Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3394

Appeal PA13-211

Ministry of Children and Youth Services

September 16, 2014

Summary: An individual submitted a multi-part request to the ministry, seeking access to information related to psychological assessments conducted regarding Intensive Behavioural Intervention services provided under the Autism Intervention Program. 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.* In this order, the adjudicator concludes that the ministry has control over the records and orders the ministry to issue 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, sections 10(1) and 24; *Personal Health Information Protection Act, 2004*, S.O. 2004, CH. 3, Schedule A, section 4(1).

Orders and Investigation Reports Considered: PO-3036, MO-2129 and PO-2836.

Cases Considered: *Canada (Information Commissioner)* v. *Canada (Minister of National Defence)*, [2011] S.C.J. No. 25; *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20 (CanLII).

OVERVIEW:

[1] This order addresses the issues raised by the appellant's access request to the Ministry of Children and Youth Services (the ministry) under the *Freedom of*

Information and Protection of Privacy Act (the *Act*) for information related to baseline admission and discharge assessments for the Intensive Behavioural Intervention (IBI) program. The multi-part request was for access to the following information:

> … general (aggregate) information on the Autism Intervention Program (AIP), a program run by the Ministry of Children and Youth Services. The AIP is run by nine regional providers who are contracted by the Ministry to provide Intensive Behavioural Intervention (IBI) to children and youth with autism.
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> According to the Autism Intervention Program Guidelines (2006), the AIP providers must conduct baseline and discharge psychological assessments at the start and end of IBI. I would like to request the following information:
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> 1. What psychological instruments are each regional provider using to assess adaptive and cognitive functioning? Examples include the Vineland-II Adaptive Behaviour Scales (Survey Edition), the Mullen Scales of Early Learning, the WPPSI-III or WPPSI-IV, and the Stanford Binet 5.
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> 2. In 2012, how many children began receiving IBI? According to the baseline psychological data, of those children who began receiving IBI, how many were considered intellectually disabled when they started IBI? How many had an estimate of cognitive functioning with a standard score of <70, or at the 2nd percentile or lower? How many had an overall adaptive behaviour composite (ABC) of less than 70, or at the 2nd percentile or lower? How many had both a cognitive score <70 and ABC <70?
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> 3. In 2012, how many children were discharged from IBI? According to the mandated discharge assessment, of those children who were discharged from IBI, how many received a diagnosis of intellectual disability? How many had an estimate of cognitive functioning with a standard score of <70, or at the 2nd percentile or lower? How many had an overall adaptive behaviour composite (ABC) of less than 70, or at the 2nd percentile or lower? How many children had an estimate of cognitive functioning of >85 (average range or 16th percentile or higher)? How many children had an overall adaptive behaviour composite (ABC) of >85? How many children had both a cognitive measure of >85 and adaptive behaviour composite of >85?

4. In 2012, how many children, at discharge, were given each type of cognitive assessment? For example:

    a. 20 children, Mullen Scales of Early Learning
    b. 5 children, WPPSI-III
    c. 10 children, Stanford Binet 5

5. Specific to Hamilton-Niagara, the purpose of IBI is to "change a child's developmental trajectory or rate of development". Of the children who discharged in 2012, how many children met this criteria according to the clinical supervisor?

[2] The ministry disclosed some information to the requester with respect to the second and third parts of the request, but took the position that it does not have custody or control of the information responsive to the first, fourth and fifth portions of the request or portions of the second and third parts. In the decision, the ministry explained that regional service providers, or transfer payment agencies (TPAs), are responsible for conducting diagnostic and developmental/psychological assessments and suggested that the requester contact the regional providers directly to obtain the requested information. The ministry provided a link to its website for access to the AIP Guidelines.

[3] The requester, now the appellant, appealed the ministry's decision on the basis of his belief that the ministry has custody or control of the information that is responsive to the request. A mediated resolution of the appeal was not possible, and the appeal proceeded to the adjudication stage for an inquiry. I sent a Notice of Inquiry to the ministry and received representations, which I shared with the appellant.

