

**Office of the Information and Privacy Commissioner  
Province of British Columbia  
Order No. 301-1999  
March 11, 1999**

**INQUIRY RE: An applicant's request to the Ministry for Children and Families for a deleted e-mail message and the Ministry's duty to search back-up tapes**

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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 (the Office) on February 8, 1999 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of an applicant's request for review of a decision by the Ministry for Children and Families (the Ministry) to refuse access to a deleted electronic mail (e-mail) message.

**2. Documentation of the inquiry process**

The applicant wrote to the Ministry on July 6, 1998 to request "a copy of an Email that was sent to me on November 23, 1995 at approximately 11:00 a.m." The Ministry responded on October 1, 1998 by telling the applicant that he could not be given access, because the record "does not exist." The applicant requested a review of this response on October 19, 1998. Both parties consented to an extension of the original ninety-day deadline of January 18, 1999. On January 15, 1999 a Notice of Written Inquiry was issued for an inquiry to be held on February 8, 1999.

**3. Issue under review and the burden of proof**

The issue before me is the Ministry's application of section 6(1) of the Act in responding to the applicant's request.

Section 57 of the Act, which establishes the burden of proof on parties in an inquiry, is silent with respect to a request for review about the duty to assist under

section 6 of the Act. In Order No. 110-1996, June 5, 1996, I decided that the burden of proof is on the public body.

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 Ministry for Children and Families' case**

The Ministry submits that the only issue before me is whether it has a duty to search its backup tapes for the record requested by the applicant. Its general position is that it does not have a duty to do so under section 6(1) of the Act. I have discussed its detailed submissions below.

**5. The applicant's case**

The applicant states that he received an e-mail message from a fellow Ministry employee on a certain date. He is evidently now before the Labour Relations Board for a purpose for which he now requires a copy of this record. The applicant argues that this record is still retrievable.

**6. Discussion**

This particular inquiry involves a request from a former employee of the Ministry for a copy of an e-mail message, perhaps of a "personal" nature, that he received from a fellow employee on or about a certain time on November 23, 1995. The sender has submitted, in an affidavit, that she does not remember sending the applicant an e-mail message fitting the description provided to her by the Ministry's freedom of information officer. She deposes in her affidavit that all e-mail messages that she had sent or received prior to that date were deleted from her operating system on or about May 30, 1996.

The applicant contends that the facts of this inquiry are distinguishable from previous cases, because he has provided information concerning the date and time that the e-mail message was sent. The fact that the applicant has provided details concerning the timing of the e-mail message does not address the underlying concern, which I addressed in those previous Orders, namely that deleted e-mail messages stored in backup records should not be treated under the same rules as records under the Act. It continues to be my view that, under normal circumstances, there is no requirement on the part of a public body to search backup records, at least in the context of present technology.

The Ministry relies, essentially, on my decisions in Order No. 73-1995, December 21, 1995, and Order No. 198-1997, November 20, 1997, which held that there is no obligation on the part of a public body, under the Act, to recover from a backup system a specific item that may be stored therein. Since these decisions remain clear in terms of my effort to apply the Act to such a record in dispute, I find no reason in the context of this inquiry to elaborate further.

I agree with the Ministry that a requirement to search backup tapes, under normal circumstances (such as exist in this inquiry), goes “far beyond” the “reasonable effort” mandated by section 6(1) of the Act. I do not accept that the circumstances in this case are exceptional in any way. There is no evidence to support the assertion of the applicant that this Ministry has a backup system that would make a specific record easily retrievable. I do think that the Ministry is being excessive in arguing that it would never be reasonable under section 6(1) to search backup systems for a particular record. As I said in Order No. 73-1995, pp. 9-10, specific technology in use, or available to a public body in future, might make it reasonably easy and inexpensive to recover a specific record. That is not the case at present in this Ministry. Thus it might become “reasonable” to require a public body to do so on the basis of section 6(2), which the Ministry continues to assert is not the issue before me in this inquiry.

In the absence of a duty to search backup tapes, the question of whether there was an obligation to create a record from backup tapes under section 6(2) does not arise.

## **7. Order**

I find that the Ministry for Children and Families has discharged its duty within the meaning of section 6(1) of the Act. Under section 58(3)(a), I require the Ministry for Children and Families to perform its duty to assist the applicant. However, since I have found that there is no requirement to search backup tapes, I find that the Ministry has complied with this Order and has discharged its duty under section 6(1).

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David H. Flaherty  
Commissioner

March 11, 1999