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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 121-1996
September 3, 1996

INQUIRY RE: A decision by the Ministry of Agriculture, Fisheries and Food to refuse access to computer backup tapes containing deleted e-mail

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner on May 22, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for a review of a decision of the Ministry of Agriculture, Fisheries and Food (the Ministry) to deny the applicant access to records on the basis of section 6(2) of the Act.

This inquiry will also consider the issues raised by the applicant's complaint that the Ministry failed to retain any relevant electronic mail backup tapes when it received the applicant's initial request for records. He asserts that this failure compromised his efforts to obtain evidence that the Ministry discriminated against him and jeopardized his right to ensure the accuracy of his personal information.

2. Documentation of the inquiry process

On October 12, 1995 the applicant submitted a request to the Ministry for all records in the then British Columbia Systems Corporation (BCSC)'s backup tapes for all deleted information originated from, and received by, four named individuals on various topics. On November 1, 1995 the Ministry replied that it was unable to provide access to the requested records on the basis of section 6(2) of the Act. The Ministry stated that re-creating the deleted electronic files went beyond the technical capabilities of its normal hardware and software. The Ministry also stated that creating the records would unreasonably interfere with its operations. On November 10, 1995 the applicant requested a review of the Ministry's decision.

On February 13, 1996 the applicant also submitted a complaint to my Office regarding the Ministry's failure to "pull" appropriate records from a normal retention and disposal schedule in response to his request for records under the Act before the records were allegedly destroyed.

3. Issues under review at the inquiry and the burden of proof

The issues under review in this inquiry are whether the Ministry is required to recreate electronic files from backup tapes under section 6(2) of the Act and whether the Ministry was obliged to retain the backup tapes in response to the applicant's request for records. Section 6 of the Act reads 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.

Section 57 does not establish the burden of proof in this case, which is about the application of section 6. In Order No. 105-1996, May 27, 1996 at page 2, I stated: "Section 57 of the Act, which establishes the burden of proof on parties in an inquiry, is silent with respect to the duty to assist under section 6 of the Act. Since public bodies are in a better position to address the issue of creating a record, the burden of proof for this inquiry will be on the Ministries." In the present case, the Ministry has argued that section 57 does not apply and also that it is "procedurally unfair to place the onus solely on the public body," suggesting that the onus should be on both parties. I adopt my reasoning from Order No. 105-1996 and conclude that the Ministry has the burden of proving that it complied with its duty to assist under section 6.

The Act also does not refer to the burden of proof regarding complaints reviewed under section 52. This particular complaint concerns an alleged failure of the public body in its duty to assist the applicant, similar to the issues raised in the request for review. Thus it is appropriate, in my view, that the initial burden of proof be on the Ministry to respond to the complaint, since it is in the best position to address the issue raised by the applicant.

4. The applicant's case

The applicant originally asked for all deleted information in BCSC's backup tapes originating from and received by four named individuals and dealing with the following topics: the applicant; another named individual; harassment; discrimination; classification;

reclassification; appeal; job description; performance planning and review; Ombudsman; Human Rights.

In his original request for review, the applicant emphasized that he sought records already created that in his view were in fact available and stored on backup tapes. In his view, there was no need to create or recreate records, since they already existed. The applicant also rejected the Ministry's reliance on section 6(2) of the Act to deny his request, because BCSC has the technical and computer expertise "to effectively access requested records through utilizing its electronic word search programs of its mainframe computers." He also rejected the Ministry's argument about the costs of such recovery, because he asked for limited information on the basis of specific search criteria and he had not received any cost estimates for such access to his own personal information under section 75 of the Act. It is his view that the requested search would not unreasonably interfere with the operations of the Ministry.

In the applicant's view, the "Ministry unreasonably denied my right to access records within the meaning, spirit and intent of the Act." He seeks a strong message to the Ministry that the failure to preserve requested records should not be permitted to happen again. (Reply Submission of the Applicant, p. 10)

5. The Ministry's case

The Ministry argues that it has acted properly and with respect to both the spirit of the Act and my Orders in handling this request. However, because this applicant requested deleted e-mail, it questions my jurisdiction and authority to review the matter. (Submission of the Ministry, paragraphs 5.2, 5.4) I discuss this jurisdictional issue below. I have also dealt separately with the applicant's complaint.

