Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-3083-R

Appeal PA10-248

Order PO-3036

Ministry of Children and Youth Services

June 7, 2012

Summary: This is a reconsideration of Order PO-3036, concerning a request for the number of clients and number of approved hours for each client receiving Intensive Behavioural Intervention under the Direct Funding Option. In Order PO-3036, the institution's decision that it did not have control of the responsive records was dismissed and the institution was ordered to issue an access decision to the appellant. In this reconsideration order, the adjudicator upholds her decision in Order PO-3036 and finds that the ministry has control under the *Act*.

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

Orders and Investigation Reports Considered: P-384, PO-2103, MO-1237.

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

OVERVIEW:

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

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

[2] The appellant appealed the ministry's decision that the number of hours approved for clients receiving IBI service under the DFO is not in its custody or control. After an inquiry was conducted into the appeal, I issued Order PO-3036 where I found the ministry to have control of the information at issue and ordered them to:

> …issue an access decision to the appellant in accordance with Part II of the *Act*, treating the date of [the order] as the date of the request.

[3] On February 10, 2012, I received a request from the ministry to reconsider my decision that the ministry has control over the information at issue. The ministry's reconsideration request was shared with the appellant, in accordance with Section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*. The appellant also provided representations.

[4] For the reasons that follow, I uphold my decision in Order PO-3036 directing the ministry to issue an access decision to the appellant.

ISSUES:

A. Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order PO-3036?

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

DISCUSSION:

A. Are there grounds under section 18.01 of the IPC's Code of Procedure to reconsider Order PO-3036?

The Reconsideration Process

[5] Section 18 of the IPC's *Code of Procedure* sets out the grounds upon which this office may reconsider an order. Sections 18.01 and 18.02 of the *Code of Procedure* state as follows:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:

(a) a fundamental defect in the adjudication process;

(b) some other jurisdictional defect in the decision; or

(c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

Grounds for the Reconsideration Request

[6] The ministry submits that it can establish that there is a jurisdictional defect in Order PO-3036 as contemplated by section 18.01(b) because the records requested are outside the application of the *Act*. The ministry submits that I incorrectly applied some of the factors used to establish control and failed to consider other control factors when making my decision. Finally, the ministry submits that I did not follow past decisions of this office relating to transfer payment agencies.

[7] During the inquiry into this appeal, the ministry did not provide representations on any of the control factors despite having two opportunities to do so. In addition, the ministry provided little or no evidence to substantiate its claim that the records were not in its control. As stated above, this office will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision. The ministry's representations in support of its reconsideration request which finally address the control factors is, in my view, the ministry's attempt to reargue the control issue after failing to do so at first instance. The ministry's actions in this appeal show disregard for the inquiry process and if the ministry's request for reconsideration had been based on any of the other grounds in section 18.01, I would have summarily dismissed its request.

[8] The ministry's lack of meaningful representations in the inquiry process to this appeal and then its subsequent reconsideration request has resulted in a serious delay in its rendering a final decision to the appellant. However, in light of the ministry's representations and evidence on the issue of control, I have determined that I will address the question of whether the ministry has control of the responsive records based on the new evidence and render a decision on its merits. Based on my review of the parties' representations and my decision in Order PO-3036, I find there has been no jurisdictional error within the meaning of section 18.01(b) and I uphold my decision in Order PO-3036.

[9] Before beginning my analysis of the evidence, I wish to address the ministry's argument that my finding in Order PO-3036 departs from a long line of cases from this

office which have determined that records related to transfer payment agencies are not in the custody or control of the respective institutions. The Commissioner is not bound by the principle of *stare decisis* and can depart from past decisions of this office on similar matters.[1] In the particular case of custody and control, the factual issues which are addressed in the control factors are paramount and consequently, the ministry's submission that this is a basis for a reconsideration request is untenable.

B. Does the ministry have custody or control of the records responsive to the appellant's request?

[10] As set out in Order PO-3036, under section 10(1), the *Act* only applies to records that are in the custody or under the control of the institution.

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

Factors relevant to determining custody or control

[12] The ministry submitted representations on the following factors which I had examined in Order PO-3036:

- Contractual relationship between the ministry and the transfer payment agencies (TPAs).
- Does the institution have a statutory power or duty to carry out the activity that resulted in creation of the record?
- Does the TPA operate at arm's length from the ministry?

