

ISSN 1198-6182

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 198-1997
November 20, 1997**

INQUIRY RE: The adequacy of the Ministry of Finance and Corporate Relations' response to a request for e-mail messages

**Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: <http://www.oipcbc.org>**

1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on August 26, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of the response by the Ministry of Finance and Corporate Relations (the Ministry) to the applicant's request for specific e-mail messages in electronic or paper form or both.

2. Documentation of the inquiry process

The applicant's counsel submitted a request on January 28, 1997 for various records concerning the applicant and indicated that the applicant was especially interested in e-mail messages between two named individuals in hard copy or electronic form or both. The Ministry responded on February 14, 1997 by providing copies of all records that it was able to find. Counsel for the applicant subsequently wrote to the Ministry to expand the dates of search for the requested e-mail messages and to suggest that they could be obtained through the government's Information Technology Services Division (ITSD). On April 18, 1997 the Ministry again responded that it had released all available records. The applicant wrote to the Office on May 25, 1997 to ask for a review of the Ministry's response. The applicant indicated her belief that all e-mail messages are retrievable for up to a year after transmission and asked that the particular messages at issue be retrieved before they are purged from the system. The Office opened the review file on May 28, 1997. The 90-day time limit expired on August 26, 1997.

3. Issue under review and the burden of proof

The issue under review is the adequacy of the Ministry's search for records responsive to the applicant's request, including the issue of whether the Ministry was required to carry out a search to determine whether deleted e-mail messages were captured by system backup tapes.

The relevant section of the Act is as follows:

Duty to assist applicants

- 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.
- (2) Moreover, the head of a public body must create a record for an applicant if
 - (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
 - (b) creating the record would not unreasonably interfere with the operations of the public body.

4. The applicant's case

The applicant, a former employee of the Ministry, claims that she has seen printouts of the e-mail messages at issue. At the time of the initial request for access to certain Ministry e-mail records, the applicant believed that copies of the messages existed in various locations and formats. It is her submission that the Ministry did not search in all of the locations that she suggested. The applicant also believes that messages can be retrieved from the Office Vision system for up to one year after the date of a message.

The applicant submits that the Ministry incorrectly limited its search for responsive records to her personnel file, and the office of only one of the two individuals who authored or received the alleged communications. She is particularly interested in securing a copy of a "libellous" message written from one of these individuals to the other.

5. The Ministry's case

The Ministry submits that the parameters that it used to conduct its search for the requested records were entirely consistent with the scope of the request, and that it has made every reasonable effort to be responsive to it. (Submission of the Ministry, sections

1.01 and 2.01) See Order No. 30-1995, January 12, 1995. The Ministry filed affidavit evidence outlining the scope of the searches undertaken. The Ministry further submits that it “is not required to prove to the degree of absolute certainty that the e-mail message the Applicant has requested does not exist.” (Submission of the Ministry, section 3.01) (See Order No. 176-1997, July 21, 1997, p. 2; and Order No. 178-1997, July 25, 1997, p. 3)

I have discussed below the Ministry’s submission with respect to the search of backup tapes.

6. Discussion

Based on my review of the evidence, I accept that the Ministry has made every reasonable effort in conducting the search and responding to the applicant’s request. The Ministry conducted a thorough search of the records at the Human Resources Branch and the Revenue Information Systems Branch for copies of any reports, evaluations, job assessments, or job performance appraisals in the applicant’s personnel file since September 2, 1995 and all Office Vision e-mail communications between the two individuals identified by the applicant between June 1, 1996 and June 21, 1996. When the applicant expanded her request to include any e-mail messages between the two named individuals between May 21, 1996 and July 26, 1996, further inquiries revealed that all of the documentation had been provided. I am satisfied that the search undertaken by the Ministry covered the scope of the applicant’s request and that the Ministry made every reasonable effort to respond openly, accurately, and completely to her.

The applicant asserts that she saw the e-mail message in question. To the extent that the Ministry suggests that there is no evidence of this, her statement alone is evidence that I have to consider. However, the applicant provided no details of how or when she saw the offending message. Affidavit material from the two individuals involved indicates that they have no recollection of such a message, nor any record that such a message ever existed. Even if such a message did exist at some point, I accept that there was no record of any such message at the time of the applicant’s request.

The Search of Backup Tapes

The basic premise that I accepted in Order No. 73-1995, December 21, 1995, p. 5, is that deleted e-mail is no longer a “record” under the Act. This effectively disposes of the issue in this inquiry.

In Order No. 73-1995, I discussed the accessibility of backup e-mail records in detail. As I concluded in that Order, the purpose of backup systems is to provide for the re-establishment of whole systems of records in the event of a catastrophe, “not for the recovery of an individual item that may be stored therein over a certain time frame.” I found in that case that it was not appropriate to order a public body to use backup tapes held by systems operators “as a method of recovering certain specific records (which may

not even exist)....” Order No. 73-1995, pp. 7-8. I agree with the Ministry’s submission that these observations are applicable in this case and determinative of this issue.

In addition, the Ministry has:

entered evidence which shows that the likelihood of the requested e-mail message existing on backup tape is extremely low. That is, neither the alleged sender nor the alleged recipient recall the e-mail message ever having been sent/received, and if it was sent/received it must have been deleted prior to the time the alleged sender and alleged recipient searched their electronic files, and in that case the chances of it having been captured on backup tape are completely dependent on the timing of the deletion vis-à-vis the timing of the taping on backup tapes. (Submission of the Ministry, section 4.01)

In this connection, I do not accept the applicant’s contention that the costs of searching backup tapes “should that become a last resort due to lack of voluntary release by directly-involved parties - cannot be used as an excuse by the party of whom the request is made - in this instance the Ministry of Finance.” (Reply Submission of the Applicant)

Can an applicant pay the costs of searching backup tapes to recover records?

The applicant has raised the issue of whether the Ministry should provide her with a quote for the cost of conducting a search of the backup tapes and whether she should be provided with the opportunity to pay these costs. The applicant contends that “the costs of reproduction and search would be minimal due to the fact that these records have already been requisitioned and reproduced into hard copy at the request of [].” However, since the records that she claims to have seen reproduced in hard copy do not appear to exist any longer in that format, from a technical perspective her request entails far more than asking “for a second reproduction of the same records.” The applicant’s expectation concerning the “minimal” nature of the costs may be unrealistic.

Since I do not intend to order the Ministry to retrieve a record of a deleted e-mail message from backup/recovery tapes, the applicant’s request for a quote and an opportunity to pay for the costs will have to be addressed by the Ministry outside the scope of the Act.

7. Order

Section 58(1) of the Act requires me to dispose of the issues in an inquiry by making an order under this section. I find that the search conducted by the Ministry of Finance and Corporate Relations in this case was a reasonable effort within the meaning of section 6(1) and that the Ministry is not required to search backup tapes to determine whether deleted e-mail message information was captured.

Under section 58(3)(a), I require the Ministry of Finance and Corporate Relations to perform its duty under section 6(1) to make every reasonable effort to assist the applicant. However, since I have found that the search conducted was reasonable, I find that the Ministry has complied with this Order and discharged its duty under section 6(1) of the Act.

David H. Flaherty
Commissioner

November 20, 1997