Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3520

Appeal PA14-84

Ministry of the Attorney General

August 7, 2015

Summary: In this order the adjudicator finds that records of the Office of the Children's Lawyer for Ontario (OCL) covered by a request are in the custody or control of the Ministry of the Attorney General. She orders the ministry to issue an access decision to the appellant, which decision may be made by the OCL.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 10(1), *Courts of Justice Act*, sections 89(3.1) and 112(1).

Orders and Investigation Reports Considered: Order PO-2006

Cases Considered: *Ontario (Children's Lawyer) v Ontario (Information and Privacy Commissioner)*, [2003] OJ No 3522 (Div Ct), appeal dismissed [2005] OJ No 1426 (CA); *Canada (Information Commissioner) v. Canada (Minister of National Defence),* 2011 SCC 25, [2011] 2 SCR 306; *Ontario (Attorney General) v Ontario (Assistant Information and Privacy Commissioner),* 34 OR (3d) 611, [1997], OJ No 2485 (Ont CA); *Montana Indian Band v. Canada*, [1988] F.C.J. No. 339; *Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto* (June 3, 1997), Toronto Doc. 21670/87Q (Gen. Div.).

BACKGROUND:

[1] For more than two decades, the Office of the Children's Lawyer for Ontario (the OCL or the Children's Lawyer) and its predecessor, the Official Guardian, has responded to requests under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or

the *Act*) as a branch of the Ministry of the Attorney General (the ministry). This office (the IPC) has issued more than a dozen orders in appeals from access decisions in relation to records of the OCL. One such appeal resulted in court proceedings in which the Divisional Court upheld an order of the IPC applying exemptions under *FIPPA* to records of the OCL.[1]

[2] In this appeal, the OCL takes the position that the records sought by a requester are not covered by the *Act*. For the reasons that follow, I do not accept this position and I direct the OCL to issue an access decision to the requester.

[3] This appeal arises out of a request to the ministry for information related to services provided to the requester's two children by the Children's Lawyer in custody and access proceedings in Thunder Bay and Milton. In particular, the request was for:

- Privileged and non-privileged reports relating to two named children and an identified court file in the Thunder Bay Superior Court of Justice;
- All documents filed with the court, including settlement reports, medical reports, psychological and educational reports, conversations and notes, transcript; and
- All notes and information relating to the duties of a named lawyer in an identified Milton file, including notes, court documents, assessment.

[4] In addition to the named lawyer in Milton, the requester specified he was seeking the records of two named individuals representing the Children's Lawyer in Thunder Bay, one being the OCL's legal agent and the other a social worker. Although the request is broad, it appears that the requester was primarily interested in obtaining notes and other documents of the social worker used to support the opinion she provided during the trial in Thunder Bay. These documents were entered as exhibits at the trial and were part of the court file.

[5] In response to the request, the ministry issued a decision letter denying access to the requested records. The ministry advised that the Children's Lawyer takes the position that the *Act* does not apply to litigation files where it provides services to children. The ministry advised that, as a result, records related to these files are not in the custody or under the control of the ministry. The ministry's decision letter states that the person responsible for the decision is the Children's Lawyer.

[6] In its decision, the ministry provided the requester with the addresses of the two courts from which he could seek court records. The appellant states that when he attempted to obtain some of the exhibits from the court file in Thunder Bay, he was told by court officials they had been removed from the file by the OCL's agent. The appellant then contacted the legal agent in Thunder Bay to request the exhibits,

---

[1] *Ontario (Children's Lawyer) v Ontario (Information and Privacy Commissioner)* , [2003] OJ No 3522 (Div Ct), appeal dismissed [2005] OJ No 1426 (CA) [*Children's Lawyer*]

without success. The OCL advised him that further disclosure of records to him, if any, would be addressed through this appeal.

[7] The requester (now the appellant) appealed the ministry's decision. As mediation did not resolve the appeal it was transferred to the adjudication stage of the appeals process. I invited submissions from the ministry on the issues raised in the appeal, to which the Children's Lawyer responded. As the Children's Lawyer states in its materials that its representations are not made by or on behalf of the ministry, I requested and received clarification from the Freedom of Information Co-ordinator for the ministry on its position in this appeal. The Assistant Deputy Attorney General, Victims and Vulnerable Persons Division, responded to my inquiry, stating that the ministry adopts the position of the OCL.

[8] Before me are the representations of the Children's Lawyer and the appellant, including a reply and supplementary representations from the Children's Lawyer, and sur-reply representations from the appellant.

DISCUSSION:

[9] The sole issue in this appeal is whether the ministry has custody or control of the requested records.

