Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4217

Appeals PA18-00561 and PA19-00407

Ministry of the Attorney

General December 6, 2021

Summary: The appellant sought access, under the *Freedom of Information and Protection of Privacy Act*, to information held by the Office of the Children's Lawyer (OCL) relating to reports prepared by OCL clinical investigators in the context of his custody and access proceeding. The Ministry of the Attorney General (ministry) denied access to the records on the basis that they are not in the ministry's custody or under its control. The appellant argued that OCL is itself an institution under the *Act* and that the records should be disclosed to him on that basis.

In this order, the adjudicator reviews the Court of Appeal's decision in *Ontario* (*Children's Lawyer*) *v. Ontario* (*Information and Privacy Commissioner*), 2018 ONCA 559 (CanLII), where the court found that certain records of the OCL were not in the ministry's custody or under its control. The adjudicator finds that, based on the court's reasoning, the reports at issue in the present appeals are similarly not in the ministry's custody or control. She finds, further, that the OCL is not itself an "institution" under the *Act* in relation to the records at issue. Finally, she finds that information sought by the appellant about reports being "overturned" or "retracted", and disciplinary information relating to a particular clinical investigator, does not exist. She dismisses the appeals.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 10(1); Ontario Regulation 460, R.R.O. 1990, section 1(1); *Courts of Justice Act*, R.S.O. 1990, c. C.43, section 112.

Orders and Investigation Reports Considered: Orders PO-3520, PO-4066, and MO-2130.

Cases Considered: *Ontario* (*Children's Lawyer*) *v. Ontario* (*Information and Privacy Commissioner*), 2018 ONCA 559 (CanLII), application for leave to appeal dismissed 2019 CanLII

23873 (SCC); *Canada* (*Information Commissioner*) *v. Canada* (*Minister of National Defence*), 2011 SCC 25, [2011] 2 SCR 306.

BACKGROUND:

[1] This order addresses two access requests the appellant made, one to the Ministry of the Attorney General (ministry) and the next to the Office of the Children's Lawyer (the OCL), under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*). The ministry and the OCL denied his requests on the basis that the ministry does not have custody or control of the records he seeks and that the OCL is not itself an institution under the *Act*.

[2] As explained more fully below, the OCL is an office within the ministry. It describes itself on its website as "an independent law office in the Ministry of the Attorney General that delivers justice programs on behalf of children." It is the relationship between OCL and the ministry that gives rise to the issues in this appeal.

[3] The particulars of the appellant's access requests, and the responses of the ministry and the OCL are as follows.

Appeal PA18-00561

[4] The appellant made this access request to the ministry for the following information for the time period of January 1, 2013 to August 1, 2018:

1. Request for statistical records under the category of access and custody disputes:

    a. How many access and custody cases has the Office of the Children's Lawyer (the OCL) investigated

    b. How many times has the OCL recommended sole custody to the mother

    c. How many times has the OCL recommended sole custody to the father

    d. How many times has the OCL recommended joint custody

    e. How many disputes to an OCL final report have been filed with the OCL

    f. How many disputes resulted in a new investigation being ordered

    g. Have many times [has] Manager [named OCL manager] overturned a file report and what are the Court File numbers

    h. How many disputes were denied and a refusal to change the recommendations issued

i. How many times has civil action been taken against the OCL

2. Request for records related to [Clinical Investigator A]:[1]

   a. How many access and custody cases has [Clinical Investigator A] investigated

   b. How many times has [Clinical Investigator A] been removed from a case he was assigned

   c. How many times has [Clinical Investigator A] recommended sole custody to the mother

   d. How many times has [Clinical Investigator A] recommended sole custody to the father

   e. How many times has [Clinical Investigator A] recommended joint custody

   f. How many disputes have been submitted in response to [Clinical Investigator A's] final report

   g. How many times has one of [Clinical Investigator A's] final reports been retracted

   h. Release of all reports submitted by [Clinical Investigator A] filed in Family Court. Court and OCL file numbers need to be provided

   i. Release of all formal or informal disciplinary records of [Clinical Investigator A]

3. Release of the OCL dispute process procedure and a breakdown of how a dispute is assessed.

[5] In response, the ministry's Freedom of Information Coordinator sent a decision letter to the appellant stating the following:

> The Children's Lawyer takes the position that [*FIPPA*] does not apply to files where the Children's Lawyer exercises her independent statutory mandates. Her office is an independent office that delivers services in the administration of justice on behalf of children. When the Children's Lawyer renders these services, she is not acting on behalf of the Crown or the Ministry of the Attorney General. As such, any records related to those files are not in the custody or control of the Ministry of the Attorney General.

[1] The same investigator named in the access request at issue in PA19-00407; see below.

> In addition, the Office of the Children's Lawyer has indicated that no records exist in relation to parts 1(b), (c), (d), (f), (g), (h) and 2(b), (c), (d), (e), (g), (h) and (i) of your request.
>
> We understand that the Office of the Children's Lawyer is willing to provide you with some information from your request outside the scope of the *FIPPA*. You may wish to contact [the OCL Provincial Manager, Clinical Services] for further information.
>
> The person responsible for making this decision is [the Children's Lawyer].

[6] The appellant appealed the decision to the Information and Privacy Commissioner of Ontario (IPC). During the course of mediation, the parties had discussions with each other and the mediator. Pursuant to these discussions, the ministry again wrote to the appellant, stating:

> The Office of the Children's Lawyer … continues to take the position that requested records are not subject to *FIPPA*. Further, the OCL takes the position that no records exist in relation to parts 1(b), (c), (d), (e), (f), (g), (h), and 2 (c), (d), (e), (f), (g), and (h) of your request.[2]
>
> On October 18, 2018, the OCL provided you with the following information outside the scope of *FIPPA*.
>
> > Between January 1, 2013 and August 1, 2018:
> >
> > - There were 9184 Children's Lawyer Clinical Investigations (point 1(a)));
> > - [Clinical Investigator A] completed 8 Children's Lawyer reports (point 2(a));
> > - During this same time period, the OCL was aware of 9 civil claims against the OCL (point 1(i))
> > - The OCL is only aware of 1 other instance where a file of [Clinical Investigator A] was re-assigned to another agent (Point 2(b)).
>
> With respect to part 2(g), the OCL does not "retract" reports, as they do not have the ability to "retract" a report or remove it from a court file.
>
> With respect to part 3 of your request, please find attached a description of the dispute process, as provided by the OCL.

[2] As seen below, the OCL also maintained its position that no records exist in respect of part 2(i) (disciplinary records). This appears to be an omission in its letter, but is of no consequence here.

[7] The appellant was satisfied with the response to items 1(a), 1(i), 2(a), 2(b) and 3 of the request. These items are, therefore, no longer at issue in this appeal.

