

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4238

Appeal PA15-488

Ministry of the Attorney General

February 25, 2022

Summary: The appellant sought access, under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*), to information held by the Office of the Children's Lawyer (OCL) in the context of custody and access proceedings as well as specific OCL procedural policies. 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 *FIPPA* applies to the OCL and that the OCL was required to disclose the records to him under the *Act*.

In this order, the adjudicator reviews the Court of Appeal's decision in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*¹, 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, information at issue in the present appeal is similarly not in the ministry's custody or control. He finds, further, that the OCL is not itself an "institution" under the *Act* in relation to the records at issue. Finally, he finds that the specific procedural policies requested by the appellant have been provided to him, do not exist or qualify for exemption under section 19 (solicitor-client privilege) of the *Act*. He dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 1, 2(1) (definition of institution), 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 Considered: Orders MO-2130, PO-2719, PO-3520, PO-4066 and PO-4217.

¹ 2018 ONCA 559 (CanLII).

Cases Considered: *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559 and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25.

OVERVIEW:

[1] The appellant is a father who has been involved in legal proceedings regarding the custody of his children. As explained more fully below, he made an access to information request to the ministry which responded on behalf of the Office of the Children's Lawyer (OCL). 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.

[2] The appellant made his request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to the following information:

1. All records related to the number of cases referred to the Office of the Children's Lawyer in Ontario in 2011, 2012, 2013, and 2014, in which the OCL recommended that the mother receive custody of the children. In the alternative, I request that I be provided with the exact number in an official document.
2. All records related to the number of cases referred to the Office of the Children's Lawyer in Ontario in 2011, 2012, 2013, and 2014, in which the OCL recommended that the father receive custody of the children. In the alternative, I request that I be provided with the exact number in an official document.
3. All records related to the number of court orders issued to the Office of the Children's Lawyer in Ontario in 2011, 2012, 2013, and 2014, in which the OCL was issued court orders and denied that they are required to follow court orders. In the alternative, I request that I be provided with the exact number in an official document.
4. All records related to the number of clinical investigator reports that were disputed by the father and filed with the Office of the Children's Lawyer in Ontario in 2011, 2012, 2013, and 2014. In the alternative, I request that I be provided with the exact number in an official document.
5. All records related to the number of clinical investigator reports that were disputed by the mother and filed with the Office of the Children's Lawyer in Ontario in 2011, 2012, 2013, and 2014. In the alternative, I request that I be provided with the exact number in an official document.
6. All records related to the number of clinical investigator reports that were disputed by the mother and filed with the Office of the Children's Lawyer in

Ontario in 2011, 2012, 2013, and 2014 [...]. In the alternative, I request that I be provided with the exact number in an official document.²

7. All records related to the number of clinical investigator reports that were successfully disputed by the mother in Ontario in 2011, 2012, 2013, and 2014. In the alternative, I request that I be provided with the exact number in an official document.
8. All records related to the number of clinical investigator reports that were successfully disputed by the father in 2011, 2012, 2013, and 2014. In the alternative, I request that I be provided with the exact number in an official document.
9. All records related to the number of cases referred to the Office of the Children's Lawyer in Ontario in 2011, 2012, 2013, and 2014, in which the father requested an OCL investigation and it was granted. In the alternative, I request that I be provided with the exact number in an official document.
10. All records related to the number of cases referred to the Office of the Children's Lawyer in Ontario in 2011, 2012, 2013, and 2014, in which the mother requested an OCL investigation and it was granted. In the alternative, I request that I be provided with the exact number in an official document.
11. All records related to the number of hours spent with the father (as stated in the investigator's invoice) during a clinical investigation, in 2013, in which the Clinical Investigator [named investigator] was assigned. In the alternative, I request that I be provided with the exact number in an official document for each case.
12. All records related to the number of hours spent with the mother (as stated in the investigator's invoice) during a clinical investigation, in 2013, in which the Clinical Investigator [named investigator] was assigned. In the alternative, I request that I be provided with the exact number in an official document for each case.
13. All records related to the number of cases referred to the Office of the Children's Lawyer in Ontario in 2013, in which the Clinical Investigator [named investigator] was assigned. In the alternative, I request that I be provided with the exact number in an official document.
14. All records related to the number of cases referred to the Office of the Children's Lawyer in Ontario in 2013, in which the Clinical Investigator [named investigator], made the decision that the mother was the better care giver and

² I note that item 6 is a duplicate of item 5. The appellant conceded this to be the case during mediation at the IPC.

provided that recommendation to the courts. In the alternative, I request that I be provided with the exact number in an official document.