[4] Upon receipt of the Notice of Inquiry and ministry's representations, the appellant contacted this office because the ministry had referred to several documents in its submissions, but had not attached copies of them. At my request, staff from this office contacted the ministry in order to seek copies of these documents. In response to this request, the ministry provided its Service Contract with TPAs (January 2013), the Service Description and Data Schedules, the Data Elements and Definitions, the Approval Letter template and the Consolidated Autism Reporting Template.[1]

[5] At around the same time I received the ministry's additional documentation, I also received the appellant's representations. Accompanying the appellant's representations were several documents, some of which were the same as those sent

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[1] The ministry indicated that the approval letter template was sent because "some of the AIP agencies receive approval letters rather than signing Service Contracts." The ministry also advised that "these documents are located on our ministry's intranet, so they are not publicly available, with the exception of the Consolidated Autism Reporting Template."

by the ministry.[2] After considering the appellant's representations, I decided to seek representations in reply from the ministry. First, I advised the ministry that the appellant had withdrawn the appeal in relation to part five of his request and that this part of the request no longer formed part of my inquiry. I also asked the ministry to clarify the significance of the Consolidated Autism Reporting Template to the issues before me in this appeal and to respond to the appellant's arguments respecting custody or control over the information requested. The ministry submitted reply representations.

[6] In this order, I find the ministry has control over the requested information. I order the ministry to issue a decision to the appellant.

DISCUSSION:

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

[7] The question before me is whether records that are responsive to the request are "in the custody or under the control" of the ministry for the purpose of section 10(1) of the *Act*, which states, 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 ...

[8] Under section 10(1), the *Act* applies only to records that are in the custody or under the control of an institution. 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.[3]

[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.[4] 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.[5]

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[2] The documents that were identical to those sent by the ministry were the Service Contract – January 2013 (8 pages) and the Specialized Services Data Elements and Definitions – 2B-CYS13-MCYS-E (59 pages). A third document, Explanation of Data Elements – 1-3-MCYS-E (6 pages), was also submitted.

[3] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

[4] Order PO-2836.

[5] *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.

[11] In seeking the parties' representations on this issue, I provided them with a list of the factors developed by this office to determine whether or not a record is in the custody or control of an institution.[6] Past orders have held that in determining whether records are in the "custody or control" of an institution, the factors must be considered contextually in light of the purpose and spirit of the legislation.[7] The courts have also emphasized the importance of interpreting the provisions of the *Act* with a generous approach to access contemplated by, and consistent with, its purpose and spirit.[8]

[12] Although the complete list of factors that may be relevant in such a determination is not set out here, the ones relevant to my decision are discussed below. Particularly important in the circumstances of this appeal is the test set out in *Canada (Information Commissioner) v. Canada (Minister of National Defence).*[9] In that decision, the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

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

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

Representations

[13] The ministry describes how its Freedom of Information and Protection of Privacy (FIPP) Unit contacted staff from the relevant program and service areas to discuss this request. The FIPP analyst consulted staff from the ministry's Autism Policy Unit (APU), which is responsible for establishing policies and guidelines for the AIP. In particular, the Manager of the APU was asked if any records existed that would answer the questions posed by the appellant in the request. The ministry states that the APU manager responded that "no directly responsive records" existed "as the majority of the information being requested was not in the Unit's custody or control." Similarly, the Client Services Branch, which provides oversight of child and youth services programs funded by the ministry, advised the FIPP Unit that responsive records existed only for portions of the second and third parts of the request.[10]

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[6] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above; *Canada Post Corp. v. Canada (Minister of Public Works),* cited above. See also Orders 120, P-239, MO-1251 and PO-2683.
[7] *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).
[8] *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner,* 2009 ONCA 20 (CanLII) (*Toronto Police*).
[9] 2011 SCC 25, [2011] 2 SCR 306.
[10] This was the information provided to the appellant for the year 2012: the number of children receiving IBI and the number discharged from IBI.

[14] The ministry submits that under the AIP Guidelines, which are publicly available, the regional service providers are responsible for carrying out developmental/psychological assessments for diagnostic purposes. Under section 4.1 of the AIP Guidelines, regional providers must use certain assessment tools and if they wish to revise the standardized assessments, they must do so in consultation with the ministry. The ministry submits that no responsive records exist in response to part one of the request because no such consultation has taken place. The ministry submits that even if responsive records did exist, they would not be records created by an officer or employee of the ministry, but rather the TPA, which is independent of the ministry because it is a non-profit organization governed by its own Board of Directors.