[8] The appellant, however, wished to proceed to adjudication to pursue access to the information related to items 1(b), (c), (d), (e), (f), (g), (h), and 2(c), (d), (e), (f), (g), (h) and (i) of the request. The appellant disagreed with the ministry's position that any responsive records are not in its custody or control and that records responsive to the request do not in fact even exist.

Appeal PA19-00407

[9] The appellant made this next access request directly to the OCL, seeking the following information for the time period of January 1, 2015 to August 1, 2019. There is some overlap with the information sought in Appeal PA18-00561.

1. Request for statistical records held by the OCL related [to] custody and access investigation reports:

    a. How many times has the OCL recommended sole custody to the mother

    b. How many times has the OCL recommended sole custody to the father

    c. How many times has the OCL recommended joint custody

    d. How many times has the OCL not made a recommendation

    e. How many disputes to an OCL final report have been served on the OCL

    f. How many disputes resulted in a new investigation being ordered

2. Records related to all investigations conducted by [Clinical Investigator A][3]

    a. How many times has [Clinical Investigator A] recommended sole custody to the mother

    b. How many times has [Clinical Investigator A] recommended sole custody to the father

    c. How many times has [Clinical Investigator A] recommended joint custody

    d. How many times has [Clinical Investigator A] not made a recommendation

    e. How many disputes were served on the OCL related to a final report issued by [Clinical Investigator A]

[3] The same investigator named in the request at issue in Appeal PA18-00561; see above.

3. Records related to all investigations conducted by [Clinical Investigator B]

    a. How many times has [Clinical Investigator B] recommended sole custody to the mother

    b. How many times has [Clinical Investigator B] recommended sole custody to the father

    c. How many times has [Clinical Investigator B] recommended joint custody

    d. How many times has [Clinical Investigator B] not made a recommendation

    e. How many disputes were served on the OCL related to a final report issued by [Clinical Investigator B]

[10] The appellant's request continued:

> … the information is readily available in the reports for each case under a specific section called "Recommendations."
>
> In lieu of the OCL having to retrieve the requested statistical information, I am willing to attend in person to review the "Recommendations" section of each report or have the OCL send me the "Recommendations" section of the reports covering the time period.

[11] In response, the OCL sent a letter to the requester that stated the following:

> Contrary to your letter, the OCL is not a named "institution" under [the *Act*]. As such, we are forwarding your request to the Ministry of the Attorney General, the defined "institution" under [the *Act*], for its consideration.

[12] The appellant appealed the decision to the IPC and the appeal was assigned to an IPC analyst who contacted the ministry to discuss the OCL's forwarding of the request to the ministry. The OCL then sent a second letter to the appellant that stated the following:

> … the Ministry of the Attorney General has redirected your request to me for a response.
>
> Please be advised that the Office of the Children's Lawyer does not track the information you are requesting, and the requested records do not exist.
>
> For your information, a recent court decision, *Ontario (Children's Lawyer) v Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559, upholds the position [of] the Office of the Children's Lawyer (OCL) that

> [the *Act*] does not apply to files where the Children's Lawyer exercises her independent statutory mandates. Her Office is an independent office that delivers services in the administration of justice on behalf of children. When the Children's Lawyer renders these services, she is not acting on behalf of the Crown or the Ministry of the Attorney General. As such, any records related to those files are not in the custody or control of the Ministry.

[13] No mediated resolution was achieved and the appellant advised the mediator that he wished to proceed to adjudication.

[14] Both appeals then moved to the adjudication stage.

Adjudication stage

[15] As the adjudicator assigned to these appeals, I invited and received representations from the parties on the issues on appeal.[4] Counsel for the OCL provided representations and detailed affidavits in response to the Notice of Inquiry directed to the ministry.[5] I decided to continue the inquiries into the two appeals jointly, given the overlap in issues and the fact that the parties are the same in each.

[16] The affidavits filed by the OCL included:

- Two affidavits sworn by its Provincial Manager of Clinical Services.[6] These affidavits set out the background and structure of the OCL; the nature of the records at issue; the process for the OCL's performing its clinical investigation services to the court; the OCL's relationship to the ministry; and the nature of the information and records the OCL has that relates to the appellant's access request. One of the affidavits provides additional information about the OCL's logging of disputes, and provides some information about the number of disputes logged each year since 2015.

- An affidavit sworn by the OCL's Chief Administrative Officer.[7] This affidavit sets out the nature of the information that the OCL reports to the ministry as part of its accountability requirements.

[17] Throughout this order, I will refer to these individuals as the Provincial Manager and the CAO, respectively.

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[4] All of the parties' representations were shared with each other in accordance with the IPC's *Practice Direction 7.*

[5] The ministry confirmed that it would not be providing representations in these appeals, over and above those made by the OCL.

[6] Dated October 16, 2019 and January 31, 2020. The former was filed in Appeal PA18-00561 and the latter in Appeal PA19-00407. The affidavits, which are substantially similar, were filed before the decision to process the appeals together.

[7] Dated January 31, 2020.

[18] For the reasons that follow, I uphold the ministry's decisions and dismiss the appeals.

ISSUES:

[19] The appellant stated the issues before me as follows:

- Is the OCL an institution, and therefore, subject to the Act?
- Was the OCL entitled to forward the request to the ministry?
- Are the responsive records in the custody or under the control of the OCL and/or the ministry?
- Do records responsive to the request exist?

[20] Where a requester believes that further records exist that have not be identified by the institution, the issue is whether the institution has conducted a reasonable search for records. This order, then, addresses the following issues:

A. Is the OCL an institution, and therefore, subject to the *Act*? Was the OCL entitled to forward the appellant's second request (Appeal PA19-00407) to the ministry?

B. Are the responsive records in the custody or under the control of the ministry? Did the ministry conduct a reasonable search for records in its custody or control?

RECORDS:

[21] The following information remains at issue in the appeals:

- Appeal PA18-00561: the information requested in items 1(b), (c), (d), (e), (f), (g), (h), and 2(c), (d), (e), (f), (g), (h) and (i) of the appellant's request, and
- Appeal PA19-00407: all requested information.[8]

[22] For the ease of reference and analysis in this order, I have grouped the information into the following categories:

- Statistical information about the custody recommendations portion of OCL clinical investigator reports, i.e. the number of times the reports made certain custody

[8] Although the OCL provided some information about disputes to the appellant during the course of adjudication, this information was never formally removed from the scope of the appeal.

recommendations, including custody recommendations made by Clinical Investigators A and B in particular,[9]

- Statistical information about disputes filed in respect of OCL clinical investigator reports, including with respect to Clinical Investigators A and B in particular,[10,11]
- All reports submitted by Clinical Investigator A and filed in Family Court,[12]
- Statistical information about how many times clinical investigator reports have been retracted or overturned,[13] and
- Disciplinary records of Clinical Investigator A.[14]

DISCUSSION:

The Court of Appeal's decision in *Children's Lawyer*

[23] I begin with a discussion of the Court of Appeal's findings in *Ontario* (*Children's Lawyer*) *v Ontario* (*Information and Privacy Commissioner*)[15] (*Children's Lawyer*), because the court's findings in that case are relevant to the issues before me.