[10] Section 10(1) of the *Act* provides a right of access to a record or part of a record in the custody or control of an institution. 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.[2]

[11] 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. 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). As well, through section 67, a record may be subject to an overriding confidentiality provision enacted in another statute.[3]

[12] The courts and this office have applied a broad and liberal approach to the custody or control question. One court has observed that "[t]he notion of control referred to in [the Act] is left undefined and unlimited. Parliament did not see fit to

---

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

[3] One example is found in section 89 of the *Legal Aid Services Act, 1998*, covering communications, among other things, between legal clinic workers and their clients. Another example, in the municipal sphere, is section 181 of the *City of Toronto Act, 2006*, discussed in Reconsideration Order 2629-R.

distinguish between ultimate and immediate, full and partial, transient and lasting, or "de jure" and "de facto" control."[4]

Factors relevant to determining "custody or control"

[13] This office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.[5] The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution? [6]
- What use did the creator intend to make of the record?[7]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[8]
- Is the activity in question a "core", "central" or "basic" function of the institution?[9]
- Does the content of the record relate to the institution's mandate and functions?[10]
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?[11]
- If the institution does have possession of the record, is it more than "bare possession"?[12]

---

[4] *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), cited with approval in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072.
[5] Orders 120, MO-1251, PO-2306 and PO-2683.
[6] Order 120.
[7] Orders 120 and P-239.
[8] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.
[9] Order P-912.
[10] *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.
[11] Orders 120 and P-239.
[12] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?[13]

- Does the institution have a right to possession of the record?[14]

- Does the institution have the authority to regulate the record's content, use and disposal?[15]

- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?[16]

- To what extent has the institution relied upon the record?[17]

- How closely is the record integrated with other records held by the institution?[18]

- What is 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?[19]

[14] The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?[20]

- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?

- Who owns the record?[21]

- Who paid for the creation of the record?[22]

---

[13] Orders 120 and P-239.
[14] Orders 120 and P-239.
[15] Orders 120 and P-239.
[16] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[17] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; Orders 120 and P-239.
[18] Orders 120 and P-239.
[19] Order MO-1251.
[20] Order PO-2683.
[21] Order M-315.
[22] Order M-506.

- What are the circumstances surrounding the creation, use and retention of the record?[23]

- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?[24]

- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution?[25] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution?[26]

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?[27]

- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?[28]

[15] In determining whether records are in the "custody or control" of an institution, the above factors must be considered contextually in light of the purpose of the legislation.[29]

---

[23] Order PO-2386.
[24] *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).
[25] Orders M-165 and MO-2586.
[26] *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.).
[27] Order MO-1251.
[28] Order MO-1251.
[29] *City of Ottawa v. Ontario*, cited above.

[16] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)* (*Minister of National Defence*),[30] the Supreme Court of Canada adopted 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?

Representations of the parties

The OCL's representations

[17] The OCL submits that the records at issue were all collected or prepared by agents of the OCL for the purposes of providing legal representation to the appellant's children. The OCL maintains that it is independent from the ministry when providing legal representation on behalf of children in the administration of justice. Therefore, submits the OCL, the records at issue are not subject to the *Act* as they are not in the custody or under the control of the ministry.

[18] The OCL states that she derives her powers, duties and responsibilities through statute and common law, and does not receive direction with respect to the exercise of those powers from the Attorney General or any other ministry official. The OCL cites provisions from the *Courts of Justice Act*,[31] *Child and Family Services Act*,[32] *Family Law Rules*, *Rules of Civil Procedure*,[33] *Children's Law Reform Act*,[34] and *Estate Administration Act*[35] as examples of the statutory bases for the Children's Lawyer's powers, duties and responsibilities.

[19] The OCL states that it is divided into two departments, the Personal Rights Department and the Property Rights Department. The Personal Rights Department of the OCL becomes involved on behalf of a child in custody or access proceedings when so ordered by the court, under the *Courts of Justice Act* (the *CJA*). Section 89(3.1) of the *CJA* provides that the Children's Lawyer may act as the legal representative of the child where requested by the court. In acting under this section, the OCL may provide legal representation only, or legal representation with clinical assistance.

---

[30] 2011 SCC 25, [2011] 2 SCR 306.
[31] RSO 1990, c C-43.
[32] RSO 1990, c C-11.
[33] RRO 1990, Reg 194.
[34] RSO 1990, c C-12.
[35] RSO 1990, c E-22.

[20] Under sections 112(1) and (2) of the *CJA*, the OCL may investigate and make recommendations to the court on matters concerning custody, access, support and education of the child, on its own initiative or on request of the court. The services provided under this section consist of a clinical investigation and report, without legal representation.

[21] The OCL submits that any records related to services provided under section 89(3.1), whether they encompass legal representation, or legal representation with clinical assistance, are covered by solicitor-client privilege. No solicitor-client privilege, however, attaches to records in relation to services provided under section 112.

[22] The OCL submits that the courts use a standard form to request the services of the Children's Lawyer, in which both of the above sections are referred to and the nature of the services to be provided is left to the Children's Lawyer to determine. It states that in the case of the appellant's children, a judge made an initial order in the context of custody and access proceedings in Thunder Bay, appointing the Children's Lawyer under section 112 only. This initial order of December 18, 2008 was revised on January 5, 2009 to include both sections. Following receipt of the revised order, the Children's Lawyer determined that legal representation would be provided, with the assistance of a clinical investigator.[36]

[23] The proceedings in Thunder Bay concluded, but the appellant began a new proceeding in Milton after the mother and children moved to that jurisdiction. Another judge requested the involvement of the OCL again, and this time, the OCL decided to provide legal representation only, without the assistance of a clinical investigator.

