

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4220

Appeal PA20-00485

Ministry of Children, Community and Social Services

December 20, 2021

Summary: This appeal deals with an access request for documents related to expenses incurred for the appellant's son by a service provider to the Ministry of Children, Community and Social Services. In response to a previous request, the ministry disclosed documents to the appellant, including the amount of annualized funding approved for her son. The ministry issued a decision that no records exist beyond those already provided to the appellant and the spending of public funds for individuals is not reflected in records in the ministry's holdings. The appellant filed an appeal, based on her belief that more records exist, raising the issue of reasonable search under section 24. She also argued that the ministry has custody or control of the requested records under section 10(1). In this order, the adjudicator finds that the ministry conducted a reasonable search for responsive records and that the specific records the appellant seeks do not exist. She also concludes that she does not need to answer the hypothetical question of whether the ministry would have custody or control of responsive records, if they existed. She upholds the ministry's decision and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 10(1) and 24.

OVERVIEW:

[1] The appellant is an individual whose son receives services in respect of his disability from an agency (the transfer payment agency or TPA) funded by the Ministry of Children, Community, and Social Services (the ministry). The appellant made an access request dated July 12, 2020 under the *Freedom of Information and Protection of*

Privacy Act (the *Act*) to the ministry for:

... the detailed spending of [the appellant's son]'s annualized funding from October 2017 - March 20, 2020 and from March 20, 2020 - July 2020. I am asking for details - what was spent and how much spent.

[2] Enclosed with the request was a copy of a previous access request, submitted by the appellant to the ministry, and proof of the appellant's Litigation Guardianship for her son.

[3] As background, the appellant's current request relates to expenses incurred for her son by a specific service provider, which is a transfer payment agency (TPA) that receives funds from the ministry. Individuals can apply through Developmental Services Ontario (DSO) to see if they are eligible to receive adult developmental services funded by the ministry. The TPA has a DSO office, where individuals can apply for individualized support, including 24-hour supported group living. The DSO funding is needs-based and each adult undergoes yearly assessments to determine the amount of funding they qualify for.

[4] The appellant's son is an adult with a developmental disability, who lived in a group living residence run by the TPA. In response to a previous access request, the ministry disclosed to the appellant a document entitled "[name of TPA] 2017/18 Explanatory Notes", which contains the amount of annualized funding approved for her son, commencing April 1, 2019. The appellant is now seeking access to information on what the TPA is doing with the annualized funding approved for her son, as he is no longer living at the TPA's group living residence.

[5] The ministry issued a decision on August 20, 2020, advising that it conducted a search for records responsive to the request and "no records exist beyond what was previously provided in [the appellant's] previous request." The ministry's decision also advised that the relevant program area within the ministry provided the following statement regarding the request:

Ministry funded agencies follow an established business process where they reconcile how public funding was used. Agencies provide this information for all the services they deliver so the ministry can ensure all public funds are being used appropriately. This process takes place each fiscal year.

[The TPA]'s funds are allocated by the ministry to support global operating costs for [name of group living residence], which supports [appellant's son] and other residents. As previously communicated by the regional office, this funding is not individualized.

[6] The appellant appealed the ministry's access decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[7] A mediator was assigned to explore the possibility of resolving the appeal. As outlined in her letter of appeal, the appellant advised the mediator that she believes more records exist than what was provided to her by the ministry, thereby raising the issue of reasonable search. The appellant also advised the mediator that she believes the ministry has custody or control of the requested records.

[8] Further mediation was not possible and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[9] An adjudicator was assigned to this appeal and she decided to conduct an inquiry. She began her inquiry by inviting and receiving written representations from the ministry addressing the facts and issues set out in the Notice of Inquiry. The non-confidential portions of the ministry's representations were shared with the appellant in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*. While the appellant did not provide representations during adjudication, she provided information in her letter of appeal and during mediation.

[10] The appeal was then transferred to me to continue with its adjudication.¹ In this order, I find that the ministry conducted a reasonable search for records responsive to the current access request and conclude that I do not need to answer the hypothetical question of whether the ministry would have custody or control of individualized spending records in the hands of the TPA, if they existed. Accordingly, I uphold the ministry's decision and dismiss the appeal.

ISSUES:

- A. Did the ministry conduct a reasonable search for records?
- B. Are the additional records the appellant seeks "in the custody" or "under the control" of the ministry under section 10(1)?

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

Issue A: Did the ministry conduct a reasonable search for records?

[11] First, I will consider the issue of whether the ministry conducted a reasonable search for responsive records.

¹ I have reviewed all the file material and representations and have determined that I do not require further information before making my decision.

