



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
*for British Columbia*

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Order F19-04

## OFFICE OF THE PREMIER

Celia Francis  
Adjudicator

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**Summary:** A journalist requested copies of an employee's emails for a 12-hour period in April 2017. The Office of the Premier disclosed three pages of records and said it was not obliged under s. 6(1) (duty to assist an applicant) of the *Freedom of Information and Protection of Privacy Act* to search the employee's Recover Deleted Items folder for any other responsive records. The adjudicator found that the Office of the Premier should have searched this folder in the first instance and that, therefore, it had not complied with its duty under s. 6(1). At the time of the inquiry, the requested emails were no longer in the employee's Recover Deleted Items folder because the system had automatically deleted them from that folder and saved them to a backup server. The adjudicator further found that, in view of the complexity, effort and cost involved, the Office of the Premier is not obliged to restore the emails from the backup in order to respond to the journalist's access request.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, s. 6(1).

## INTRODUCTION

[1] This case concerns whether a public body is obliged to search deleted emails in response to an access request under the *Freedom of Information and Protection of Privacy Act* (FIPPA). On April 7, 2017, a journalist made a request to the Office of the Premier for all of the emails of its Executive Director, Communications and Issues Management (Executive Director), "in all folders, for the period of 9:30 a.m. to 9:30 p.m. on April 6, 2017." In late May 2017, the Office of the Premier responded by disclosing three pages of records.

[2] The journalist complained to the Office of the Information and Privacy Commissioner (OIPC) about the adequacy of the search the Office of the

Premier had conducted, noting that a similar request by a political party had yielded 91 pages of responsive records. In early June 2017, the Office of the Premier told the journalist that it had searched again but had found no additional records.

[3] In mid-June 2017, the journalist made a second access request, this time for the message tracking logs<sup>1</sup> for all emails to and from the same Executive Director, including date, time, sender, recipient and message subject, for the same period as his first request. The Office of the Premier disclosed 17 pages of responsive records.<sup>2</sup>

[4] According to the fact report for this inquiry, the message tracking logs indicated that the Recover Deleted Items folder contained emails responsive to the journalist's April 7, 2017 request. The fact report added that the Office of the Premier did not search the Recover Deleted Items folder before its contents were deleted and saved to the backup server in accordance with government policy.<sup>3</sup>

[5] Mediation by the OIPC did not resolve the complaint and the matter proceeded to inquiry. The OIPC received submissions from the journalist and the Office of the Premier.

## ISSUES

[6] The issues before me are:

1. Whether the Office of the Premier conducted an adequate search for records and thus discharged its duty under s. 6(1) of FIPPA and, if not,
2. What is the appropriate remedy?

## DISCUSSION

### ***Adequate search – s. 6(1)***

[7] Section 6(1) of FIPPA reads as follows:

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<sup>1</sup> A message tracking log is “a detailed record of all activity as email flows through the transport pipeline on Mailbox servers. Any actions by a user that generates [sic] email would result in log entries.” Affidavit of Senior Technical Architect, Office of the Chief Information Officer, Technology Solutions, Ministry of Citizens' Services, para. 10.

<sup>2</sup> The Office of the Premier's submission indicates that most of the emails were media advisories, news releases and media articles; see message tracking logs, Exhibit A, Affidavit of Senior Technical Architect, Office of the Chief Information Officer, Technology Solutions, Ministry of Citizens' Services,

<sup>3</sup> Fact report, paras. 10 & 11. The Office of the Premier did not dispute these statements.

- 6 (1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[8] Past orders have said that s. 6(1) “requires a public body to conduct an adequate search for records that respond to the access request. The public body must undertake such search efforts as a fair and rational person would find acceptable in all the circumstances. This does not impose a standard of perfection.”<sup>4</sup>

*Submission of the Office of the Premier*

[9] The Office of the Premier’s evidence is that its employees use Microsoft Outlook. When an employee deletes an email in Microsoft Outlook, it moves into the employee’s Deleted Items folder. When the employee deletes emails from his/her Deleted Items folder (or when Outlook automatically deletes emails from that folder, which it can be programmed to do at regular intervals), the emails move into the employee’s Recover Deleted Items folder. The BC Government has configured the Recover Deleted Items folder to retain emails for 33 days, to capture them in the routine monthly backup of all data on government servers. The Exchange Server automatically removes from the Recover Deleted Items folder any email that has been in the folder for 33 days. This email removal process runs in the background 24 hours/day and is a “continuous rather than periodic process.” After an email has been in the Recover Deleted Items folder for 33 days, it is “automatically permanently deleted” from the user’s account and is then only available in the backup. Government policy direction, in place since December 2015, prohibits employees from manually deleting emails in their Recover Deleted Items folders (called “triple deletion”).<sup>5</sup>

