

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3589

Appeal PA15-54

Ministry of Community and Social Services

March 23, 2016

Summary: The appellant submitted an access request to the Ministry of Community and Social Services for records created by a transfer payment agency relating to her son. The ministry located one occurrence/incident report and disclosed it to her. She appealed the ministry's access decision because she believes that two additional occurrence/incident reports must exist and be in the ministry's custody or control. After the mediation stage of the appeal process ended, the transfer payment agency disclosed the two remaining occurrence/incident reports to the appellant. However, the appellant argued that the adjudicator should conduct an inquiry and render an order because parents, including herself, will continue to make access requests to the ministry for records that were created by transfer payment agencies. In this order, the adjudicator finds that because the remaining records sought by the appellant have been disclosed to her, the appeal is moot. As a result, he dismisses the appeal.

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

Orders and Investigation Reports Considered: Orders MO-2728, MO-2049-F, MO-2218, MO-2525, MO-2571, PO-2756, PO-2879-R, PO-2910 and PO-3057-I.

Cases Considered: *Borowski v. The Attorney General of Canada*, [1989] 1 SCR 342.

OVERVIEW:

[1] The appellant submitted an access request under the *Freedom of Information*

and Protection of Privacy Act, (the Act) to the Ministry of Community and Social Services (the ministry) for the following records relating to her son:

All records, incident reports, reports made by the [a named transfer payment agency]¹ (Ottawa) for [the ministry] dated: October 31 or November 1, 2012; October 22, 2014 and November 10, 2014.

[2] In response, the ministry sent a decision letter to the appellant which stated that it was providing her with all of the ministry records responsive to her request. In particular, it provided her with an occurrence/incident report, dated October 31, 2012.

[3] The appellant appealed the ministry's access decision to the Information and Privacy Commissioner of Ontario (IPC), which assigned a mediator to assist the parties in resolving the issues in dispute.

[4] The appellant advised the mediator that the ministry had not disclosed the occurrence/incident reports related to the October 22, 2014 and the November 10, 2014 incidents, and that she wished access to these records. The appellant maintained that these records existed and that the transfer payment agency had forwarded these records to the ministry, in accordance with the ministry's policy.

[5] The appellant further maintained that the ministry had oversight and inspection powers with respect to incidents that took place at the transfer payment agency, and that the ministry and the agency had joint access to an electronic record filing system that contained incident records. The appellant claimed that the ministry had both possession of the agency's incident records and the power to obtain these records from the agency.

[6] Thus, the appellant raised two appeal issues: 1) whether the ministry's search for the records in question was reasonable; and 2) whether the ministry had custody or control of the records in question.

[7] The ministry advised the mediator that it had conducted three searches for ministry-held records related to the October 22, 2014 and November 10, 2014 incidents and that it did not have any such records. It explained that the transfer payment agency routinely forwarded only serious incident reports to the ministry, and that serious incident reports had not been required for the incidents in question.

[8] The ministry further stated that the transfer payment agency had confirmed to the ministry that while serious occurrence reports for the incidents in question did not exist, other types of incident records did exist in the agency's files. It further advised that it was neither the ministry's practice nor its policy to obtain incident records, other

¹ Transfer payment agencies are mainly community-based organizations that receive funding from the ministry to deliver a variety of programs and services.

than serious incident reports, from the transfer payment agency. It stated that it was not willing to change its position on this issue.

[9] The appellant disputed the ministry's claim that the transfer payment agency had previously disclosed incident records in relation to the October 22, 2014 and November 10, 2014 incidents to her. She advised the mediator that she wished to pursue both the issues of reasonable search and custody or control at adjudication. The mediator issued a report to the parties that identified these two issues as remaining in dispute.

[10] After the mediator's report was issued, the appellant contacted the mediator and advised her that the transfer payment agency had now sent her a copy of the remaining records (i.e., the occurrence/incident reports of October 22, 2014 and November 10, 2014).