[24] In providing personal rights services, the OCL uses either in-house staff or fee-for-service agents. In the proceedings involving the appellant, the services were provided by lawyers in the two communities, acting as agents for the OCL. The OCL also used the services of a clinical investigator in Thunder Bay, the social worker named in the appellant's request.

[25] The OCL submits that the Divisional Court, in *Children's Lawyer*[37], has recognized the independence of the OCL when it provides services to a child. It submits that, while the OCL is accountable to the Attorney General on some administrative and budgetary matters related to the expenditure of public funds, it is completely independent from the ministry when providing services on behalf of children.

[26] The OCL states that, other than administrative and budgetary records, its records are kept separate from those of the ministry; it does not provide the ministry with access to any of its records relating to the services it provides on behalf of children; it is solely responsible for the creation, maintenance and disposition of records related to

[36] The OCL's representations use the terms "clinical agent" and "clinical investigator" interchangeably.
[37] Cited above.

the services provided to children; its policies and procedures related to the conduct of litigation or services provided on behalf of children are reviewed and approved by the Children's Lawyer or her delegate, and not by any other government or ministry official; and when the Children's Lawyer is unable to act due to sickness or absence, her duties are delegated to an OCL senior executive, never to a ministry official.

[27] The OCL submits that the Children's Lawyer's fiduciary obligations to non-governmental clients require independence which precludes her from acting in the interests of the Crown. The OCL provides a few examples of instances in which it acts adverse to the interests of the ministry, including in litigation where a child has a cause of action against the Crown; where there is a constitutional question before the court that affects a child's interests; and where the OCL is seeking disclosure of a Crown Brief on behalf of a child. The OCL submits that without independence from the ministry, there would be an irresolvable conflict of interest and it would be prevented from acting for its clients with complete and undivided loyalty, dedication and good faith.

[28] The OCL submits that the *FIPPA* scheme would create an inherent conflict of interest if the ministry was to obtain the records in order to make an access decision under the *Act*, as this would interfere with the independence of the Children's Lawyer. Conversely, the OCL submits that requiring the Children's Lawyer to exercise discretion to disclose exempted records under the *Act* would also create an intolerable conflict of interest, because her duties to her client would prevent her from disclosing records to a third party where it would be against her client's best interests to do so. Therefore, the OCL submits that the Children's Lawyer is unable to properly exercise discretion under the *Act*, or submit to the ministry's exercise of that discretion, because she is bound by her fiduciary and common law duties as a solicitor to always adopt a position favourable to her clients.

[29] The OCL addressed the questions outlined in Order P-120,[38] set out above. The OCL submits that the records are not in the custody or under the control of the ministry based on the following considerations:

- The records were created by agents of the Children's Lawyer while providing legal representation on behalf of children and were intended for use in litigation in custody and access proceedings as ordered by the court;

- The records were not created for use by the ministry or on behalf of the Crown;

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

[38] And approved by the Court in *City of Ottawa v Ontario*, cited above; the ten questions are outlined above.

- The ministry does not have possession of the records and does not have any statutory or other right to possess or regulate the use or disposal of the records;

- The records at issue are kept separate from other OCL records that the ministry is entitled to obtain from OCL; and

- No ministry official or employee has access to these records.

[30] In response to the test articulated by the Supreme Court of Canada,[39] the OCL submits that the ministry does not have control of the records at issue. It submits that the ministry does not have an interest in the records as they relate to private litigation of parties in a custody and access dispute where the Children's Lawyer is acting on behalf of child clients. The OCL also submits that no senior official in the ministry could reasonably obtain a copy of the records upon request, nor would they ever be provided to the ministry for any purpose.

[31] The OCL submits that a solicitor-client relationship exists between the Children's Lawyer and the child client when the OCL is providing legal representation. As such, records that belong to the child client, as determined under the *Solicitors Act*, are under the child's, and not the OCL's or the ministry's, control for the purposes of the *Act*.

[32] The OCL submits that a finding that the records are not subject to *FIPPA* does not mean that accountability and oversight mechanisms are not in place. It refers to the *Solicitors Act*[40] the *Family Law Rules*; the role of the Auditor General in examining and reporting on the accounts and financial transactions of the Children's Lawyer; a Value for Money audit by the Auditor General; the role of the Law Society of Upper Canada; and Ontario courts.

[33] Rule 21 of the *Family Law Rules* establishes a process for the exchange of information when the OCL provides a report under section 112 of the *CJA*. With reference to these *Rules*, the OCL states that it cannot be the intention of the *Act* to grant parties to litigation covered by those rules an additional mechanism to obtain disclosure from someone with an interest in a case by reason of the fact that the person's legal representative was funded by a government agency.

[34] The OCL states that during the course of the family law proceedings, disclosure of relevant documents was provided to the requester. The documents, which included notes of meetings with collateral sources and the parents and records provided by, or involving, collateral sources, were disclosed in accordance with the *Family Law Rules*, rather than pursuant to the *Act*.

