

INTERPRETATION BULLETIN

Custody or Control

This interpretation bulletin outlines the factors to determine if a record is in the custody or under the control of an institution, as set out in **section 10(1)** of the *Freedom of Information and Protection of Privacy Act* and **section 4(1)** of the *Municipal Freedom of Information and Protection of Privacy Act*. This document further explains how to determine “custody or control” when an institution holds the record or when another individual or organization holds the record.

Section 10(1) of FIPPA and section 4(1) of MFIPPA read in part as follows:

“[...] every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless [...]”.

IS THE RECORD “IN THE CUSTODY” OR “UNDER THE CONTROL” OF THE INSTITUTION?

Under section 10(1) of FIPPA and section 4(1) of MFIPPA, the right of access applies to a record that is in the custody **or** under the control of an institution; the record need not be both.¹

If the record is not in the custody or under the control of the institution, the general right of access is not established and none of the exclusions or exemptions need to be considered.

¹ Order **P-239** and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

The courts and the IPC have given a broad and liberal interpretation to the concept of “custody or control”² consistent with the well-established principle that FIPPA and MFIPPA “shall ... receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.”³

In deciding whether a record is in the custody or control of an institution, the factors outlined below are considered in context and in light of the purposes of the Acts.⁴

DETERMINING “CUSTODY OR CONTROL” WHEN AN INSTITUTION HOLDS THE RECORD

Mere possession of a record is not necessarily determinative of whether a record is in the custody or under the control of an institution. The IPC considers the following non-exhaustive list of factors when deciding if a record that is held by an institution is in the custody or under the control of that institution.⁵

- 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 its creator provided it voluntarily or pursuant to a statutory or employment requirement?¹¹

2 *Ontario Criminal Code Review Board v. Hale*, 1999 CanLII 3805 (ON CA); *Canada Post Corp. v. Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA); and Order MO-1251.

3 *City of Toronto Economic Development Corp. v. Ontario (Information and Privacy Commissioner)*, 2008 ONCA 366 (CanLII) at para. 30, adopted in *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20 (CanLII) at para. 43.

4 *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).

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. Hale*, cited above.

9 Order P-912.

10 *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, cited above, and Orders 120 and P-239.

11 Orders 120 and P-239.

- If the institution does have possession of the record, is it more than “bare possession”? In other words, does the institution have the right to deal with the record in some way and does it have some responsibility for its care and protection?¹²
- 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 their 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 uses to which the institution may put the record?¹⁶
- To what extent has the institution relied on the record?¹⁷
- How closely is the record integrated with other records held by the institution?¹⁸
- What is the usual practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature?¹⁹

This list is not exhaustive. Some of these factors may not apply in a specific case, while other factors not listed above may apply.

DETERMINING “CUSTODY OR CONTROL” WHEN ANOTHER INDIVIDUAL OR ORGANIZATION HOLDS THE RECORD

The Supreme Court of Canada has adopted the following two-part test to determine 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?²⁰

12 Order [P-239](#) and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

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; Order [MO-2586](#).

17 *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above, and Orders [120](#) and [P-239](#).

18 Orders [120](#) and [P-239](#).

19 Order [MO-1251](#); Order [MO-2586](#).

20 *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306.

In addition, the following factors may also be relevant in determining whether a record is in the custody or under the control of an institution even when another individual or organization holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?²¹
- Is the individual, agency or group who has physical possession of the record an “institution” for the purposes of the Act?²²
- Who owns the record?²³
- Who paid for the creation of the record?²⁴
- What are the circumstances surrounding the creation, use and retention of the record?²⁵
- Are there any contractual provisions between the institution and the individual who created the record that give the institution the express or implied right to possess or otherwise control the record?²⁶
- Was there any understanding or agreement between the institution and the individual who created the record or any other party that the record was not to be disclosed to the institution? If so, what was the precise undertaking of confidentiality given by the individual who created the record, to whom was it given, when, why and in what form?²⁷
- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?²⁸
- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what is the scope of that agency, and does 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?²⁹
- To what extent did the institution rely or intend to rely on the records?³⁰

21 Order [PO-2683](#); Order [MO-2586](#).

22 Order [MO-2586](#).

23 Order [M-315](#).

24 Order [M-506](#).

25 Order [PO-2386](#).

26 *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, 1999 CanLII 6922 (BC SC); Order [MO-1251](#); Order [MO-2586](#).

27 Orders [M-165](#) and [MO-2586](#).

28 Order [MO-2586](#).

29 *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.); Order [MO-1251](#); Order [MO-2586](#).

30 Order [MO-1251](#).

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession, to possess or control records of this nature in similar circumstances?³¹
- Does the institution have a statutory power or duty to carry out the activity which resulted in the creation of the records, and is the activity in question a “core”, “central” or “basic” function of the institution?³²

31 Order **MO-1251**; Order **MO-2586**.

32 Order **MO-1251**.