

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3406

Appeal PA12-566

Ministry of Children and Youth Services

October 7, 2014

Summary: The ministry contracts with transfer payment agencies in each of a number of regions in the province to administer and deliver the Autism Intervention Program (AIP) to children and youth with autism spectrum disorders. The Children's Hospital of Eastern Ontario (CHEO) is the Regional Service Provider for delivery of the AIP in the Eastern Region of Ontario.

The ministry received a request for access to copies of the "Job Descriptions", "Statement of Duties" or similar documentation for the positions of Clinical Director and Program Director for the Eastern Ontario AIP for certain time periods. The appellant appealed the ministry's decision that responsive records are not within its custody or under its control for the purposes of section 10(1) of the *Act*, and also took the position that the ministry did not conduct an adequate search.

Because CHEO is also an institution under the *Act*, during the processing of this appeal the ministry transferred the request to CHEO, who responded by providing copies of current records to the appellant. However, the issue of whether the ministry has custody or control of records that pre-date January 1, 2007 remained an issue in this appeal.

CHEO had located one responsive record that pre-dates January 1, 2007. This order determines that the one responsive record is not in the custody or control of the ministry for the purpose of the *Act*. This order also finds that the ministry's search for responsive records was reasonable.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 10(1), 69(1) and 69(2).

Orders and Investigation Reports Considered: PO-3036, PO-3083-R and PO-3394.

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] S.C.J. No. 25.

BACKGROUND AND OVERVIEW:

[1] The Ministry of Children and Youth Services (the ministry) contracts with transfer payment agencies (TPAs) in each of a number of regions in the province to administer and deliver the Autism Intervention Program (AIP), which provides intensive behavioural intervention (IBI) to children and youth with autism spectrum disorders.

[2] The Children's Hospital of Eastern Ontario (CHEO) is the Regional Service Provider for delivery of the AIP in the Eastern Region of Ontario.

[3] The ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

Copies of the "Job Descriptions", "Statement of Duties" or similar documentation for the following positions at the [AIP] – Eastern Ontario:

- Clinical Director;
- Program Director

The above-requested documents should be the descriptions or statements in effect during the period:

- June 2006 to June 2007; and
- At present

[4] The ministry initially responded to the request by stating that no responsive records exist in its record-holdings. The appellant appealed the ministry's decision.

[5] During mediation, the ministry confirmed its position that the responsive records do not exist in its record-holdings because this information is not within its custody or control. The ministry stated that the responsive records are in the custody or control of the regional AIP – in this case – CHEO. The appellant took the position that the job description information he seeks is within the ministry's custody or control, and that the ministry's search for records was not reasonable.

[6] During the processing of this file, and because CHEO is also an institution under the *Act*, the ministry issued a revised decision, indicating that it was transferring the appellant's request to CHEO. This file was placed on hold pending the outcome of CHEO's decision.

[7] CHEO then issued a decision to the appellant in which it granted access to certain records - namely - the current "Job Descriptions", "Statement of Duties" or similar documentation for the Clinical Director and Program Director positions at the AIP - Eastern Ontario. CHEO provided the appellant with three documents: a job competition posting for the position of Clinical Director issued March 27, 2013; a job description for the position of Clinical Director effective as of August 30, 2010; and a job description for the position of Autism Director dated March 12, 2008.

[8] However, CHEO's decision regarding the request for the job descriptions that were in effect from June 2006 to June 2007 was that these records were not covered by the *Act* as they came into the custody or control of CHEO prior to January 1, 2007. CHEO referred to section 69(2) of the *Act* in support of its position.

[9] As the appellant was unable to access the records for the period covering June 2006 - June 2007 from CHEO, and maintained that the ministry has custody or control of these records, I reactivated this appeal file.

[10] I sent a Notice of Inquiry to the ministry and CHEO, initially, inviting representations on the issues. In the Notice, I identified that the records at issue in this appeal were only those records responsive to the request for job description information covering the period from June 2006 - June 2007. I also indicated that the issues in this appeal were whether the responsive records are in the custody or control of the ministry, and whether the ministry's search for records was reasonable. Both the ministry and CHEO provided representations in response.