6. The intervenors' cases

The B.C. Civil Liberties Association (BCCLA) urged me not to disturb the decision of the Ministry in this case, on the basis of my Order No. 73-1995, December 21, 1995, but encouraged me to participate with other appropriate bodies "in developing guidelines to aid those public bodies which provide e-mail facilities in distinguishing institutional documents from private communications." Its view is that the distinction between public documents and private communications is far from clear. I discuss this matter further below.

The BCCLA is also concerned that the applicant's request does not clearly seek only information associated with this applicant on the series of topics he is concerned with: "Otherwise, it is, on its face and in plain language, a request for access to records that could well have absolutely nothing to do with [the applicant's] case, but could have serious consequences for the privacy of both the subjects and those discussed by them in connection with the list of topics."

The Chief Information Officer for the province also intervened in this inquiry in support of the Ministry's several positions, as did the Commissioner for the Public Service Employee Relations Commission (PSERC). Both asserted that deleted e-mail is not a record under the Act,

and that therefore the subject matter of this review is beyond my jurisdiction. I have discussed below several other points made by PSERC.

7. Discussion

My jurisdiction in this matter

The Ministry makes the interesting argument that there is no record in dispute in this inquiry, because no record exists and, it argues, I can only deal with "what are records under the Act." (Submission of the Ministry, paragraph 4.1) Its point is that the former "records" were deleted in electronic form. My view is that I do have jurisdiction over the disposition of what may have been records under the Act at the time of a request for them. Moreover, the Ministry itself admitted in its main submission that the requested record may indeed have existed on a backup tape of deleted electronic mail held by BCSC. (Submission of the Ministry, paragraph 4.3) In fact, the Ministry responded to the applicant on November 1, 1995 by saying that it could not create the record, relying on section 6(2) not to have to do so. I have jurisdiction to determine whether a public body has complied with its duties under section 6.

I wish to deal directly with the Ministry's contention that the request for access in this inquiry is for information that is not a record. The applicant asked for backup tapes that the Ministry states "are not a record in the custody or under the control of the Public Body. Deleted information is not a record." (Submission of the Ministry, paragraph 5.4) In Order No. 73-1995, December 21, 1995, p. 5, I generally accepted the premise that deleted e-mail is no longer a record under the Act on the basis that specific information cannot be easily recovered from a "disaster recovery" backup system. The point in the present inquiry is not that the record does not exist today, but that it likely did exist at one point in time. I have jurisdiction to determine whether, in this case, the deleted e-mail was a record at the time of the original request and whether it was accessible in its deleted form.

Thus I am unpersuaded by the Ministry's various arguments to the effect that I do not have jurisdiction in this matter. Its position, and that of the government intervenors, could encourage illicit or premature destruction of electronic records in particular so that access to information requests under the Act could not be satisfied.

Some matters of definition for electronic records

Confusion is occurring because of the different definitions that are in use for the terms: "delete," "backup," and "archive."

Delete means to strike out, obliterate. In my opinion, "delete" means there must be a conscious, legitimate act to remove a record from existence. It does not mean simply pressing the delete key on one of the government's e-mail systems. Such an action simply places your e-mail in a "Wastebasket" folder, at least for some government systems. The intention of the wastebasket is to allow you to "change your mind." In the plain English meaning of the word "delete," the user has not in fact deleted the record. A knowledgeable user will not only delete a record but

also empty his or her wastebasket (or equivalent terminology if such a service exists) to ensure that a record has been thoroughly destroyed. An analogy can be drawn from the handling of paper records. If a person throws something in his or her wastebasket, whether physical or electronic, it is still there and it can be recovered during a short period, perhaps a day or a week, until it is removed and destroyed.

Backup means the copying of an electronic record onto tape, or other medium, for purposes of preservation. This word does not exist outside of the computer systems arena. The intention of a backup tape is to restore a system after a crash. If there is no easy way to recover an individual file, then it is a backup. Custodians of records under the Act need to be able to answer the following questions in order to determine the retrievability of a record that may exist on a backup tape. Can one identify which tape an individual file is on? Is it stored on the backup medium sequentially? Does recovery call for a systems rebuild, or can the "backup" program deliver the file individually? Is the backup medium reused according to a predetermined backup schedule, or is it reused according to a document retention period?