[13] In addition, the ministry submits that I failed to consider the following factors:

- The record was not created by an officer or employee of the institution.[2]
- As administrative records, the ministry has no authority to dictate the content of the records.[3]

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[1] *TransCanada Pipelines Ltd.* v. *Beardmore (Township) (2000)*, 186 D.L.R. (4th) 403 (Ont. C.A.), at para. 129. This principle has been recognized repeatedly by the IPC, most recently in Order PO-2976.
[2] Order P-120
[3] Orders P-120 and P-239

- The TPAs that have physical possession of the record are not "institutions" for the purposes of the *Act*.

- The records are in the possession of the TPAs because they are responsible for the day-to-day administration of providing IBI services to eligible individuals. The ministry has no role in the day-to-day administrative activities of the TPAs.[4]

Analysis of control factors

Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?[5]

[14] In Order PO-3036, after reviewing provisions of the contracts between the TPAs and the ministry, I found that this factor should be given some weight in my consideration for the reasons that follow:

> Based on my review of provisions set out above, I find that the ministry has a contractual right to exercise control over the information at issue. In particular, I find the following parts of the provisions to be relevant:
>
> - The TPAs are required to keep the records relating to the funding and the provision of the programs.
>
> - The ministry is permitted to attend the TPAs to review the records.
>
> - The ministry is permitted to copy any records, invoices and other documents which relate to the funding or provision of the program.
>
> - The ministry has the right to request information from the TPA as it relates to the review of funding or the provision of the program.
>
> I note that the following factors weigh against a finding of control:
>
> - The ministry's rights listed above only relate to: (1) determining the items and purposes the TPA is expending

[4] Order PO-2368

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

> the funds and, (2) determining whether the TPA is effectively operating the program in accordance with the agreement.
>
> - The TPA #1 contract specifically stipulates that the terms of the agreement do not give the ministry control over the TPAs' books, accounts or other records.
>
> In considering the weight I should place on this factor, I note that the information requested by the appellant, namely the number of approved IBI hours for each client in the program, is information relating to both the provision of the AIP[6] program and the ministry's funding of it. I find that this information, under the terms of both contracts, is the type of information that the ministry would be entitled to review, copy, possess or request from the TPA.

[15] The ministry submits that its relationship with the TPAs is substantially limited by its contracts with the various agencies and while it may be entitled to review, copy, possess or request records from the TPA, this right of access is limited to the performance of accountability or audit functions. The ministry cites Orders P-384 and PO-2103 in support of its position that its rights under the contract with the TPAs are limited and this factor should not be given any weight in my determination of the control issue.

[16] In Order P-384, the Ministry of Education had a contractual relationship with the Cornwall Youth Employment Centre to provide youth employment counseling and deliver the FUTURES program. In finding that the responsive records were not in the ministry's control, Inquiry Officer Holly Big Canoe held:

> The Ministry representations state "[t]hough we have access to these records, it is for audit and accountability purposes only." I have reviewed the contracts and I agree.
>
> The records at issue do not reside at the Ministry, and FUTURES delivery organizations are not agents of the Ministry. The FUTURES program in Cornwall is delivered on a purchase of service basis through a transfer payment contract with the Youth Employment Counselling Centre. Information respecting employers in the program is not forwarded to the Ministry at any time. The Ministry's inspection and audit rights are only for the purposes of ensuring the program compliance and funding accountability.

[6] "AIP" is the Autism Intervention Program.

[17] Order PO-2103, concerned the relationship between the Ministry of Agriculture, Food and Rural Affairs and pounds regulated by the *Animals for Research Act*. In finding that the ministry did not have control of the responsive records, former Senior Adjudicator David Goodis held the following:

> I agree that pursuant to its statutory inspection powers, the Ministry may demand the production of pound records and, in that sense, the Ministry has a right to possess the records. In my view, this limited right does not lead to the conclusion that the Ministry in any generalized way has the right to possess the records as would be the case, for example, where an agent is carrying out a statutory function on the Ministry's behalf [see, for instance, my Order MO-1251]….In my view, there is a qualitative difference between an organization's powers to possess records pursuant to its regulatory mandate, and its powers to possess records for other reasons such as the fact that it owns them or they were created on its behalf.