[11] In its representations, CHEO takes the position that any responsive records are not in the custody or control of the ministry. It also provides information about the responsive record which it did locate, as follows:

CHEO has one document which might meet the criteria of the request. This document is a Job Fact Sheet that was filled out by the then Program Director - in June of 2005. The document is not unique to the Autism Intervention Program - Eastern Ontario. It is a generic document prepared by the Human Resources Department at CHEO to help in the evaluation of positions within CHEO's structure. It identifies the responsibilities of a position; relative time spent on various functions; reporting relationships and other attributes of a position. This form is a CHEO document, developed by CHEO for its internal HR management activity.

[12] After receiving representations from CHEO and the ministry, I sent the Notice of Inquiry, along with a copy of the representations of both parties, to the appellant, who also provided representations in response.

[13] In this order, I find that the ministry's search for responsive records was reasonable. I also find that the 2005 Job Fact Sheet is not in the custody or control of the ministry.

RECORDS:

[14] The one record identified as responsive to the request for records in effect from June 2006 to July 2007 is a 2005 CHEO Job Fact Sheet relating to the then Program Director.

ISSUES:

- A. Did the ministry conduct a reasonable search for records?
- B: Is the 2005 Job Fact Sheet in the custody or control of the ministry, and therefore subject to the *Act*?

DISCUSSION:

Issue A. Did the ministry conduct a reasonable search for records?

Introduction

[15] In appeals involving a claim that additional responsive records exist, as is the case in this appeal, 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*. If I am satisfied that the search carried out was reasonable in the circumstances, the ministry's decision will be upheld. If I am not satisfied, further searches may be ordered.

[16] A number of previous orders have identified the requirements in reasonable search appeals.¹ In Order PO-1744, Acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

... the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an

¹ See Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920.

experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

[17] I agree with Acting-Adjudicator Jiwan's statement.

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

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

[20] As noted above, CHEO located three records responsive to the requests for current job descriptions and similar information, and disclosed them to the appellant. With respect to the request for "Job Descriptions", "Statement of Duties" or similar documentation for the positions of Clinical Director and Program Director at CHEO in effect during the period from June 2006 to June 2007, CHEO located one document in its record-holdings. That is an internal Human Resources Job Fact Sheet filled out by the then Program Director in June of 2005.

[21] Regarding the issue of whether the ministry conducted a reasonable search for responsive records in effect from June 2006 to July 2007, the ministry provides representations in support of its position that it conducted a reasonable search. It begins by confirming that it did not seek clarification of the request, as the request was unambiguous. It then states that it determined that it did not have "possession" of any job descriptions, statements of duty, or similar information as it pertains to the Autism Intervention Program for Eastern Ontario. This determination was made by a Program Supervisor and a Policy Analyst in the ministry's Central East Regional Office, both of whom "have an understanding of the relationship the ministry has with the Autism Intervention Program Eastern Ontario and a working knowledge of related processes and procedures." The ministry then states that the Program Supervisor and Analyst made this determination after undertaking the following:

- Reviewing the agency's last approved service contract and associated service description schedules for the Autism Intervention Program to determine that there was no requirement to submit job descriptions/statement of duties to the ministry.
- Reviewing electronic and hard copy versions of:

- the agency's core file, which includes historical information, legal corporation documentation, compliance documents, action requests, and major capital requests; and
 - the agency's financial and program files, including budget submissions, service contracts, payment ledgers, year-to-date reporting, and accountability monitoring.
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- Conducting reviews of autism-sector planning and resource documentation retained at the ministry's Eastern Regional Office.
 - Contacting the Autism Intervention Program's current Program Director in order to determine if the agency had, to her knowledge, submitted any 'job description and/or statement of duties' documents to the regional office that would have been in effect during the time periods specified by the appellant.
 - Consulting with the Children's Community Programs Manager (CPM) for the Eastern Regional Office in order to determine if any ministry requirement for the submission of such documents existed.

[22] As a result, the ministry submits that it conducted a full and reasonable search for records that would be responsive to this request.

