

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-030

March 29, 2010

ALBERTA CORPORATE HUMAN RESOURCES

Case File Number F4476

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Summary: Under the *Freedom of Information and Protection of Privacy Act*, the Applicant asked the Public Body for records relating to his long term disability insurance (LTDI) claim, which were held by Great-West Life. The Public Body responded that the Act did not apply, so the Applicant requested a review.

Under section 6(1) of the Act, an applicant has a right of access to a record if it is in the custody or under the control of a public body. The Adjudicator noted that Great-West Life was deemed to be an employee of the Public Body, the requested records were held for the purpose of its duties, as an employee, to manage and adjudicate the Applicant's LTDI claim, and the Public Body relied on the records, albeit indirectly. This weighed in favour of a conclusion that the Public Body had custody or control of the records.

On the other hand, the Adjudicator found that Great-West Life intended to use the records for its own independent purposes, their content related to its own mandate and functions rather than those of the Public Body, and the Public Body did not have the authority to possess the records, regulate their use or dispose of them. He noted that there was an arm's length arrangement between the Public Body and Great-West Life to ensure that decisions regarding a public service employee's eligibility for LTDI benefits were made in a neutral manner by a third party independent of the Government of Alberta as an employer. This arm's length arrangement was required by the applicable regulation, had a reasonable basis, and was reflected both in the services agreement between the Public Body and Great-West Life and in the actual conduct of those parties.

On weighing the relevant considerations, the Adjudicator concluded that the records requested by the Applicant were not in the custody or under the control of the Public Body, and that the Applicant therefore could not obtain access to them under the Act.

Statutes and Regulations Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(e), 1(r), 4(1), 6(1), 12(1) and 72; *Personal Information Protection Act*, S.A. 2003, c. P-6.5; *Public Service Act*, R.S.A. 2000, c. P-42; *Workers' Compensation Act*, R.S.A. 2000, c. W-15, s. 89(1)(c); *Public Service Long Term Disability Income Continuance Plan Regulation*, Ministerial Order 8/1998, definition (a).

Authorities Cited: **AB:** Orders 96-019, 99-032, 2000-003, F2002-006, F2002-014, F2006-024, F2006-028 and F2009-023; Investigation Report P2009-IR-002/F2009-IR-002.

I. BACKGROUND

[para 1] In a request for access to information dated January 14, 2008, the Applicant asked Alberta Employment, Immigration and Industry for records relating to his long term disability insurance ("LTDI") claim held by The Great-West Life Assurance Company ("Great-West Life"). He stated that he previously requested the records from Great-West Life but that Great-West Life withheld some of them under the *Personal Information Protection Act*. The Applicant took the position that the records could also be requested from the Government of Alberta under the *Freedom of Information and Protection of Privacy Act* because Great-West Life is under contract with the Government.

[para 2] Alberta Employment, Immigration and Industry responded to the Applicant's access request on behalf of Alberta Corporate Human Resources. Alberta Corporate Human Resources is the public body that is responsible for the Long Term Disability Income Continuance Plan (the "LTDI Plan") and maintains a service agreement with Great-West Life for the management and adjudication of LTDI claims. The public body in this inquiry is therefore Alberta Corporate Human Resources (the "Public Body").

[para 3] By letter dated January 22, 2008, the Public Body advised the Applicant that it could not process his access request because the requested information did not fall under the *Freedom of Information and Protection of Privacy Act* (the "Act").

[para 4] By letter dated March 20, 2008, the Applicant requested that this Office review the Public Body's response. The Commissioner authorized a portfolio officer to investigate and try to settle the matter. This was not successful, and the Applicant request an inquiry by letter dated June 20, 2008. A written inquiry was set down.

II. RECORDS AT ISSUE

[para 5] The records consist of those held by Great-West Life in relation to the Applicant's LTDI claim.

III. ISSUE

[para 6] The Notice of Inquiry, dated June 10, 2009, set out the issue of whether the records requested by the Applicant are in the custody or under the control of the Public Body, as set out in section 4(1) of the Act.

IV. DISCUSSION

Are the records in the custody or under the control of the Public Body, as set out in section 4(1) of the Act?

[para 7] Section 4(1) states that the Act applies to all records in the custody or under the control of a public body. There are exclusions for certain types of records, but there is no suggestion here that the records requested by the Applicant fall under an exclusion. Rather, the issue to be decided in this inquiry is whether the records requested by the Applicant – being records held by Great-West Life – are in the custody or under the control of the Public Body. If so, the Applicant has a right of access to them under section 6(1), subject to any exceptions to disclosure, and the Public Body has a duty to provide a response under section 12(1) by indicating to the Applicant whether access is granted or refused and, if refused, the reasons for the refusal.