15. All records related to the number of cases referred to the Office of the Children's Lawyer in Ontario in 2013, in which the Clinical Investigator [named investigator], made the decision that the father was the better care giver and provided that recommendation to the courts. In the alternative, I request that I be provided with the exact number in an official document.
16. All records related to the number of cases referred to the Office of the Children's Lawyer in 2013, in which the Clinical Investigator, [named investigator], provided the recommendation to the courts that she has no opinion on custody. In the alternative, I request that I be provided with the exact number in an official document.
17. All records related to the enabling statutes under which the Office of the Children's Lawyer operates.
18. All policies relating to procedural fairness that the Office of the Children's Lawyer operates under.
19. All procedural policies that the Office of the Children's Lawyer follows when reviewing notes taken by the investigator.
20. All procedural policies in place to deal with an investigator submitting false and/or misleading information to the courts on behalf of the Office of the Children's Lawyer.
21. All procedural policies of relating to an investigator operating outside of their jurisdiction.
22. All procedural policies regarding the approval for the clinical investigator's report.
23. All policies regarding the dispute process of clinical investigator reports.

[3] In response, the ministry 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 services are provided on behalf of children by the Children's Lawyer. Her office is an independent office within the Ministry of the Attorney General (MAG) 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 MAG. As such, any records related to those files are not in the custody or under the control of

MAG. Given that the records you have requested are files where the Children's Lawyer has acted on behalf of children, *FIPPA* does not apply.

[4] Notwithstanding this position, the ministry's letter advised that with respect to items 1 to 10 where the appellant was seeking aggregate data for the period between 2011 and 2014 and items 11, 12, 14, 15 and 16, where aggregate data was also being sought, the OCL does not collect or documents the statistics that are responsive to those items, and that, accordingly, no responsive records exist.

[5] The ministry provided the following information relating to item 17 of the request:

With respect to item 17, section 112 of the *Courts of Justice Act*³ provides that the Children's Lawyer may conduct an investigation and make recommendations to the court in proceedings under the *Divorce Act* (Canada) or the *Children's Law Reform Act*. For more information about the Office of the Children's Lawyer please visit www.attorneygeneral.jus.gov.on.ca.

[6] The requester (now the appellant) appealed the decision to this office.

[7] At mediation, the mediator noted that the ministry's decision did not appear to address item 13 or items 18 to 23 of the request. The ministry advised the mediator that the OCL takes the position that the requested records, including those that may be responsive to item 13 and items 18 to 23 of the request, are not in the ministry's custody or control.

[8] The appellant disagreed with the ministry's position that responsive records are not in its custody or control and that the OCL does not collect or document the statistics requested.

[9] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator is assigned to the appeal and may conduct an inquiry under the *Act*. Shortly after it was moved to adjudication, this office received a formal written request from the OCL to place the appeal on hold, pending the outcome of this office's application to the Supreme Court of Canada (SCC) for leave to appeal the decision of the Ontario Court of Appeal in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*⁴ (*Children's Lawyer*). Representations were sought, received and exchanged and I granted the hold request.

[10] On March 28, 2019, the SCC released its judgement dismissing this office's leave application.

³ RSO 1990, c C.43.

⁴ 2018 ONCA 559

[11] Accordingly, the stay request was no longer a live issue and I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the ministry and the OCL.

[12] After receiving the initial Notice of Inquiry, the ministry requested that the appeal be returned to mediation to determine if issues could be resolved. The appellant agreed to return to mediation.

[13] At the second mediation, the appellant advised that item 17 of the request was no longer at issue in the appeal.⁵ In addition, the ministry sent a letter to the appellant providing him certain information. The letter set out the following:

The Office of the Children's Lawyer ("OCL") 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 items 1 to 10 of your request.