[10] The Office of the Premier submitted that it complied with s. 6(1) in searching for the responsive records. It acknowledged that a public body is obliged to search for responsive records in Deleted Items folders. It argued, however, that its obligation under s. 6(1) does not extend to searching Recover Deleted Items folders. In its view, to “force” an employee to do so would be inconsistent with proper records management<sup>6</sup> and would “disregard” the purpose of this folder,<sup>7</sup> which it said are these:

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<sup>4</sup> Order 02-18, 2002 CanLII 42443 (BC IPC), at para. 7, for example.

<sup>5</sup> Office of the Premier’s initial submission, paras. 14-16; Affidavit #1 of Senior Technical Architect, Office of the Chief Information Officer, Technology Solutions, Ministry of Citizens’ Services, paras. 7 & 9. Office of the Premier’s additional submission (December 12, 2018); Affidavit #2 of Senior Technical Architect, Office of the Chief Information Officer, Technology Solutions, Ministry of Citizens’ Services, paras. 3-4. The quotes are from the additional submission.

<sup>6</sup> Office of the Premier’s initial submission, para. 35.

<sup>7</sup> Office of the Premier’s initial submission, para. 50.

- To ensure that all government emails are captured in the monthly backups that store all data on government servers for a minimum of 13 months. The purposes of the backups are to assist investigations, meet legal requirements (such as providing records for the purposes of civil litigation) and assist with disaster recovery.
- To temporarily store emails that have been deleted from the Deleted Items folder in the event that an employee realizes she or he made a mistake with the initial deletion.<sup>8</sup>

[11] The Office of the Premier conceded that the requested records were likely in the Recover Deleted Items folder at the time it received the journalist's access request. It said that this folder does not appear in an employee's list of email folders so the fact that stored emails remain in it is "not readily apparent."<sup>9</sup> However, the Office of the Premier also admitted that it is technically easy to search the Recover Deleted Items folder. The Office of the Premier argued, however, that it would be unreasonable to require it to carry out this search since the emails "appear to be transitory", "of no value" and are thus properly deleted.<sup>10</sup>

[12] The Executive Director gave evidence that, in his position, he received a high volume of emails every day. He said he regularly deleted emails he considered to be transitory. Based on his review of the message tracking logs, the Executive Director said that he would have deemed the emails he received on April 6, 2017 to be transitory and he would have deleted them to his Recover Deleted Items folder. He said that, in keeping with his usual practice when responding to FIPPA requests, he would have searched all of his Outlook email folders, including his Deleted Items folder. The Executive Director said that he would not have searched his Recover Deleted Items folder because the emails in this folder were transitory and properly disposed of.<sup>11</sup> The Office of the Premier said that the message tracking logs show that the Executive Director sent only one email.<sup>12</sup> It provided a copy of this email with its submission, which I understand to be the email it disclosed to the journalist.<sup>13</sup>

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<sup>8</sup> Office of the Premier's initial submission, para. 14; Affidavit #1 of Senior Technical Architect, Office of the Chief Information Officer, Technology Solutions, Ministry of Citizens' Services, para. 8.

<sup>9</sup> Affidavit #2 of Senior Technical Architect, Office of the Chief Information Officer, Technology Solutions, Ministry of Citizens' Services, para. 3.

<sup>10</sup> Office of the Premier's initial submission, paras. 20-55. Office of the Premier's supplementary submission (December 12, 2018).

<sup>11</sup> Affidavit of Executive Director, paras. 9-16. He also said he did not keep paper copies of the emails or save electronic copies outside his Outlook account.

<sup>12</sup> Affidavit #1 of Senior Technical Architect, para. 13.

<sup>13</sup> Office of the Premier's initial submission, section 6, "Records (previously provided to the Applicant)." The journalist's request for review says that he received only one three-page email in response to his request.

*Journalist's submission*

[13] The journalist argued that the Executive Director should not have deleted the emails in the first place and the Office of the Premier should retrieve and disclose them. He referred to former Commissioner Denham's Investigation Report F15-03<sup>14</sup> (Access Denied report) in support of his position.

