

APPENDIX 1

DETERMINING CUSTODY AND CONTROL STANDARDS

Parent Policy: Protection of Privacy Policy

Custody and Control are not defined in FOIPPA. They must be determined on a case-by-case-basis.

1.0 Custody

You usually have **custody** of a record if it's in your **possession** — in your electronic database or paper files, for example. However, simply possessing the record is not enough to determine the question of custody. To have custody of a record, you must also have some right to deal with the record and some responsibility for its care and protection.¹ For example, your employee's personal journal, unrelated to work, would not be in your custody even if it is stored at their work station.

2.0 Control

Even if a record is not in your possession, it could potentially be under your **control**. For example, if you have authority to manage a record related to your mandate and function and you rely on it for business purposes, it may be under your control regardless of whether you physically possess it. A record held by your consultant, for example, could be in your control in some circumstances.

3.0 Standard

The standard for determining Custody and Control is based on the Ontario OIPC Order 120 by former Commissioner Sidney Linden. The list demonstrates the kinds of questions that could be considered in making such determinations and is not exhaustive list.

¹ See IPC Order P-239.

Each item on the following list should be considered in the context of the legislative purpose and intent:

- a. Was the record created by an officer or employee of the institution?
- b. What use did the creator intend to make of the record?
- c. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- d. 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?
- e. Does the institution have a right to possession of the record? (does it have bare possession only)
- f. Does the content of the record relate to the institution's mandate and functions?
- g. Does the institution have the authority to regulate the record's use?
- h. To what extent has the record been relied upon by the institution?
- i. How closely has the record been integrated with the other records held by the institution?
- j. Does the institution have the authority to dispose of the record?