

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3864

Appeal PA17-350

Ministry of Community and Social Services

July 16, 2018

Summary: The Ministry of Community and Social Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to, and the correction of, records pertaining to a Crown Wardship. At the close of mediation, the only issue remaining was whether the ministry had custody or control over the appellant's Crown Wardship records. The ministry took the position that it did not have custody or control of the appellant's Crown Wardship files, which it asserted would be under the custody and control of a Children's Aid Society. This order upholds the decision of the ministry and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 10(1); *Child and Family Services Act*, R.S.O. 1990, c. C.11; *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1.

Order Considered: P-1069.

OVERVIEW:

[1] The Ministry of Community and Social Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to, and the correction of, records pertaining to a Crown Wardship.

[2] In a subsequent telephone conversation between the requester and the ministry the requester clarified and confirmed that she sought:

Access to records pertaining to my own personal information, regarding any record of Crown Wardship; which was on [specified date] to [specified date], according to the Toronto Children's Aid Society.

[3] In its initial decision letter, the ministry took the preliminary position that section 67(1) (conflict with another Act) excludes Crown Wardship records from *FIPPA* and explained:

We can confirm that Crown Wardship files are in the custody and control of a Children's Aid Society (CAS). As such you may want to contact the CAS you attended directly; however, please be advised that they are not subject to the *Act*.

[4] In a supplementary decision letter, the ministry further advised that:

We have carefully reviewed your correction request and do not believe that you have provided sufficiently specific information to provide an employee of this ministry the ability to identify the records you believe require corrections.

In addition, as per your request for corrections to 'Crown Wardship' records, we can confirm that no such records would be in our custody and control. They would reside with Children's Aid Societies (CAS's), which are not directly operated by the Ministry of Children and Youth Services. You may wish to contact the CAS's that you attended in order to determine if corrections may be made to their records; however, please note that CAS's are not subject to the *Act*.

[5] The requester (now the appellant) appealed the ministry's decisions.

[6] At mediation, the appellant provided some additional information to the ministry and it conducted a further search for responsive records, however, no additional responsive records were found. Also at mediation, the ministry advised that it was no longer relying on the possible application of the section 67(1) exclusion but took the position that any responsive records were not within its custody or control. The appellant advised the mediator that she takes issue with the ministry's assertion that any responsive records are not within its custody or control.

[7] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[8] Shortly after the Mediator's Report was sent to the parties, the ministry issued a further supplementary decision letter recapping what it had written in its previous decision letters, but advising the appellant that it had now located a Status Review Order and a Status Review Application pertaining to the appellant's Crown Wardship, which were then disclosed to the appellant, in full. Accordingly, whether or not

additional Crown Wardship records pertaining to the appellant are within the ministry's custody or control became the sole issue in the appeal.

[9] I commenced my inquiry into this appeal by sending a Notice of Inquiry to the ministry setting out the facts and issues in the appeal. The ministry provided representations advising that it was relying on the position it had set out in its further supplementary decision letter and had nothing further to add. A copy of the letter was included with its representations. I then sent a Notice of Inquiry to the appellant who provided representations in response, which were then shared with the ministry. The ministry advised it had nothing to add to its earlier response. Shortly thereafter, the appellant provided additional materials for my consideration. All of the submissions and materials filed were considered by me in making my determination in this appeal.

[10] In this order, I uphold the decision of the ministry and dismiss the appeal.

DISCUSSION:

[11] 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 . . .

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

[13] 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.¹ 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.² 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). The courts and this office have applied a broad and liberal approach to the custody or control question.³

[14] The ministry's position is that Crown Wardship files would reside with the Children's Aid Societies which are not directly operated by the Ministry of Children and Youth Services or the Ministry of Community and Social Services and that any

¹ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

² Order PO-2836.

³ *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), cited with approval in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25, [2011] 2 SCR 306.

responsive records in the custody or control of the ministry were disclosed to the appellant.

[15] The appellant takes the position that the ministry has control of any responsive records held by Children's Aid Societies. She makes the following submissions in support of her position:

The record was created by agents of the state (see sections 63(1) and 63.1 of the *Child and Family Services Act* [the *CFSA*]⁴) and responsive records were created with respect to a child in care of a Children's Aid Society on behalf of the state.⁵

The Province of Ontario has statutory power over all 47 Children's Aid Societies in Ontario under the *Child and Family Services Act*.