*Analysis*

[14] The Office of the Premier's submission devoted considerable attention to the supposedly transitory nature of the requested emails, arguing the Executive Director properly disposed of them. It also suggested that the emails would be "of little or no value" to the journalist.<sup>15</sup> However, whether the emails were transitory or valuable to the journalist is irrelevant, in my view. The journalist did not request emails pertaining to a specified subject. He requested *all* of the Executive Director's emails for a 12-hour period. As such, all of the Executive Director's emails for that period were responsive to the request, whether transitory or valuable.

[15] In my view, the Office of the Premier was obliged to search the Executive Director's Recover Deleted Items folder in addition to his other email folders. The Office of the Premier argued that proper records management is essential and that it includes the regular disposal of transitory records.<sup>16</sup> I agree. I do not, however, accept the Office of the Premier's argument that searching the Recover Deleted Items folder would have had "negative implications" for records management, including the proper disposal of transitory records.<sup>17</sup> The Office of the Premier admitted that the responsive records were likely in the Recover Deleted Items folder when it received the journalist's access request. The Office of the Premier's evidence also shows that it is not technically difficult or onerous to retrieve emails from the Recover Deleted Items folder. On the contrary, as noted earlier, the Office of the Premier admitted that it would have been easy to search that folder for the responsive records.<sup>18</sup>

[16] The Executive Director also admitted that it would have been easy to respond to the request, given that it was for emails from the previous day.<sup>19</sup> He did not say he could not search the Recover Deleted Items folder for some reason. Indeed, one of the purposes of the Recover Deleted Items folder is to temporarily store emails that were mistakenly deleted from the Deleted Items folder. The Office of the Premier also provided evidence that an employee can go to the Recover Deleted Items folder (before the 33-day storage time expires)

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<sup>14</sup> Investigation Report F15-03, 2015 BCIPC 63 (CanLII).

<sup>15</sup> Office of the Premier's initial submission, para. 57.

<sup>16</sup> Office of the Premier's initial submission, paras. 34-36

<sup>17</sup> Office of the Premier's initial submission, para. 34.

<sup>18</sup> Office of the Premier's initial submission, paras. 52-53.

<sup>19</sup> Affidavit of Executive Director, para. 9.

to retrieve “wrongfully deleted emails.”<sup>20</sup> This all suggests that an individual employee can easily restore emails from the Recover Deleted Items folder.

[17] I also disagree with the Office of the Premier that retrieving the responsive emails would have “disregarded” the purposes of the Recover Deleted Items folder. Rather, it seems to me that responding to FIPPA requests is entirely consistent with use of the folder for the purpose of meeting legal requirements.

[18] The journalist drew to my attention the *Government Records Service Guide on Transitory Records* which gives the following direction to its employees: “Do not destroy any transitory records that are relevant to a FOIPPA request or legal discovery.”<sup>21</sup> I also note former Commissioner Denham’s specific comments on this issue in her Access Denied report:

It is important to note that once a public body receives an access to information request, it must keep all records, including both transitory and non-transitory records, in its custody or under its control. If these records are responsive, the public body must produce them unless specific exemptions to disclosure under FIPPA apply.<sup>22</sup> [footnote omitted]

[19] The Office of the Premier did not comment on or dispute the validity of these directions and their application to the Office of the Premier. It also did not explain why, in light of such clear, unambiguous guidance, it did not retrieve the relevant records from the Executive Director’s Recover Deleted Items folder, either at the time of the request or, at the very least, before the emails were deleted from that folder 33 days later.

[20] For the reasons given above, I find that, in failing to search the Executive Director’s Recover Deleted Items folder for responsive records, the Office of the Premier did not comply with its duty under s. 6(1) to respond to the journalist “openly, accurately and completely.”

### ***What remedy is appropriate?***

[21] Given my finding that the Office of the Premier failed to comply with its duty under s. 6(1), I must consider what remedy is appropriate. According to the fact report for this inquiry, the emails are no longer in the Executive Director’s Recover Deleted Items folder but they still exist on the government’s backup server. The Office of the Premier did not dispute this statement. However, it argued that it is not obliged to restore the contents of the Executive Director’s

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<sup>20</sup> Affidavit #2 of Senior Technical Architect, Office of the Chief Information Officer, Technology Solutions, Ministry of Citizens’ Services, para. 3.