On July 12, 2019, I understand that the OCL provided you with the following information outside the scope of *FIPPA*.

For the year 2013:

Item 11 & 12 - the number of hours spend by [named investigator] during clinical investigations with father/mother are reflected in invoices as Fathers: 7 hours/Mothers 6 hours.⁶

Item 13 - The number of cases referred to the OCL, in which [named investigator] was assigned. [Named investigator] was assigned to conduct four investigations and reports in 2013. Three of those files were transferred to another clinical agent shortly after they were assigned as [named investigator] accepted a position [identified position] at the OCL.

Item 14, 15 & 16 – The number of times [named investigator] recommended to the courts that the mother/father "was the better caregiver;" and the number of times [named investigator] stated in a report that she has no opinion on custody. Out of the four files assigned to [named investigator], only one report was filed with the court. In that report, [named investigator] did not provide any custody or access recommendations as the parties settled the matter before a report was completed.

[14] The second mediation did not fully resolve the appeal and it was returned to the adjudication stage of the appeals process.

⁵ Accordingly, I will address it no further in this order.

⁶ As this information was provided in accordance with the appellant's request I will address items 11 and 12 no further in this order.

[15] I then sought representations from the ministry and the OCL on the facts and issues set out in a Supplementary Notice of Inquiry.

[16] The OCL provided responding representations, which included an affidavit from its Provincial Manager of Clinical Services. After reviewing OCL's response, I decided to seek further representations from the OCL as set out in a letter dated November 18, 2019.⁷ I subsequently became aware that the OCL had provided an affidavit from its Chief Administrative Officer (CAO) in another appeal before the IPC⁸, which I asked to be shared with the appellant in this appeal in a severed form, by removing the identity of the appellant in that other appeal. OCL consented to share that affidavit in a severed form. Representations were then sought from the appellant on the facts and issues set out in this Notice of Inquiry as well as OCL's representations and the severed affidavit that was received in another proceeding before the IPC. The appellant advised that he would be filing no additional representations in response to the Notice of Inquiry and relied on the materials he previously provided to this office in the course of his appeal.

[17] In making their representations, the parties were invited to address and refer to the *Children's Lawyer* decision of the Ontario Court of Appeal, which I discuss in more detail below.

[18] In this order I find that, based on the court's reasoning in *Children's Lawyer*, the records responsive to items 1 to 10 and 13 to 16 of the request are similarly not in the ministry's custody or control. I find, further, that the OCL is not itself an "institution" under the *Act* in relation to the records at issue in items 1 to 10 and 13 to 16 of the request. Finally, I find that the specific procedural policies requested by the appellant (items 18 to 23) have been provided to him, do not exist or qualify for exemption under section 19 (solicitor-client privilege) of the *Act*. The appeal is dismissed.

RECORDS:

[19] The records at issue are the records, to the extent that any exist that are responsive to items 1 to 10 and 13 to 16 as well as 18 to 23 of the appellant's request.

ISSUES:

- A. Is the OCL an institution under the *Act*?
- 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?

⁷ A copy of which was provided to the appellant in this appeal.

⁸ The appellant was not a party to the other appeal, which resulted in Order PO-4217.

DISCUSSION

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

[20] In Order PO-4217, Senior Adjudicator Gillian Shaw recently addressed a similar request for information about custody recommendations and disputes (OCL procedural policies were not at issue in Order PO-4217).

[21] In her Order she conducted a detailed analysis of the Court of Appeal's findings in *Children's Lawyer* and the issue of custody and control of the type of information requested at items 1 to 10 and 13 to 16 of the appellant's request. I agree with the manner in which she summarizes the findings in *Children's Lawyer* and my summary essentially adopts hers.

[22] The court's decision in *Children's Lawyer* resulted from an access request made to the ministry under the *Act* for various records related to services provided to the requester's⁹ two children by the Children's Lawyer 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.

[23] 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 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.

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

[25] In her Order PO-3520 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 distinguish between different aspects of the operations of 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

⁹ Not the same individual as the appellant in the appeal before me.

that office's core mandate, within the broader umbrella of the ministry's supervision of the administration of justice.