[para 8] “Custody” refers to the physical possession of a record whereas “control” refers to the authority of a public body to manage, even partially, what is done with a record (Order F2002-014 at para. 12). A recent Order of this Office noted that “bare” possession of information does not amount to custody, as the word “custody” implies that there is some right or obligation to hold the information in one's possession (Order F2009-023 at para. 33). In order for the Act to apply to particular records, it is sufficient for a public body to have custody *or* control of them; the public body does not have to have both custody *and* control (Order F2002-014 at para. 13).

1. Review of criteria regarding custody or control

[para 9] Previous Orders of this Office have set out ten non-exhaustive criteria, or questions, to consider in determining whether a public body has custody or control of records (Order 99-032 at para. 63; Order F2006-024 at paras. 21 to 45). Both parties directly addressed these criteria in their submissions. I have placed other points made by them under the heading I found most fitting for the particular point.

a) *Were the records created by an officer or employee of the Public Body?*

[para 10] The Applicant submits that Great-West Life is an employee of the Public Body. In support, he cites the Services Agreement, signed June 16, 2006, between Great-West Life and the Government of Alberta, which is represented by the Public Body. Under Article II(g) of the Services Agreement, Great-West Life agrees to adjudicate claims in accordance with the relevant provisions of the Government's LTDI Plan. The Applicant points out that Article II(f) states that, in performing its obligations under the Agreement, Great-West Life is acting as agent of the Government.

[para 11] The Public Body similarly notes that Great-West Life is under contract with it for the management and adjudication of LTDI claims made by government employees. When specifically addressing the above criterion, the Public Body states that Great-West Life "may be deemed to be an employee of the Public Body for the purposes of FOIP, and as defined under section 1 of the FOIP Act". (The Public Body goes on to argue that the duties of Great-West Life, as an employee, are limited by the terms of its contract and the present circumstances, which I will address in the context of other criteria below.)

[para 12] Section 1(e) of the Act states that "employee", in relation to a public body, includes "a person who performs a service for the public body ... under a contract or agency relationship with the public body". Previous Orders of this Office have found that, where a service provider is deemed to be an employee of a public body under section 1(e), the above criterion regarding custody and control is fulfilled (Order F2002-006 at paras. 30 to 34; Order F2006-028 at paras. 22 to 24). Relying on those Orders, and noting here that the Applicant and Public Body agree that Great-West Life is an employee, I find that Great-West Life is an employee of the Public Body. I also find that records requested by the Applicant were created by Great-West Life, as his access request of January 14, 2008 referred to information used in Great-West Life's assessment of his LTDI claim, and to documentation and methodology used to justify its decision regarding his entitlement to benefits.

[para 13] The fact that the records in question were created by an employee of the Public Body weighs in favour of a conclusion that the Public Body has custody or control of them.

b) *What use did the creator intend to make of the records?*

[para 14] The Applicant submits that the records were created to facilitate the delivery of a program to determine whether a civil servant is entitled to benefits under the LTDI Plan. He emphasizes that the program is provincially regulated, and that the records were created solely for the purpose of that program.

[para 15] The Public Body similarly says that Great-West Life intended the records to be used for the management and administration of the Applicant's LTDI claim. However, it argues that the duties of Great-West Life are limited to its contractual role,

and that the Services Agreement intends for Great-West Life to retain custody and control of the records requested by the Applicant. In support of its position, the Public Body points out the following excerpt (at page 3) of a Privacy Impact Assessment regarding the LTDI Plan, which was prepared by the Public Body in November 2007 (the “PIA”):

1.4.2. Program Administration

... Historically, CHR [the Public Body] has maintained a service agreement with the Adjudicator [Great-West Life] to adjudicate claims to which government employees are entitled. The agreement was made with the understanding that all claim records were the property of the GoA [the Government of Alberta].

In 2006 the renewal of the contractual agreement now provides that information and records compiled or created under the contract, which are in the custody or control of the Adjudicator, are not the property of the GoA.

This change in the contractual agreement allows the GoA to remain at arm’s length from the Adjudicator’s administration of the LTDI.

[para 16] Given the understanding that records created by Great-West Life in the performance of its services would not become the “property” of the Government, so as to ensure that the administration of LTDI claims made by government employees remains at arm’s length, the Public Body argues that Great-West Life intended for the records to be used for its own independent purposes. I note, elsewhere in the PIA (at page 15), that there is an express intention that “[a]ll information and records compiled or created under the contract are under the control and custody of the Adjudicator [Great-West Life]”. To reflect this intention, the Public Body notes Article IV of the Services Agreement with Great-West Life, which says that records not actually provided to the Government by Great-West Life are subject to the *Personal Information Protection Act* rather than the *Freedom of Information and Protection of Privacy Act*.

[para 17] In response, the Applicant submits that the PIA contains no evidence and no adequate explanation to back up the assertion that records held by Great-West Life are not the property of the Government of Alberta. He submits that a contract is at arm’s length between two parties if each has very specific responsibilities and obligations, and that access and privacy legislation does not alter the nature of that relationship. The Applicant objects to the appropriateness and effect of Article IV of the Services Agreement, which I discuss in greater detail when reproducing and reviewing that Article under another criterion below.