<sup>21</sup> Journalist’s response submission, para. 38. He did not provide a copy of this guide but included this quote.

<sup>22</sup> Investigation Report F15-03, p. 18. The journalist referred to this passage in his response, at para. 24.

Recover Deleted Items folder from the backup server.<sup>23</sup> The Office of the Premier did not initially explain what would be required to restore the emails from the backup servers in this case. However, in response to my request, the Office of the Premier provided an additional submission and evidence on this issue. The journalist did not respond.

[22] The Office of the Premier provided the following evidence on the issue of restoring email backups:

- The email backup process is designed for disaster recovery, not retrieving individual emails or mailboxes. Recovering emails from backup tapes is a costly and time-consuming process.
- Email backups cannot be equated with an archival database. They are stored in a mailbox database on one of 26 mail servers which support the 58,000 users in the Provincial government.
- To recover an email, Office of the Chief Information Officer (OCIO) Enterprise Services employees, who must be pulled from other tasks, require special approval and must follow strict procedures.
- It is not possible to retrieve the email messages of a single user. Rather, an entire mailbox database, which might be shared by 2,200 users, must be restored.
- The OCIO Enterprise Services staff need the name of the mailbox, a timeframe and any topics to be searched, and must then generate a digital image of the entire database hosting the mailbox in question.
- This requires producing “a full system image” for one of the 26 mail servers at the relevant point in time. This takes approximately six hours of staff and processing time and necessitates restoring significant volumes of information that is irrelevant to the search.
- It is necessary to load the restored data onto a dedicated server and there might not always be a server available.
- Once the restoration of the mailbox database is complete, OCIO Enterprise Services staff can only reproduce an entire mailbox and must then search it manually. These secondary tasks can take hours.<sup>24</sup>

[23] I accept that the government’s backup server is designed to allow it to recover entire databases in the event of a disaster and it is not intended to be a backup filing system or archive. I also accept the evidence that the process for restoring email backups and retrieving individual emails requires considerable effort and time on the part of staff. It is not, in my view, reasonable to expect the OCIO Enterprise Services to take time from their regular work to carry out these

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<sup>23</sup> Office of the Premier’s initial submission, paras. 56-57.

<sup>24</sup> Office of the Premier’s additional submission, paras. 9-10. Affidavit #2 of Senior Technical Architect, Office of the Chief Information Officer, Technology Solutions, Ministry of Citizens’ Services, paras. 5-12. The OCIO Enterprise Services staff charge a ministry \$1,000 to restore a single mailbox for a single date.

tasks in the case of normal access requests. In an extraordinary case, for example, if there were reason to believe that an email had been improperly deleted in an attempt to evade FIPPA obligations, I might consider it appropriate to restore email backups. However, I do not consider this to be such a case. There is no evidence of improper deletion of emails here.

[24] Past orders on the issue of deleted emails concluded that the s. 6(1) duty does not extend to retrieving deleted records from backup tapes. In those cases, two former Commissioners had evidence that it would be “complex, costly and time-consuming” for public bodies to do so.<sup>25</sup> Despite the passage of almost two decades, it is evident that the technology for restoring email from the government’s backups has not changed. The former Commissioners’ findings are still applicable here, in my view.

[25] The Office of the Premier’s evidence has persuaded me that it would be a complex, onerous and costly business to restore the requested emails. In the circumstances of this case, I am satisfied that it is not reasonable to require the Office of the Premier to restore the email backups in order to respond to the journalist’s access request.

## **CONCLUSION**

[26] I found above that the Office of the Premier should have searched the Executive Director’s Recover Deleted Items folder for the responsive records and that it had not, therefore, complied with its duty under s. 6(1) to respond to the journalist “openly, accurately and completely.” However, I also found that the Executive Director’s emails are no longer in the Recover Deleted Items folder and it would not be reasonable in this case to order the Office of the Premier to restore the email backups and search them for the responsive records. In light of this finding, I confirm under s. 58(3)(a) of FIPPA that the Office of the Premier has performed its duty under s. 6(1) respecting this latter issue.

January 29, 2019

## **ORIGINAL SIGNED BY**

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Celia Francis, Adjudicator

OIPC File No.: F17-70372

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<sup>25</sup> Order 02-25, 2002 CanLII 42454 (BC IPC), paras. 16-17; Order No. 73-1995, 1995 CanLII 482 (BC IPC), pp. 3, 5-6.