---

[39] *Canada (Information Commissioner) v Canada (Minister of Defence)*, cited above; the two factor test is outlined above.
[40] RSO 1990, c S-15.

[35] The OCL's reply and supplemental submissions elaborate on its position, as well as answering additional questions from me. The OCL submits that providing public access to children's private litigation files would do nothing to promote the purpose of the *Act*, namely to enable citizens to participate in democracy, nor would serve any other public interest.

[36] The OCL submits that in determining whether an organization is "part of" the ministry for the purposes of *FIPPA*, all aspects of the relationship between the ministry and the organization must be considered. The OCL submits that the mere fact that it has Ontario Public Service employees does not mean that it is "part of" the ministry for the purposes of *FIPPA*, nor does it mean that the ministry has custody or control of the records. The OCL notes that Ontario courts are staffed with public servants, yet the court records they handle are not subject to *FIPPA*, while other organizations with public service employees, such as the Public Guardian and Trustee and the Ontario Labour Relations Board, are specifically listed as public institutions under the *Act*.

[37] The OCL cites *Ontario (Attorney General) v Ontario (Assistant Information and Privacy Commissioner)* [41] (*Walmsley*) in support of its position that the absence or presence of a separate statutory administrative structure is not determinative of whether the ministry has custody and control of the records.

[38] In its supplementary representations, the OCL was asked to consider how its office's past practice in responding to *FIPPA* requests affects the issue of custody and control. The OCL submits that its past actions cannot prevent the Children's Lawyer from asserting that the records at issue in this appeal are not subject to the *Act*, and notes that for the past several years, the Children's Lawyer has taken the position that records relating to children's litigation files are not in the custody or control of the ministry. The OCL also submits that jurisprudence regarding custody and control has evolved in recent years, and that the applicability of *FIPPA* to records where the Children's Lawyer acts on behalf of children has yet to be decided by the courts. Apart from its reference to the two-part test in the *Minister of National Defence* case for records not in an institution's physical possession (referred to above), the OCL has not specified how any evolving jurisprudence has affected the factors to be considered in the custody or control analysis as previously applied by this office.

[39] In its supplementary representations, the OCL states that the Children's Lawyer was never involved with the appellant's children pursuant to section 112 of the *CJA*. Rather, the OCL submits that a clinical investigator was assigned to work with the legal representative under section 89(3.1) of the *CJA*. The OCL submits that in this case, the OCL's method of service was legal representation and the services provided by the investigator were for the purpose of assisting counsel rather than providing clinical/social work. Accordingly, the OCL submits that the file remained a legal file

[41] Cited above.

throughout the OCL's involvement, and that privilege attaches to communications amongst the legal representative, the clinical investigator and the child client as a result. The OCL distinguishes this from a case where a clinical investigator is assigned to conduct an investigation and report to the court pursuant to section 112 of the *CJA*, and no solicitor-client relationship exists between the child client and the investigator.[42] The OCL also submits that where a clinical investigator is assigned pursuant to section 112 of the *CJA*, the *Solicitors Act* does not govern the contents of the file, as it does where a solicitor-client relationship exists.

[40] In my supplementary questions, I asked the OCL about its delegated authority from the Attorney General under *FIPPA*. In response, it provided me with a copy of a delegation dated January 29, 1998, signed by the then Attorney General, which it submits provided it with delegation of authority under *FIPPA*.

[41] I also asked the OCL to comment on the relevance of a number of cases, including *Montana Band of Indians v Canada (Minister of Northern Affairs)*,[43] *Canada Post Corp. v Canada (Minister of Public Works)*,[44] and Reconsideration Order MO-2629-R. The OCL submitted that they were either distinguishable on their facts, or support its position that the ministry does not have custody or control of the records at issue. In addressing *Jane Doe v Board of Commissioners,*[45] the OCL agrees that the disclosure process during litigation pursuant to the *Family Law Rules* does not preclude an individual from making an access request under *FIPPA*. The OCL explains that it referenced the *Family Law Rules* disclosure process in its original representations to illustrate that there are additional avenues available to the appellant to seek disclosure of the records.

The appellant's representations

[42] The appellant submits that the OCL is withholding notes of the clinical investigator that the court in Thunder Bay ordered it to produce. These notes were made exhibits at the trial. The appellant provided a copy of the exhibit list from the trial, which supports his assertion that the notes of the clinical investigator, as well as other records of the OCL, became part of the court record. The appellant states that solicitor-client privilege over these records was waived during the trial. He has tried to obtain the exhibits from the court in Thunder Bay and they are no longer in the file. The appellant states that he was told by the court clerks in Thunder Bay that the OCL's agent withdrew the records from the court's file before it was transferred to Milton from Thunder Bay.

---

[42] Citing *Catholic Children's Aid Society of Toronto v SSB*, 35 RFL (7th) 178 (Ont Sup Ct).
[43] [1998] FCJ No 339.
[44] Cited above.
[45] *Jane Doe v Board of Commissioners of Police for the Municipality of Metropolitan Toronto* (June 3, 1997), Toronto 21670/87Q (Ont Gen Div).