[23] The appellant takes the position that the ministry has failed to provide sufficient evidence to establish that its search was reasonable. He states that the ministry has provided "no detail about where the search was conducted and what files were reviewed." He then states that, from his standpoint, it:

... seems reasonable that the ministry would require information about how the services which it has contracted with to a transfer payment agency are being conducted. This would include details about the structure of the transfer payment agency and information about the positions responsible for delivering services. This would be an essential element in assessing whether the ministry and public are receiving value for money and whether services are being delivered as per the conditions of the contract for services.

[24] He also takes the position that it is "inconceivable that job descriptions or statements of duties for the two positions requested are not held in the files of the ministry or [the AIP]," and refers to the fact that the ministry provides funding to transfer payment agencies to deliver the programs.

[25] The appellant also states:

While not privy to the records management systems of the ministry or CHEO, it is possible that the job descriptions requested may be found in

materials related to CHEO's successful bid to provide autism intervention services. It is reasonable to assume that the successful bidder would have provided detailed information about how the program would be delivered and about the positions responsible for delivering it.

Findings

[26] To begin, on my review of the question of whether the ministry has conducted a reasonable search for records in this appeal, I note that the ministry takes the position that the responsive record in the hands of CHEO is not in its custody or control, and I address this issue below. My review of the reasonable search issue is restricted to whether the ministry's search of its own record-holdings was reasonable.

[27] As set out above, in appeals involving a claim that 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 search for responsive records was reasonable in the circumstances, the ministry's decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

[28] A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request.² In addition, in Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

[29] I adopt the approach taken in the above orders for the purposes of the present appeal.

[30] The ministry has identified that the Program Supervisor and a Policy Analyst in its Central East Regional Office reviewed the request and conducted searches, and reviewed their processes to determine whether records responsive to the request existed in the ministry's record-holdings. This included reviewing the agency's service contract and schedules, reviewing the agency's core file and financial and program files, reviewing the autism-sector planning and resource documentation, contacting the

² Order M-909.

Autism Intervention Program's current Program Director, and consulting with the CPM for the Eastern Regional Office. The ministry maintains that no responsive records exist in their record-holdings.

[31] The appellant takes the position that the ministry has failed to provide sufficient evidence to establish that its search was reasonable. He states that the ministry has provided "no detail about where the search was conducted and what files were reviewed." He indicates his view that job position information should have been provided to the ministry. He also refers to the documentation that would have been provided at the stage when CHEO bid for the opportunity to provide autism intervention services as a possible location for responsive records.

[32] In this appeal, the nature of the records requested is clear – evidenced by the fact that CHEO was able to identify the records responsive to the request and issue decisions on them.

[33] In the circumstances, based on the information provided by the ministry regarding the searches conducted and the results of those searches, I am satisfied that the ministry's search for records responsive to the request was reasonable. Although the appellant believes the ministry ought to have responsive records in its record-holdings, I am satisfied that the searches conducted by the identified staff of the ministry are reasonable. I also note that the ministry has identified that these searches included a search through the Agency's core file, including historical information, and that this addresses the appellant's questions regarding any possible records which may have been provided at the bid stage.

[34] In reasonable search appeals the issue is not whether records ought to exist, as argued by the appellant, but whether the ministry's search for them was reasonable. In the circumstances, I am satisfied that it was, and I dismiss this aspect of the appeal.

Issue B: Is the 2005 Job Fact Sheet in the custody or control of the ministry, and therefore subject to the *Act*?

Preliminary matter raised by the ministry

[35] In its initial representations, as a preliminary matter, the ministry takes the position that the identified record (the 2005 Job Fact Sheet filled out by the then CHEO Program Director) was in the custody or under the control of CHEO prior to January 1, 2007 and that, as a result, this office is without jurisdiction to review decisions regarding it.

[36] The ministry refers to sections 10 and 69 of the *Act* in support of its position. The introductory portion of section 10(1) reads:

(1) Subject to subsection 69 (2), 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, ...

[37] Section 69 reads:

(1) This Act applies to any record in the custody or under the control of an institution regardless of whether it was recorded before or after this Act comes into force.

Hospitals

(2) Despite subsection (1), this Act only applies to records in the custody or under the control of a hospital where the records came into the custody or under the control of the hospital on or after January 1, 2007.