It is a core function of the ministry, historically, and, a core function of the Ministry of Children and Youth Services since 2007. (...).

Pursuant to statutory mandate and policy, the Ministries have control through databases but no enabling legislation as required. (...)⁶.

It is only the Ministries who have control or the ability to change the record, Children's Aid Societies can only add to the record.⁷

The Ministries have a right to the record, and as a statutory parent under the *Child and Family Services Act* however, the registry is not *Charter*⁸ compliant, and, there is no enabling legislation for the Provincial databases, named as Legacy, Fast Track or the Child Protection Information system as required for these massive big data projects, and section 8 of the *Child and Family Services Act* was subject to automatic repeal in 2011 having never been enacted, leaving all youth in and from care in a position of statelessness through administration in violation of sections 7, 8, 12, 15 and 24(1) of [the *Charter*].

⁴ *Child and Family Services Act*, R.S.O. 1990, c. C.11, now repealed and replaced by the *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1.

⁵ The appellant refers to the following cases in support of her position: *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 SCR 83, 2007 SCC 38; *Children's Aid Society of Toronto v. M.(A.)*, 2002 CanLII 45665 (ON CJ); *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145; *Children's Aid Society of Toronto v. A.C.*, 2016 ONCJ 750.

⁶ In support of this submission the appellant refers to a number of policies and the *Child and Family Services Act*, generally.

⁷ In support of this submission the appellant refers to a Fast Track User guide, and CAS record information she provided.

⁸ The *Canadian Charter of Rights and Freedoms, The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

The ministry entirely mandates the policy surrounding Children's Aid Society records.

Only the ministry has that information, as fast Track information is logged each time a file is accessed and only the Ministry has access to that log, which was previously provided to [this] office. It depends on which database. The Child Protection Information System has not been fully implemented.

Fast Track has been around since 2011, the Legacy database since 1979 but there is very little public information on both.

It is entirely integrated (Fast Track and The Child Abuse Registry are accessed through the same interface (...)) since the *Baldwin* Decision entire childhood histories are shared.

According to the *Child and Family Services Act*, the Children's Aid Societies are the custodians and they can be multiple custodians with no oversight. (...). They are mentioned under [*FIPPA*] in exemptions specific only to adoption records, etc.

I own the record as it is information about me. Hence the term "information custodian".

I do not believe there were agreements historically between Children's Aid Societies and the province prior to Bill 89 as that is a new process in preparation for the new act.

... , the agent bound the institution through the *Child and Family Services Act* and jurisprudence.

... , the records relate to a core function of the departmental matter of the ministry, paid for by tax dollars.

The government institution can easily obtain a copy and I have previously provided the information and sharing agreement from The Provincial Advocate for Children and Youth.

[16] The appellant submits that she has "no interest in other people's information" and that she is "aware there are serious problems with my file containing major inaccuracies". She further submits that:

The decision to share entire childhood histories with no oversight and no enabling legislation violates the *Charter* rights of children of the Crown, the most vulnerable children of Ontario, and it is the ministry who owns

the database and controls the records and has delegated their non-delegable duty.

[17] In the additional materials that the appellant provided for my consideration, she included a letter that she had received from the Ministry of Children and Youth Services in 2015. Amongst other things, the letter advised the appellant that:

Children's Aid Societies (CAS's) are independent legal entities (corporations run by volunteer boards of directors or in one case, an Indian Band operating under the *Indian Act*), accountable to the communities they serve. CAS's have custody and control of their own files, and are expected to have policies that comply with the ministry's Case Information Disclosure policy regarding access, disclosure, correction, and privacy for service providers, including CAS's. For your information, please find attached a copy of the ministry's Case Information Disclosure Policy, (1985). CAS's are also bound to follow other legislation where it may apply (e.g. *Personal Health Information Protection Act* and *Youth Criminal Justice Act*).