[para 18] I find that Great-West Life intended to use the records requested by the Applicant for its own independent use in the context of managing and adjudicating his LTDI claim. Great-West Life did not intend for the records to be used, in the normal

course, by the Public Body. There is support for this finding not only in the PIA and Article IV of the Services Agreement, but also in Article II(g) of the Services Agreement, which states that Great-West Life adjudicates claims “independent of any Government guidance”. I further note that the LTDI Plan (at page 1) states that Great-West Life “is an independent third party” who determines if a government employee qualifies for LTDI benefits. Moreover, there is a reasonable basis for the parties’ intention that the records requested by the Applicant would be used for the independent purposes of Great-West Life. The PIA indicates (at page 4): “The GoA is able to stay at an arm’s length from the adjudication of the LTDI through the contractual arrangement which provides a level of assurance that a neutral third party makes the decision re: benefits.”

[para 19] Even though the LTDI Plan is a provincial program, and there can be a variety of arm’s length arrangements as noted by the Applicant, the specific nature of the relationship between Great-West Life and the Public Body in this case militates toward a conclusion that Great-West Life intended to use the records in question for its own purposes of managing and adjudicating LTDI claims independently of the Public Body. This criterion weighs against a finding that the Public Body has custody or control of the records requested by the Applicant.

c) *Does the Public Body have possession of the records either because they have been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?*

[para 20] The Public Body submits that it does not have possession of the records requested by the Applicant because they were never provided to it. The Applicant submits that the records are necessarily in the possession of the Public Body because they are in the possession of an “employee” of the Public Body, as defined in section 1(e) of the Act. He cites a principle by which public bodies are held accountable under the Act for the actions of their employees (Investigation Report P2009-IR-002/F2009-IR-002 at para. 30, citing Order 99-032 at para. 51). He also points out that, under section 1(e), an employee can be a “person” and therefore a corporation such as Great-West Life (Order 96-019 at para. 68). The Applicant adds that there is a mandatory statutory and employment requirement for claimants to submit their personal and medical information to Great-West Life.

[para 21] There are Orders of this Office in which it was determined that a third party service provider was a deemed employee of a public body, but that the public body did not have possession of the records held by that employee (Order F2002-006 at paras. 33 and 42; Order F2006-028 at paras. 23 and 29). In my view, an employee deemed as such under section 1(e) of the Act can have possession of a record without the record also being in the possession of the public body for which the employee provides services. As noted by the Public Body in this inquiry, Great-West Life is a “third party” under section 1(r) of the Act, in that it is “an organization other than an applicant or a public body”. Because a third party employee is still a third party distinct from a public body, it is not automatically the case that records in the possession of the former are in the possession of the latter. I take the term “possession” in the context of this criterion to

mean, for instance, that the records are physically located at the offices or premises of a public body, as opposed to the offices or premises of another organization or service provider. This physical requirement gives meaning to the other criteria for determining custody or control, particularly the next one discussed in this Order. If records held by an officer or employee of a public body for the purposes of his or her duties as an officer or employee were necessarily in the possession of the public body, it would not make sense to base consideration of the next criterion on the fact that the public body does *not* have possession of the records.

[para 22] Because the records are physically located with Great-West Life, which is a third party distinct from the Public Body under the Act, I find that the Public Body does not have possession of them, and therefore the records have not been voluntarily provided to the Public Body or provided to it pursuant to a mandatory statutory or employment requirement. This weighs against a conclusion that the Public Body has custody or control of the records requested by the Applicant.

d) If the Public Body does not have possession of the records, are they being held by an officer or employee of the Public Body for the purposes of his or her duties as an officer or employee?

[para 23] The Applicant submits that this criterion is met. Conversely, the Public Body says that none of its officers or employees are holding the records for the purposes of their duties.

[para 24] I found earlier that Great-West Life was deemed to be an employee of the Public Body. Given that its duties are to manage and adjudicate LTDI claims, and the Applicant requested records relating to the management and adjudication of his claim, I find that the records are being held by an employee of the Public Body for the purpose of its duties. This weighs in favour of a conclusion that the records are in the custody or control of the Public Body.

e) Does the Public Body have a right to possess the records?

[para 25] The Applicant submits that the records are already in the possession of the Public Body, by virtue of the fact that Great-West Life is its employee under the Act. I dismissed this argument above, on the basis that Great-West Life is a third party that possesses the records in a capacity distinct from the Public Body.

[para 26] The Public Body submits that it does not have a right to possess the records in the present circumstances, given the terms of the Services Agreement with Great-West Life. Specifically, Article IV reads in part:

The Company [Great-West Life] agrees to furnish The Government on request all records relating to the contracted administrative services including access to individual claim files with the appropriate

authorizations, for the purposes of reviewing adjudication and rehabilitation services.