[43] Although he agrees that the OCL sent him some notes outside of the *Act*, he states he has not received all of the records disclosed at the trial.

[44] The appellant disputes that the OCL was given discretion to decide whether to provide legal representation or a report under section 112(1). He relies on the reasons of the judge following on the December hearing, in which only section 112(1) services were referred to. He states that the judge was very clear about what service he directed from the OCL, which was a section 112(1) investigation and corresponding report under Rule 21 of the *Family Law Rules*.

[45] It is the appellant's position that the OCL failed to conduct the section 112(1) investigation as required, or if a report was made, it was never furnished by the OCL prior to or during the trial. The appellant relies on the order of Justice McCartney, based on the reasons given at the motion, in which the judge appoints the Children's Lawyer to "conduct an investigation and to report and make recommendations to the court... pursuant to s.112(1) of the *Courts of Justice Act*."[46]

[46] The appellant submits that the OCL is overstepping its legislative boundaries by giving itself the discretion about what services to provide. Its discretion is not absolute but is limited by the endorsement of the presiding judge, who in this case ordered a report under section 112(1). He states that if the OCL had determined it did not wish to provide a report under section 112(1) of the *CJA*, it should have refused to take the file. He questions why, if the OCL did not wish to provide a report under section 112(1), it chose to appoint a clinical investigator to assist the legal agent.

[47] Regarding the OCL's position that the *FIPPA* scheme would create an inherent conflict of interest if the ministry was to obtain the records in order to make an access decision, the appellant submits the opposite: that this process would create needed transparency in the event that the Children's Lawyer failed to represent the interests of the children.

[48] It is the appellant's belief that the Children's Lawyer failed to discharge its fiduciary obligations in representing its child clients in this case. He believes that full information about its investigation should be disclosed. The OCL's clinical agent (named in his request) participated and gave evidence at the trial and it cannot now shield the notes which were the basis of that evidence. The appellant further submits that the judge relied on the evidence submitted by the OCL, that there is now a public record of that proceeding which has been relied on in subsequent proceedings, and yet not all the evidence is in the court record as it should be.

[46] As indicated above, the OCL does not dispute that such an order exists; however, it asserts that this original order was replaced by a revised order.

[49] He submits that society has a great interest in the fairness and transparency of the judicial process, and the OCL should not be able to override the court's direction by withholding the notes.

[50] The appellant states that the ministry is an "institution" for the purposes of the *Act*. The appellant submits that the records at issue are subject to the *Act* as the OCL is a government agency "under" the ministry. He submits that the OCL is publicly funded and should be accountable to the public.

[51] The appellant relies on submissions made by the OCL to the IPC, reproduced in Order PO-2006, in which it describes itself as having complete control over the conduct of litigation for which it has been appointed litigation guardian for a child. He also relies on other material including the website of the Attorney General in which the OCL is described as a "law office in the Ministry of the Attorney General which delivers programs in the administration of justice on behalf of children with respect to their personal and property rights." Clinical investigators, according to this website, "prepare reports for the court in custody/access proceedings and may assist lawyers who are representing children in such matters." The website further states that "[t]he Children's Lawyer's involvement in custody/access cases is to provide a legal representative (a lawyer) for the child or to prepare a report, or a combination of both."

Analysis and findings

[52] For the following reasons, I find that the records at issue in this appeal are in the custody or control of the ministry.

[53] There is no dispute that the *Act* applies to "institutions", which are defined to include provincial ministries. The overriding considerations in this case are:

- the undisputed fact that the OCL is a branch of the ministry and
- all of the records at issue were generated in the course of the OCL fulfilling its core mandate.

[54] Despite these considerations, a consistent theme of the OCL's submissions is an effort to differentiate the OCL, together with its mandate as a branch within the Ministry, from the Ministry itself. For the reasons set out below, I find this approach flawed.

[55] In *Children's Lawyer*, above, the Divisional Court described the OCL as "formally a branch of the Ministry of the Attorney General", although an "independent office having specialized functions for which a large degree of independence from the Ministry is vital." The OCL acknowledges that within the formal structure of the ministry, it operates as a branch within the Victims and Vulnerable Persons Division.

[56] As a branch of the ministry, the OCL is accountable to the ministry for the expenditure of public funds. In this respect, the OCL is subject to directives such as the Travel, Meal and Hospitality Expenses Directive, the Business Planning and Allocations Directive, the General Expenses Directive, and the Procurement Directive. The OCL acknowledges that records related to all these matters are subject to the *Act*.

[57] There is no separate administrative structure for the OCL established under any statute. Its legal counsel and executive, administrative and clinical/investigative staff are all employed by the ministry. The *Public Service of Ontario Act* (*PSOA*) governs the appointment and employment of all public servants in Ontario under the general supervision of the Public Service Commission. Ontario Regulation 146/10 under the *PSOA* lists all "public bodies" and "public commission bodies" which are considered part of the public service in Ontario and which do not otherwise fall within a ministry or a minister's office. The OCL is not separately listed, consistent with the conclusion that, by law, OCL staff are ministry employees.

