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### F15-17-MS

#### **FIPPA applies only to records in the custody or under the control of a public body**

An applicant received a number of records further to an access request she made to a public body. The applicant noticed that the public body's response did not include an agenda for a meeting involving a number of public bodies. The public body to whom the applicant made the request told her it didn't have a printed copy of the agenda. The applicant was aware that the agenda existed on one of the other public body's "members only" website and asked the public body to whom she had made the request to access it and provide her with a printed copy. That raised the question of whether the public body could be considered to have custody and control of records that could be accessed on the website of another public body.

The other public body confirmed to us that hard copies of the requested agenda had been distributed up to one week prior to the meeting to each participating public body. However, the public body to whom the request had been made, while acknowledging it could access the agenda electronically, told us it did not have a hard copy of it in its records at the time the request was made. It said that simply being able to access an electronic record that might be responsive to the request does not in itself constitute control of the record. We agreed. In Order 02-30, former Information and Privacy Commissioner Loukidelis relied upon Ontario Order P239, in particular noting that:

...it was said that possession of records is not enough to establish custody. A public body will only have custody if it has "some right to deal with the records and some responsibility for their care and protection."

In this case, the public body did not create the record and was not responsible for its storage and protection since the agendas were stored on another public body's website.

We concluded that electronic agendas were in neither the custody nor control of the public body to whom the request was made but suggested to the public body that in future, if it receives a similar request for another public body's records, it should transfer the request to that other public body within 20 business days pursuant to s. 11 of FIPPA.