The Company acknowledges that information and records compiled or created under this Agreement and provided to The Government are subject to the Freedom of Information and Protection of Privacy (FOIP) Act.

The Company acknowledges that information and records compiled or created under this Agreement which are in the custody of The Company, and are not provided to The Government, are subject to the Personal Information Protection and Electronic Documents Act (PIPEDA) or to the Personal Information Protection Act. The Company shall respond to the request.

[para 27] The Public Body argues that the above provisions limit its ability to bring records into its possession from Great-West Life, in that the records that may be provided to the Government are restricted to those that relate to the purposes of reviewing adjudication and rehabilitation services. It explains that this reference concerns the Public Body's ability to audit the contracted services and ensure that they are being properly delivered. It points to the Schedule of the Services Agreement (the part on "Standards of Performance"), which authorizes the Government to conduct external third party reviews of the standards of performance, adjudication, re-employment and rehabilitative services provided by Great-West Life, in which case Great-West Life must provide all requested claim information to the third-party reviewer. The Public Body says that it has a limited capacity to obtain records from Great-West Life, and that even an audit of Great-West Life's services must be done by a third party reviewer, in order to keep the Government at arm's length from the administration of its employees' LTDI benefits. The Public Body adds that this is to ensure that government employees who access the services of Great-West Life may do so without fear that their sensitive personal information might at some point fall into the hands of the department for which they work.

[para 28] On the basis that it is only entitled to request records from Great-West Life for the purpose of reviewing the adjudication and rehabilitation services provided by Great-West Life, the Public Body submits that it is not entitled to request records for the purpose of responding to an access request.

[para 29] In response, the Applicant argues that Article IV is "substandard" when compared to other contracts, and is not drafted in a manner consistent with agreements entered into by other ministries. The Applicant submits that individual public service employees had no control over, or input into, the contract with Great-West Life and were not part of the tendering or sole source process for the contract. He questions whether Article IV was reviewed by justice lawyers, and cites other contracts and forms that he believes to have more clearly defined provisions regarding access. The suggestion is that, whether advertently or inadvertently, the Services Agreement with Great-West Life

inappropriately purports to relieve the Public Body of its obligations under the Act by virtue of the fact that a record has not been “provided” to it.

[para 30] The presence of Article IV is a relevant circumstance in determining whether the Public Body has custody or control of the records, regardless of differences between Article IV and comparable provisions in other government contracts. In Order F2006-028 (at para. 34), the Commissioner found that the Workers’ Compensation Board (WCB) did not have the right to possess treatment records held by the Columbia Rehabilitation Centre because of a contractual clause stating that the WCB could only request the records for specified and limited purposes. Similar to the present matter, the clause further stated that the records “shall be the property of and under the control of the Contractor”.

[para 31] The Applicant argues that a contract cannot absolve a public body of its responsibilities under the Act. In other words, a public body cannot “contract out” of custody and control of a record. I note, for instance, Order 2000-003 (at para. 40), in which the former Commissioner stated: “I would not attach any significance to the University [of Alberta]’s argument that, by its own actions, the record is now out of its control. If it were otherwise, a public body could put any record out of reach of the Act by entering into an agreement to restrict control.” However, in that case, the former Commissioner found that the University of Alberta *actually* had a legal right of control *despite* its assertions that it did not. Specifically, it had a say in placing the relevant record in a sealed envelope with the University Archives (even assuming that the Archives was a separate entity) and had a say in unsealing it (Order 2000-003 at para. 39).

[para 32] Given Orders 2000-003 and F2006-028, I take the underlying principle to be that a public body cannot place a record outside its custody or control if, in actuality, it has custody or control. However, it is not improper for an agreement to reflect the fact that a public body does not have custody or control, if that is indeed the fact and, moreover, it is based on a reasonable rationale.

[para 33] In this case, I find that Article IV of the Services Agreement is not an attempt to contract out of custody and control. Rather, it reflects a reasonable underlying intention that, in its dealings with Great-West Life, the Public Body would not have the authority to obtain records from Great-West Life except for very limited purposes. The Public Body has explained the rationale for its general inability to request records, in that it must not become directly involved in the management and adjudication of LTDI claims made by government employees, and a general capacity of the Public Body to obtain access to records held by Great-West Life would not be in the interest of employees themselves.

[para 34] I note that a Schedule to the Services Agreement contemplates that Great-West Life will provide certain other information to the Public Body, such as progress reports on a claimant’s status with respect to job placement, an annual report, and statistical information set out in Appendix III. I also see that the aforementioned PIA (at

page 14) indicates that the Public Body receives and retains copies of letters from Great-West Life approving a claimant's entitlement to benefits. Further, an information package for claimants submitted by the Applicant indicates (at page 8, "Authorizations and Declarations") that Great-West Life and the claimant's employing department will exchange information where relevant for the purpose of discussing rehabilitation and return-to-work planning. None of this, however, detracts from my conclusion that the Public Body does not have a general right to possess the records requested by the Applicant. The purposes for which Great-West Life provides information to the Public Body are still very restricted.