[58] I agree with the OCL that, in determining whether an organization is "part of" the ministry for the purposes of the *Act*, all aspects of the relationship between the ministry and the organization must be considered. I also agree that the absence or presence of a separate statutory administrative structure is not determinative of whether the ministry has custody and control of the records. The OCL's submission, in essence, is that while it is "part of" the ministry for the purposes of the *Act* with respect to some of its records, it is not "part of" the ministry for others.

[59] I do not find any factual or legal support for such a conclusion. The *Act* applies to "institutions". Accepting that a branch of an institution is part of an institution, I find no basis for differentiating between different aspects of the operations of that branch for *FIPPA* purposes. Whether the records of the OCL are generated for the purpose of discharging its financial and other accountabilities to the ministry, in the course of providing clinical services, or in the course of legal representation, all such records are connected with that office's core mandate, within the broader umbrella of the ministry's supervision of the administration of justice.

[60] The OCL is unlike the judiciary, which has a separate existence and constitutionally distinct function from the ministry. It is also unlike the Judicial Appointments Committee considered in *Walmsley*, above, in that the Committee under consideration in *Walmsley* consisted of individuals who were neither employees nor officers of the ministry and whose role was to provide arms-length advice directly to the Attorney General independent of the Ministry.

[61] The result urged by the OCL would treat some of its records as excluded from the *Act* when it is engaged in certain functions, while other records would be subject to the *Act*. While the *Act* itself provides for such a result, through the exclusion of some

categories of records, the OCL's submissions would, in effect, amount to indirect recognition of an additional exclusion which has not been explicitly legislated.

[62] As I state above, for more than two decades, the OCL and its predecessor have responded to access requests under the *Act*. A review of some of the appeals that have come before this office in relation to the OCL indicates that while decision letters were issued by ministry staff, not the OCL, the decisions were made by the Children's Lawyer. In the appeal giving rise to Order PO-2006, for example, decision letters under the signature of the ministry's FOI Co-ordinator state that the decisions were made by then incumbent Children's Lawyer, Willson McTavish. In this case, the decision letter was signed by the ministry's FOI Co-ordinator, stating that the decision was made by the current OCL.

[63] The OCL has supplied me with a copy of the 1998 delegation signed by the Attorney General giving it the authority to make decisions under *FIPPA*. Without inquiring into the decision-making process in each and every access request made to the OCL since then, it does not appear that potential conflicts, if any, between the interests of OCL child clients and the rest of the ministry have stood in the way of responding to those requests. I believe it is fair to assume that either there has been no impediment in the nature of a conflict to the OCL providing records at issue to the ministry for the purpose of a decision or, if there has been such a conflict, the OCL has himself or herself made the pertinent access decision under the delegation.

[64] I agree with the OCL that its past practice of accepting and responding to requests under the *Act* is not determinative of the issue of whether the records at issue are covered by the *Act*. This past practice, however, is relevant in assessing the claim that the OCL could be placed in an "intolerable conflict" in responding to access requests. The OCL has indicated that it has had sole decision-making power under the *Act* with respect to litigation files involving children. Given this practice, the existence of the delegation, and no suggestion that the ministry has ever sought to exercise decision-making power over those types of records, I find it difficult to give much weight to the OCL's submissions of "intolerable conflict". If there were examples of such cases, I would have expected to have been given evidence to this effect. This past practice demonstrates, however, that the independence accorded to the OCL to perform its functions is not incompatible with its obligations under the *Act*. I see no reason the OCL cannot continue to exercise delegated authority from the Attorney General to make decisions under *FIPPA*, as it has done in the past.

[65] I wish to address the OCL's submission that providing public access to children's private litigation files serves no public policy purpose, such as enabling citizens to participate in democracy. This submission ignores the other "overarching" public policy purpose served by access to information legislation which is "to ensure ... that

politicians and bureaucrats remain accountable to the citizenry."[47] Without expressing a view on the merits of his beliefs, I observe that the appellant's representations reflect concerns about accountability of the OCL and/or its agents.

[66] I also find this submission misplaced, to the extent that it seeks to create an exclusion from the *Act* that the Legislature itself has not enacted. The Legislature deemed it appropriate to define the scope of the *Act* with reference to the records held by "institutions", subject to specifically delineated exclusions. It could have explicitly excluded the OCL, as a branch of the ministry, from the *Act*, or explicitly excluded some of the records of the OCL. I also observe that the Legislature could have enacted an overriding confidentiality provision covering categories of the OCL's records, as it has done in other cases.[48]

[67] The OCL has argued that its fiduciary duties towards its child clients are incompatible with access rights under the *Act*. Similar arguments were made in *Montana Indian Band v. Canada*[49], in which the records at issue were those of an Indian Band, generated within a fiduciary relationship between the Crown and the Band. The Federal Court, Trial Division, found that the existence of fiduciary obligations of the federal government in relation to the Band's financial information did not negate government control over the records at issue. I agree with the Court's conclusion that confidentiality concerns (in this case, of the children) can be addressed by exemptions under the applicable access to information legislation.