[18] The appellant submits that the circumstances in Order P-384 are not similar to those in the present appeal as the information at issue is qualitatively different. The appellant states:

> The Ministry retains the right to use data in an effort to determine whether or not the TPA is operating in accordance with their agreements. It also has the right to assure that the TPA's are providing services consistent with their autism intervention program (AIP) guidelines. Consistent with these guidelines, the Ministry has demonstrated their intent to determine whether or not the TPA's are consistently administering the AIP in accordance with their policies. An example of this is evidenced through the allocation of approved hours once a diagnosis of autism has been made by the TPA's. Documentation supplied by the Ministry and provided in my previous submissions shows the average number of approved hours by region across time as one such report that is used to monitor the effectiveness of the program. This report is not the result of an audit; it is the result of an AD HOC request.
>
> …
>
> The determination of approved IBI hours serves two purposes. First, the number of approved hours allocated to a child is critical to the ministry's ability to fund the AIP and second those approved hours determines the actual number of hours a child receives IBI services.
>
> …

> Since the number of hours of approved IBI services must be commensurate with the needs of the child, the funding amount is a function of the number of approved hours by the standard hourly rate for IBI services across a number of weeks. The subsequent funding amount for each child is then summed within a region to determine the funding amount for each region that must be served. This number is then submitted in a financial plan to the ministry were the actual number is then compared to budget and a variance to plan is computed.
> Since funding is equated to a unit of dollars per time, not knowing what the approved number of IBI hours for each child would render it impossible for the ministry to receive financial reports or be in a position to determine the funding amount required to service the province from time to time.

[19] Based on my review of the two decisions relied on by the ministry in support of its position that its contractual right to request the records from the TPAs weighs against finding control, I find that this factor weighs in favour of a finding of control. I agree with the appellant that the responsive information at issue in the present appeal is qualitatively different than the information requested in Orders P-384 and PO-2103. The information at issue, in my view, is the type of information the ministry would be able to request under its contracts with the TPAs and is necessary for the ministry's review of the TPAs performance and necessary for its audit function. Further, I find that the institutions' right to request the information in Orders P-384 and PO-2103 was more restrictive than the ministry's rights to receive information in the present appeal.

[20] Further, I find the Supreme Court of Canada's ruling in *Canada (Information Commissioner)* v. *Canada (Minister of National Defence)*[7] particularly helpful in this appeal. In considering the issue of "control", Madame Justice Charron writing for the majority determined:

> Where the documents requested are not in the physical possession of the government institution, the inquiry proceeds as follows.
>
> Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. The Commissioner agrees that the *Access to Information Act* is not intended to capture non-departmental matters in the possession of Ministers of the Crown. If the record requested relates to a departmental matter, the inquiry into control continues.
>
> Under step two, *all* relevant factors must be considered in order to determine whether the government institution could reasonably expect to

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

> obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The Commissioner is correct in saying that any expectation to obtain a copy of the record cannot be based on "past practices and prevalent expectations" that bear no relationship on the nature and contents of the record, on the actual legal relationship between the government institution and the record holder, or on practices intended to avoid the application of the *Access to Information Act* (A.F., at para. 169). The reasonable expectation test is objective. **If a senior official of the government institution, based on all relevant factors, reasonably should be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption.** [Emphasis added]

[21] In my view, the contractual provisions between the ministry and the TPAs establishes the ministry's right to request and to receive a copy of the records at issue. Accordingly, I find this factor weighs in favour of a finding of control.

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

[22] In Order PO-3036 I found the ministry does not have a statutory power or duty to provide IBI services and stated:

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

[23] Accordingly, I found that this factor weighs in favour of a finding of control.

[24] The ministry reinforces the point that it does not provide IBI services pursuant to any statutory requirement and submits that:

> …this factor is relevant only where "there is a relationship between the core, basic and central functions of the Ministry and the record at issue"

> (Order PO-2739 at para 51). Therefore, more than a mere connection between the Ministry's mandate and the records in question is required.

[25] The ministry submits that the records at issue do not relate directly to the core mandate of the ministry which is concerned with providing families with access to services. The ministry distinguishes between the information it requires, i.e. information for the purposes of ensuring accountability and analyzing concerns relating to service provision, and the operational nature of the information at issue. The ministry states:

> The Ministry is free to allocate funding as it sees fit to meet its broader mandate: the availability of and access to services relating to child development. The operational records of the TPAs do not relate to the Ministry's "core, basic and central functions."