[para 35] Finally, I note that Article VII of the Services Agreement states that, in the event of termination of the Agreement, Great-West Life "agrees that all claim records are the property of The Government and will be transferred to The Government's direct control as soon after the termination as reasonably possible". This likewise does not detract from my conclusion above, as the situation contemplated by Article VII does not exist here.

[para 36] In response to the Public Body's argument that its arm's length arrangement with Great-West Life ensures that it does not see the sensitive personal information of LTDI claimants, the Applicant cites various examples where personal information is able to be handled in a secure and confidential manner by a public body, even though specific individuals within that public body should not see the information. For instance, he notes that only authorized individuals can access medical information held by Alberta Health Services, and Alberta Justice cannot simply go around making inquiries into police records involving government employees. The Applicant also argues that various public bodies make decisions regarding an individual's eligibility for benefits, and have custody and control of all of the relevant records, even though decisions favourable to the individual result in payments from the government, and indirectly taxpayers, to that individual. For instance, Alberta Employment and Immigration decides whether an individual is entitled to income support payments.

[para 37] The present matter differs from the various examples cited by the Applicant. Unlike cases where only certain individuals within a public body are entitled to have access to particular information, or a staff member has a conflict of interest in a particular case, the Government *as a whole* has an interest that is adverse to *every* LTDI claimant. If a claimant is found by Great-West Life to be eligible for benefits, the Government is required, as an employer, to pay a portion of the claimant's salary. The fact that the Government is acting as an employer under the LTDI plan also distinguishes this case from situations where public bodies determine eligibility for other types of benefits. In other cases, public bodies are entrusted to act in the overall public interest, meaning that might bear in mind the interests of both the individual claimant and the general taxpayers. Here, the Public Body is not acting in the sense of administering a general public program; it is acting on the opposite side of an employer-employee relationship vis-à-vis public service employees.

[para 38] As I find that the Public Body does not have the right to possess the records requested by the Applicant, this weighs against a conclusion that it has custody or control of them.

f) *Does the content of the records relate to the Public Body's mandate and functions?*

[para 39] The Applicant submits that the records relate to the Public Body's own mandate and functions, as it oversees the LTDI Plan and the related policies and programs. He also points out that contributions to the LTDI program by union members and government managers is mandatory.

[para 40] The Public Body argues that the records do not relate to its own mandate and functions because they relate to the management and administration of the Applicant's LTDI claim, which is the outside responsibility of Great-West Life. I again note the PIA cited by the Public Body, which states that information and records compiled or created by Great-West Life under the Services Agreement are its own property, and that the contractual arrangement is intended to keep the Government of Alberta at arm's length from Great-West Life's administration of LTDI claims made by government employees. I also again note that both the Services Agreement and the LTDI Plan make it clear that Great-West Life manages and adjudicates claims independently of the Government.

[para 41] I find that the fact that the Public Body is generally responsible for the LTDI plan is not sufficient to find that the records requested by the Applicant relate to its mandate and functions. I characterize the more specific mandate and function of the Public Body to be the processing of payments for LTDI benefits where Great-West Life finds that a claimant is entitled to them. The responsibility of making decisions about eligibility, being the specific mandate and function to which the records relate here, is the independent responsibility of Great-West Life.

[para 42] In arguing that the Public Body has custody or control of the records, the Applicant emphasizes that the LTDI Plan is a government program. I acknowledge that, in managing and adjudicating LTDI claims, Great-West Life carries out a role under the *Public Service Long Term Disability Income Continuance Plan Regulation*. However, I do not believe that, because a third party carries out a statutory or regulatory function, this necessarily makes the records created by it in the custody or under the control of the public body responsible for the statutory or regulatory program. I find support for this in Order F2006-028 (at paras. 45 and 46), where the Commissioner found that records relating to the treatment of an individual by the Columbia Rehabilitation Centre did not relate to the mandate and functions of the WCB, as the WCB did not require or use those records for its own particular purposes. It is my understanding that the Columbia Rehabilitation Centre would have been carrying out a function contemplated by section 89(1)(c) of the *Workers' Compensation Act*, which is a provision requiring the WCB to take whatever measures it considers necessary to assist an injured worker to return to work, including providing him or her with rehabilitation services. The fact that the

Columbia Rehabilitation Centre was providing services and performing a function set out in the statute did not make its own treatment records fall within the WCB's custody or control.

[para 43] Finally, I note here that the *Public Service Long Term Disability Income Continuance Plan Regulation* itself expressly provides for Great-West Life's services to be independent of the Public Body. Definition (a) of the Regulation defines "adjudicator" – being Great-West Life – as "a person who is independent of the government and the employee or the employee's bargaining agent, who determines whether an employee is disabled for the purposes of this Regulation and who may also provide any additional services that are agreed to by the government and that person".