[12] 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 24.² 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.³

[13] 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.⁴ To be responsive, a record must be "reasonably related" to the request.⁵

[14] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁶ 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.⁷

Representations of the parties

[15] As outlined below, I find that the ministry conducted a reasonable search for records responsive to the current request, and I uphold it.

[16] In her letter of appeal, the appellant submits that the information she obtained from the ministry in response to her previous request supports her belief that her son's funding is individualized, contrary to what is stated in the ministry's decision letter, and therefore, records on how those funds were spent on her son specifically must exist.

[17] The ministry explains that the current request is related to a previous request received by the ministry on November 26, 2019 for:

Any and all documents from the Ministry that relate to (the appellant's son)'s budget when he was placed in a residential home..., including a copy of each year's budget of expenditures and dollars flowed to [the TPA].⁸

[18] The ministry submits that in 2019, a comprehensive search was conducted of both emails and a shared drive containing information about this TPA, using a broad and inclusive interpretation of the request, and several responsive records were provided to the appellant:

² Orders P-85, P-221 and PO-1954-I.

³ Order MO-2185.

⁴ Orders P-624 and PO-2559.

⁵ Order PO-2554.

⁶ Orders M-909, PO-2469 and PO-2592.

⁷ Order MO-2246.

⁸ The ministry issued a decision for this previous request on January 14, 2020.

Including the [TPA]'s budget packages for 2017/2018 and 2018/2019, [an] email from the Program Supervisor regarding the supports provided to individuals and funding management of the TPA, corporate reporting templates for Multi Year Residential Planning and Developmental Services Residential Intake as well as contract explanatory notes.

[19] The ministry further submits that, after considering the current request, it determined that a new search was not required. First, it submits that the appellant was previously provided with the records that could be deemed responsive to the current request as part of the previous 2019 request. Second, it submits that no further potentially responsive records had been provided by the TPA to the ministry in the time following the original request and the time of the current request.

[20] In support of its representations that it performed a reasonable search for records related to the previous request, the ministry provided me with the sworn affidavit of a Program Supervisor (the program supervisor). It submits that this employee oversees the TPA and therefore, she is knowledgeable in the subject matter of the current request.

[21] The program supervisor provides details of the ministry's financial oversight of the TPA. The program supervisor explains that while the ministry requests, obtains and reviews the financial records of the TPA, the funding provided to the TPA by the ministry is not individualized, meaning that it is not allocated to specific individuals served by the TPA. She further explains that the ministry does not require TPAs to provide individualized financial reports for the clients they serve but rather TPAs are provided a base budget annually and they must adhere to targets set out by the ministry with the base allocation they have been provided. Finally, she explains that the ministry does not receive financial reports detailing individualized funding for clients from the TPA.

[22] The program supervisor also details the efforts and steps taken by the ministry to search for records responsive to the appellant's requests. She indicates that the search conducted for the previous request did not locate any records of individualized funding for the appellant's son. She states that as the program supervisor overseeing the TPA, she would be aware if the ministry received any additional materials from the TPA. She confirms that no further financial records were received by the ministry from this TPA between 2019 and 2020 that would be responsive to the current request. Because of this, no further search was conducted.

[23] Overall, the ministry submits that all responsive records in its custody and control were provided to the appellant in response to her previous request and that no further responsive records would be expected to exist in the ministry's record holdings.

[24] As noted above, the appellant did not provide representations during adjudication.

Analysis and findings

[25] As explained below, I find that the ministry conducted a reasonable search for responsive records.

[26] The appellant initially established a reasonable basis for believing that responsive records may exist by referring to the record she received in response to her previous request, which shows an amount of funding individualized for her son.⁹ However, I am of the view that the ministry has reasonably explained why the appellant's belief is not correct. The ministry has explained that individualized records showing how money is spent do not exist because there is no statutory obligation for the TPA to maintain for itself, or provide the ministry with, individualized reports showing how it specifically spent money for each of its clients, including the appellant's son. I have also considered the ministry's representations summarized below under the custody and control issue.

[27] While the ministry's decision letter says that it conducted a search for records responsive to the appellant's current request, it is clear from the ministry's affidavit that it did not conduct a new search. Instead, the ministry relied on its previous search for the appellant's 2019 request and the knowledge of the program supervisor that the TPA has not submitted any additional information that would be responsive to the current request, to determine that there are no additional records responsive to the current request, beyond those already provided to the appellant. I note the similarity in the requests made by the appellant: the previous request was for information about the TPA's budget for the appellant's son, while the current request is for information about the TPA's spending for the appellant's son. I accept the ministry's submission that it did not conduct an additional search, as it appears reasonable that a search for records related to budgets would also likely reveal records related to spending.