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

[27] 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."¹⁰ 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.

[28] At paragraphs 96 to 102 of the decision, 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.

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,

¹⁰ *Children's Lawyer*, above at paragraph 55.

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*.

[29] 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.¹¹

[30] The court found that the records in question were not in the ministry's custody or control. I will elaborate on the court's reasons for that finding under Issue B below.

Issue A: Is the OCL an institution under the *Act*?

[31] In his materials, the appellant took the position that *FIPPA* applies to the OCL and that the OCL was required to disclose the records to him under the *Act*.

[32] In order for *FIPPA* to apply directly to the OCL, the OCL must itself be an institution under *FIPPA*. For the reasons I set out below, I find that the OCL is not an institution under the *Act* in relation to statistical information at issue in this appeal. The question then becomes whether the records at issue are in the custody or control of the ministry which is an institution. That question is addressed under Issue B.

[33] 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.

[34] 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

¹¹ *Children's Lawyer*, above at paragraph 107.

of Appeal confirmed this in *Children's Lawyer*.

[35] The appellant asserts that *Children's Lawyer* only addresses why personal information or information relating to a litigation function should not be subject to *FIPPA*. He states that it does not address the application of *FIPPA* to non-personal information or information that relates to a non-litigation function of the OCL.

[36] The appellant argues that the *Children's Lawyer* decision does not apply to his request because the decision solely addresses the law as it pertains to OCL's services under section 89(3.1) of the *Courts of Justice Act (CJA)*¹² and does not address any services the OCL may offer exclusively under section 112(1) of the *CJA*. He submits that he only seeks statistical information from the services offered by the OCL under section 112 of the *CJA*, where the child is not provided with legal representation.

[37] Also, again referring to section 112(2) of the *CJA*, the appellant submits that OCL's enabling legislation clearly states that their services are provided to the general public, not only a judicial body.

[38] Finally, in support of his position that the information he seeks should be disclosed, the appellant refers to the purposes of the *Act*, submitting that *FIPPA* provides a way to improve public information policies and public sector access along with promoting policies for good government, which include transparency and accountability.

Analysis and findings

[39] For the following reasons, I find that the OCL is not an institution in respect of information at issue in this appeal. Again, I borrow heavily from the reasons in Order PO- 4217.

[40] 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;

¹² RSO 1990, c C.43.

[41] 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.

[42] 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).

[43] 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."

[44] Like the adjudicator in PO-4217, 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.

[45] Except for the policy information in items 18 to 23 of the request, the information the appellant seeks, 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 items 1 to 10 and 13 to 16 of the appellant's access request.

[46] It may be that the *Children's Lawyer* finding regarding whether the OCL is a branch of the ministry does not apply to the policy information in items 18 to 23 of the request, because such records, arguably, are not sourced from the OCL's child client files and therefore do not relate to the OCL's representing its child clients. I address this below.

[47] 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. 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.

[48] I now address whether the records sought by the appellant are in the ministry's custody or under its control in Issue B, below.

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

[49] As was the case in Order PO-4217, the main issues in this appeal 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, as the adjudicator did in Order PO-4217, it is useful to set out some of the OCL's evidence about its role and its relationship with the ministry.

[50] The Children's Lawyer's¹³ powers, duties and responsibilities are set out in various pieces of legislation. The OCL explains, and its Provincial Manager attests, that the records at issue in this appeal relate solely to services provided by its personal rights department.¹⁴ For the purpose of the appeal 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*¹⁵ (*CJA*).

[51] 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.

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

[T]he 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.

[...]

¹³ 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.

¹⁴ Its office is divided into two departments: children's personal rights and children's property rights.

¹⁵ R.S.O. 1990, c. C.43.

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
- 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. This process was followed in the requester's case.

[53] The OCL submits that while the Children's Lawyer is accountable to the Attorney General¹⁶ 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

¹⁶ Through the Assistant Deputy Attorney General, Victims and Vulnerable Persons Division.

statutorily mandated services on behalf of children. It says that the Children's Lawyer's obligations are to the court and the children she serves.

[54] 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.