Archive means a place for storing electronic records. The definition of archive assumes that the intention is to keep a historic record of the transactions associated with business so that one can refer to them at a later date. These records would normally contain only the material one wished to keep. A request for the letter that a user wrote to Bob Smith on January 15, 1994 would be easy to find and deliverable by the archive software that created it, if it has been consciously archived. It may be kept forever or for a specific retention period based on the value of the document. It would not be kept for a period dependent on a backup schedule designed to ensure the complete system could be recovered in the event of a disaster, or the random selection of tapes from a shelf.

The requirement to produce deleted electronic mail

The Ministry is on solid grounds when it interprets Order No. 73-1995 to the effect that there is no legal obligation on a public body to restore deleted e-mail "at least under normal circumstances," to quote the language of the Order No. 73-1995, p. 7. (Submission of the Ministry, paragraph 5.6) At the time of the applicant's request, the Ministry had no policy in place to provide guidance about retrieving and holding backup tapes. Order No. 73-1995 had not been released. Thus the Ministry did not present a specific rationale for why it should not have sought to recover the deleted e-mail in the present case at whatever point and in whatever place it may have existed for its specific system of backup. The applicant pointed out the Ministry's lack of empirical substantiation of its entire section 6(2) argument. (Reply Submission of the Applicant, p. 4) Thus the Ministry did not advance evidence about the backup system it used, but it did make assertions in its submissions. Counsel stated that the Ministry's electronic mail operates on the VAX system, where there is no way of determining if a user-deleted e-mail message is still on the system or backup tape. It was submitted that retention of backup tapes would have been "a great expense." These assertions should have been supported by affidavit

evidence. While I have reservations about the lack of evidence in this case, I have concluded that the Ministry was not required to create a record under section 6(2) in the circumstances of this case.

The applicant's complaint: the retrievability of deleted e-mail

The applicant has basically complained that the Ministry failed to retain any of the backup tapes for electronic mail in existence at the time of his original request. When the Ministry was asked in January 1996 by my Office if such backup tapes were available and could be retrieved, the answer was that they were not available. (Submission of the Ministry, paragraph 5.11) I am not comfortable with the Ministry's attempted reliance on Order No. 73-1995 for confirmation of its initial inaction on this matter, since that Order was released December 21, 1995, after the applicant made the initial request.

If an applicant requests "deleted" electronic records, then a public body should preserve any records in place until the empirical and legal issues of their retrievability are addressed. It may be, for example, that recovery, as in the All-in-One e-Mail system, is as simple as retrieving the record from the electronic wastebasket. This is an empirical matter, since the passage of a day or a week destroys deleted e-mail to make it fully non-retrievable.

The applicant made his original request on October 12, 1995, which, upon receipt and processing, should have preserved any extant records, if they existed, whatever their format, provided this was technologically feasible. The Ministry now seems to interpret its refusal letter to the applicant of November 1, 1995 as at least implying that the records sought did not exist: "Had the record existed the Public Body would not have claimed that it was incapable of creating the record."

In the present inquiry, the records were kept on a VAX e-mail system maintained by the former BCSC for the Ministry rather than the IBM system that was in place in Order No. 73-1995. (Submission of the Ministry, paragraph 5.14) The Ministry states:

> Under the VAX system there is no way of determining if a user-deleted electronic mail message is still on the system or on a back-tape [*sic*]. It solely depends on when the mail is deleted. Under the VAX system, backup tapes are maintained on a shorter schedule than under the IBM system. For example, after 94 days any backup no longer exists. If any deleted electronic mail did happen to be captured by a backup, after 94 days it would be gone. (Submission of the Ministry, paragraph 5.15)

My concern is whether an applicant mounts a credible argument for the recovery of e-mail during the ninety-four day retention period under this particular system. There is generally no obligation to retrieve specific information from backup tapes. But as technology progresses, and depending on the systems involved, there may be cases where an applicant can reasonably expect such a search to be made. Similarly, a public body should establish whether the costs of such recovery are reasonable and feasible under the standards of section 6(2) of the

Act; it has not done so to my satisfaction in the present case. Clearly, cost can be a significant factor militating against an effort at recovery.

The issue in this complaint is not whether the Ministry was under an obligation to retain backup tapes of deleted electronic mail, but whether any such records existed in an accessible format when the Ministry received the applicant's original request, and whether the recovery of whatever the applicant wanted was still feasible under the criteria set out in section 6(2). (Submission of the Ministry, paragraph 5.18) The applicant cited the one-page guidance on managing e-mail issued by the Ministry on May 16, 1996, which states that "E-mail messages stored on the system are subject to FOI requests - even if the information is considered transitory or of temporary usefulness. As long as the information exists, FOI applies." (Reply Submission of the Applicant, pp. 3, 4, and Exhibit B) I agree with the Ministry's statement on this point.