[38] The ministry states that section 69(1) sets out the scope of the *Act* and the records to which it applies, and that section 69(2) establishes an exception to the broader scope set out in subsection 1. It then argues that section 69(2) limits the application of the *Act* to those records that came into the custody or under the control of a hospital on or after January 1, 2007. It then states that, where a requested document falls outside of the scope of the *Act* (i.e. came into the custody or under the control of a hospital prior to January 1, 2007), this office is without jurisdiction to review decisions to deny access to it.³

[39] The ministry then notes that CHEO made an access decision regarding the request for more recent records, but denied access to the 2005 Job Fact Sheet on the basis that this record came into the custody or control of CHEO prior to January 1, 2007, and is not subject to the *Act*.

[40] The ministry then argues that, on that basis, the requested record falls outside the scope of the *Act*, and there is therefore no need to review whether the ministry has custody or control of this record. It states:

A reading of subsection 69(2) leads to the conclusion that the [identified record falls] outside of the scope of the *Act*, as [it was] in the custody or under the control of CHEO (a hospital) and came into the custody or under the control of CHEO prior to January 1, 2007 (as [it is a record] that would have been generated by CHEO). It appears therefore that [the record falls] within the ambit of section 69(2) and ... therefore outside of the ambit of the *Act*. This conclusion disposes of this appeal as [this record is] not subject to the *Act* and therefore not subject to the general

³ The ministry refers to Order PO-3223 in support of its position.

right of access set out in section 10. Therefore, whether [the record is] within the custody or under the control of the ministry is irrelevant as the *Act* itself does not apply to [the record] subject to this request.

[41] The ministry then argues that it is not possible that section 69(2) could apply to a hospital but not to a ministry. It states:

... [S]ection 69(2) applies to 'records' and not specific institutions Further, a finding of control by the ministry would in essence create a 'back door' to records that the legislature otherwise sought to carve out of section 69(1). Such a determination would appear to constitute a collateral attack on CHEO's access decision.

It is therefore the ministry's position that, given that section 69(2) is unambiguous and its application here leads to the conclusion that the remaining [requested record is] not subject to the *Act*, the IPC is without jurisdiction in respect of any access decision relating to [this record]. This conclusion disposes of this appeal without the need to consider whether the ministry has custody or control of [the record].

[42] As a result, the ministry argues that the 2005 record, which was clearly in the custody and control of CHEO prior to January 1, 2007, cannot be subject to the *Act* and, as a result, there is no need to review whether the ministry has custody or control of this record.

[43] I reject the ministry's argument.

[44] The ministry is essentially arguing that any records in its own custody or control which also happened to be in the custody or control of a hospital prior to January 1, 2007, fall outside the scope of the *Act*.

[45] The *Act* came into effect on January 1, 1988, and has applied to records in the custody or control of provincial institutions, including the ministry, since that date. Hospitals were brought under the *Act* in January, 2012, and the amendments that brought hospitals under the *Act* included section 69(2), which is subtitled "Hospitals" and which confirms that records in the custody or control of hospitals prior to 2007 are not covered by the *Act*. I find that section 69(2) specifically applies to requests made to hospitals, and excludes these earlier records from the scope of the *Act* as it applies to the responsibility of hospitals to respond to requests for information.

[46] If I were to accept the ministry's argument, the result would be that the amendment including section 69(2) in the *Act* excludes from the scope of the *Act* certain records in the custody or control of ministries which would have been until then covered by the *Act*. Taken to its logical conclusion, the ministry's position would require

a review of all records in government record-holdings to determine whether these records, in the government's custody or control, were also concurrently in the custody or control of a hospital prior to 2007 and, if they were, to exclude them from the scope of the *Act*. Absent clear wording confirming such an interpretation, I reject the ministry's argument that section 69(2) excludes records in the ministry's own custody or control from the scope of the *Act*, and find that section 69(2) only applies to requests made to hospitals for records in the custody or control of the hospital. It does not apply to records in the custody or control of other institutions covered by the *Act*. The specific subheading of section 69(2) ("Hospitals") supports this interpretation.

Is the 2005 Job Fact Sheet in the "custody or control" of the ministry?