[68] This approach also answers the OCL's argument that she would not be able to properly exercise discretion under *FIPPA* (under the discretionary solicitor-client privilege exemption) because she is bound as a result of her fiduciary and common law duties as a solicitor to always adopt a position favourable to her clients. While the result of her fiduciary duties may constrain the exercise of the statutory discretion, that constraint does not mandate the exclusion of this category of OCL records from coverage of the Act. To put it another way, asserting privilege on behalf of the child client is not inconsistent with a finding that the OCL has control of the records. Moreover, the facts of this case demonstrate that a child client's interests are not necessarily incompatible with disclosure of records from a litigation file, whether as a result of production rules, or waiver of the solicitor-client privilege.

[69] The OCL also submitted that records that belong to the child client under the *Solicitors Act* are under the child's, and not the OCL's or the ministry's control for the purposes of the *Act*. I find this argument overreaches. Firstly, its submissions leave open the possibility that an analysis under the *Solicitors Act* would result in a conclusion that some, but not all, the records covered by this request "belong" to the child. Secondly, it does not recognize the unique role of the OCL in representing child clients.

---

[47] *Dagg v. Canada*, [1997] S.C.J. No. 63 at para. 61.
[48] See footnote 3, above.
[49] Cited above.

As the court stated in *Children's Lawyer*, "it is not appropriate to analogize the [OCL]'s unique function to that of a private sector counsel acting for an adult client." (para. 81) Thirdly, as the Federal Court of Appeal recognized in the *Canada Post* case, there is no single test for or determinant of the control issue.[50]

[70] The existence of the OCL is premised in part on the fact that children cannot represent themselves or retain counsel without a litigation guardian, as they are under the legal disability of childhood. In PO-2006, the OCL described its unique role as both the litigation guardian and legal representative for children in civil litigation matters:

> The Children's Lawyer, therefore, has a unique role in the administration of justice as litigation guardian. He is appointed to represent the interests of a particular class of persons – children – and cannot be dismissed by them. Only a judge can remove him as litigation guardian. He does not act on the instructions of the minor for whom he acts as litigation guardian, but instead has complete control over the conduct of the case, making use of the legal advice of in-house counsel or a privately retained lawyer.

[71] Even with respect to child protection cases, the role of the Children's Lawyer as legal representative, as described in its submissions in that appeal, differs from a conventional solicitor-client relationship:

> The relationship of counsel with a child client differs from a traditional solicitor-client relationship in that the child, as a minor, cannot legally instruct counsel. Counsel's role is to put the child's views and preferences before the court, and provide the court with the context behind those wishes: see Role of Child's Counsel Policy Statement which has been published by OCL. A child may have counsel even if that child cannot articulate views and preferences

[72] The Divisional Court recognized in *Children's Lawyer*, above, that the OCL acts as both the child's litigation guardian and legal representative. Thus, the OCL has fiduciary and legal obligations to the child but, given the unique role of the OCL as described above, it would be an overstatement to suggest that it has no control over files in which it provides legal services to a child.

[73] With respect to the OCL's submission that the *Act* cannot be used as an alternative access mechanism to Rule 21 of the Family Law Rules, as indicated above, the OCL acknowledged in its supplementary representations that the availability or non-availability of other avenues of disclosure does not have an impact on the right of access under *FIPPA* or *MFIPPA*.[51]

---

[50] Cited above.

[51] See *Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto* (June 3, 1997), cited above.

[74] In reviewing the factual background of this case, I am also struck by a conundrum were I to accept the OCL's position in this appeal. Depending on how it chose to proceed, the OCL would be able to effectively determine whether records relating to its provision of clinical services are subject to the *Act*. My reasoning is set out below.

[75] As described above, the duties of the OCL are found in a variety of legislation and encompass legal representation, litigation guardianship, and the provision of reports for the assistance of a court. In civil litigation matters, where no other suitable person comes forward, the OCL is to be appointed as litigation guardian (Rule 7.04, *Rules of Civil Procedure*). In child protection hearings, the OCL provides legal representation to the child (see sections 38(5) and 124(8) of the *Child and Family Services Act* and section 89 of the *CJA*).

[76] In custody and access matters, the OCL may provide legal representation to the child, under section 89(3.1) of the *CJA*, or a report for the assistance of the court, under section 112 of the *CJA*. As described by the OCL above, legal representation under section 89(3.1) may be combined with "clinical assistance". In such a case, the courts have recognized that solicitor-client privilege attaches to communications amongst the legal representative, the clinical investigator and the child.[52] On the other hand, where a clinical investigator is assigned to conduct an investigation and report to the court under section 112 of the *CJA*, there is no solicitor-client privilege in the investigator's file.