[24] In *Children's Lawyer*, the court reviewed an IPC decision regarding an access request made to the ministry under the *Act*. The request was for various records related to services the OCL provided to that requester's[16] two children in custody and access proceedings. In particular, the request was for:

- Privileged and non-privileged reports relating to the children,
- All documents filed with the court, including settlement reports, medical reports, psychological and educational reports, conversations and notes, transcript[s], and
- All notes and information relating to the duties of a named lawyer in an identified file, including notes, court documents, and assessments.

[25] The OCL took the position that the *Act* does not apply to litigation files where it provides services to children. Although the OCL did not dispute that it is a branch of the

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[9] Appeals PA18-00561 – items 1(b)(c)(d), 2(c)(d)(e) and PA19-00407 – items 1(a)(b)(c)(d), 2(a)(b)(c)(d), 3(a)(b)(c)(d).
[10] Appeals PA18-00561 – items 1(e)(f)(h), 2(f) and PA19-00407 – items 1(e)(f), 2(e), 3(e).
[11] See footnote 9.
[12] Appeal PA18-00561 – item 2(h).
[13] Appeal PA18-00561 – items 1(g), 2(g).
[14] Appeal PA18-00561 – item 2(i).
[15] 2018 ONCA 559, application for leave to appeal dismissed 2019 CanLII 23873 (SCC).
[16] Not the same individual as the appellant in the appeals before me.

ministry, and that its business and administrative records are covered by the *Act*, it took the position that records in its legal files are not.

[26] After conducting an inquiry, the IPC adjudicator found in Order PO-3520 that the records were in the ministry's custody or control. The adjudicator noted that the records may be subject to exemptions from the right of access and ordered the ministry to issue a new access decision.

[27] In her order, the adjudicator noted that the OCL is a branch of the ministry and thus is part of the ministry. On that basis, she found no reason to differentiate between different aspects of the operations of the OCL for *FIPPA* purposes. She found that whether the records of the OCL are generated for the purpose of discharging its financial and other accountabilities to the ministry, in the course of providing clinical services, or in the course of legal representation, all such records are connected with that office's core mandate, within the broader umbrella of the ministry's supervision of the administration of justice.

[28] The OCL brought an application for judicial review of the adjudicator's order. The Divisional Court upheld the order, but the Court of Appeal reversed the Divisional Court's finding and quashed Order PO-3520.

[29] The Court of Appeal began by setting out what it saw as the relevant context, namely: "the best interests of the child; the voice of the child; the confidential role of the Children's Lawyer; the child's privacy interests; the fact that confidentiality is broader than solicitor-client privilege; and the fact that the records belong to the child."[17] The court found that, given the relevant context, OCL does and must operate separately and distinctly from the ministry, and that when representing children, OCL is not a branch of the ministry.

[30] At paragraphs 96-102, the court stated:

> Although MAG is an institution within the meaning of s. 2(1) of *FIPPA*, bodies that may be administratively structured under MAG are not automatically subject to *FIPPA*. An organization's administrative structure is not determinative of custody or control; a contextual analysis is required. In *Walmsley*, this court explained that a determination of care or control "depends on an examination of all aspects of the relationship between [here the Children's Lawyer] and [MAG] that are relevant to control over the documents": at p. 619.
>
> An examination of the relationship between the Children's Lawyer and MAG relevant to custody or control over the documents discloses that – for her core functions regarding children – the Children's Lawyer is not a branch of MAG.

[17] *Children's Lawyer*, supra, para 55.

> The Children's Lawyer represents the child. She is not a government agent. Her functions and promise of confidentiality are not conferred on MAG.
>
> While the Children's Lawyer is administratively structured under and has a funding relationship with MAG, they are not connected with respect to her core functions: there is no statutory relationship between the two entities; she does not receive direction from MAG; she does not report to MAG; and her fiduciary duties are to her child clients, not to MAG.
>
> The Children's Lawyer's fiduciary duties to her child clients require undivided loyalty, good faith and attention to the child's interests, to the exclusion of other interests, including the interests of the child's parents, the interest of the Crown and the interests of MAG. The independence of the Children's Lawyer is particularly significant when she must act contrary to the interests of MAG or the Crown. Her child clients could have an action against the Crown, could have a constitutional question before the court, or could be a defendant in an action brought by the Crown.
>
> When representing children, the Children's Lawyer operates separate and apart from MAG, does not take direction or obtain input from MAG, does not provide MAG with access to records relating to children and MAG does not have authority to request them. The Children's Lawyer is solely responsible for record keeping in relation to her clients without any direction from MAG.
>
> Thus, the Children's Lawyer is not a branch of MAG for the purposes of the children's records. Again, an organization's administrative structure is not determinative of custody or control for purposes of *FIPPA*.

[31] The court went on:

> Since the Children's Lawyer is not part of MAG, and is thus not an institution, an analysis is required to determine whether the records are under MAG's custody or control.[18]

[32] The court then found that the records in question were not in the ministry's custody or control, for reasons that I summarize further under issue B, below.

Issue A: Is the OCL an institution, and therefore, subject to the *Act*? Was the OCL entitled to forward the appellant's second request (Appeal PA19-00407) to the ministry?

[33] As I explained above, the appellant submitted his first access request (Appeal

[18] *Ibid*, para 107.

PA18-00561) to the ministry, and submitted his second access request (Appeal PA19-00407) directly to the OCL. In the context of the latter, he argues that the OCL is itself an institution under the *Act* and as such, the OCL was required to disclose the requested records to him under the *Act*.

Is the OCL an institution under the *Act*?

[34] Section 10(1) of the *Act* provides for a general right of access to records in the custody or under the control of an institution.

[35] The OCL submits that, while the Children's Lawyer is administratively structured under the ministry, she is an independent appointee who is not acting on behalf of or in the interest of the ministry when providing statutorily mandated services to children. As such, the OCL says that it is not an "institution" under the *Act*, and notes that the Court of Appeal confirmed this in *Children's Lawyer.*

[36] The appellant says that he submitted his second access request directly to OCL because the Court of Appeal in *Children's Lawyer* determined the OCL has custody and control of the types of records he seeks, which are in the OCL's case management system. The OCL then sent his request to the ministry who never acknowledged or responded to it (as noted above, during mediation at the IPC, the ministry referred the request back to OCL for a response).