[47] The courts and this office have applied a broad and liberal approach to the custody or control question.⁴ Based on this 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.⁵ The list is not 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?⁶
- What use did the creator intend to make of the record?⁷
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?⁸
- Is the activity in question a "core", "central" or "basic" function of the institution?⁹
- Does the content of the record relate to the institution's mandate and functions?¹⁰

⁴ *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.

⁵ Orders P-120, MO-1251, PO-2306 and PO-2683.

⁶ Order P-120.

⁷ Orders P-120 and P-239.

⁸ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above at note 3.

⁹ Order P-912.

¹⁰ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); 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?¹¹
- If the institution does have possession of the record, is it more than “bare possession”?¹²
- 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?¹³
- Does the institution have a right to possession of the record?¹⁴
- Does the institution have the authority to regulate the record’s content, use and disposal?¹⁵
- 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?¹⁶
- To what extent has the institution relied upon the record?¹⁷
- How closely is the record integrated with other records held by the institution?¹⁸
- 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?¹⁹

[48] 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?²⁰

¹¹ Orders P-120 and P-239.

¹² Order P-239; *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.

¹³ Orders P-120 and P-239.

¹⁴ Orders P-120 and P-239.

¹⁵ Orders P-120 and P-239.

¹⁶ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.

¹⁷ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1; Orders P-120 and P-239.

¹⁸ Orders P-120 and P-239.

¹⁹ Order MO-1251.

²⁰ Order PO-2683.

- 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?²¹
- Who paid for the creation of the record?²²
- What are the circumstances surrounding the creation, use and retention of the record?²³
- 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?²⁴
- 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?²⁵ 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?²⁶
- 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?²⁷

²¹ Order M-315.

²² Order M-506.

²³ Order PO-2386.

²⁴ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

²⁵ Orders M-165 and MO-2586.

²⁶ *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) and *David v. Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).

²⁷ 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?²⁸

[49] Moreover, in determining whether records are in the “custody or control” of an institution, the above factors must be considered contextually in light of the purpose of the legislation.²⁹

[50] In addition to the above factors, the Supreme Court of Canada³⁰ has recently articulated a two-part test to determine institutional control of a record:

1. whether the record relates to a departmental matter, and
2. whether the institution could reasonably be expected to obtain a copy of the record in question upon request.

[51] According to the Supreme Court, control can only be established if both parts of this test are met.

Representations

[52] CHEO provides representations in support of its position that the 2005 Job Fact Sheet is not in the custody or control of the ministry. It states that the ministry does not have a copy of this document in its physical possession and there is no reason why it would have the document. It also states that the ministry has “no access” to the document, and then reviews the indicia of custody and control set out above, and states:

- the record was not created by an officer or employee of the ministry;
- the creator of the record intended that it be used by CHEO solely for internal CHEO HR management purposes;
- the ministry has no statutory power or duty to carry out the activity that resulted in the creation of the record. It was created by and for CHEO HR management purposes;
- the HR management function is a CHEO function and has nothing to do with the ministry;
- the content of the record does not relate to the ministry’s mandate;
- the ministry does not have physical possession of the record;

²⁸ Order MO-1251.

²⁹ See *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835, [2010] 328 D.L.R. (4th) 171 (Div. Ct.); leave to appeal denied (C.A. M39605), para 31.

³⁰ *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25 [National Defence].

- the ministry has no right to possession of the record;
- the ministry has no reason to use the record;
- the ministry does not rely on the record for any purpose;
- there is no integration of the record with records of the ministry; and
- the ministry does not typically possess, use or otherwise have access to CHEO HR records.

[53] CHEO then states:

While the Ministry provides funding to CHEO for the purposes of the Autism intervention Program ..., there is nothing in the funding arrangement that gives the Ministry custody or control over such HR records created for internal CHEO purposes, even if they are related to the delivery of the Program.

[54] CHEO then summarizes its position by stating:

In short, the Ministry does not have physical possession of the record. The Ministry has no statutory or contractual control over the record. None of the attributes which would give it custody and control are present in this case and there is no basis for compelling CHEO to provide a copy of the record to the Ministry in response to the request under appeal.

[55] CHEO provided me with a copy of the 2005 Job Fact Sheet at issue in this appeal.