[11] The appellant further explained that although she had received the remaining records, the ministry's response to her access request still needs to be reviewed by an adjudicator. In particular, she argued that her appeal is not moot because parents, including herself, will continue to make access requests to the ministry for records that were created by transfer payment agencies.

[12] This appeal was not resolved during mediation and was moved to the adjudication stage of the appeal process for an inquiry. I sought and received representations from the appellant only. In this order, I find that the issues being appealed are moot and I dismiss the appeal.

DISCUSSION:

Is the appeal moot?

[13] A preliminary issue that must be resolved is whether this appeal is moot because the transfer payment agency has provided the appellant with copies of the remaining records that she was seeking from the ministry under the *Act*.

[14] In Order P-1295, Assistant Commissioner Irwin Glasberg considered the question of when an appeal under the *Act* could be considered moot. He stated:

The leading Canadian case on the subject of mootness is the Supreme Court of Canada's decision of *Borowski v. The Attorney General of Canada* [(1989), 57 D.L.R. (4th) 231]. There, the court commented on the topic of mootness as follows:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of

resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot ...

In the *Borowski* case, Sopinka J., speaking for the court, indicated that a two-step analysis must be applied to determine whether a case is moot. First, the court must decide whether what he referred to as "the required tangible and concrete dispute" has disappeared and the issues have become academic. Second, in the event that such a dispute has disappeared, the court must decide whether it should nonetheless exercise its discretion to hear the case.

[15] The approach taken by Assistant Commissioner Glasberg, which was to apply the test set out in *Borowski*, has been adopted in several subsequent IPC orders.² In particular, adjudicators declined to make a determination in regard to exemptions claimed for records (or other issues) where the requester already had obtained access to the records at issue, rendering the appeal moot. This determination is made where there is not sufficient public interest or importance to continue with an inquiry to review an institution's access decision.

[16] Consequently, in the notice of inquiry that I sent to the appellant, I asked her to address the following two questions in her representations:

1. Has the required tangible and concrete dispute in this appeal disappeared and rendered the issues of reasonable search and custody/control academic?
2. If so, should the adjudicator decide to nonetheless exercise his discretion to hear this appeal and continue with an inquiry to review the ministry's access decision?

[17] In her representations, the appellant does not directly address these two questions. Instead, she sets out a chronology that outlines her attempts to access the three occurrence/incident reports relating to her son from both the transfer payment agency and the ministry. She states:

² See Orders MO-2728, MO-2049-F, MO-2218, MO-2525, MO-2571, PO-2756, PO-2879-R, PO-2910 and PO-3057-I.

It took about a year, a FIPPA request to [the ministry], a long IPC mediation process, and an extensive correspondence with [ministry] program supervisors in order to obtain the incident reports from the [ministry] and [the transfer payment agency] after the agency's refusals.

[18] In applying the test for mootness established in *Borowski*, I find that the first part of the test has been met, because the live controversy relating to the undisclosed records has disappeared. The transfer payment agency provided the appellant with the remaining occurrence/incident reports that she was seeking, which, in my view, means that the issues in this appeal have become academic.

[19] With respect to the second part of test, I have considered whether I should nonetheless exercise my discretion to hear this appeal and continue with an inquiry, notwithstanding the fact that the appellant has received access to all of the records that she was seeking. The appellant advised the mediator that her appeal should not be considered moot because parents, including herself, will continue to make access requests to the ministry for records that were created by transfer payment agencies.

[20] The argument raised by the appellant has some merit because it is not clear whether all occurrence/incident reports created by transfer payments agencies are in the custody or control of the ministry under the *Act*. However, I find that this argument does not raise an issue of sufficient public interest or importance that would justify continuing with an inquiry, particularly when the records sought by the appellant in this particular appeal have been disclosed to her.

[21] In short, I find that the appeal is moot and there would be no useful purpose in continuing with an inquiry to review the ministry's access decision.

ORDER:

The appeal is dismissed.

Original Signed by: _____
Colin Bhattacharjee
Adjudicator

_____ March 23, 2016