[15] Central to the ministry's position that the requested information is not in its custody or under its control is the ministry's characterization of the nature of the information as clinical and psychological data; i.e., the diagnoses, cognitive functioning and adaptive behaviour scores of children receiving IBI, as well as the psychological tools used to evaluate functioning. The ministry submits that the information is derived from clinical assessments and is used to make clinical decisions about the intensity, duration and setting of IBI for each particular client. The ministry maintains that it does not create, collect or maintain such information and that such information is only properly "contained in individual case files maintained by the responsible agency."

[16] The ministry notes that it does not fund the AIP or IBI services pursuant to any specific statutory duty or legal requirement. Rather, the ministry maintains that the government has "chosen to fund the services as part of its efforts to help Ontario families with access to services and supports."

[17] According to the ministry, the only possible basis upon which it might be entitled to possess such information would stem from its contractual relationship with the regional service providers (or TPAs). The ministry notes that it contracts with the nine TPAs to administer and deliver the AIP according to the AIP Guidelines. However, the ministry maintains that it does not require or rely on the particular "clinical information" requested in monitoring the service contracts with the TPAs. The ministry states that the TPAs are required to report data to the ministry only as outlined in the contract and schedules and notes that the information provided "shall include service data such as statistics on target achievements," according to the Data Elements and Definitions document. As the ministry views it, the information it currently receives from the regional service providers is comprised of data about the number of eligibility assessments (eligible or not eligible), but is not client-level information, which the ministry asserts would be an "unnecessary collection" of personal information. In this context, the ministry contends that it does not have the authority to regulate the content, use or disposal of the information requested.

[18] The ministry's representations also convey concern that the psychologists employed by the TPAs are health information custodians under section 3(1)1 of the

Personal Health Information Protection Act, 2004,[11] and that the requested information constitutes "personal health information," as defined in section 4(1) of the *PHIPA*. The ministry submits that it cannot find "clear authority to permit disclosure of the records [by the psychologists] to the TPA and to the ministry" for the purpose of granting access to them.

[19] Respecting Order PO-3036, where other information related to IBI was determined to be in the ministry's custody or control,[12] the ministry argues that it is distinguishable on the basis of the nature of the requested information. The ministry submits that Order PO-3036 was concerned with information relating to IBI program funding while the requested information in this appeal relates to clinical decisions respecting individual children in the IBI program, which the ministry could not reasonably be expected to obtain. This type of information, the ministry emphasizes, is not required for the ministry to ensure that the TPA is providing IBI services in accordance with the contract.

[20] At my request, the ministry addressed the test set out in *Canada (Information Commissioner) v. Canada (Minister of National Defence)* (cited above). Regarding the first part of the test, the ministry submits that:

> The type of information being requested does not relate to a departmental matter. Although the ministry funds the [IBI] program as part of its mandate to provide services to Ontario families and their children, … the records that are responsive … would be of a clinical nature. … [S]uch clinical decisions are not departmental matters as the ministry is not in a position to evaluate the clinical decisions and findings of the TPA staff who administer the program and who have specific qualifications to do so. …[13]

[21] The ministry's answer to the second part of the *National Defence* test is that in light of its relationship with the TPAs, particularly the limited information-gathering provided for by the service contracts it has with them, it does not have the requisite degree of control over any responsive records that may be in the TPAs' possession and the ministry could not reasonably be expected to obtain such records upon request.

[22] The appellant's position, in summary, is that custody or control over the requested information is established by the AIP Guidelines and the ministry's service contracts with the TPAs. The appellant also submits that, contrary to the ministry's

[11] S.O. 2004, CH. 3, Schedule A.

[12] Issued by Adjudicator Stephanie Haly in January 2012. In June 2012, Adjudicator Haly issued a decision dismissing the ministry's reconsideration request and upholding the original disposition (Reconsideration Order PO-3083-R).

[13] In this section of the ministry's representations, there is a detailed explanation of the avenues open to families who disagree with clinical decisions made at the regional program level, including recourse to the Independent Review Mechanism (IRM) process using independent reviewers qualified as psychologists or psychological associates.

assertion, the requested information merely consists of the psychological instruments to evaluate each regional providers' clients and the statistical aggregate data related to their outcomes, which is not connected to any identifiable child. In the appellant's view, the requested information is in the "physical possession" of the regional providers, but is under the ministry's control.

