

Information and Privacy Commissioner,  
Ontario, Canada



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

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## FINAL ORDER PO-4505-F

Appeal PA23-00098

Ministry of Municipal Affairs and Housing

April 08, 2024

**Summary:** The Ministry of Municipal Affairs and Housing has received a high volume of requests for access to records relating to the decision to amend the Greenbelt Plan. This appeal arises from one of those requests, in which there was delay in issuing a final access decision within the time prescribed by the *Act*.

The Auditor General's *Special Report on Changes to the Greenbelt* included observations regarding the use of personal email accounts by political staff and the deletion of emails. In light of these published observations, and on the IPC's own initiative, the adjudicator issued Interim Order PO-4449-I and ordered the ministry to take steps to secure the preservation and recovery of records responsive to the appellant's request.

The ministry provided the adjudicator with affidavit evidence explaining measures in place to preserve records relating to amendments to the Greenbelt Plan.

In this final order, the adjudicator is satisfied that measures are in place to secure the preservation of records relating to the subject matter of the access request giving rise to this appeal. Regarding the recovery of responsive records, the adjudicator accepts the ministry's evidence of the steps taken to recover records relating to government business contained in personal email and messaging accounts of former staff and acknowledges the limitations to retrieving data that may have been permanently deleted prior to such measures being taken. The adjudicator makes recommendations to enhance compliance and accountability regarding record retention practices going forward.

**Statutes Considered:** *Freedom of Information and Protection of Privacy*, R.S.O. 1990, c. F31, as amended, section 10.1; *Archives and Recordkeeping Act*, 2006, S.O. 2006, c. 34, Part III.

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

## **OVERVIEW:**

[1] As described in Interim Order PO-4449-I, 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. The request includes records relating to Greenbelt Plan policies and mapping, staff reports and decision packages, analyses of statements of environmental values, records from the Premier's Office, Minister's Office and Ministry officials regarding the modifications and information and data on the quantum of expansion lands and employment conversions. The request covers records in all formats including emails, USB drives and file sharing services but not information submitted to the ministry by specified regions. The time period for the request is from September 1, 2022 to November 18, 2022.

[2] The ministry issued an interim access decision indicating that partial access may be granted to responsive records. However, the ministry failed to issue a final access decision within the time period prescribed by the *Act* and the requester (now appellant) appealed to the Information and Privacy Commissioner of Ontario (the IPC). Appeal file PA23-00098 was opened and assigned to the acting adjudicator. The acting adjudicator found the ministry to be in a position of deemed refusal and issued Order PO-4434 on August 28, 2023, ordering the ministry to issue a final access decision to the appellant.

[3] The process used to select land for withdrawal from the Greenbelt Plan was the subject of an audit by the Office of the Auditor General of Ontario (the Auditor General). In the Auditor General's *Special Report on the Changes to the Greenbelt* (the Auditor General's report), she noted that personal email accounts were used by political staff for communicating with lobbyists and external parties and that emails were regularly being deleted.

[4] The Office of the Integrity Commissioner of Ontario (the Integrity Commissioner) also published a report following an investigation into whether the responsible minister's role in the decision to change the Greenbelt Plan contravened the *Members' Integrity Act*, 1994.

[5] As noted in Interim Order PO-4449-I, the Auditor General's published observations raised concerns regarding the preservation of records pending the processing of the appellant's request and the determination of any issues arising from the ministry's final access decision.

[6] In paragraphs 27 and 28 of Interim Order PO-4449-I, I summarised the importance of the preservation of records to the effective exercise of the appellant's access rights under the *Act*, where I stated:

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.

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.

[7] In Interim Order PO-4449-I, I found that the Auditor General's observations regarding the use of personal email accounts by political staff and the deletion of emails provided a reasonable basis for believing that records responsive to the appellant's request may be irretrievably lost or destroyed. As a result, I ordered 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 provisions of the *Archives and Recordkeeping Act, 2006* (the *ARA*). To verify that the ministry had done so, I ordered the ministry to provide me with affidavit evidence setting out the measures taken.