The applicant has also relied on a draft action plan on e-mail, dated September 19, 1995, from the then B.C. Archives and Records Services (BCARS). It states clearly that a policy should allow access to backup tapes as records under the Act, including deleted messages stored on backup tapes. For example, "BCARS concluded that records could not be considered destroyed until they were physically destroyed or, for electronic records, irretrievable." The applicant concludes that the items he has quoted "clearly defined that the government has ownership and responsibility of electronic records, included deleted e-mail records." (Reply Submission of the Applicant, p. 5) The government's response is that this draft policy did not become official policy. Ironically, the applicant made a similar argument about other draft policy that the Ministry relied on. (Reply Submission of the Applicant, p. 7; Reply Submission of the Ministry, p. 2) This battle of draft policies primarily reflects the unsettled state of law and practice in this domain under the Act. The operative point is the need for government policy. But I agree that final policy is what should guide a public body in these circumstances.

The applicant has also relied on Section C.3.7, p. 5 of the *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, prepared by the government, which states:

> Public bodies do not dispose of any records relating to a request after it is received, even if the records are scheduled for destruction under an approved schedule. This includes any transitory records which may exist at the time the request is transmitted.

His argument is that the Ministry's lack of action on his original request was in direct violation of this requirement.

The retrievability of deleted records

With respect to the general issue of the retrievablity of deleted records, I am persuaded by the evidence provided by the Ministry in an affidavit, but not argued in its submissions, that the applicant's request would have required a sizable search of six months of deleted electronic mail on backup tapes held by BCSC, which was beyond its normal hardware, software and technical capabilities. (Affidavit of Merv Scott, paragraph 3) However, the Ministry made no attempt to

ascertain the existence of backup tapes until January 25, 1996, when it learned that such tapes had most likely been written over. (Affidavit of Merv Scott, paragraph 8) It asserts that it was acting in accordance with draft government policy in not attempting to search for the backup tapes at the time of the original request. In retrospect, I find this regrettable, since a public body should discover whether responsive records indeed exist in any format as soon as possible after an access request is received.

In Order No. 73-1995, I accepted the "basic premise" that deleted e-mail is not a record under the Act, when it can be located only on a backup system. My qualification was, and is, the ease of recoverability of such a record from a wastebasket facility or, less likely, a backup tape. In this case, we do not know the whereabouts and retrievability of any "deleted" records at the time of a request that asked specifically for them.

I am of the view that, in future, recordkeepers should ascertain whether records exist in whatever form when an applicant specifically requests deleted records and then establish whether section 6 of the Act requires them to attempt recovery of such materials. The relative impact of what is at stake is a relevant consideration here, as I pointed out in Order No. 73-1995, pp. 9, 10. If there is doubt about the possibility or necessity of retrieval of records, they should be preserved until the matter has been resolved in compliance with section 6.

The applicant's in camera submission

The Ministry objects to the fact that a small portion of the applicant's submission was made *in camera*. (Reply Submission of the Ministry, p. 1) Having reviewed the material in question, I find that the submission was made appropriately in the circumstances of the sensitive personal information that the applicant wished to share with me and not with the Ministry. I intend to be as tolerant of *in camera* submissions by applicants as I have been of those made by public bodies, even though I encourage all parties to use them sparingly.

The mootness of the issue

As noted above, I would have liked to receive empirical data from the Ministry as to whether an item in its "backup" system is recoverable in a relatively easy manner. However, since the records originally requested do not now exist, and may never have existed, I do not see the utility of obtaining such evidence now. But other public bodies contemplating a section 6(2) argument are reminded of this necessity.

The distinction between private communications and public documents

As noted above, John Dixon, Secretary to the Board of Directors of the BCCLA, raised some important issues about the need to examine archived voice-mail and e-mail held by public and private institutions in terms of whether it is truly public or private with respect to the Act, that is whether they are institutional or private documents. He refers particularly to records generated by employees of public bodies using modem communications from their homes:

> This is not to say that any and all e-mail communications within institutions are private, or ought to be treated as private, or as not forming part of the working documentation on the institution. It is, rather, to say that the *distinction* between institutional documents and private communications is, for now at least, fuzzy, and individuals ought, in this unresolved environment, be able to protect their own--and others'-- privacy by deleting e-mail they do not wish to be subject to access by a search of institutional records.