[55] 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.

[56] 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.

[57] For the following reasons, I find that the records responsive to items 1 to 10 and 13 to 16 of the request are not in the ministry's custody or control. I address items 18 to 23 in my discussion of the search issue under the next heading.

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

[58] 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 . . .

[59] 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 control of an institution; it need not be both.¹⁷

[60] 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.¹⁸ A

¹⁷ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

¹⁸ Order PO-2836.

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).

[61] The courts and this office have applied a broad and liberal approach to the custody or control question.¹⁹

Factors relevant to determining "custody or control"

[62] 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.²⁰ 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,²¹
- what use the creator intended to make of the record,²²
- whether the institution has a statutory power or duty to carry out the activity that resulted in the creation of the record,²³
- whether the activity in question is a "core", "central" or "basic" function of the institution,²⁴
- whether the content of the record relates to the institution's mandate and functions,²⁵
- whether the institution has physical possession of the record that amounts to more than "bare possession",²⁶
- whether the institution has a right to possession of the record,²⁷

¹⁹ *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.

²⁰ Orders 120, MO-1251, PO-2306 and PO-2683.

²¹ Order 120.

²² Orders 120 and P-239.

²³ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

²⁴ Order P-912.

²⁵ *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.

²⁶ Orders 120 and P-239.

²⁷ Orders 120 and P-239.

- whether the institution has the authority to regulate the record's content, use and disposal,²⁸
- whether there any limits on the use to which the institution may put the record,²⁹
- the extent to which the institution has relied upon the record,³⁰
- how closely the record is integrated with other records held by the institution,³¹ 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.³²

[63] 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,³³
- who owns the record,³⁴
- who paid for the creation of the record,³⁵
- the circumstances surrounding the creation, use and retention of the record,³⁶
- 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,³⁷
- any understanding or agreement between the institution and the creator of the record that the record was not to be disclosed to the institution,³⁸ and

²⁸ Orders 120 and P-239.

²⁹ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

³⁰ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Order 120.

³¹ Orders 120 and P-239.

³² Order MO-1251.

³³ Order PO-2683.

³⁴ Order M-315.

³⁵ Order M-506.

³⁶ Order PO-2386.

³⁷ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

³⁸ Orders M-165 and MO-2586.

- whether the individual who created the record was an agent of the institution for the purposes of the activity in question.³⁹

[64] 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*.⁴⁰

[65] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,⁴¹ 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

[66] As Senior Adjudicator Shaw did in Order PO-4217, a review of the court’s reasons on the custody/control issue in *Children’s Lawyer* will set the context for my findings below.

[67] The court began by observing that, given its conclusion that the OCL 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, but rather, whether the ministry does.

[68] 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.

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

- 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.

³⁹ *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.).

⁴⁰ *City of Ottawa v. Ontario*, cited above.

⁴¹ 2011 SCC 25, [2011] 2 SCR 306.

- 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. The Children’s Lawyer does not allow ministry officials to access or possess these 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.

[70] The court went on to say that the ministry’s past practice of forwarding requests to OCL for a response under the *Act*⁴² is not determinative, and that the evolving nature 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

[71] 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

⁴² Implicit in the court’s reasons is the fact that past practice also included the OCL’s behaving as though its records are covered by the *Act*.

issue in this appeal relates to matters where the OCL is not acting on behalf of 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.

[72] 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. In addition, 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).

[73] 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.

[74] At the intake stage of the appeal the appellant submitted to the IPC Registrar that the requested information can be obtained with minimal effort, arguing that:

- a. Information regarding the general statistics for decisions made in previous cases can be obtained from the summary pages filed with the courts. These summary pages include custody recommendations for a male or a female. My request is simply for the information regarding male or female recommendation for child custody. OCL does keep copies of all documents submitted to the courts.
- b. Information regarding the specific statistics for the independent contractor, [named individual], regarding hours spent with the male vs. female during the investigation process would be available from invoices. Independent contractors, such as [named individual], are allotted a number of hours for every investigation. These invoices detail where the investigator spent their hours and are submitted to MAG for payment. It would be a trivial task to review these invoices and provide statistical information for the past two years on how the investigator divided the hours between the male and female parties.