[8] On November 3, 2023, the ministry provided me with affidavit evidence about its record retention practices and the measures in place to secure the preservation of records pending the processing of the appellant's and other access requests made under the *Act*. In addition, the ministry provided affidavit evidence explaining the limitations to retrieving data that may have been permanently deleted prior to these measures being put in place. The ministry has requested that portions of its affidavit be treated as confidential pursuant to Practice Direction 7 to the *IPC Code of Procedure*.

[9] Interim Order PO-4449-I was made on the IPC's own initiative following the Auditor General's observations and on an urgent basis to secure the preservation of records. I have exercised my discretion not to share the ministry's affidavit with the appellant nor seek representations in response to it since this is a separate matter from the appellant's ongoing appeal. Accordingly, it is not necessary to decide whether these portions of the affidavit meet the confidentiality criteria in Practice Direction 7. For present purposes, I will refer to these portions in summary only.

[10] In this final order and for the following reasons, I am satisfied that there are

measures in place to secure the preservation of responsive records relating to the changes to the Greenbelt plan pending the processing of the request and the determination of issues arising from the ministry's final access decision. I also acknowledge the limitations to retrieving email records that may have been permanently deleted prior to the preservation measures being put in place.

[11] As a result of the ministry's evidence, I make recommendations to enhance compliance with record retention obligations in the Minister's and the Deputy Minister's offices and accountability for record management practices.

## **DISCUSSION:**

[12] The sole issue outstanding in this appeal is the preservation of records pending the processing of the appellant's request and the determination of any proceedings arising from the ministry's final access decision.

[13] As already noted, the preservation of records is fundamental to the access regime of the *Act* and the IPC has held that the destruction of records after receipt of a request is a concerning matter that compromises the integrity of the access system.<sup>1</sup>

[14] As a public body within the meaning of the *ARA*, the ministry has duties relating to recordkeeping and record management practices. 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.

[15] The *ARA* also provides that 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.<sup>2</sup>

[16] 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

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<sup>1</sup> Order M-1053.

<sup>2</sup> *ARA*, sections 11-14.

or policies, whether established under an Act or otherwise, that apply to the institution.

[17] In Interim Order PO-4449-I, I found that the Auditor General's observations provided 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.

[18] From my review of the affidavit evidence provided by the ministry on November 3, 2023, I am satisfied that since the Auditor General began her audit process and as part of that process and the inquiry by the Integrity Commissioner in early 2023, there are measures in place to preserve records relating to the amendment to the Greenbelt Plan that may be responsive to request received under the *Act*.

[19] In addition, I am satisfied that the ministry has taken steps to retrieve records related to government business contained in personal emails or messaging accounts of a former political staff member. I also accept the ministry's evidence explaining the limitations of being able to retrieve records that may have been permanently destroyed before measures to preserve records were put in place.

### **The ministry's evidence**

[20] The ministry provided me with an affidavit from the Assistant Deputy Minister in its Planning and Growth Division. The Assistant Deputy Minister states that they were personally involved in "the Greenbelt project" in fall 2022 and the ministry's response to the Auditor General's audit and the Integrity Commissioner's inquiry processes. The Assistant Deputy Minister also had direct involvement with the ministry's responses to requests made under the *Act* for access to records relating to the Greenbelt changes.

[21] The affidavit provides evidence of: (i) the ministry's record retention practices; (ii) the steps taken to locate records upon receiving notification of the request giving rise to this appeal; (iii) the collection and preservation of records as part of the Integrity Commissioner's inquiry and the Auditor General's audit; (iv) steps taken in response to the Auditor General's published recommendations; (v) steps taken to recover records related to government business contained in personal emails; and (vi) the recovery of deleted data from the Ontario Public Service (OPS) email system.