[37] The appellant argues that since the ministry is an institution under the *Act*, "by default" the same designation should be extended to the OCL as an arm of the ministry. He notes that the Director of the OCL is appointed by the Lieutenant Governor on the recommendation of the Attorney General. He also notes that the IPC has previously viewed the OCL as an institution.[19]

[38] He argues that there needs to be a mechanism for accountability when it comes to the OCL. He says the Ontario Ombudsman's office will not accept or pursue complaints against the OCL, the ministry has no oversight capabilities aside from financial oversight, the Ontario Human Rights Commission will not accept complaints about the OCL from anyone other than the child, and pursuing civil action against the OCL requires production of information from the OCL to prove it, which leads back to the freedom of information process. He says it is unethical for the OCL to avoid having to disclose information by arguing that it is independent from the ministry and also does not itself qualify as an institution under the *Act.*

[39] The appellant also argues that there are several key differences between this case and the circumstances in *Children's Lawyer*. He says that in the latter case, the requester was seeking the complete OCL files including statements of his children, which could have placed the children's well-being at risk. He also observes that the OCL

[19] The appellant did not elaborate, but it appears he is referring to Order PO-3520 and the adjudicator's reference to the OCL's having responded to access requests under the *Act* for the past two decades.

produces the reports at issue in this appeal to the parents of the child in question, and files them with the court, so the reports become a matter of public record.

[40] The appellant refers to the Auditor General's 2011 report, which the appellant says cited a lack of transparency in the OCL's reporting. He says his request for statistical records from the OCL is reasonable to ensure transparency and fairness within its investigations. He says:

> The OCL refuses to provide this information citing various frivolous reasons which puts the Appellant in an unreasonable position to request every file number and court location for the requested records, then have to attend each court across the province in an attempt to locate and copy each OCL report within the public court record. The reasonable solution is for the OCL to produce the records for the requested information to be available for viewing.

[41] Finally, he says that it could take years to amend the *Act* or Regulation 460 to designate the OCL as an institution and that in the meantime, and in the interests of accountability, the IPC should order the OCL to provide the records he seeks.

Analysis and findings

[42] For the following reasons, I find that the OCL is not an institution in respect of the records at issue in this appeal.

[43] Section 2(1) of the *Act* defines "institution" as follows:

> "institution" means,
>
> (0.a) the Assembly,
>
> (a) a ministry of the Government of Ontario,
>
> (a.1) a service provider organization within the meaning of section 17.1 of the *Ministry of Government Services Act*,
>
> (a.2) a hospital, and
>
> (b) any agency, board, commission, corporation or other body designated as an institution in the regulations;

[44] Section 1(1) of Ontario Regulation 460 states:

> The agencies, boards, commissions, corporation and other bodies listed in column 1 of the Schedule are designated as institutions.

[45] The ministry is an institution under the *Act* as a ministry of the government of

Ontario (paragraph (a) of the definition). The OCL is not an institution under any of paragraphs (0.a), (a), (a.1), or (a.2). The Schedule to Ontario Regulation 460 does not list the Office of the Children's Lawyer as an institution for the purposes of paragraph (b).

[46] The OCL, therefore, is not a separate institution under the *Act.* Nor is the OCL, when it is representing its child clients, part of the ministry for the purpose of the *Act*. In *Children's Lawyer*, the court found that "for her core functions regarding children - the Children's Lawyer is not a branch of MAG."

[47] While I am sympathetic to the appellant's arguments about accountability and transparency in respect of OCL's operations, I am bound by the Court of Appeal's finding in *Children's Lawyer*. The OCL is not its own institution under the *Act*, nor is it part of the ministry for the purposes of the *Act* when the OCL is representing its child clients. As a result, the *Act* does not apply to records from the OCL's child client files.

[48] The information sought by the appellant, with one exception, is all contained in the OCL's child client files. I find, therefore, that the OCL is not part of the ministry for the purposes of the appellant's access request.

[49] The one exception is for the category "E" records (disciplinary records of Clinical Investigator A). It may be that the *Children's Lawyer* finding regarding whether the OCL is a branch of the ministry does not apply to this category of records, because such records, arguably, do not relate to the OCL's representing its child clients. I do not need to determine this issue, however, as I find, below, that category "E" records do not exist.

[50] While I recognize that the appellant will likely see this result as unfair, I note that the definition of "institution" in the *Act* leaves out many other public bodies. That the OCL receives public funds, and that its work would seem to attract a need for public accountability, may be policy arguments in favour of an amendment to Regulation 460, but they are not on their own sufficient bases on which to find that the OCL is an institution under the *Act*.[20]

[51] Whether any specific records from the OCL's child client files are subject to the right of access in section 10(1) of the *Act*, therefore, depends on whether those records are in the ministry's custody or under its control. The appellant argues that the OCL has custody of the records he seeks. However, and as noted by the Court of Appeal, the issue is not whether OCL has custody or control of the records. The issue is whether the ministry, as the institution under the *Act*, has custody or control of the records. I address this matter below under Issue B.

[20] See Order PO-4066 at para 96.

The OCL's forwarding of the second access request to the ministry

[52] The appellant disputes the actions of the OCL in forwarding his second access request to the ministry. Since the OCL is not a separate institution under the *Act*, and is administratively structured under the ministry, I see no error in its decision not to initially respond to the request itself, but to instead forward it to the ministry for its handling.[21]

[53] The ministry then redirected the appellant's access request back to the OCL for a response. In the circumstances, I also see no error in the OCL's then responding to the access request on behalf of the ministry. As the office whose records were being sought, the OCL was well placed to respond, and as noted in Order PO-3520, the OCL has delegated authority to respond to requests to the ministry in relation to OCL records. Given the nature of the records sought, it was reasonable in this case for the ministry to forward the request to the OCL to respond on the ministry's behalf.

[54] I note that there may be other circumstances where it would not be appropriate for the ministry to refer a request under the *Act* to the OCL for its response, even where the request relates to the OCL's operations. As I discuss below, the OCL is required to report certain information to the ministry, including, for example, high-level financial data. Where an access request relates to such information, it may be incumbent on the ministry itself to respond. However, that is not the type of information before me.

Issue B: Are the records sought by the appellant in the ministry's custody or under its control? Did the ministry conduct a reasonable search for records in its custody or control?

Background: The role of the OCL and its relationship with the ministry

[55] The main issues in these appeals are whether the records sought by the appellant are in the ministry's custody or under its control and whether the ministry has conducted a reasonable search for records in its custody or control. I address these issues below, beginning with whether the requested information is in the ministry's custody or control. Before doing so, it is useful to set out some of the OCL's evidence about its role and its relationship with the ministry.

[56] The Children's Lawyer's[22] powers, duties and responsibilities are set out in various pieces of legislation. The OCL explains, and its Provincial Manager attests, that

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[21] In this regard, I note that the provisions of the *Act* in section 25 that set out the circumstances under which an institution may forward or transfer a request to another institution are of no application here – because the OCL is not an institution in respect of the records at issue. My reference to the OCL's "forwarding" the request to the ministry is meant in the ordinary sense, not in the sense of the forwarding of a request under section 25.