[77] In this case, the appellant and his wife appeared before the court in December 13, 2008, on a motion by the appellant's wife to appoint the OCL to conduct an investigation. In the judge's reasons, the motion was granted. The judge stated that the OCL was appointed and requested to "conduct an investigation and to report and make recommendations to the court herein, pursuant to s. 112(1) of the *Courts of Justice Act*."[53]

[78] Consistent with the judge's reasons, the court issued an order to that effect, dated December 18, 2008. However, it appears that the judge issued a second, revised order, dated January 5, 2009, stating that the matter is referred to the OCL "to provide such services, under s. 89(3.) and s. 112 of the [CJA] as she deems appropriate for the minor child(ren)…". Following on this revised order, the OCL decided to provide legal representation, with the assistance of a clinical investigator. This investigator, the social worker named in the appellant's request, ultimately gave evidence at the trial in Thunder Bay on the issue of custody and access, after gathering information and interviewing various people.

---

[52] *Catholic Children's Aid Society of Toronto v. SSB*, cited above at paras 23-24.

[53] The judge's reasons are reported. However, to prevent identification of the appellant, I do not provide the citation for those reasons here.

[79] In explaining the discrepancy between the judge's reasons and the revised order, the OCL states that there is a "standard form order" that courts use to request the services of the OCL in custody and access proceedings and the judge in this case did not initially use the standard form order. It indicates that the revised order, in which the OCL is given discretion to decide whether to provide legal representation (with or without clinical assistance) under section 89(3.1) *or* a report under s. 112, is the standard OCL form order.

[80] I observe that the standard order describes the scope of the OCL's rights and activities in providing services under both of these sections, and that there is overlap in the nature of the activities described under each section. In the standard order, whether the OCL chooses to act under section 89(3.1) or section 112 of the *CJA*, it has the right to independently inquire into "all the circumstances relating to the best interests of the child(ren)".

[81] The appellant's submissions suggest that he was unaware of the revised order. It is apparent that he has relied on the judge's reasons, and the order signed by the court appointing the OCL under s. 112(1) of the *CJA*, without reference to s.89(3.1). He therefore maintains that the judge ordered the OCL to conduct an investigation under s. 112(1). Had it done so, the records of its investigator would not have been covered by solicitor-client privilege.

[82] I have described in some detail the circumstances under which the OCL came to provide legal representation to the appellant's children because it illustrates an unusual feature of this case. From the above, it is evident that an important part of the OCL's functions is to assist a court in making custody and access decisions, through the provision of information from a clinical investigator. This information, it appears, may be provided in one of two ways: by the clinical investigator assisting legal counsel for the child and giving evidence at the trial, or by the clinical investigator providing a report to the court. In the latter case, the investigator's file is not covered by solicitor-client privilege while in the former, it is.

[83] The OCL states that it has become standard for courts to give the OCL discretion to decide which of these two routes to adopt in a given case. If I were to accept the OCL's submission that its legal files, including all the information of the investigator, are not covered by the *Act*, the OCL in effect would have the ability to decide that certain records are covered by the *Act* while others, created for a similar or overlapping purpose are not, through its exercise of this discretion. I find this outcome inconsistent with the intent, spirit and words of the *Act*.

[84] In the above analysis, I have assumed that records of a clinical investigator appointed under section 112 are covered by the *Act*. Although this issue is not strictly raised by this appeal, since the OCL in the appellant's case chose not to provide its services under section 112 of the *CJA*, it is a fair assumption in the circumstances. The

OCL's submissions on the issue of custody or control rest on the existence of a solicitor-client relationship between it and the children it represented in this case. Its submissions do not identify any other basis for its position that these records are not in the custody or control of the ministry.

[85] I turn briefly to the factors this office typically applies in cases of custody or control as reflected in the list of questions set out earlier in this order. Since the OCL's answers to these questions are premised on it being a separate entity, it is apparent that the preliminary identification of the OCL as part of the ministry leads to answers opposite to those offered by the OCL in its submissions. The following examples illustrate that the application of these factors supports my finding that the records at issues are under the control of the ministry.

Were the records created by an officer or employee of the institution? Who holds the records?

[86] Some of the records were created by the OCL's legal agents retained for the purpose of providing legal representation to the appellant's children. Others were created by the clinical investigator assigned to assist the legal representative. There is no suggestion that the OCL does not have the right to the files of these individuals, and it has not taken any position to the contrary.

What use did the creator intend to make of the record/what is the relationship between the record and the institution's mandate and functions?

[87] The records were created in carrying out activities which are central to the OCL's mandate.

Does the institution have the authority to regulate the record's content, use and disposal?

[88] The OCL has authority to regulate the use of its records, subject to its fiduciary and legal obligations to its child clients on which it acts as litigation guardian and legal counsel.

[89] The OCL's submissions on the two-part test in *Ministry of National Defence*, above, are also premised on it being a separate entity from the ministry. Accepting that the OCL is a branch of the ministry, it would be redundant to ask whether the OCL "could reasonably be expected" to obtain the records at issue.

[90] I conclude, therefore, that the records sought by the appellant are in the custody or control of an institution under the *Act*. I will direct the ministry to issue an access decision to the appellant, which decision may be made by the OCL under its delegation.

ORDER:

I order the ministry to issue an access decision to the appellant in accordance with Part ll of the *Act,* treating the date of this decision as the date of the request.

Original Signed By: August 7, 2015
Sherry Liang
Assistant Commissioner