Analysis and Finding

[18] This office has addressed this type of request in the past. In Order P-1069, Inquiry Officer Mumtaz Jiwan was addressing two requests that raised the same issues and similar arguments to those raised by the appellant in this appeal. Inquiry Officer Jiwan set out the background for the requests at issue before her as follows:

The Ministry of Community and Social Services (the Ministry) received two requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all information in the requesters' Crown ward files pertaining to a specific period (1968-1969). The two requesters are sisters who are seeking access to their own personal information for the period of their Crown wardship. The Ministry identified certain court orders as responsive to the requests and granted partial access.

Access was denied to records, or portions thereof, that contained the personal information of individuals other than the requesters. The Ministry also advised the requesters that the remaining information sought may be found in the Crown ward files maintained by the Children's Aid Society, Niagara (CAS).

The requesters appealed the decisions of the Ministry on the basis that additional records should exist. The requesters also claim that the Ministry has control over CAS records and therefore, should be able to allow access to them. Two separate appeal files (P-9500225 and P-9500339) were opened. Since the institution and the issues in each file are the same

and in the interests of expediency, this order will dispose of the issues in both P-9500225 and P-9500339.

[19] As set out in Order P-1069, the appellants in that appeal took the following position:

The appellants submit that in accordance with the Directory of Records which lists the type of personal information records maintained by provincial ministries and their agencies, the Ministry's Crown ward files should include more than court orders. In particular, the Ministry is required to maintain copies of the medical histories of Crown wards and parents, the social history of the parents and grandparents, placement history, plan and review of care, discharge plans and termination of wardship orders. The appellants have only received copies of court orders. The appellant (P-9500339) states that the Ministry has not provided her with her Crown wardship document. The appellant (P-9500225) points out that the records pertaining to the termination of her wardship in 1971 when custody was awarded to a family member have not been located by the Ministry.

[20] As set out in Order P-1069, the Ministry of Community and Social Services made the following responding submissions in that appeal with respect to the reasonableness of its search for responsive records:

The Ministry explains that the *Child Welfare Act*, in effect at the time that the appellants' records were created, required the court issuing orders in child welfare cases to send copies of such orders to the Ministry. Such orders could relate to temporary care and custody or adjournments, supervision orders, society or Crown wardship orders, payment orders and other judgments affecting the welfare of the child.

By way of background, the Ministry submits that at the time that the records were created, the CAS had the rights and responsibilities of legal guardian for the purposes of the child's care, custody and control. The Ministry states that the files maintained by the CAS reflected this role and therefore, were extensive, containing legal documents, family social history, placement history and the social worker case notes.

The Ministry acknowledges that the current Directory of Records contains a detailed list of records which may be maintained in Ministry files but submits that the requirements under the previous legislation were different and therefore, the records that the Ministry created and maintained during that time, consisted mostly of court orders.

The Ministry states that records of this nature would not have been destroyed. The Ministry explains that at the time that these Crown ward files were created, they were required to be retained for 60 years. In 1987, the retention schedule was revised to 100 years. Therefore, all such files are held in the area Ministry offices until termination of the wardship, at which time the records are microfilmed and retained for 100 years. The Ministry states that all Crown ward files for the time period at issue (1968-69) are on microfilm stored in one location.

[21] The Ministry of Community and Social Services made the following responding submissions in that appeal with respect to the issue of custody or control:

In Order P-239, Commissioner Tom Wright considered the issue of "control" and he stated:

In my view, the fact that there may be limits on the institution's ability to govern the use of the records is relevant to the issue of whether the institution has control of the records, but does not preclude an institution from having custody.

[22] After adopting former Commissioner Sidney B. Linden's approach in Order P-120, and setting out the factors he considered, Inquiry Officer Jiwan wrote:

The Ministry submits that it does not have control over the records kept by the CAS and that this reflects the different roles and responsibilities of the two organizations. The Ministry states that it "has a general supervisory and monitoring role over the CAS while the CAS has the rights and responsibilities of a parent for its wards' custody, care and welfare."

The Ministry states that the CAS operates under the *Child and Family Services Act* (previously the *Child Welfare Act*), its regulations and Ministry standards and guidelines and is administered by an independent Board of Directors. The CAS is a transfer payment agency in that it receives annual operating funding from the Ministry and the local municipality and is accountable to the Ministry only for the use of those funds and for the quality of the program.

