

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

INTERIM ORDER PO-4449-I

Appeal PA23-00098

Ministry of Municipal Affairs and Housing

October 13, 2023

Summary: The Ministry of Municipal Affairs and Housing (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the withdrawals of land from the Greenbelt Plan. To date, the ministry has not issued a final access decision in response to the request. An appeal was made to the IPC and Appeal file PA23-00098 was opened to determine the issue of the ministry's deemed refusal under section 29(4) of the *Act*.

In light of the Auditor General's observations in her *Special Report on Changes to the Greenbelt*, the appeal file was moved to the adjudication stage. In this interim order, the adjudicator finds that the Auditor General's observations regarding the use of personal email accounts by political staff and their record retention practices, provide reasonable grounds for the belief that records responsive to the appellant's request may be irretrievably lost or destroyed. Accordingly, the adjudicator orders the ministry to take steps to secure the preservation and recovery of responsive records within its custody or control, in accordance with its duties set out in section 10.1 of the *Act* and the *Archives and Recordkeeping Act*, 2006.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990., c. F31, as amended, sections 10.1, 26, 29 and 54; *Archives and Recordkeeping Act*, 2006, S.O. 2006, c. 34, Sched. A., Parts I and III.

Investigation Reports Considered: *Deleting Accountability: Records Management Practices of Political Staff, A Special Investigation Report*, IPC, June 5, 2013.

Decisions and Orders Considered: PHIPA Decisions 23 and 221, Order M-1053 and Order MO-3281.

Cases Considered: *RJR-MacDonald Inc. v. Canada (A.G.)* [1994] 1 SCR 311, 1994 Can LII 117 (SCC), *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306.

OVERVIEW:

[1] The Ministry of Municipal Affairs and Housing (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

1. Records in relation to withdrawals of land from the Greenbelt Plan, including:
 - All draft/redlined greenbelt plan policies;
 - All draft/redlined greenbelt plan mapping;
 - All staff reports providing risks/analysis and justifications for modifications or changes to the greenbelt;
 - All decision packages, including modification analysis;
 - All analysis of the statement of environmental values, all decision summaries;
 - All memoranda, emails or minute notes from Premier's Office, Minister's Office and Ministry officials regarding modifications and changes; and
 - Information and data on the quantum of expansion lands and employment conversions.
2. This request includes documentation of any kind in all formats including emails, USB drives and SharePoint or another file sharing service.
3. This request does not include information submitted to the ministry by Niagara, Hamilton, Halton, Waterloo, Peel, York or Durham Regions, communications materials, publicly available documentation or purely scheduling correspondence.

For the time period from September 1, 2022 to November 18, 2022.

[2] The ministry received the request on November 18, 2022 and on December 19, 2022 issued a time extension under section 27 of the *Act*. As a result of the time extension, the deadline for the ministry to issue a final access decision was January 18, 2023.

[3] On January 26, 2023, the ministry issued an interim decision, which included a fee estimate and indicated that partial access may be granted to records.

[4] The requester, now appellant, appealed to the Information and Privacy Commissioner of Ontario (IPC) on the basis that the ministry had failed to issue a final access decision and was in a position of deemed refusal.

[5] Appeal file PA23-00098 was opened and assigned to the acting adjudicator. The acting adjudicator decided to conduct an inquiry and sought and received representations from the ministry.

[6] As a result of the ministry's representations in relation to its time estimate for issuing a final decision and in order to ensure no further delays in processing the appellant's request, the acting adjudicator ordered the ministry to issue a final access decision to the appellant by September 15, 2023. Accordingly, the acting adjudicator issued Order PO-4434 on August 28, 2023.

[7] The ministry advises that it has received an unprecedented number of access requests in relation to the Greenbelt Plan amendment.

[8] In August 2023, the Auditor General published her *Special Report on the Changes to the Greenbelt*. This report reviewed the process used to select land for withdrawal from the Greenbelt Plan. The withdrawal of lands from the Greenbelt Plan is the subject matter of the appellant's request. The Auditor General reported observing during the audit that personal email accounts were used by political staff for communicating with lobbyists and external parties and that emails were regularly being deleted.

[9] The Auditor General made several recommendations at the conclusion of her report, including the following:

Records Retention (with a Focus on Emails)

6. Non-elected political public service staff receive formal training on records retention policy as per the *Archives and Recordkeeping Act, 2006*, clarifying which types of emails and other documents are required to be retained and what information needs to be included on meeting calendars.

Restriction on the Use of Personal Email Accounts for Government Business

7. Non-elected political public service staff receive reinforced communications on the inappropriate use of personal email accounts for government business with annual, formal documented attestation that this policy is being followed.¹

¹ *Special Report on Changes to the Greenbelt*, Appendix 8: Recommendations for the Secretary of the Cabinet and Chief of Staff in the Office of the Premier, at page 92.