[para 44] Because the management and adjudication of the Applicant's LTDI claim is carried out independently by Great-West Life, at arm's length from the Public Body, I find that the records requested by the Applicant relate to a separate mandate and to separate functions carried out by Great-West Life, as opposed to the Public Body's mandate and functions. This weighs against a conclusion that the Public Body has custody or control of the records.

g) *Does the Public Body have the authority to regulate the use of the records?*

[para 45] The Applicant submits that the Public Body can regulate the use of the records through the authority of legislation, regulation and the contract with Great-West Life. He argues that the Public Body created the LTDI Plan, but simply chose to outsource its administration to Great-West Life. He again submits that the choice to use a private contractor should not shield the Public Body from its obligations under the Act.

[para 46] The Public Body submits that it has no authority to regulate the use of the records in question, as it has contracted with Great-West Life for the administration of LTDI claims and the records are used for purposes specific to the business of Great-West Life.

[para 47] The term "regulate" has been defined as "govern or control by law; subject to esp. legal restrictions" (Order F2002-006 at para. 67). The aforementioned PIA submitted by the Public Body states (at page 2) that the *Public Service Act* grants the Public Body the authority to amend and administer the *Public Service Long Term Disability Income Continuance Plan Regulation*, which is made by ministerial order. The Public Body therefore arguably has the authority to regulate the use of the records requested by the Applicant, in that it could possibly theoretically give itself that authority.

[para 48] However, a determination of whether a public body has the authority to regulate the use of records depends on whether there is existing authority in the circumstances. I find that, under the actual terms of the LTDI Plan and the Services Agreement with Great-West Life, the Public Body does not have the legal authority to govern or control the use of the records requested by the Applicant. As previously discussed in this Order, the existing arrangement is that the records are intended to be

used independently by Great-West Life for its own mandate and functions. The basis for the arm's length arrangement is to ensure the neutrality and impartiality of decisions regarding government employees' eligibility for LTDI benefits. In outsourcing the management and adjudication of LTDI claims to Great-West Life in this particular case, the Public Body effectively relinquished any authority to regulate the use of the records in question, except for very limited purposes explained earlier.

[para 49] The fact that the Public Body does not have the authority to regulate the use of the records requested by the Applicant weighs against a conclusion that it has custody or control of them.

h) To what extent have the records been relied upon by the Public Body?

[para 50] The Applicant submits that the Public Body relies on the records held by Great-West Life, given that hundreds of civil servants are found to be eligible to receive benefits, or are denied benefits, under the LTDI Plan each year. He argues that records like those that he has requested in relation to himself form the basis of millions of dollars in payments, these payments are processed through government payroll, and a rehabilitation plan is negotiated with managers and supervisors when a civil servant returns to work. By contrast, the Public Body says that it has not relied on the records in question in any way.

[para 51] The LTDI Plan is a plan adopted by the Government of Alberta for the benefit of its employees. The *Public Service Long Term Disability Income Continuance Plan Regulation* sets out provisions on coverage, eligibility for benefits, payment amounts, rehabilitation programs and termination of benefits. All of these matters, even though managed or adjudicated by Great-West Life, are relevant to the Public Body. In particular, if Great-West Life finds that a claimant is eligible for LTDI benefits, the Public Body must pay the claimant a portion of his or her salary.

[para 52] I therefore find that the Public Body relies on records held by Great-West Life, albeit indirectly. In other words, the Public Body relies on the decisions made by Great-West Life, which are based, in turn, on the records compiled and created by it. With respect to the specific records requested by the Applicant about himself, the Public Body relied on them in that Great-West Life denied his claim to LTDI benefits, resulting in his ineligibility for those particular employee benefits, and resulting in the fact that the Public Body did not have to pay his claim.

[para 53] I conclude that this criterion weighs in favour of a conclusion that the Public Body has custody or control of the records. However, I limit its weight due to the fact that I have found that the Public Body relies on the records only indirectly.

i) *How closely are the records integrated with other records held by the Public Body?*

[para 54] As the records requested by the Applicant are held by Great-West Life as opposed to the Public Body, I find that they are not integrated with other records held by the Public Body. This weighs against a conclusion that the Public Body has custody or control of the records.

[para 55] Because Great-West Life is a third party distinct from the Public Body, even though it is also an “employee” under section 1(e) the Act, I again dismiss the Applicant’s argument that records held by Great-West Life, as an employee, are necessarily also held by the Public Body.

j) *Does the Public Body have the authority to dispose of the records?*

[para 56] The Public Body submits that it does not have the authority to dispose of the records requested by the Applicant, as it does not maintain copies and has no applicable retention and disposition schedules. The Applicant responds that, even if that is the case, the Public Body had an obligation to set out terms and conditions regarding access, storage and disposal of records in its contract with Great-West Life.