I agree with the BCCLA's identification of the problem:

> Protocols may need to be developed in order to ensure that the use of electronic media of communication do not evolve in ways that undermine the goals sought by access to information and privacy statutes and commissions... Users of electronic media may need to be sensitized to the extent to which their communications are accessible to others both in real time and as a result of some future search.

The BCCLA urges me to take a lead in coordinating such efforts. I will attempt to deal with aspects of these issues in Orders such as this one and also encourage the Chief Information Officer of the province to continue his coordinating activities in this regard. For this purpose, I will send the BCCLA's submission directly to the Chief Information Officer.

The submission of PSERC made comparable points, although it appears to regard some of them as settled rather than problematic. Thus I regard the following statements as requiring further inquiry and deliberation in terms of establishing government policy on deleted electronic records, including e-mail, as my discussion above has indicated:

> Retrieval of stored e-mail is costly because the record is not easily found. Government has no statutory or other requirement to save or restore electronic e-mail.
>
> In practical terms, e-mail is considered to be on the communication continuum between conversation and document. As the Employer, we presently respect our employees' right to privacy on the telephone (i.e. we do not tape and record phone conversations, for example).
>
> We also wish to point out that the interpretation of 'record' versus 'transitory document' will vary between public bodies as it is determined by the nature of their business, and we believe it is vital to recognize those differences.
>
> ...An e-mail which has been deleted at the end of the business day, is not captured by a backup system. Once restored, the system will not know that a record does not exist until what does exist has been determined. There is no guarantee that deleted e-mail is even on the system especially if deleted prior to a backup.

Conclusion

When a request for access is received, a public body has an obligation under section 6 of the Act to locate any records, manual or electronic, that are responsive to the request. For electronic records, this should include extant data that have been deleted from a system but are still readily retrievable, and records on archive or backup tapes that are also readily retrievable without excessive efforts. I realize that the latter two categories may not be very common in actual practice, given the current state of recovery software and backup systems. But as I recognized in Order No. 73-1995, the pace of technological change is breathtaking. Public bodies have an obligation to try to ensure that applicants receive any records that they are entitled to when an access request is actually received.

But I reiterate that unless a particular e-mail system in fact makes it relatively easy to retrieve deleted records from a wastebasket or archived or backup tapes, then there is no obligation on a public body to make the effort under section 6 of the Act. See Order No. 73-1995.

Submission of the mediation record to an inquiry

The Ministry included in its submission excerpts from a letter from a Portfolio Officer who attempted to mediate this request for review. The applicant did not object to this but stated that he did not have the "legal education nor experience" to assist in determining whether the referenced letter from the Portfolio Officer should be reviewed by the Commissioner. He also indicated that "all relevant evidence should at least be considered by the Commissioner." I interpret his statements to mean that he would be content for me to determine whether or not I should review this information. The policies and procedures of my Office do not allow a party to include in a submission any record generated by my Office during the mediation process, unless that party has obtained the written consent of the other parties to do so. This policy is based on the principle that mediation is a separate process which requires that information passing among the parties and the mediator be kept confidential. The rationale for this is, first, to ensure candour and the best opportunity for settlement and, second, to ensure that I am not influenced in my decisions in a subsequent inquiry by the opinions of my staff. Where the parties agree that this information ought to go before the Commissioner, as in the present case, the rationale for the policy no longer applies.

In this inquiry, while the applicant did not explicitly consent, he did express the view that I should "maintain a level of administrative flexibility in determining relevancy or admissibility of records." Thus I have considered the entire submission of the Ministry in this case. However, I strongly encourage all parties in an inquiry to comply with my Office's policy before including any such material in a submission.

8. The complaint

I find that the Ministry failed to consider whether it could retain any of the backup tapes in existence at the time of the applicant's request. Thus the complaint has, in part, been

substantiated. To ensure that these issues are addressed at the time a future request for information is made, I request the Ministry to develop appropriate policies for these e-mail issues.

9. Order

I find that the Ministry of Agriculture, Fisheries and Food was not required to create a record under section 6(2) of the Act and thus was authorized to refuse access to the records requested by the applicant.

Under section 58(2)(b) of the Act, I confirm the decision of the Ministry of Agriculture, Fisheries and Food to refuse access to the records requested by the applicant.

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David H. Flaherty
Commissioner

September 3, 1996