[10] In a published response to the Auditor General's report, the Premier's Office accepted the recommendations that record retention policies for political staff communications need reinforcing and that attestation processes be used to confirm the exclusive use of government email platforms.²

[11] The observations in the Auditor General's report raise concerns regarding the preservation of records within the ministry's custody or control that are responsive to the appellant's request pending the processing of the request and the determination of any issues in proceedings that may result from the ministry's access decision.

[12] In light of these concerns, appeal file PA23-00098 has been moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry and exercise associated powers of inquiry.

[13] For the reasons set out below, I am making this order on an urgent basis to secure the preservation of records relating to the amendment of the Greenbelt Plan within the ministry's custody or under its control pending the processing of the appellant's request. More specifically, I am ordering the ministry to take all reasonable measures to preserve records responsive to the appellant's request, including any responsive emails or other communications held in the personal accounts of political staff, pending the processing of the request and determination of any further proceedings that may result from its access decision.

DISCUSSION:

The Governing Law

[14] The preservation of records is fundamental to the access regime of the *Act*. The IPC has held that the destruction of records after receipt of a request compromises the integrity of the access system.³

[15] Record deletion by political staff was the subject of a special investigation by the IPC in 2013, where the Former Commissioner, Ann Cavoukian, concluded:

[T]he practice of indiscriminate deletion of all emails sent and received by the former Chief of Staff was in violation of the *Archives and Recordkeeping Act, 2006* (ARA) and the records retention schedule developed by Archives of Ontario for ministers' offices. In my view, this practice also undermined the purposes of the *Freedom of Information and Protection of Privacy Act* (FIPPA), and the transparency and accountability principles that form the foundation of both Acts.

² *Special Report on Changes to the Greenbelt*, Response from the Government (Chief of Staff, Office of the Premier), at page 16-17.

³ Order M-1053.

[16] The *Archives and Recordkeeping Act, 2006*⁴ (*ARA*) is a cornerstone of the right of access enshrined in the *Act*. This is reflected in Part I of the *ARA*, which sets out its purposes, interpretation and application. The ministry is a public body within the meaning of the *ARA* and the public records it creates or receives are subject to the *ARA* duties relating to recordkeeping and record management practices.⁵

[17] Part III of the *ARA* contains provisions authorizing the Archivist of Ontario to prepare a records schedule that sets out, for a class of public records that a public body creates or receives, the length of time the records will be retained and the disposition of the records at the end of the retention period. Where the Archivist has not prepared a records schedule, the public body is required to prepare its own records schedule that is subject to the approval of the Archivist. Each public body is required to comply with the applicable record schedule. Further, public records may not be transferred, destroyed or otherwise disposed of except in accordance with the records schedules or the written consent of the Archivist.⁶ Section 15 of the *ARA* states that a public record may not be,

- a. destroyed or damaged;
- b. altered so as to delete information from it;
- c. made illegible;
- d. removed from the custody or control of a public body or the Archives of Ontario;
or
- e. concealed from a public body or the Archivist.

[18] In 2014, an institution's duties to ensure the preservation of records within its custody or control were reinforced by the enactment of section 10.1 of the *Act*, which states:

Every head of an institution shall ensure that reasonable measures respecting the records in the custody or under the control of the institution are developed, documented and put into place to preserve the records in accordance with any recordkeeping or records retention requirements, rules or policies, whether established under an Act or otherwise, that apply to the institution.

[19] The Supreme Court of Canada has adopted a two-part test on the question of whether a government institution has control of records that are not in its physical possession.⁷ Where the content of a record relates to a departmental matter and the

⁴ S.O. 2006, c. 34, Sched. A.

⁵ Part I of the *ARA* is reproduced as an Appendix to this Order.

⁶ *ARA*, at ss 11-14.

⁷ *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306.

institution could reasonably expect to obtain a copy of the record upon request, the Court has stated that the record will be found to be within the control of the institution.⁸

[20] In the Auditor General's *Special Report on the Changes to the Greenbelt*, the process used to select lands for the provincial government's amendment to the Greenbelt Plan, was the subject of a value-for-money audit and an assessment. As noted above, the Auditor General reported observing during the audit that personal email accounts were used by political staff and that emails were regularly being deleted. For the reasons set out below, I am satisfied that these observations are reasonable grounds for believing that records under the custody or control of the ministry and responsive to the appellant's request may be irretrievably lost or destroyed pending the processing of the request and the determination of any issues resulting from the ministry's access decision.

Use of personal email by political staff

[21] The Auditor General reported observing that political staff used their personal email accounts as a conduit for government email correspondence with lobbyists and other external parties.⁹ The Auditor General noted that this use of personal emails is contrary to Ontario Public Service cybersecurity guidelines. Section 4.14 of the report states:

It is important to note that any communication between lobbyists and political staff about government business is still subject to the [*Act*], and is not excluded from this act even if communication occurred on a personal email account.