The Ministry submits that the files maintained by the CAS are entirely under the control and custody of the CAS and that the CAS has complete jurisdiction over their maintenance or management including approving or refusing access to the files. The Ministry states that the CAS files are created by the CAS employees for their own use, that the contents of the files relate solely to the mandate of the CAS and that the Ministry has no knowledge or authority over the use or disposal of these records.

In its representations, the CAS states that it is a non-profit corporation governed by a Board of Directors independent of the Ministry. The CAS confirms that it is partially funded by the Ministry and that the Ministry monitors the operations of children's aid societies and conducts periodic reviews of the care and services being provided to the children in care.

The CAS states that it maintains a record for each child in its care and for every family to whom it provides service and that these records are created and maintained by the CAS for its own uses. The CAS points out that even though the *Act* does not apply to it, it routinely receives requests for access to its records from parents and children previously associated with the CAS. The CAS states that reasonable efforts are made to provide the information sought by way of written summaries, if requested, and since the information is often on microfiche, this often involves lengthy delays.

One of the appellants submits that a separate request for access to the Crown ward files was made directly to the CAS. The CAS advised the appellant that it was not the CAS' policy to provide access to a copy of the files. In its response, the CAS indicated that efforts would be made to respond to any specific questions or issues. The information sought was not provided to the appellant.

In their representations, the appellants' state that they are now both adults trying to fill in the gaps of their early lives and that access to their Crown ward files would provide the necessary information.

The appellants submit that the CAS is funded by the Ministry and therefore, the Ministry must have control over the administration and records of the CAS. With their representations, the appellants have included copies of the *Child Welfare Act*, the governing legislation during the relevant period, together with amendments and copies of Crown ward administrative reviews. The appellants have also included court cases where records of children's aid societies have been allowed in evidence.

I have carefully reviewed the representations of the parties. The Ministry has addressed each of the factors listed above and submits further that its right to access the records held by the CAS is limited to ensuring compliance with the *Child and Family Services Act* (the *CFSA*) and the regulations. In my view, the Ministry's right of access to the records is limited to requiring financial accountability for the funds provided to the CAS and to periodic administrative reviews for the purpose of ensuring compliance with the *CFSA*. I find therefore, that the Ministry does not have control over the records held by the CAS for the purposes of section 10(1) of the *Act*.

[23] Although Inquiry Officer Jiwan found that the records were not in the ministry's custody or control, with the result that the requester could not access them from the ministry under the *Act*, she encouraged the CAS itself to consider access in the following postscript:

Having determined that the Ministry does not have control over the requested records, I am mindful that the information to which access is sought consists of the personal information of the appellants, albeit of a sensitive nature. I am aware that children's aid societies are currently not subject to the *Act*. The Children's Aid Society, Niagara (the CAS) has indicated that it does receive requests for access from former service receivers and former wards and addresses them on an individual basis. I note that the records relate to events during the period that the appellants were designated Crown wards and that these two individuals are now adults. While I am appreciative of the position of the CAS and the sensitive nature of the records at issue, the CAS may wish to consider whether disclosure of records, such as the ones at issue in this appeal, would be in the best interests of the individuals who were formerly in its care.

[24] This concern has now been addressed by the Ontario legislature, when it recently adopted legislation⁹ bringing Children's Aid Societies under the scope of this office's mandate.

[25] I am not satisfied that the appellant has provided sufficient evidence for me to revisit the finding of Inquiry Officer Jiwan that the ministry does not have custody or control over Children's Aid Societies' records. In my view, the relationship between the ministry and Children's Aid Societies has not changed to such a degree to merit a deviation from her determinations. I am satisfied that, in all the circumstances, the ministry does not have custody or control of the appellant's Crown Wardship records.

ORDER

I uphold the decision of the ministry and dismiss the appeal.

Original Signed by: _____

Steven Faughnan
Adjudicator

July 16, 2018

⁹ The *Child, Youth and Family Services Act, 2017* SO 2017, c 14, Sch 1 with specific provisions to come into force on January 1, 2020.