[23] Regarding the records responsive to part one of the request, the appellant submits that the ministry cannot simply direct him to the AIP Guidelines to determine what standardized assessments are being used because the guidelines contain examples, not a complete list. The appellant states that the AIP Guidelines mandate a certain standardization of assessments between the TPAs, in consultation with the ministry. He maintains that the ministry has control over this information and could obtain it upon simple request.

[24] The appellant relies on Order PO-3036 and submits that the information he is requesting is, in fact, comparable to the information that was found to be in the ministry's control by Adjudicator Haly. He relies, in particular, on Adjudicator Haly's finding that the TPAs do not operate at arms-length because: the ministry contracts with the TPAs to administer and deliver the AIP and funds the provision of this service to the public; and the ministry has a contractual right to dictate to the TPA certain components of the records that should be created, as well as how they should be maintained and stored.

[25] The appellant also challenges the ministry's assertion that the information requested is not a "departmental matter" as described in *National Defence,* based on his reading of the AIP Guidelines and the ministry's standard contract with the TPAs. The appellant refers to section 6.6 of the AIP Guidelines as holding the regional program accountable to the ministry for the management of IBI program and service delivery in accordance with government policies, services contract requirements and the guidelines. As a basis for the ministry being able to obtain the requested information, the appellant relies on section 6(a) of the standard TPA contract, which requires each TPA to maintain service records that "… shall include service data such as statistics on target achievements and such other information as Ontario requires."

[26] The appellant also cites the broad wording of section 6(b) of the contract, under which the ministry could receive from the TPA "upon reasonable request, a comprehensive report acceptable to Ministry staff respecting the services being provided." According to the appellant, the information requested is related to the evaluation of program outcomes and, therefore program effectiveness, which falls within the ministry's oversight role. The appellant argues that because the ministry's contract with the TPAs establishes such a high standard in terms of information over which the ministry can exert control, the requested information could easily be considered "such other information as Ontario requires" under section 6(a) or part of a "comprehensive report" under 6(b).

[27] With respect to the service data schedule, the appellant points out that it requires the TPAs to provide certain discrete statistics, which he maintains are analogous to the requested information: the number of IRM requests for independent eligibility reviews that were deemed inconsistent with the child's case file; and the number of IRM requests for independent discharge reviews that were deemed inconsistent with the child's case file. The appellant asserts that a consistent characterization of the information would suggest that the information about IRM requests is clinical, just as the ministry insists the information he is requesting is clinical. According to the appellant, this contradicts the ministry's position that it does not oversee or have involvement in the clinical decision-making of the IRM reviewers. Further, the appellant submits that:

> … an IRM decision is based on clinical data found in individual client files, yet the ministry has determined that it wants this information. The fact that the ministry is actively tracking some types of clinical information and not the specific information requested by the appellant does not mean the ministry should be excused from providing the information as it has the means to do so. The appellant submits that the number of children scoring below or above a psychometric score is a similar measure to the number of children who have received a decision "inconsistent with the case file".

[28] The appellant maintains, however, that both the requested information and the IRM information are not actually clinical data, as asserted, but rather statistical information derived from individual client files. The appellant suggests that due to the aggregate nature of the information requested, it would measure the progress of the IBI program overall, not any individual child's progress. In this regard, the appellant also maintains that the *PHIPA* is not relevant because no individual child or HIC would be identified by the requested information.

[29] With respect to the factor identifying customary practices of the individual who created the records in relation to possession or control of information of this nature, the appellant submits that release of statistical data regarding outcomes of an intervention program is common because:

> clinicians usually want to see that treatments are effective and meet best practices. IBI is not different in this respect. Release of statistical data that does not identify any specific individuals is usually not denied, assuming cost is considered.

[30] In reply, the ministry maintains that the "administrative framework" imposed by the AIP Guidelines can be monitored without the requested information. The ministry reiterates that it does not require the type of clinical data requested to ensure that

TPAs conduct assessments in compliance with the AIP Guidelines. The ministry also responds that it reviews the data requirements for its TPA contract oversight annually to improve data collection for monitoring purposes. According to the ministry, the information collected relates to "outputs" of the program, such as the number of children waiting for service, the number of children served, and the number of children discharged. In the ministry's view, the information related to those outputs which was disclosed to the appellant is sufficient as a "public performance measure." The ministry submits that since the requested information is not necessary for the ministry's purpose of ensuring the regional providers' compliance with the guidelines or monitoring the number of children receiving IBI, the information is not a "departmental matter."