[75] The appellant also stated that he requested policies and procedures that only pertained to investigations conducted without lawyer involvement. He submits that without lawyer involvement, solicitor-client privilege under section 19 of the *Act*,⁴³ would not apply for the particular policies he requested, unlike the claim made in similar requests, such as in Order PO-2719.

[76] In the course of the hold application⁴⁴, the appellant submitted that his request pertains to the non-legal services consulting services provided by the OCL, where a claim of solicitor-client privilege is not applicable, or to policies, procedures and statistical information that would not contain any privileged or personal information about children, including his child.

[77] At the intake stage of the appeal, the appellant added that he has evidence that the OCL provides their services differently depending on if they are providing information on a male or a female and that the statistical information he is requesting would help determine if this discrepancy is a systemic problem or that of a particular investigator. He believes that his appeal would benefit society by ensuring that OCL's policies are not infringing anyone's equality rights as protected by section 15(1) of the *Canadian Charter of Rights and Freedoms*.⁴⁵

[78] In the course of the hold application, the appellant submitted that the purposes of the *Act* includes providing access to "government information" and protecting the

⁴³ The application of the section 19 solicitor-client exemption to the policy identified as responsive to item 23 of the request is addressed in more detail under Issue B, below.

⁴⁴ Discussed in the background above.

⁴⁵ The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

privacy of individuals with respect to personal information about themselves⁴⁶. He adds that the *Act* provides a way to improve public information policies and public sector access along with promoting polices for good government, such as:

- i. Transparency: The public's right to know what government is doing and how decisions have been reached.
- ii. Accountability: The public's ability to hold elected representatives responsible for how they carry out their roles.
- iii. Public participation: Citizen involvement in policy development and decision-making.
- iv. Fairness in decision-making: An individual's ability to present their side of an issue, and their right to access the information on which a decision-maker will act, including the criteria to be applied.
- v. Personal privacy: The government's records of personal information and information management practices, and an individual's right to have access to government information concerning them.
- vi. Administrative costs: The cost-benefit of the resources required to administer the legislation and the benefits to society from a more open government.

Analysis and findings on custody or control

[79] For the reasons that follow, I find that the information at items 1 to 10 and 13 to 16 of the appellant's request is not in the ministry's custody or control. Further, given my findings (under the search issue below) that the information in items 18 to 23 has already been provided to the appellant, does not exist or qualifies for exemption under section 19 of the *Act*, I do not need to make a finding on the ministry's custody or control of that information.

[80] With respect to items 1 and 2 of the request, 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 cases

⁴⁶ Section 1 of *FIPPA* provides that the purposes of the *Act* are,
a. to provide a right of access to information under the control of institutions in accordance with the principles that,
i. information should be available to the public,
ii. necessary exemptions from the right of access should be limited and specific, and
iii. decisions on the disclosure of government information should be reviewed independently of government; and
b. to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

referred to the OCL in Ontario in 2011, 2012, 2013 and 2014 in which the OCL has recommended that a mother or father receive custody of the children. The Provincial Manager says that this is not the type of information that would be inputted into the OCL's database.

[81] With respect to item 3 of the request, the OCL says, and the Provincial Manager attests, that the OCL does not collect statistics (and has no records) relating to "the number of court orders issued to it when it denied that it was required to follow court orders" in 2011, 2012, 2014 and 2014. The Provincial Manager says that this is not the type of information, if it existed, that would be inputted into the OCL's database.

[82] With respect to items 4, 5 and 6 of the request, the OCL submits, and the Provincial Manager attests, that it does not collect statistics (and has no records) relating to the number of times a mother or a father filed a dispute in 2011, 2012, 2013, and 2014. The Provincial Manager says that this is not the type of information, if it existed, that would be inputted into the OCL's database.

[83] In relation to items 7 and 8 of the request, the OCL submits, and the Provincial Manager attests, that the OCL states that it does not collect statistics (and has no records) about the number of disputes that were "successfully disputed by the mother or father in Ontario in 2011, 2012, 2013 and 2014." The OCL says that this is not the type of information, if it existed, that would be inputted into the OCL's database.