[22] The Children's Lawyer is the individual who is appointed under section 89(1) of the *Courts of Justice Act* and heads the Office of the Children's Lawyer. Often the two terms are used interchangeably.

the records at issue in this appeal relate solely to services provided by its personal rights department.[23] For the purposes of the appeals before me, the most notable responsibility of the Children's Lawyer in that department is the assignment of a clinical investigator to conduct an investigation and prepare a report for the court in custody and access matters under section 112 of the *Courts of Justice Act*[24] (*CJA*).

[57] In her affidavits, the Provincial Manager explains that where the OCL becomes involved on behalf of a child in custody/access proceedings or child protection proceedings, its services consist of legal representation, legal representation with clinical assistance, or a clinical investigation and report. The OCL uses either in-house staff or fee-for-service agents who have been selected and trained by OCL to legally represent or provide clinical investigation services to children.

[58] The Provincial Manager further elaborates on the clinical investigation process under section 112 of the *CJA* as follows:

> The Children's Lawyer may cause an investigation to be made and may make recommendations and report to the court on all matters concerning custody of or access to a child who is subject to a proceeding under the *Divorce Act* (Canada) or the *Children's Law Reform Act.* … In practice, the Children's Lawyer typically only acts at the request of the court and in accordance with a court order in conducting investigations and reports to the court in custody and access proceedings.
>
> When the Children's Lawyer determines that she will conduct an investigation and report pursuant to section 112 of the *CJA,* she is required to serve notice on the parties and file the notice with the court. After the parties are served with the notice, they are required to serve the Children's Lawyer with every document in the case that involves the child's custody, access, support, health or education, as if the Children's Lawyer were a party in the case. Further, the Children's Lawyer is given the same rights as a party to document disclosure and questioning witnesses about any matter involving the child's custody or access (see Rule 21 of the Family Law Rules).
>
> In conducting a section 112 investigation, OCL clinicians typically:
>
> > a. interview the parties, the children, and collateral sources involved with the parties and the children;
> >
> > b. observe the children with each party seeking custody of, or access to, the children; and

[23] Its office is divided into two departments: children's personal rights and children's property rights.
[24] R.S.O. 1990, c. C.43.

> c. review reports/documents from professionals involved with the parties and children.
>
> After completing the investigation, the OCL clinician typically files a report with the court with recommendations related to the custody and/or access issues in the litigation. After the report is filed, any party to the litigation may serve and file a statement disputing anything in the OCL report…
>
> The parties in a custody and access dispute have the ability to challenge the OCL report and provide evidence to the court to contradict the findings in the report. If the parties are unable to agree on the custody or access issues, the presiding judge ultimately makes the custody and access decisions and takes into account all of the admissible evidence before the court. The OCL report is only one piece of evidence that forms the evidentiary record before a court.
>
> In addition (after a section 112 report is filed), the OCL provides disclosure of the complete file of the clinician upon the request of a party in the proceeding.

[59] The OCL submits that while the Children's Lawyer is accountable to the Attorney General[25] on some administrative and budgetary matters related to the expenditure of public funds, the ministry does not dictate or influence how the OCL provides its statutorily mandated services on behalf of children. The Provincial Manager attests that the Children's Lawyer's obligations are to the court and the children she serves.

[60] The OCL submits, and the Provincial Manager attests, that in recognition of the need for the Children's Lawyer's independence, the OCL is structured to avoid any influence or appearance of influence from government or the ministry. For example, the OCL does not provide the ministry with access to any of its records relating to the services it provides to children. Further, the OCL never sends information or documents from its files to the ministry relating to the services it provides to children. Only aggregated expenditure data is forwarded to the ministry as part of the OCL's accountability requirements for the disbursement of public funds.

[61] Elaborating on what information the OCL reports to the ministry, the OCL's CAO explains in her affidavit that the OCL's reporting consists of 1) financial reporting, where it reports high level financial information (e.g. Public Accounts, Estimates, the Multiyear Planning Process, and Quarterly Year-End reporting), 2) compliance reporting (e.g. an annual *Accessibility for Ontarians with Disabilities Act* compliance report and *Public Sector Salary Disclosure Act* reporting), and 3) operational reporting (e.g. high-level reporting on staff complement and employee sick leave). The CAO emphasizes that while the ministry receives the above-noted high-level staffing information from the

[25] Through the Assistant Deputy Attorney General, Victims and Vulnerable Persons Division.

OCL, the ministry does not manage OCL employees or the work they perform at the OCL.

[62] As noted above, the OCL uses either in-house staff or fee-for-service agents who have been selected and trained by OCL to legally represent or provide clinical investigation services to children. In terms of the fee-for-service agents, the CAO's evidence is that the ministry does not receive information about these agents or the work they do on behalf of the Children's Lawyer, except high-level financial data relating to the total amount of money spent on services by practice area. The ministry is also not involved in the selection, retention, or termination of OCL agents.

[63] In the absence of any evidence to the contrary, I accept this sworn evidence provided by the Provincial Manager and the CAO with respect to the role of the OCL and its relationship with the ministry.

Are the records sought by the appellant in the ministry's custody or control?

[64] As stated, the information requested by the appellant and that is still at issue in these appeals falls into the following categories:

A. Statistical information about the custody recommendations portion of OCL clinical investigator reports, i.e. the number of times the reports made certain custody recommendations, including with respect to Clinical Investigators A and B in particular,

B. Statistical information about disputes filed in respect of OCL clinical investigator reports, including with respect to Clinical Investigators A and B in particular,

C. All reports submitted by Clinical Investigator A and filed in Family Court,

D. Statistical information about how many times investigator reports have been retracted or overturned, and

E. Disciplinary records of Clinical Investigator A.

[65] Section 10(1) of the *Act* 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,[26]

[66] The right of access afforded by section 10(1) of the *Act* applies only to records that are in the custody or under the control of an institution (here, the ministry). A record will be subject to right of access in the *Act* if it is in the custody or under the

[26] Section 10(1) goes on to list exceptions to the general right of access. Those exceptions are not relevant to the issues in these appeals.

control of an institution; it need not be both.[27]

[67] However, 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.[28] 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).

[68] The courts and this office have applied a broad and liberal approach to the custody or control question.[29]

Factors relevant to determining "custody or control"

[69] Through its caselaw, the IPC has developed a list of factors to consider in determining whether a record is in the custody or control of an institution.[30] The list is not exhaustive – some of the listed factors may not apply in a specific case, while other unlisted factors may apply. The factors include the following:

- whether the record was created by an officer or employee of the institution,[31]
- what use the creator intended to make of the record,[32]
- whether the institution has a statutory power or duty to carry out the activity that resulted in the creation of the record,[33]
- whether the activity in question is a "core", "central" or "basic" function of the institution,[34]
- whether the content of the record relates to the institution's mandate and functions,[35]

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[27] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[28] Order PO-2836.
[29] *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.
[30] Orders 120, MO-1251, PO-2306 and PO-2683.
[31] Order 120.
[32] Orders 120 and P-239.
[33] Order P-912, upheld in *Ontario* (*Criminal Code Review Board*) *v. Ontario* (*Information and Privacy Commissioner*), cited above.
[34] Order P-912.
[35] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); and Orders 120 and P-239.