[28] In the absence of any evidence to the contrary, I accept the ministry's representations and the sworn affidavit of the program supervisor. Despite the fact that the ministry did not conduct a new search, I am satisfied that the ministry has demonstrated it expended a reasonable effort to identify and locate records reasonably related to the request. I am also satisfied that the program supervisor, who oversees the TPA, is an experienced employee knowledgeable in the subject matter of the request. Under the *Act*, the onus is on the ministry to provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. Based on the materials before me, I find that the ministry has done so.

[29] Moreover, I am satisfied that a further search would not yield additional responsive records and that there would be no useful purpose in requiring a further search for responsive records. When I consider the information provided by the ministry, there is no reasonable basis for me to conclude that further searches would

⁹ This would appear to be consistent with the fact that individuals applying for individualized support undergo yearly assessments to determine the amount of funding they qualify for, as noted above.

result in additional responsive records.

[30] Accordingly, I find that the ministry has conducted a reasonable search for records responsive to the current request.

CUSTODY OR CONTROL

Issue B: Are the requested records “in the custody” or “under the control” of the ministry under section 10(1)?

[31] As noted above, the ministry submitted that despite conducting a reasonable search, additional responsive records, specifically, the individualized spending records sought by the appellant, do not exist. In the alternative, the ministry submits that, even if responsive records exist, they would not be in the ministry’s custody or control.

[32] Section 10(1) reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless...¹⁰

[33] 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 the *Act* if it is in the custody or under the control of an institution; it need not be both.¹¹

[34] 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.¹² 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).

[35] The courts and the IPC have applied a broad and liberal approach to the custody or control question.¹³ Based on this approach, the IPC has developed a list of factors to consider in determining whether a record is in the custody or control of an institution.¹⁴

[36] The list of factors developed by the IPC is not intended to be exhaustive and the

¹⁰ Section 10(1) goes on to list exceptions to the general right of access. Those exceptions are not relevant to the issues in this appeal.

¹¹ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

¹² Order PO-2836.

¹³ *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.

¹⁴ Orders 120, MO-1251, PO-2306 and PO-2683.

factors applicable to a particular case will depend upon the facts. The Divisional Court has held that in determining whether records are in the “custody or control” of an institution, the applicable factors must be considered contextually with regard to the purpose of the legislation.¹⁵

[37] In addition to the above factors, the Supreme Court of Canada has articulated a two-part test to determine institutional control of a record in cases where an institution does not hold a record. The IPC has applied this test in such situations:

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?¹⁶

Representations of the parties

[38] During mediation, the appellant expressed her belief that the ministry has custody or control of the requested records; that is, records related to individualized spending for her son.

[39] The ministry submits that it did not refuse to provide the appellant with any portion of a record based on the reason that responsive records were not in its custody or control. The ministry’s response to the request is that the requested records do not exist, or if they do exist, they are not in the ministry’s custody or control. It also submits that the appellant has merely asserted that records should exist.

[40] The ministry explains that the TPA receives funding from the ministry for the services they provide to many clients through several group homes. This funding from the ministry may be both for the TPA’s capital and operating expenses. The TPA is subject to ministry oversight under the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008 (SIPDDA)*, which provides the legislative framework for ministry-funded adult developmental services in Ontario. As such, the ministry may request certain records from the TPA in relation to its oversight role.

[41] It also explains that the ministry does not require its TPAs to detail the expenses they may incur in respect of each individual client they may serve. Rather, funding provided to the TPA is provided as part of a base budget that the TPA uses to operate each of its group home locations. It further explains that these budgets are not individualized to clients (e.g. not allocated to specific individuals served by the TPA) and therefore, records regarding individualized budgets do not exist and are not required by the ministry in its oversight role.

¹⁵ *City of Ottawa v Ontario*, 2010 ONSC 6835 (Div. Ct.).

¹⁶ *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII).

[42] As noted above, the appellant did not provide representations during adjudication, in response to the ministry's representations.

Analysis and findings

[43] While the appellant expressed her belief during mediation that additional responsive records are in the ministry's custody and control, she did not address any of the factors set out in the Notice of Inquiry, nor did she provide a basis for concluding that records containing the individualized spending information she is seeking would be in the TPA's record holdings.

[44] Based on the evidence before me, there is no reason to believe that the TPA has the records the appellant seeks. The statutory framework described by the ministry does not require the TPA to maintain individualized records for each client, or to provide such individualized records to the ministry. As a result, I do not need to answer the hypothetical question of whether the ministry would have control of such records held by the TPA, if they existed.

ORDER:

I uphold the ministry's access decision and dismiss the appeal.

Original signed by: _____
Valerie Silva
Adjudicator

December 20, 2021 _____