[22] The ministry's obligation to take reasonable measures to preserve records under section 10.1 of the *Act*, includes all records within its custody or under its control. The appellant's request includes a request for access to records in email form regarding modifications or changes to the Greenbelt Plan. In light of the Auditor General's observation regarding the use of personal email by political staff, there are reasonable grounds for believing that records within the ministry's control and responsive to the appellant's request may include emails or other communications in the form of texts or other direct messaging held in the personal email accounts of political staff.

Deletion of emails by political staff

[23] The Auditor General also reported the need for reinforcement in the record retention policies for political staff communications. Section 4.15 of the report states:

⁸ See Order MO-3281, decided under the municipal version of the *Act*.

⁹ *Special Report on Changes to the Greenbelt*, Section 4.14 Use of Personal Email Accounts Contrary to Public Service Cybersecurity Guidelines, at page 67.

During the course of our audit, we observed that emails were regularly being deleted by political staff. However, email correspondence relating to the undertaking to make changes to the Greenbelt was not exempt from the Archives and Recordkeeping Act, 2006, (Recordkeeping Act) and should not have been deleted ...

The Recordkeeping Act governs the management, destruction and preservation of the electronic and paper records of public bodies. This ensures that records related to the activities of all public bodies are available and foster government accountability and transparency. The records schedule outlined in the Recordkeeping Act dictates how and when relevant public records are to be maintained, transferred, altered or destroyed.

The obligations around retaining and destroying public records apply to ministers, their political and office staff as well as ministry program area staff. Excluded records include ministers' personal, political caucus and constituency records. Exemptions to the records schedule are possible for: an access request made under the [Act]; requests by the Legislative Assembly; legal discovery or other proceedings; or public inquiries through *Public Inquiries Act, 2009*.¹⁰

[24] The appellant's request is for records relating to the withdrawal of land from the Greenbelt Plan. The Auditor General's audit of the process of selection of lands for withdrawal from the Greenbelt Plan is therefore related to the subject matter of the appellant's request. In my view, the Auditor General's observations about the record retention practices of political staff, specifically that emails were regularly being deleted by political staff, provides reasonable grounds for believing that records responsive to the appellant's request may be irretrievably lost or destroyed pending the processing of the request and determination of issues arising from the ministry's access decision.

Preservation and recovery of records

[25] The IPC has previously ordered, on an urgent basis, that steps be taken to ensure the security of records of personal health information under the *Protection of Personal Health Information Act (PHIPA)*.¹¹ Although not directly applicable to the preservation of general records under the *Act*, I am assisted by the principles referenced in these orders in my analysis of the issue of preservation and recovery of records in this appeal.

¹⁰ *Special Report on Changes to the Greenbelt*, Section 4.15 Record-Retention Policies for Political Staff Communications Needs Reinforcing, at pages 67-8. The exemptions to which the Auditor General refers require the public body to retain records for longer periods of time until the need to use them for other specified purposes has lapsed.

¹¹ PHIPA Decisions 23 and 221.

[26] In PHIPA Decision 23, the former Assistant Commissioner, Sherry Liang, issued an interim order to preserve records after considering the test for interlocutory injunctive relief set out in *RJR-MacDonald Inc. v Canada (A.G.)*.¹² This test is as follows:

First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[27] The preservation of records, including the recovery of deleted emails, pending the processing of the appellant's request under the *Act* is a serious issue. The ministry has indicated in its interim access decision to the appellant that, from its preliminary review of the records, it may decide to grant partial access to records. The preservation of records is fundamental to an institution's response to a requester's exercise of access rights under the *Act*. By the same analysis, the irretrievable loss or destruction of records undermines the purposes of the *Act* and its foundations of transparency and accountability.¹³

[28] In my view, the burden placed upon the ministry to take reasonable steps to preserve records pending the processing of the appellant's request is insignificant compared to the harm the appellant would suffer in the event that responsive records are irretrievably lost. The loss or destruction of responsive records would deny the appellant the opportunity to effectively exercise its right of access under the *Act*. In the case of records that are destroyed, this harm cannot be cured.

[29] In contrast, requiring the ministry to take steps to preserve responsive records that are within its custody or under its control, including measures to recover records, affirms the ministry's existing obligations under section 10.1 of the *Act* and under the *ARA*.

[30] For the reasons set out above, pursuant to section 54(3) of the *Act*, I order the ministry to take all reasonable measures to preserve records relating to the withdrawals of land from the Greenbelt Plan responsive to the appellant's request, pending the ministry's processing of the request and the determination of any proceedings that may result from the ministry's access decision. Where records responsive to the appellant's request and within the ministry's custody or control have been deleted, the measures to be taken by the ministry include taking reasonable steps to recover deleted records so that they are not irretrievably lost.