[para 57] I find that the Public Body does not have the authority to dispose of the records in question. As explained earlier in this Order, the Public Body cannot obtain them under the terms of its arrangement with Great-West Life, and therefore cannot obtain them for the purpose of disposal. Further, Great-West Life uses and requires the records for its own independent management and adjudication of LTDI claims, so the Public Body cannot require Great-West Life to dispose of the records. The Public Body had no obligation to give itself the authority to access, store or dispose of records held by Great-West Life, again because the Government was entitled to set up the arm’s length relationship with Great-West Life for the purposes of neutral and impartial management and adjudication of LTDI claims made by government employees.

[para 58] The fact that the Public Body does not have the authority to dispose of the records requested by the Applicant weighs against a conclusion that it has custody or control of them.

2. Additional points raised by the Applicant

[para 59] The ten criteria discussed above are not exhaustive. I therefore note the Applicant’s additional argument that, in order to have an effective appeal process, an individual must have access to the information used by Great-West Life in determining his or her eligibility for LTDI benefits, and must have the opportunity to correct facts that are wrong or evidence that has been misinterpreted. The Applicant argues that the *Personal Information Protection Act* (“PIPA”) protects access rights less effectively than the FOIP Act, for instance in that PIPA has lengthier timelines for responding to an access request. He also suggests that it is easier for an entity to withhold information

under PIPA than under the FOIP Act, given that he had difficulty obtaining a “Progress and Assessment Management Plan” from Great-West Life, and has still not received all of the documentation and methodology used to justify Great-West Life’s decision.

[para 60] I find that the foregoing has little bearing on whether the Public Body has custody or control of the records requested by the Applicant in this case. The Applicant essentially raises reasons for making his access request under the FOIP Act. The reason for, or importance of, an access request is generally not relevant to whether a public body has custody or control of the requested records. Moreover, the Applicant was not without recourse, given that he made an access request for the same records to Great-West Life under PIPA and Great-West Life granted him partial access. The fact that Great-West Life withheld some information does not mean that there was an inappropriate effect on the Applicant’s appeal regarding his eligibility for benefits, as he was entitled to ask this Office to determine whether the information that he requested from Great-West Life was properly withheld. It also goes without saying that an access request to the Public Body under the FOIP Act, if that Act were to apply, would not necessarily result in release of all of the requested records, as there are exceptions to disclosure under that Act as well.

[para 61] The Applicant argues that where he is denied access to information, he is denied natural justice in terms of his appeal process. However, while access-to-information legislation may certainly assist the Applicant, it is not the only, or even most appropriate, means of ensuring that his claim for LTDI benefits is decided justly and fairly. Ordinary principles of law regarding natural justice and procedural fairness apply to Great-West Life’s determination of whether an individual is eligible for LTDI benefits, and they likewise apply in an appeal of a decision of Great-West Life before an Appeal Board. These principles exist separate and apart from any access-to-information legislation.

3. Summary of considerations and conclusion

[para 62] Great-West Life is considered under the Act to be an employee of the Public Body, the records relate to its duties, as an employee, to manage and adjudicate the Applicant’s LTDI claim, and the Public Body indirectly relied on the records in that it relied on the decision of Great-West Life regarding the Applicant’s eligibility for benefits. These three criteria weigh in favour of a finding that the Public Body has custody or control of the records requested by the Applicant. On the other hand, because Great-West Life is a third party under the Act distinct from the Public Body, and the records requested by the Applicant are with Great-West Life and not the Public Body, the Public Body does not have possession of the records and they are not integrated with other records of the Public Body. These two factors weigh against a finding that the Public Body has custody or control of the records.

[para 63] Great-West Life manages and adjudicates LTDI claims made by government employees in a manner and arrangement that is independent and at arm’s length from the Government and therefore the Public Body. The intention of Great-West Life is to use the records for its own independent purposes, and the content of the records

relates to its separate mandate and functions, which both weigh against a finding that the Public Body has custody or control of the records. Moreover, the applicable contract allows the Public Body to obtain records held by Great-West Life for limited purposes only, rather than more generally, with the result that the Public Body does not have the right in this case to possess the records requested by the Applicant, to regulate their use, or to dispose of them. These three factors weigh against a finding that the Public Body has custody or control of the records.

[para 64] In this inquiry, my findings that the Public Body does not possess the records, they are not integrated with other records of the Public Body, Great-West Life uses the records for its own independent purposes, they relate to its separate mandate and functions, and the Public Body has no authority to possess, use or dispose of the records, outweigh my findings that Great-West Life is deemed to be an employee of the Public Body, holds the records for the purpose of its duties, as an employee, to manage and adjudicate LTDI claims, and the Public Body indirectly relies on the records.