[84] With respect to items 9 and 10 of the request, the OCL submits, and the Provincial Manager attests, that the OCL does not collect statistics (and has no records) related to the number of cases where a mother or father requested an OCL investigation and it was granted. The OCL says that this is not the type of information, if it existed, that would be inputted into the OCL's database.

[85] In relation to item 13 of the request (the number of times a named clinical investigator was assigned in 2013), the OCL submits, and the Provincial Manager states, that the following information was already provided to the appellant:

The named clinician was assigned to conduct four investigations and reports in 2013. Three of those files were transferred to another clinical agent shortly after they were assigned as the named clinician accepted a position as Regional Clinical Supervisor at the OCL.

[86] As indicated in the letter provided in the course of mediation, this was provided "outside of *FIPPA*".⁴⁷

[87] With respect to items 14, 15 and 16 of the request (relating to the number of times a named clinical investigator opined the better caregiver was the mother, the father, or had no opinion), the OCL's Provincial Manager, Clinical Services stated while

⁴⁷ Discussed in the background above.

the number of times that the named clinician recommended to the courts that the mother or father "was the better caregiver" are not statistics that the OCL collects or keeps, the OCL reviewed the named clinician's files to assist the requester with his request. The OCL stipulated that it had provided the following information "outside of *FIPPA*" on the basis that the ministry does not have custody or control of it:

Out of the four files assigned to [named clinician], only one report was filed with the court. In that report, [named clinician] did not provide any custody or access recommendations as the parties settled the matter before a report was completed."

[88] I have no reason to doubt the sworn evidence of the Provincial Manager, and I accept, that the statistical records requested in items 1 to 10 and 13 to 16 do not currently exist. I noted above, that information responsive to items 13 to 16 was provided to the appellant, "outside of *FIPPA*".

[89] For reasons I explain below, I do not need to decide whether the OCL can or cannot produce the requested information in items 1 to 10 and 13 to 16 from its existing records. I note in that regard, that the OCL did provide some information relating to items 13 to 16 to the appellant. I would simply note as an aside that from the OCL's own evidence, it is clear that records relating to items 1 to 10 and 13 to 16 of the requested information exist in some form including in the paper child client files.⁴⁸

[90] However, based on the OCL's evidence, I also find that, even if the OCL can produce the requested statistics in relation to items 1 to 10 and 13 to 16, this information would all be derived from the child client files themselves.

[91] Given that all of the responsive information in items 1 to 10 and 13 to 16 is found in the OCL's child client files, I agree with Senior Adjudicator Shaw's finding in Order PO- 4217 that there is 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.

⁴⁸ 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.

[92] In that regard, I agree with and adopt her findings at paragraphs 92 to 99 of her decision where she wrote:

[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 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,⁴⁹ the circumstances surrounding the creation, use and retention of the record,⁵⁰ and whether the individual who created the record was an agent of the institution for the purposes of the activity in question.⁵¹

[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 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.

⁴⁹ Order PO-2683.

⁵⁰ Order PO-2386.

⁵¹ *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.).

[93] For the same reasons, I also conclude that the ministry does not have custody or control of the records at issue in the appeal before me.

[94] I would reach the same result applying the two-part test in *National Defence*,⁵² 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?

[95] 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.⁵³

[96] The Court of Appeal also 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. (emphasis added)⁵⁴

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

⁵² 2011 SCC 25, [2011] 2 SCR 306.

⁵³ *Children's Lawyer* at para 112.

⁵⁴ *Children's Lawyer* at para 101.

[98] For the above reasons, I find that the records responsive to items 1 to 10 and 13 to 16 are not in the ministry's custody or control.⁵⁵

[99] With respect to the specific OCL policies requested by the appellant at items 18 to 22 of the request, I do not need to determine whether they would be in the custody or control of the ministry as I find below that no records responsive to these categories exist. In the case of the record responsive to item 23 it has been previously determined to qualify for exemption under section 19 of the *Act*. I also address this below.