¹² [1994] 1 S.C.R. 311, 1994 Can LII 117 (SCC), at para 43. Irreparable harm at Part 2 of the three-part test includes harm that cannot be compensated for in damages.

¹³ *Deleting Accountability: Records Management Practices of Political Staff, A Special Investigation Report*, IPC, June 5, 2013.

ORDER:

1. I order the Ministry of Municipal Affairs and Housing to take steps to preserve records within its custody or under its control relating to the withdrawal of lands from the Greenbelt Plan (for the period from September 1, 2022 to November 18, 2022) pending the ministry's processing of the request and the determination of any proceedings that may result from the ministry's access decision. Such steps must include the ministry taking all reasonable measures to comply with its obligations set out in section 10.1 of the *Act* and the *Archives and Recordkeeping Act, 2006* in relation to these records.
2. In the event that the Ministry identifies records relating to the withdrawal of lands from the Greenbelt Plan (for the period from September 1, 2022 to November 18, 2022) within its custody or under its control that have been deleted or destroyed, I order the Ministry to take reasonable steps to recover such records pending its processing of the appellant's request and the determination of any proceedings that may result from the ministry's access decision.
3. In order to verify compliance with provisions 1 and 2 above, the ministry shall provide me with affidavits setting out the steps taken to preserve records, including the measures in place to ensure preservation and recovery of records in accordance with any recordkeeping or record retention requirements, rules or policies that apply to the ministry, pursuant to section 10.1 of the *Act* and the *Archives and Recordkeeping Act, 2006*.
4. The affidavits required under provision 3 above, shall be provided to me by **November 3, 2023**.

Original Signed by: _____
Katherine Ball
Adjudicator

_____ October 13, 2023

APPENDIX

Archives and Recordkeeping Act, 2006

PART I

PURPOSES, INTERPRETATION AND APPLICATION

Purposes of the Act

1 The purposes of this Act are,

- a. to ensure that the public records of Ontario are managed, kept and preserved in a useable form for the benefit of present and future generations;
- b. to foster government accountability and transparency and to support effective government administration by promoting and facilitating good recordkeeping by public bodies; and
- c. to encourage the public use of Ontario's archival records as a vital resource for studying and interpreting the history of the province.

Interpretation

2 (1) In this Act,

"Archivist" means the Archivist of Ontario appointed under section 8; ("archiviste")

"Deputy Minister" means the deputy minister to the Minister; ("sous-ministre")

"legislative body" means,

- a. the Legislative Assembly or a committee of the Legislative Assembly,
- b. an officer of the Legislative Assembly or of the Legislature, or
- c. an officer or servant of the House; ("organisme législatif")

"Minister" means the member of the Executive Council who is assigned the administration of this Act under the *Executive Council Act*; ("ministre")

"prescribed" means prescribed by regulation; ("prescrit")

"private record" means a record that is not a public record; ("document privé")

"public body" means,

- a. the Executive Council or a committee of the Executive Council,
- b. a minister of the Crown,
- c. a ministry of the Government of Ontario,
- d. a commission under the *Public Inquiries Act, 2009*, or
- e. an agency, board, commission, corporation or other entity designated as a public body by regulation; (“organisme public”)

“public record” means a record made or received by a public body in carrying out the public body’s activities, but does not include constituency records of a minister of the Crown or published works; (“document public”)

“record” means a record of information, including data, in any form, including a record made, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic, optical or any other means, but does not include a mechanism or system for making, sending, receiving, storing or otherwise processing information; (“document”)

“regulation” means a regulation made under this Act. (“règlement”)

Record of archival value

(2) For the purposes of this Act, a record is a record of archival value if,

- a. it relates to,
 - i. the origin, development, organization or activities of a public body, a legislative body, a court or any other person or entity,
 - ii. the development or implementation of a law or of a policy or decision of a public body, a legislative body or any other person or entity, or
 - iii. the history of Ontario or of any part of Ontario;
- b. it has the characteristics of a record of archival value that are prescribed;
- c. it is designated as a record of archival value by regulation; or
- d. it belongs to a class of records prescribed as being a class of records of archival value.

Laws re privacy and access, privileges

3 (1) Nothing in this Act limits the operation of any law or privilege governing the protection of privacy or access to information in respect of records held by public bodies and legislative bodies.

Same

(2) Nothing in this Act limits the operation of any other privilege that may exist in respect of a record transferred to the Archivist or to another person or entity under this Act.

Orders of Assembly and courts, statutory provisions

4 Nothing in this Act shall be taken or deemed to authorize the retention,

transfer, destruction or other disposition of any public record in contravention of an order of a court or of the Legislative Assembly or in contravention of an express provision in any other Act.

Crown bound

5 This Act binds the Crown.