[56] The ministry's representations state that it "relies upon" the position taken by CHEO on the issue of custody or control of the identified record.

[57] The appellant begins by referring to two previous orders of this office (PO-3036 and PO-3083-R) which found that the ministry had control of certain records held by a Transfer Payment Agency. The appellant maintains that the record at issue is under the control of the ministry because the ministry funds the Autism Intervention Program, and because the ministry has not been able to refute the reasoning in Orders PO-3036 and PO-3083-R.

[58] The appellant then refers to CHEO's representations on the issue of custody and control and questions some of the points made by CHEO. His representations can be summarized as follows:

- CHEO's comments about the "creation" of the record fail to develop a case to substantiate how this would negate issues of Ministerial control;
- CHEO's comment that "The HR management function is a CHEO function and has nothing to do with the Ministry" is not correct. Oversight by the

ministry of the management functions of a transfer payment agency is an essential element in ensuring that the ministry (and the people of Ontario) are receiving value for the monies transferred and that program objectives are being delivered according to the terms of the contract for services;

- CHEO's comment that "The content of the record does not relate to the ministry's mandate" is also not correct. The content of the record is one tool among many used by the ministry to evaluate and ensure compliance with the terms of the contract for services;
- CHEO's comment that the ministry does not have physical possession, or right to possession, of the record does not affect the ministry's control of the record;
- CHEO has not substantiated its position that "the ministry has no reason to use the record", based on the applicable legislation;
- CHEO is unable to substantiate its position that "The ministry does not rely on the record for any purpose;"
- The fact that there is no integration of the record with records of the ministry is irrelevant and immaterial;
- CHEO's statement that the ministry "does not typically possess, use or otherwise have access to CHEO HR records" weakens its argument by conceding that there are situations where HR records are available to the ministry.

[59] The appellant also confirms that an institution only needs to have either custody or control of a record in order for the record to be subject to the *Act*. He then argues that the ministry has control over the record, and that the ministry and CHEO have failed to establish that it does not have such control, nor have they addressed how Orders PO-3036 and PO-3083-R do not apply.

Analysis and findings

[60] After considering the submissions made by the parties, as well as the nature of the record at issue, I find that the record (the 2005 Job Fact Sheet) is not in the custody or control of the ministry for the purpose of the *Act*. I make this finding for a number of reasons.

[61] To begin, based on my findings above that the ministry conducted a reasonable search for responsive records, and based on the evidence provided by the parties, I am satisfied that the 2005 Job Fact Sheet is not in the possession or the custody of the ministry. As a result, the issue in this appeal is whether the ministry has control of the record which is in CHEO's possession.

[62] I have considered the factors set out above in deciding whether or not the ministry has control of record, and I make the following findings.

[63] First, I have reviewed the record, which is a questionnaire entitled "CHEO Job Fact Sheet," prepared by the Human Resources Department at CHEO. I accept CHEO's description of this record as one prepared "to help in the evaluation of positions within CHEO's structure." It was filled out by the then Program Director. In addition to identifying the job responsibilities of the Director, this 8-page document also provides the then program director's responses to numerous questions regarding the position including the relative time spent on various functions; reporting relationships and other attributes of the position. I am satisfied that this document is a CHEO document, developed by CHEO for its internal HR management activity. I am also satisfied that the questions in the document and the responses by the Program Director relate directly to the Human Resource aspect of the position, seeking input from the then Director about various skills sets, educational requirements, unique challenges, and other issues regarding the position.

[64] Based on my review of the document, I accept CHEO's position that this record was not created by an officer or employee of the ministry, and that it was intended that it be used by CHEO solely for internal CHEO HR management purposes. I also find that the ministry does not regulate the content, use or disposal of this record.

[65] Furthermore, although the record relates to the delivery of the Autism Intervention Program (because it was filled out by the then Program Director), which is funded by the ministry, I accept CHEO's position that the ministry has no statutory power or duty to carry out the activity that resulted in the creation of the record. It was created by CHEO solely for CHEO HR management purposes.