- whether the institution has physical possession of the record that amounts to more than "bare possession",[36]
- whether the institution has a right to possession of the record,[37]
- whether the institution has the authority to regulate the record's content, use and disposal,[38]
- whether there any limits on the use to which the institution may put the record,[39]
- the extent to which the institution has relied upon the record,[40]
- how closely the record is integrated with other records held by the institution,[41] and
- 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.[42]

[70] As I found above, when representing its child clients, the OCL is separate from the ministry for the purpose of the *Act*. Where an individual or organization other than the institution holds the record, the IPC has found that the following factors can assist in an assessment of custody or control:

- who has possession of the record, and why,[43]
- who owns the record,[44]
- who paid for the creation of the record,[45]
- the circumstances surrounding the creation, use and retention of the record,[46]
- any provisions in contracts between the institution and the creator of the record that expressly or by implication give the institution the right to possess or otherwise control the record,[47]

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[36] Orders 120 and P-239.
[37] Orders 120 and P-239.
[38] Orders 120 and P-239.
[39] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[40] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; Orders 120 and P-239.
[41] Orders 120 and P-239.
[42] Order MO-1251.
[43] Order PO-2683.
[44] Order M-315.
[45] Order M-506.
[46] Order PO-2386.

- any understanding or agreement between the institution and the creator of the record that the record was not to be disclosed to the institution,[48] and

- whether the individual who created the record was an agent of the institution for the purposes of the activity in question.[49]

[71] In determining whether records are in the custody or under the control of an institution, the above factors must be considered contextually in light of the purposes of the *Act*.[50]

[72] In *Canada* (*Information Commissioner*) *v. Canada* (*Minister of National Defence*),[51] the Supreme Court of Canada set out 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?

Children's Lawyer v Ontario reasons on the custody/control issue

[73] A review of the court's reasons on the custody/control issue in *Children's Lawyer* will set the context for my findings below.

[74] The court began by reiterating that, given its conclusion that the OCL, when representing child clients, is not part of the ministry for the purposes of the *Act*, the relevant question is not whether OCL has custody or control of the records from these files, but rather, whether the ministry does.

[75] The court went on to find that the records in that case were created by legal agents of the OCL while providing legal representation to children. The records were not created for or on behalf of the ministry – the OCL's role precludes it from acting in the interest of the ministry or the Crown in these matters.

[76] Referring to the various factors listed above that are relevant to the custody and control analysis, the court found as follows:

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[47] *Greater Vancouver Mental Health Service Society v. British Columbia* (*Information and Privacy Commissioner*), [1999] B.C.J. No. 198 (S.C.).
[48] Orders M-165 and MO-2586.
[49] *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.).
[50] *City of Ottawa v. Ontario*, cited above.
[51] 2011 SCC 25, [2011] 2 SCR 306.

- The records were intended solely for use in litigation on behalf of child clients in custody and access proceedings as ordered by the court. They were not created for the ministry's use or on behalf of the Crown.

- The ministry does not have possession of the records. They are exclusively held by the Children's Lawyer in her legal file.

- The records are being held by the Children's Lawyer for the purposes of her independent statutory, legal and fiduciary duties to children, and not as an agent of the ministry.

- The ministry has no statutory or other right to possess the records. Allowing the ministry to have access to, or possession of, the records would violate the Children's Lawyer's duty to maintain the confidentiality of her child clients' records.

- The records' contents do not relate to the ministry's mandate or functions. The contents of the records relate to the Children's Lawyer's independent statutory functions in providing legal representation to children in custody and access proceedings. These functions are statutorily conferred exclusively on the Children's Lawyer, and not on the ministry or the Attorney General.

- The ministry has no authority to regulate the use of the records. The regulation of the use of these records is within the exclusive authority of the Children's Lawyer in accordance with her professional obligations to her child clients.

- The ministry has never relied on, or had possession of, the records. The records have only been relied on by the Children's Lawyer in order to represent the interests of its child clients in litigation.

- The Children's Lawyer's files related to legal services provided to children are kept separately from any ministry records. No official or employee outside of the Children's Lawyer has access to these records.

- The records are maintained and disposed of in accordance with a records policy established by the Children's Lawyer in 2006. The Children's Lawyer does not obtain ministry approval or direction related to its child client records or on its internal policies related to these files.

[77] The court went on to say that the ministry's past practice of forwarding requests to OCL for a response under the *Act*[52] is not determinative, and that the evolving nature

[52] Implicit in the court's reasons is the fact that that past practice also included the OCL's responding to access requests as though its records are covered by the *Act.* "Secrecy Around Children's Lawyer Only Breeds Distrust" by Omar Ha-Redeye (Slaw.ca, July 23, 2018) (https://canliiconnects.org/en/commentaries/63427).

of the functions of the Children's Lawyer with respect to advancing children's interests and the voice of the child requires new scrutiny.

Representations on custody/control of the records at issue in these appeals

[78] With respect to the appeals before me, the OCL says that an analysis of the two factors set out by the Supreme Court of Canada in *Minister of National Defence* clearly demonstrates that the ministry does not have control of individual section 112 (clinical investigation) files. First, the records at issue in these appeals relate to matters where the OCL is not acting on behalf of the ministry. Beyond the ministry's funding relationship with the OCL, the ministry does not have an interest in these records, as they relate to private litigation of parties in a custody and access dispute where the Children's Lawyer is acting in the interests of children at the request of the court. Further, no senior official at the ministry could reasonably expect to obtain a copy of the records upon request, nor would the OCL ever provide these records to the ministry for any purpose.

[79] With respect to the various factors listed above, the OCL submits as follows:

- The records were not created by an officer or employee of the ministry. Individual section 112 files/records are created by clinical agents or in-house clinical investigators at the OCL. These records are created on behalf of the Children's Lawyer who is appointed pursuant to the *Courts of Justice Act* to provide independent statutory functions on behalf of children in the administration of justice.

- Individual section 112 files/records are intended solely for use in custody and access proceedings as ordered by the court, to which the ministry is not a party.

- The ministry does not have possession of individual section 112 files/records. They are exclusively held by the Children's Lawyer, who holds them for the purposes of her statutory duties, and not as an agent of the ministry.

- The ministry does not have any statutory or other right to possess individual section 112 files/records. The OCL does not allow any ministry officials to access or possess these records.

- The regulation of the use of individual section 112 files/records is within the exclusive authority of the Children's Lawyer. The Children's Lawyer uses these records for the sole purpose of discharging her independent statutory functions. No other ministry official or employee has any authority to regulate the use of the records.