[31] Regarding the appellant's submissions on the comparable nature of the requested information and the IRM data, the ministry maintains that they are distinct types; the IRM data, unlike the requested data, "does not relate to the reasons for a decision to be deemed consistent or inconsistent with the case file materials."

[32] The ministry's reply representations conclude with submissions directed at establishing that it has no obligation to create a record to answer the appellant's request in this situation where the information "does not currently reside in the format requested." The ministry explains that the data would have to be extracted from individual case files to create a new record containing the aggregate information requested. According to the ministry, the *Act* establishes a right of access to "'records,' not information more broadly" and past orders reviewing the definition of "record" in section 2(1) of the *Act* confirm that institutions are not required to create such a record. The ministry also maintains that if it is found to have control of these records, "the implications of *PHIPA* in retrieving these files from clinical professionals who fall within the definition of a HIC remain relevant… [as do] … the implications of [access under] *PHIPA* and the personal information exemption under s. 21 of FIPPA…"

Analysis and findings

[33] For the reasons that follow, I find that information requested by the appellant is in the ministry's control within the meaning of section 10(1) of the *Act*. My finding is based on the two-part test for institutional control articulated by the Supreme Court of Canada in *Minister of National Defence*, as well as the reasoning in past orders and the terms of the ministry's agreement with the regional service providers.

[34] The Supreme Court of Canada's 2011 decision in *Minister of National Defence,* regarding a determination of this issue under the federal *Access to Information Act,*[14] has become the accepted test for determining institutional control over information that

[14] R.S. 1985, c A-1, s. 4. Corresponding to section 10(1) of the *Act* (FIPPA), section 4(1) of the *ATIA* provides that "Subject to this Act, but notwithstanding any other Act of Parliament, every person … has a right to and shall, on request, be given access to any record under the control of a government institution."

is not in its physical custody. Even before *National Defence,* this office had taken a similar approach to the issue.[15] Writing for the majority, Madame Justice Charron indicated that:

> Where the documents requested are not in the physical possession of the government institution, the inquiry proceeds as follows.
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> Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. The Commissioner agrees that the Access to Information Act is not intended to capture non-departmental matters in the possession of Ministers of the Crown. If the record requested relates to a departmental matter, the inquiry into control continues.
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> Under step two, all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The Commissioner is correct in saying that any expectation to obtain a copy of the record cannot be based on "past practices and prevalent expectations" that bear no relationship on the nature and contents of the record, on the actual legal relationship between the government institution and the record holder, or on practices intended to avoid the application of the Access to Information Act (A.F., at para. 169). The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably should be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption.

[35] I adopt the Supreme Court's test for establishing control under the *Act* and have applied it in this appeal.

[36] To begin, I reject the ministry's attempt to distinguish this appeal from Order PO-3036 (and Reconsideration Order PO-3083-R) based on the nature of the information requested. At the very heart of both appeals are records related to the IBI therapy that is carried out under the auspices of the AIP, a program that all agree is within the ministry's purview. The request in the appeal leading to Order PO-3036 was for "the number of clients and number of hours approved for each client receiving … IBI service under the Direct Funding Option …," payment-related records that Adjudicator Stephanie Haly concluded were in the ministry's custody or control. While the request in this case does not seek information about the funding of AIP program services, *per se*,

[15] For example, Orders P-120 and P-239.

it seeks information directly related to the evaluation of outcomes of the funded service which, in my view, is information that is substantially similar in nature as regards the ministry's oversight role for the AIP.

[37] The first part of the test in *National Defence* asks whether the information is related to a departmental matter. The ministry's evidence is that in the context of the regional service providers' responsibility for carrying out developmental/psychological assessments for diagnostic purposes, information about or related to those assessments is clinical, psychological data about the children receiving IBI. As the ministry positions it, the information collected under the service agreements with TPAs relates to "outputs" of the IBI program, which should suffice as a "public performance measure." In other words, since the requested information is not required to ensure the compliance of the TPAs or inform the public about the program, the requested information is not a departmental matter. However, I prefer the appellant's characterization of the requested information. Specifically, I accept that it is not clinical data about individual IBI clients, even if its source is individual client files, and that the information distilled permits measurement of the progress of the IBI program overall. Therefore, I find that the requested information – the types of psychological assessments used by the regional providers, as well as the outcome evaluation data - relates to a departmental matter of the ministry in its oversight capacity respecting the AIP.

