

## Consider other factors that can enter into the mix in determining the Custody & Control of Records

[17] Accordingly, I agree with my predecessor, in Order No. 11-1994, that the following comments of Commissioner Linden (as he then was) in Ontario Order 120, [1989] O.I.P.C. No. 84, at p.7 (Q.L.), are relevant in addition to the *Policy and Procedures Manual* factors mentioned in *Greater Vancouver*:

In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation.

[18] I also agree with my predecessor that the following control indicators, taken from p. 7 (Q.L.) of Ontario Order 120, are useful in deciding the control issue in cases under our Act:

I believe that **consideration of the following factors** will assist in determining whether an institution has "custody" and/or "control" of particular records:

1. Was the record created by an officer or employee of the institution?
2. What use did the creator intend to make of the record?
3. 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?
4. 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?
5. Does the institution have a right to possession of the record?
6. Does the content of the record relate to the institution's mandate and functions?
7. Does the institution have the authority to regulate the record's use?
8. To what extent has the record been relied upon by the institution?
9. How closely is the record integrated with other records held by the institution?
10. Does the institution have the authority to dispose of the record?

These questions are by no means an exhaustive list of all factors which should be considered by an institution in determining whether a record is "in the custody or under the control of a institution". However, in my view, they reflect the kind of considerations which heads should apply in determining questions of custody or control in individual cases.