- Individual section 112 files/records are only relied on by the OCL for the purpose of conducting section 112 investigations and reports to the court and no other use is made of the records.

- Individual section 112 files/records are kept separately from any other ministry records. These records are not intermingled with any other ministry records, or even with other OCL records that the ministry is entitled to obtain from the OCL (e.g. administrative or budgetary records).

[80] The OCL says that an examination of these factors points overwhelmingly to the conclusion that the records are not in the custody or under the control of the ministry.

[81] The appellant submits that the records are in the OCL's custody or control. However, given my finding above that the OCL is not, when representing its child clients, an institution under the *Act*, the question is not whether the records are in the OCL's custody or control, but whether they are in the ministry's custody or control. Though asked to do so, the appellant did not make submissions specifically responding to this question. However, he did attach to his representations a critique of the Court of Appeal's decision in *Children's Lawyer*, entitled "Secrecy Around Children's Lawyer Only Breeds Distrust."[53] That article sets out the author's opinion on the shortcomings of the Court of Appeal's decision, and concludes with the following statement:

> Public confidence in the family law system remains at an all time low. Greater secrecy as to how one of the most central institutions in this area of law functions will certainly not assist it, and potentially serves to exacerbate this distrust even further. No government institution, especially one which so directly impacts the lives of the public, should be completely insulated from such scrutiny.

Analysis and findings on custody or control

[82] For the reasons that follow, I find that the information in categories "A" to "C" is not in the ministry's custody or control. Further, given my findings (under the search issue below) that the information in categories "D" and "E" does not exist, I do not need to make a finding on the ministry's custody or control of that information.

[83] As stated, categories "A" through "C" of the records at issue are as follows:

A. Statistical information about the custody recommendations portion of OCL clinical investigator reports, i.e. the number of times the reports made certain custody recommendations, including with respect to Clinical Investigators A and B in particular,

B. Statistical information about disputes filed in respect of OCL clinical investigator reports, including with respect to Clinical Investigators A and B in particular,

C. All reports submitted by Clinical Investigator A and filed in Family Court.

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[53] "Secrecy Around Children's Lawyer Only Breeds Distrust" by Omar Ha-Redeye (Slaw.ca, July 23, 2018) (https://canliiconnects.org/en/commentaries/63427).

[84] The OCL explains that its client child files are kept in both hard copy and in its electronic case management system, the Children's Information and Legal Database (CHILD). Recently the OCL has been attempting to move away from paper records to CHILD.

[85] In relation to category "A" of records (custody recommendations), the OCL submits, and the Provincial Manager attests, that the statistical records requested by the appellant do not exist. The OCL does not collect statistics (and has no records) relating to the number of times the OCL or either of the named clinical investigators has recommended sole custody to a mother, sole custody to a father, or joint custody.

[86] In relation to category "B" (disputes), the OCL says, and the Provincial Manager attests, that the OCL does not have a record that outlines the number of disputes filed for either of the periods requested by the appellant in his two requests (collectively covering 2013-2019). The OCL did not start logging disputes in the CHILD database until late 2015 and they were not consistently logged in the database until the summer of 2018. As a result, the number of disputes logged in the OCL's database does not reflect the total number of disputes filed in response to OCL reports prior to the summer of 2018. Further, the Provincial Manager attests that the OCL does not collect statistics on the number of disputes that resulted in ordering a new investigation, nor is this information logged in the OCL database.

[87] With those caveats, the OCL's representations and affidavit (which were shared with the appellant) set out the total number of disputes logged in the OCL database for each year from 2015 to 2019, and the number of disputes filed in respect of Clinical Investigators A and B in each of those years. The OCL says that the dispute information it provided to the appellant was retrieved from individual files in the OCL's case management system and that it was providing the information to the appellant "outside of the *Act*."

[88] I have no reason to doubt the sworn evidence of the Provincial Manager, and I accept, that the statistical records in categories "A" (custody recommendations) and "B" (disputes) (other than the dispute information already provided to the appellant) do not currently exist.

[89] Other than the dispute information it provided to the appellant, the OCL also claims that it cannot produce the requested statistics from the information in CHILD. For reasons I explain below, I do not need to decide whether the OCL can or cannot produce the requested information from its existing records. I would simply note as an aside that from the OCL's own evidence, it is clear that records relating to categories "A" and "B" of the requested information exist in some form, either in the CHILD

database, and/or in the paper child client files.[54]

[90] However, based on the OCL's evidence, I also find that, even if the OCL can produce the requested statistics in relation to categories "A" and "B", those statistics would all be derived from the child client files themselves.

[91] Given that all of the responsive information in categories "A" and "B" – as well as category "C", which consists of Clinical Investigator A's reports themselves – is found in the OCL's child client files, I see no basis upon which to distinguish the Court of Appeal's finding in *Children's Lawyer* that these types of records are not in the ministry's custody or control.

[92] I acknowledge that there are some differences between the information sought in these appeals and that are sought in *Children's Lawyer*. In the appeals before me, and as the appellant has pointed out, much of the requested information (for example, the clinical reports themselves) is a matter of public record, as these reports have been filed in the relevant family court files. In contrast, the range of information at issue in *Children's Lawyer* was much broader and included information that would likely have been subject to solicitor-client privilege. I note, however, that the information at issue in *Children's Lawyer* also included some information that had been filed in family court, and the Court of Appeal did not distinguish between the types of information before it, finding that none of it was in the ministry's custody or control.

[93] The other difference between the appeal before me and the *Children's Lawyer* case is that in the *Children's Lawyer* case, the requested information was specific to that requester's children. Here, the appellant largely seeks information not about any particular children, but rather, statistics about certain aspects of the clinical investigators' reports and disputes filed with respect to them.

[94] However, to the extent that statistics may be capable of being produced, as I noted above, they would all be derived from individual child client files. In other words, the responsive records in this case arise out of, and relate directly to the OCL's

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[54] In Order MO-2130, with reference to the definition of a "record" in the *Act*, and the relevant Regulation, the IPC noted that where a request is for information that currently exists in a recorded format different from the format asked for by the requester, the institution has dual obligations:

> First, if the requested information falls within paragraph (a) of the definition of a record, the Police have a duty to identify and advise the requester of the existence of these related records (i.e., the raw material). However, the Police are not required to create a record from these records that is in the format asked for by the requester (e.g., statistics).
>
> Second, if the requested information falls within paragraph (b) of the definition of a record, the Police have a duty to provide it in the requested format (e.g., statistics) if it can be produced from an existing machine readable record (e.g., a database) by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution, and doing so will not unreasonably interfere with the operations of the Police. In such circumstances, the Police have a duty to create a record in the format asked for by the requester.

responsibility under section 112 of the *Courts of Justice Act* to assign a clinical investigator to conduct an investigation and prepare a report for the court in custody and access matters. Like the records at issue in *Children's Lawyer*, these records relate to services provided to children in the context of such matters. The Court of Appeal stated:

> When representing children, the Children's Lawyer operates separate and apart from MAG, does not take direction or obtain input from MAG, does not provide MAG with access to records relating to children and MAG does not have authority to request them. The Children's Lawyer is solely responsible for record keeping in relation to her clients without any direction from MAG.