[26] The appellant submits that the information at issue directly relates to the ministry's responsibility to fund and oversee the AIP program and the provision of IBI services. The appellant states:

> What the ministry has failed to communicate in their reconsideration submission is their obligation to the province and the taxpayer in assuring each of the TPA's administers services consistent with the policy requirements to diagnose autism and to allocate approved hours commensurate with the needs of the child.
>
> Without the approved number of hours, the ministry would not be able to determine the funding required by region. The "raw" data is the heart of Order PO-3036 and speaks to the core function of the ministry's ability to fund the AIP. Without it, the ministry and the TPA's can [not] derive a funding amount.

[27] Based on my review of the ministry's representations, I find that the ministry has not established that this factor weighs against a finding of control. Instead, as I did in Order PO-3036, I find that this factor should be given some weight in favour of a finding of control on the part of the ministry. In my view, there is more than a mere connection between the ministry's mandate and the records at issue. The ministry stated in its representations:

> The ministry is not required to provide IBI services, but has chosen to fund those services as part of its mandate to provide Ontario families with access to services. It therefore has no function in administering the day-to-day operations of its transfer payment agencies (which are the essence of the records being sought by the requester), and it only collects

> information for the purpose of ensuring accountability and analyzing concerns relating to service provision.

[28] The appellant is not interested in records relating to the day-to-day operations of the TPAs. The appellant is seeking information about the number of clients and number of hours approved for each client receiving IBI services under the DFO option. This information goes directly to the ministry's obligation of ensuring the accountability of the TPAs providing this provincially funded service.

[29] Further, in my view, whether the ministry provides the IBI services itself or contracts with TPAs to do so, it does so pursuant to its mandate. Accordingly, I find that this factor should be given some weight in favour of a finding of control.

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

[30] In Order PO-3036 I set out the criteria to be considered in determining whether the TPAs operate at arms' length from the ministry which was established in the Court of Appeal's decisions in *Walmsley*[8] and *Ontario (Criminal Code Review Board)*[9]. In considering these two cases and the contractual relationship between the ministry and the TPAs, I found that the TPAs were not meant to operate independently and at arm's length from the ministry. In finding that the TPAs were not meant to operate at arm's length from the ministry, I found the following factors to be particularly relevant:

- The ministry contracts with the TPAs to administer and deliver the AIP and thus funds the provision of this service to the public.

- The ministry has the power to request, copy, review, and receive the information at issue from the TPA regarding the use of public funds and the provision of the IBI services.

- The TPA #2 is described in the contract [between itself and the ministry], referred to above [in Order PO-3036], as the "Delivery Agent".

- The ministry has a contractual right to dictate to the TPA the records that should be created, and how they should be maintained and stored.[10]

[31] The ministry submits that the TPAs were established to operate at arm's length from the ministry and submits that I incorrectly interpreted the above listed factors. The ministry states:

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[8] *Walmsley* v. *Ontario(Attorney General)* (1997), 34 O.R. (3d) 611

[9] *Ontario (Criminal Code Review Board)* v. *Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072

[10] Order PO-3036, paragraph 38.

> Underlying the conclusion at paragraph 37, that the TPAs do not operate at arm's length from the ministry, is the oversight function that the ministry plays in relation to the agencies. This was incorrectly interpreted as a factor weighing in favour a finding of control pursuant to the authorities cited above.
>
> Further, the fact that the TPAs are described as the "delivery agent" is immaterial. In Order P-384, cited above, the organization with which the Ministry of Education contracted was referred to as a "Delivery Agency", despite a finding that the Ministry did not have control of the organization's records. The term "delivery agent" should not be determinative; rather the finding of whether the TPAs are arm's length in this particular instance should depend on the particular facts at issue.
>
> As the Order correctly noted, the TPAs staff members and employees are not employees or staff of the ministry. As well, the TPA's day-to-day administrative functions are undertaken by the TPAs. Decisions as to the eligibility for and the number of hours of treatment for each client are made by the TPAs with no input from the ministry. Finally, the ministry's record keeping requirements pursuant to its contractual relationships with the TPAs (referenced, for example, at paragraph 19 of the Order) are submitted as being not nearly prescriptive enough to weigh in favour of a finding of control.

[32] In conclusion, the ministry submits that on the balance the TPAs do, in fact, operate at arm's length from the ministry and this factor weighs against a finding of control.