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

[100] 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 24.⁵⁶ A further search may be ordered where the institution's search for responsive records in its custody or control is deficient.⁵⁷

[101] 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.⁵⁸ 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.⁵⁹

[102] In relation to items 18 to 22 of the request (policies on various topics), the OCL submits, and the Provincial Manager attests, that she reviewed the policies in place during the time period requested by the requester and advised that there were no procedural policies related to procedural fairness; reviewing notes taken by a clinician; dealing with an investigator submitting false and/or misleading information to the courts on behalf of the OCL; the clinician acting outside of their jurisdiction; or the approval for the clinical investigator's report.

[103] With respect to item 23 of the request, the Provincial Manager states that the OCL has a policy document related to the dispute process for section 112 reports that was in place during the relevant time period of the request, and says:

⁵⁵ 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.

⁵⁶ Orders P-85, P-221 and PO-1954-I.

⁵⁷ Order MO-2185.

⁵⁸ Orders P-624 and PO-2559.

⁵⁹ Order MO-2246.

This is a 2-page document that: (a) is marked as "Solicitor-Client Privileged, Private and Confidential"; (b) was drafted by lawyers at the OCL and approved by the Children's Lawyer for Ontario; (c) outlines the relevant statutory provisions for section 112 disputes, legal advice on what constitutes a "dispute" and steps to take if a dispute is received. It also provides legal advice on preparation for cross-examination and the implications of not filing a dispute.

[104] She explains that this is not a document that the OCL shares with the ministry as it relates to the Children's Lawyer's independent statutory functions and it is subject to solicitor-client privilege. She says that it was only shared with staff at the OCL or OCL clinical agents and was part of a set of documents that an IPC adjudicator previously found to be subject to solicitor-client privilege in Order PO-2719.

Analysis and findings on the search for records

[105] I found above that records responsive to items 1 to 10 and 13 to 16 of the request 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.

[106] Based on the evidence of the OCL's Provincial Manager of Clinical Services, which was not challenged by the appellant, I am also satisfied that no records exist that are responsive to items 18 to 22 of the appellants request.

[107] It is arguable that records responsive to item 23 are not within the ministry's custody or control, for the reasons set out above, i.e. such records relate to the OCL's statutory function in relation to representing children in a custody and access dispute. For the reasons below, however, even if the policy the OCL identified as responsive to item 23 is in the ministry's custody or control, the IPC has previously found in Order PO- 2719 that it is exempt from disclosure under section 19 of the *Act*.

[108] Section 19 provides that an institution may refuse to disclose a record,

- a. that is subject to solicitor-client privilege;
- b. that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
- c. that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[109] In Order PO-2719, a different requester made a request under the *Act* for access to a Training Manual or similar publication under different name (e.g. Guidelines, Field Handbook, Investigation Plan etc) and a Sample Report. There were two responsive

records that were identified as being at issue in Order PO-2719, being:

1. Office of the Children's Lawyer Personal Rights Nuts and Bolts, April 2006 (Record 1), and
2. Policy and Procedural Manual for Clinical Investigators Office of the Children's Lawyer (Record 2).

[110] In Order PO-2719 ministry described Record 1 as "the manual provided to in-house and panel lawyers who represent children on behalf of [the OCL] in child protection and custody/access cases." The ministry stated that Record 1 "contains directions about how cases are to be handled" on behalf of the OCL and its clients.

[111] In Order PO-2719, the ministry described Record 2 as "the manual provided to in-house counsel and panel clinical investigators who prepare investigations and reports for the court, and assist lawyers who represent children on behalf of [the OCL]." Like Record 1, the ministry stated that Record 2 "contains directions on how cases are to be handled" by the OCL.

[112] In Order PO-2719 the adjudicator found that the records qualified for exemption under the solicitor-client communication head of privilege at section 19(a) of the Act.

[113] In the appeal before me, the Provincial Manager stated, and I accept, that item 23 was part of a set of documents that the IPC adjudicator previously found to be subject to solicitor-client privilege in Order PO-2719. The appellant was provided with the OCL's representations and affidavit and he did not address nor challenge that evidence. I see no reason to depart from the finding in Order PO-2719 in the circumstances.

ORDER:

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

Original Signed by: _____
Steven Faughnan
Adjudicator

February 25, 2022 _____