[95] Although there may be policy arguments, from an accountability perspective, for finding the information before me to be in the ministry's control, the court's statement is clear: individual child client files in the hands of the OCL are not in the ministry's custody or control.

[96] As noted above, the factors that the IPC uses to assess custody or control include who has possession of the record, and why,[55] the circumstances surrounding the creation, use and retention of the record,[56] and whether the individual who created the record was an agent of the institution for the purposes of the activity in question.[57]

[97] The appellant has not disputed, and I accept, the OCL's evidence that the records are created by clinical agents or in-house clinicians at the OCL. These records are created on behalf of the Children's Lawyer who is appointed pursuant to the *Courts of Justice Act* to provide independent statutory functions on behalf of children in the administration of justice, and the OCL does not act in the interest of the government or the ministry in these matters. The records are kept separately from any other ministry records and away from any record that the ministry is entitled to obtain from the OCL (e.g. administrative or budgetary records) and the OCL does not allow any ministry officials to access or possess these records. The Children's Lawyer uses these records for the sole purpose of discharging her independent statutory functions. No other ministry official or employee has any authority to regulate the use of the records. Further, I accept and there appears to be no dispute that individual section 112 files/records are only relied on by the OCL for the purpose of conducting section 112 investigations and preparing reports for the court and no other use is made of the records.

[98] As I noted above, these factors must be assessed contextually in light of the purposes of the legislation. One of the purposes of the *Act* is to promote transparency

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[55] Order PO-2683.
[56] Order PO-2386.
[57] *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.).

in the operations of public agencies. I take the appellant's point, and that of the author of the article the appellant referred me to, that the Court of Appeal's decision in *Children's Lawyer* may have the effect of shielding a public agency wielding considerable power from accountability to the public. While that may be, I am bound by the court's decision and in my view, it applies equally to the category "A", "B" and "C" records before me. In *Children's Lawyer*, the court made it clear that OCL's record-keeping in respect of its clients is an OCL matter, not a ministry matter. An examination of the factors, in view of the court's finding, leads me to the conclusion that neither the clinical investigator reports nor the disputes filed in respect of them are in the ministry's custody or control. Rather, they are records in respect of the OCL's child clients and contained in the respective child client files.

[99] I conclude that the ministry does not have custody or control of these records.

[100] I would reach the same result applying the two-part test in *National Defence*,[58] where the Supreme Court of Canada set out 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 ministry matter?

2. Could the ministry reasonably expect to obtain a copy of the document upon request?

[101] In *Children's Lawyer,* the court stated:

> Once the relevant test is applied to the child's records with the Children's Lawyer, it is clear that MAG does not have control of the records:
>
> > *Step one: Do the contents of the requested records relate to a departmental matter?*
> >
> > The answer must be no. MAG plays no part in the records of the Children's Lawyer. The records do not relate to a departmental matter; MAG has nothing to do with the Children's Lawyer's work.
> >
> > *Step two: Could MAG reasonably expect to obtain a copy of the records upon request?*
> >
> > Again the answer – for the reasons set out above – is no. Neither MAG officials nor the Attorney General could reasonably expect to obtain a copy of the requested records.[59]

[102] The Court of Appeal also stated:

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[58] 2011 SCC 25, [2011] 2 SCR 306.
[59] *Children's Lawyer* at para 112.

> When representing children, the Children's Lawyer operates separate and apart from MAG, does not take direction or obtain input from MAG, *does not provide MAG with access to records relating to children and MAG does not have authority to request them.* The Children's Lawyer is solely responsible for record keeping in relation to her clients without any direction from MAG. (emphasis added)[60]

[103] In my view, these statements apply equally to the clinical investigator reports and dispute information logged in the OCL's individual child client files.

[104] For the above reasons, I find that the records responsive to categories "A" through "C" are not in the ministry's custody or control.[61]

[105] In terms of categories "D" (information about the overturning/retraction of clinical reports) and "E" (disciplinary records of Investigator A), I do not need to determine whether they are in the custody or control of the ministry as I find below that no records responsive to these categories exist.

Did the ministry conduct a reasonable search for records in its custody or control?

[106] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.[62] A further search may be ordered where the IPC determines that the institution's search for responsive records in its custody or control is deficient.[63]

[107] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate records that relate to the request.[64] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[65]

[108] The appellant submits that OCL did not conduct a reasonable search for the records, because it acknowledges that records exist in its system but argues that it is

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[60] *Children's Lawyer* at para 101.
[61] To the extent that some of the requested information is located in court files, a question that could arise is whether these court materials are in the ministry's custody, given that the courts fall under the umbrella of the ministry. This argument was not made to me, and I note that the IPC has consistently found that documents found in court files are not in the ministry's custody or control: see Order P-994, among others.
[62] Orders P-85, P-221 and PO-1954-I.
[63] Order MO-2185.
[64] Orders P-624, PO-2554 and PO-2559.
[65] Order MO-2246.

not required to produce them as they don't fall under the *Act*.

[109] He says that the information he seeks about custody recommendations exists within the Recommendations section of each report issued by the OCL. He also points out that while the OCL disclosed information about the number of disputes it received each year, it did not say, out of that number, how many of those disputes led to the OCL's ordering a new investigation or admitting to errors with the investigation.

Analysis and findings on the search for records

[110] I found above that categories "A" to "C" of the records are not in the ministry's custody or control. Because an institution's obligation to search for records only relates to records in its custody or control, the ministry has no obligation to conduct any further searches for records in these categories.

[111] Further, I am satisfied that no records exist in categories "D" and "E". With respect to category "D" (information relating to the overturning/retracting of reports), the OCL's Provincial Manager explains in her affidavit[66] that, while a second report may be prepared by a new clinician, resulting in both reports then being filed with the court, the OCL does not "overturn" or "retract" OCL reports, nor are disputes "denied" or "accepted". I accept the OCL's evidence that the original reports are not "overturned" or "retracted".

[112] With respect to category "E" (disciplinary records for Clinical Investigator A), the Provincial Manager attests[67] that the OCL does not have such records.

[113] The appellant has not given me any reason to doubt this sworn evidence, and I accept it as true.

[114] Based on the material before me, I find that the ministry's search for records responsive to categories "D" and "E" was reasonable. Since I accept that these records do not exist, I will not order any further searches for them.

ORDER:

I uphold the access decisions of the ministry and dismiss the appeals.

Original Signed by: December 6, 2021
Gillian Shaw
Senior Adjudicator

[66] Dated October 16, 2019 in relation to Appeal PA18-00561.
[67] In her October 16, 2019 affidavit in relation to Appeal PA18-00561.