[38] I am also satisfied that the ministry could reasonably be expected to obtain a copy of the information upon request, as contemplated by part two of the test established in *National Defence.* As in Order PO-3036, the nature of the contractual relationship between the ministry and the regional providers, or TPAs, points to a finding of control. In particular, I note the following reasons of Adjudicator Haly that I find applicable in the circumstances of the appeal before me:

> [21] Based on my review of [contractual] 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:
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> - 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.** [emphasis added]
- 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.

[39] In this appeal, as stated, I am satisfied that the requested information is related to the evaluation of program outcomes and, therefore program effectiveness, which falls within the ministry's oversight role. The ministry argues that it does not require or rely on the particular information requested to monitor the service contracts with the TPAs and provided the Consolidated Autism Reporting Template to demonstrate what information it currently collects (and requires) for program oversight. In my view, however, it is no answer to the question of control over the requested information to say that the oversight of the IBI program mandated by the AIP Guidelines can be accomplished without the requested information. As the Divisional Court stated in *Ontario (Criminal Code Review Board)* (cited above), the mere fact that an institution has not exercised control over particular records in the past "will not necessarily advance the institution's argument that it, in fact, has no control."[16]

[40] In this context, I accept the appellant's submission that certain provisions in the ministry's contract with the TPAs establish a high standard in terms of information over which the ministry can exert control. In particular, the wording of section 6 of the contract speaks to information mentioned previously, including: section 6(a) "statistics on target achievements and such other information as Ontario requires;" and section 6(b), as part of a "comprehensive report acceptable to Ministry staff." Based on this wording, I conclude that the requested information is the type of information that the ministry would be entitled to review, copy, possess or request from the TPAs.

[16] See also Order PO-2836.

Therefore, I conclude that the contractual provisions weigh in favour of a finding of control on the part of the ministry.

[41] Having considered the evidence, including the context and comparison with the circumstances of Order PO-3036, I am satisfied that in its oversight role, the ministry could reasonably expect to obtain the requested information from the TPAs upon request, according to part two the test established by *National Defence*. As both parts of the *National Defence* test have been met, I conclude that the ministry has the requisite degree of control in the circumstances to establish that the requested information is within the ministry's custody or under its control for the purposes of section 10(1) of the *Act.*

[42] In the ministry's submissions about the custody or control factors relating to customary practice and authority to regulate the content, storage or disposal of the records, the ministry conveyed concern regarding the potential for this request to result in an "unnecessary collection" of personal information or personal health information. In response to this point, I should reiterate that 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.[17] Information may be exempt or excluded from the *Act*. Indeed, as stated in section 15 of the ministry's service contract with the TPAs, "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.*"

[43] Further, regarding the ministry's concerns about whether the requested information constitutes personal health information as defined in section 4(1) of the *Personal Health Information Protection Act*, I am inclined to favour the appellant's position that he does not seek personal health information, or personally identifiable information, but rather aggregate data.[18] Regardless, the determination of those issues awaits an access decision by the ministry in which such issues might be squarely raised.

[44] Finally, with regard to the ministry's submission that the requested information does not exist in the form of a record and that there is no obligation under the *Act* to create one, I consider these arguments to be premature. Should it be necessary to address the issue as a consequence of my decision in this order, there is ample guidance provided by past orders to assist in the consideration of the ministry's obligations with respect to information in its record holdings that does not exist in the format requested.[19] Any corresponding considerations related to fees may also be addressed at that time.

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[17] Order PO-2836.

[18] For a discussion of severance in relation to personal (health) information in an appeal under FIPPA, see Order PO-2744, for example.

[19] See Orders MO-2129, PO-2904 and PO-3100. See also *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, *supra,* for further discussion, including the responsibility shared by a requester for costs.

[45] To conclude, I find that the requested information related to the psychological assessments and IBI outcome evaluations under the AIP is in the ministry's control. I order the ministry to obtain this information from the TPAs and issue an access decision with respect to it.

ORDER:

1. I order the ministry to issue an access decision letter to the appellant in accordance with the provisions of the *Act,* treating the date of this order as the date of the request.

2. I order the ministry to provide me with a copy of the decision letter referred to in Provision 1 when it is sent to the appellant.

Original signed by: September 16, 2014
Daphne Loukidelis
Adjudicator