



F07-24-MS In Whose Custody Is a Diary on a Work Computer?

A public body employee complained that someone in the office had improperly accessed records on his work computer, including a diary and a private letter. The public body was unable to confirm or deny whether the employee's computer had been improperly accessed because it did not have an audit trail on the computer at the time of the alleged incident.

The first step in deciding the course of our investigation was to determine whether the records in question were in the custody or under the control of the public body, thereby placing them within the scope of the *Freedom of Information and Protection of Privacy Act* under section 3(1).

The courts have examined which factors indicate "custody" or "control" of records by a public body. For example, in the Matter of the Decision of the Information and Privacy Commissioner of British Columbia (Order No. 308-1999), 2000 BCSC 929, in paragraph 25, the Honourable Justice Shabbits agreed with the following comments by the Commissioner:

- (a) that custody of records requires more than that the records be located on particular premises;
- (b) that in order for a public body to have custody of records, the public body must have immediate charge and control of the records, including some legal responsibility for their safe keeping, care, protection or preservation; and
- (c) that "custody" in the Act reflects a choice by the Legislature to limit the Act's application to "government" records, and not to personal records of employees that happen to be located on public body premises.

We found that the record was not created by a staff member in the course of his or her duties and that the contents of the records were neither used by the organization nor a record that related to the public body's mandate and functions. The public body had no authority to regulate the record's use and disposition and had not relied upon the record in any way.

As the records in question were not in the custody or control of the public body, we had no jurisdiction to proceed further and therefore terminated our investigation of the complaint.