[33] The appellant submits that in Order MO-1237 former Senior Adjudicator Goodis determined the issue of whether an agency relationship between an architecture firm and the York Catholic District School Board established control for the purposes of the *Act*. In my view, the finding in this case on the agency relationship between an institution and an outside organization is relevant primarily to cases where there is an engineering or architecture firm involved with the institution. Accordingly, I do not find that it is helpful in the circumstances of this appeal.

[34] I find that the ministry's representations do not establish that this factor should weigh against a finding of control. The ministry's submission is that its oversight function should not be read as indicative of a non-arm's length relationship with the TPAs. While I accept that the ministry has an oversight function over the TPA, I find that the appellant's argument that the records at issue directly relate to the ministry's oversight function more compelling. Further, I agree that the use of term "delivery agent" should not be determinative of the control issue, nor should it establish an agency relationship between the ministry and the TPA. However, I find the fact is that

the TPAs are contracted by the ministry to provide a service. Accordingly, I find that the ministry's relationship with the TPAs was established to be not at arm's length and I find this factor weighs in favour of control.

Other factors

[35] The ministry submits that I failed to consider the following factors which way against a finding of control:

- The record was not created by an officer or employee of the institution [Order P-120].
- As administrative records, the ministry has no authority to dictate the content of the records [Orders P-120 and P-239].
- The TPAs that have physical possession of the record are not "institutions" for the purposes of the *Act*.
- The records are in the possession of the TPAs because they are responsible for the day-to-day administration of providing IBI services to eligible individuals. The ministry has no role in the day-to-day administrative activities of the TPAs [Order PO-2386].

[36] The appellant submits the following in response to the ministry's submission that it does not have the ability to direct the content of the TPAs administrative documents:

> My request does not ask for the actual number of hours a child is provided IBI services within the day-to-day operation of an IBI program. My request is specific for the number of hours that have been approved prior to the delivery of day-to-day services. I am not asking the ministry to conduct an audit in an effort to determine the actual day-to-day hours spent in IBI services.

[37] Further, the appellant submits the following:

> The ministry['s] contract with the TPAs is designed to meet two basic conditions listed below:
>
> 1. Assess children for eligibility and funding
>
>   a. The TPA determines eligibility and the number of approved hours for IBI services.
>
> 2. The delivery of the services once admitted

a. This includes Child and Family support services, IBI Services and Transition services.

…

Please note that condition "2" is what the ministry refers to as the day-to-day delivery of IBI services. My request has nothing to do with the day-to-day delivery of services [to] a child in an IBI program. My request is specific to condition 1; a condition that is clearly identified as a requirement in the AIP guidelines. The guideline specifically states the ministry requires a TPA to render or confirm a diagnosis of autism and determine the intensity otherwise known as the number of approved hours commensurate with the needs of the child. Once the intensity or "number of approved hours" has been determined, it is used to fulfill two purposes. The first is to allocate funding for the purpose of financial planning and report consistent with the ministry's requirements on financial disclosure from the TPA's. The second is to provide a financial limit within which the delivery of IBI services may be purchased. As such, the service intensity or "number of approved hours commensurate with the needs of the child" is an input into financial planning for all parties. Once service delivery begins the number of approved hours is simply a level of funding within which services may be delivered. In actual fact, the number of hours delivered to a child varies significantly during the day-to-day delivery of services.

[38] In Order PO-3036, I considered the following factors as relevant to a finding against control:

- The TPA staff members and employees are not employees or staff of the ministry.

- The TPAs staff recommendations about the number of hours of treatment for each client are made independently of the ministry.

[39] However, despite these factors, I went on to conclude that the ministry does have the requisite degree of control of the records at issue for the purposes of section 10(1) of the *Act*.

[40] Having reviewed the ministry's representations on the additional factors which weigh against control, I conclude that the ministry has sufficient control over the requested information for the purposes of section 10(1) of the *Act*. Having considered the totality of the factors, I find that the ministry has control of the records at issue and has not established a jurisdictional error in Order PO-3036, as is required by section

18.01(b) of the *Code*. Accordingly, I will order the ministry to issue a decision letter to the appellant.

ORDER:

1. I order the ministry to issue an access decision to the appellant in accordance with Part II of the *Act*, treating the date of this decision as the date of the request and without recourse to a time extension.

2. I remain seized of any new appeal that the appellant may file with respect to the access decision that the ministry is required to issue under Order provision 1.

Original Signed By
Stephanie Haly
Adjudicator

June 7, 2012