[66] I also accept the evidence provided by CHEO that the ministry would have no right to possession of the record, no reason to use the record, and would not rely on the record for any purpose. Unlike an ordinary "Job Description" or "Job Posting," this record was clearly created and used by CHEO for its own internal HR purposes.

[67] I have also considered the appellant's representations on the control issue. The appellant takes the position that the record relates to the ministry's mandate and that "the content of the record is one tool among many used by the ministry to evaluate and ensure compliance with the terms of the contract for services." Although I accept that the record relates to the provision of the AIP, which previous orders have established is within the ministry mandate,³¹ I do not accept that this record is or would be used by the ministry to evaluate and ensure compliance with its contracts with AIP providers. As stated above, this record is an internal CHEO HR document, used for internal CHEO purposes.

[68] The appellant also argues that the ministry's oversight of the management functions of a transfer payment agency is "an essential element in ensuring that the

³¹ See Orders PO-3036 and PO-3083-R.

ministry ... [is] receiving value for the monies transferred and that program objectives are being delivered according to the terms of the contract for services.” Again, although I accept that the ministry has the oversight responsibility for the provision of the program, I do not accept that the record at issue, an internal CHEO HR document used for internal CHEO purposes, sufficiently relates to the Program or the funding of it such that the ministry would have control over it.

[69] I have also reviewed Order PO-3036 (and Order PO-3083-R which confirmed Order PO-3036), which are relied upon by the appellant. Those orders resulted from a request to the ministry for information about the number of approved hours for each client receiving IBI under the AIP program, broken down by region.

[70] In Order PO-3036, Adjudicator Stephanie Haly reviewed the indicia of control of this type of information, including a review of the relevant parts of the service contracts as they related to this funding information. She found that the ministry had control of the requested information for a number of reasons, including: that the ministry had a contractual right to exercise control over the information at issue; that the information at issue was created as a result of the ministry’s actions to fulfill its mandate to provide the IBI services; that the ministry paid for the creation of the information at issue; that the TPA was not established to operate at arm’s length from the ministry; and that the information at issue related to both the provision of the AIP program and the ministry’s funding of it. She also found that the requested information related “directly to the ministry’s obligation of ensuring the accountability of the TPAs providing this provincially funded service.”

[71] In my view, the records at issue in Order PO-3036 and the one at issue in this appeal are quite different. Adjudicator Haly was dealing with records that related directly to both the provision and the funding of the AIP. Unlike those records, I find that the internal CHEO HR record at issue in this appeal relates to a CHEO HR function, and does not sufficiently relate to the provision or funding of the AIP such that the ministry would have a right to exercise control over it.

[72] I have also considered Order PO-3394, recently issued by this office, which determined that information related to psychological assessments conducted regarding IBI services provided under the AIP were under the control of the ministry. In that order, Adjudicator Daphne Loukidelis also reviewed the factors determining whether the ministry had control of those records. In finding that the ministry did have control of them, Adjudicator Loukidelis also reviewed the application of the two-part test for determining control of records not in the physical possession of the government body, found in the decision by the Supreme Court of Canada in *National Defence*.³²

(1) Do the contents of the document relate to a departmental matter?

³² See footnote 30, above.

- (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

[73] Adjudicator Loukidelis found that the requested information (the types of psychological assessments used, as well as the outcome evaluation data) relate to a departmental matter of the ministry in its oversight capacity respecting the AIP. She also found that, in its oversight role, the ministry could reasonably expect to obtain the requested information from the TPAs upon request. Therefore, she determined that the ministry had the requisite degree of control of the records.

[74] In this appeal, the contents of the record before me may be considered, in a broad sense, to relate to a departmental matter. However, because the record relates to an internal CHEO HR function, I am not satisfied that the ministry could reasonably be expected to obtain a copy of it upon request for the purpose of the second part of the test established by the Supreme Court of Canada in *National Defence*.

[75] As a result of the above, I find that the 2005 Job Fact Sheet is not in the custody or under the control of the ministry.

ORDER:

1. I find that the ministry's search for responsive records was reasonable.
2. I find that the 2005 Job Fact Sheet is not in the custody or control of the ministry for the purposes of the *Act*, and dismiss this appeal.

Original Signed By: _____
Frank DeVries
Adjudicator

_____ October 7, 2014