[para 65] The Applicant takes the position that the Public Body has custody or control of the records held by Great-West Life because the LTDI plan is a provincial program, the Public Body opted to outsource its administration, other public bodies retain custody or control of records where they outsource delivery of a service, and the Public Body, through Article IV of its Services Agreement with Great-West Life, is attempting to contract out of its obligations regarding access to information under the Act. He submitted a copy of *Managing Contracts under the FOIP Act – A Guide for Government of Alberta Contract Managers and FOIP Coordinators* (Edmonton: revised March 2008). Among other things, it states (at page 67) that a “public body cannot evade its responsibilities under the FOIP Act by saying that it does not have control of records.” It further states (at page 82): “The contract should address access by the public body to records and information that relate to the contract and that are in the custody of the contractor. The contract must ensure that the public body can comply with the access provisions of the FOIP Act.”

[para 66] In most, if not almost all, cases where a public body contracts with a third party service provider, the public body retains control over the records relating to the services, the FOIP Act therefore applies, and the public body cannot contract out of its obligation regarding access requests under the Act. However, the present matter is an exception where, for legitimate reasons, the Public Body does not retain control over the records held by Great-West Life. It is not a matter of the Public Body contracting out of custody and control; it does not have custody or control in the first place. While the *Guide* cited by the Applicant makes it clear that a public body normally retains control over records relating to services provided by a third party, and that the public body should therefore ensure that its control is reflected in the contract, the *Guide* does not purport to say that this is universally true. In the context of contracting for service delivery, it notes (at page 13) that “the outsourcing agreement should state *whether* the public body maintains control over the records” [my italics].

[para 67] Here, Article IV of the Services Agreement between Great-West Life and the Public Body reflects an intention that records compiled or created by Great-West Life and not provided to the Government are in the custody and under the control of Great-West Life as opposed to the Public Body. Article IV and other provisions of the Agreement indicate that the Public Body will obtain, or may request, information for only limited purposes. The Public Body and Great-West Life were entitled to assign custody and control over records held by Great-West Life in a manner that they considered appropriate in the circumstances, as there is a reasonable rationale for the arm's length arrangement. It is to ensure that the management and adjudication of LTDI claims remain neutral, and not at all influenced by the Public Body acting as an employer paying out LTDI benefits. This independence and neutrality is mandated by the *Public Service Long Term Disability Income Continuance Plan Regulation* in that the adjudicator must be a person who is independent of the government and the employee or the employee's bargaining agent.

[para 68] Unlike various other contracts or arrangements between the government and service providers, and unlike other programs in which eligibility for a benefit is determined, the issue here is not just about keeping sensitive information secure and confidential. The arm's length arrangement, and decision to keep the records requested by the Applicant outside the Public Body's custody and control, is due to the adverse relationship between the Government of Alberta, as an employer, and its public service employees who claim LTDI benefits. The fact that the Public Body and LTDI claimants have adverse interests is demonstrated by the fact that, when a claimant initiates a second-level appeal regarding his or her entitlement to LTDI benefits, an Appeal Board – which is administered by yet another third party separate from both Great-West Life and the Public Body – consists of a representative of the Alberta Union of Provincial Employees, a representative of the employer being the Government of Alberta, and a third person agreed upon by both AUPE and the Government (Page 4 of the PIA).

[para 69] Material submitted by the parties in this inquiry indicates that, with respect to LTDI claims, the collection of information by the Public Body, and the exchange of information between it and Great-West Life, is indeed very restricted. The Privacy Impact Assessment regarding the LTDI Plan indicates (at page 15) that the Public Body, the government's LTDI liaison officer (who is employed by Service Alberta) and the individual's employing ministry retain minimal information for the specific purpose of administering the financial process, and they provide minimal information to Great-West Life for the purpose of its administration of the LTDI process (page 15). The majority of a claimant's personal information is provided directly by the employee, and his or her physician, to Great-West Life (page 17 of the PIA). An information package for claimants submitted by the Applicant indicates (at page 3) that, if Great-West Life does not approve benefits, it sends a letter directly to the claimant explaining the reasons for the denial. If Great-West Life finds that an individual is entitled to benefits, Great-West Life sends only an approval letter to the LTDI liaison officer, and the government maintains paper files with minimal personal information, and no medical information, about the individual (page 10 of the PIA).

[para 70] Therefore, not only does this case involve a legitimate and reasonable rationale for keeping the records requested by the Applicant outside the custody and control of the Public Body. The foregoing facts demonstrate that the Public Body, in actuality, obtains information from Great-West Life for only limited purposes. In other words, the Public Body is not purporting that the records in question are outside its custody or control when, in fact, its conduct or relationship to the records shows that they are within its custody or control.

[para 71] On consideration of the various criteria for determining custody and control, and all of the facts and circumstances drawn to my attention by the parties, I conclude, on balance, that the records requested by the Applicant are not in the custody or under the control of the Public Body.

V. ORDER

[para 72] I make this Order under section 72 of the Act.

[para 73] I find that the records requested by the Applicant are not in the custody or under the control of the Public Body. I therefore conclude that the Applicant has no right of access to them under the Act.

Wade Riordan Raaflaub
Adjudicator