### ***Record Retention Schedules***

[22] The ministry states that its record retention schedules have been developed in accordance with the requirements of the *ARA*. There are common schedules for the

Minister's Office<sup>3</sup> and the Deputy Minister's Office, which are applicable to all ministers' and deputy ministers' offices, and specific schedules for branches within the Planning and Growth Division. The common schedules were approved and signed by the Archivist of Ontario in March 2015. The ministry states that the Deputy Ministers' Office schedule and the common schedule for branches within the Planning and Growth Division were prepared in 2008 and most recently reviewed in 2022.

[23] The ministry explains that the schedules identify categories of records and provide the length of time that records in each category are to be retained and events that can trigger transfer or disposition of records. These schedules provide that records should only be disposed of in accordance with an approved records schedule.

[24] The ministry relies upon these schedules to demonstrate its adherence to the ARA and section 10.1 of the *Act*.

[25] Following the release of the Auditor General's report, the ministry states that all Chiefs of Staff in ministers' offices and all Deputy Ministers received a memorandum from the Premier's Chief of Staff and the Secretary of the Cabinet reinforcing the need to preserve records in accordance with existing record retention policies. The memorandum also highlighted that materials received from third parties must be documented and that only government email accounts must be used for work related emails.

### ***Notification of Access Requests***

[26] The ministry explains that it received the request giving rise to this appeal on November 18, 2022. Its Senior Information Management and Policy Advisor advised all ministry divisions of the request and asked for confirmation as to whether the division was likely to hold responsive records.

[27] Staff in the Deputy Minister's Office advised the Minister's Office of the receipt of the appellant's request. The ministry explains that since November 2022, it has received a high volume of access requests made under the *Act*. The ministry estimates that it has received approximately 330 access requests since November 2022, including 69 requests during November and December 2022. The ministry states that over 90 requests are related to the Greenbelt plan. The majority of these requests are unique with different scopes and covering different timeframes. In January 2023, a working group met to discuss the requests relating to the Greenbelt plan, including the request giving rise to this appeal.

[28] The ministry explains that as it began the process of searching for records responsive to the appellant's request, it received notification of the Integrity Commissioner's inquiry and the audit being conducted by the Auditor General. The same

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<sup>3</sup> These schedules are available at [https://www.archives.gov.on.ca/en/recordkeeping/documents/common\\_records%20Schedule\\_Ministers\\_Public\\_Records\\_March\\_2015.pdf](https://www.archives.gov.on.ca/en/recordkeeping/documents/common_records%20Schedule_Ministers_Public_Records_March_2015.pdf).

team of staff were involved in responding to the access requests and the two investigative processes. This team of staff drawn from the Deputy Minister's Office, the ministry's divisions and the Communications and Legal Services Branches have access to the records collected as part of the ministry's responses to the access requests and to the external inquiry and audit.

***Ministry's document collection process - Integrity Commissioner and Auditor General's processes***

[29] In January 2023, the ministry was notified of the Integrity Commissioner's inquiry under section 31(1) of the *Members' Integrity Act* and the Auditor General's audit regarding the process by which land was selected for removal from the Greenbelt Plan. The Integrity Commissioner and the Auditor General requested that the ministry provide information and documents to their respective offices as part of their processes.

[30] In response to the Integrity Commissioner's requests during February 2023, staff in the Deputy Minister's Office, Planning and Growth Division, Municipal Services Division and Legal Services Branch collected and produced the requested records to the Integrity Commissioner.

[31] In response to the Auditor General's request, the ministry established an internal SharePoint site dedicated to the collection and maintenance of records to be produced as part of the audit process. The ministry explains that this is standard practice as part of an audit to ensure that requests received by the ministry are tracked and documents produced to the Auditor General are organised and preserved. This work was carried out by the ministry's audit working group with direction from the team of staff described above.

[32] The ministry explains that beginning in February 2023, records provided by individuals in the Deputy Minister's Office, Planning and Growth Division, Municipal Services Division, Communications Branch, Legal Services Branch and Minister's Office were uploaded to the internal Ministry SharePoint site. This work was done by the Ministry's audit working group. The uploading of records to the Ministry's internal SharePoint site continued over a period of months.

[33] The ministry states that the records collected for the Integrity Commissioner's office were also uploaded to the internal SharePoint site.

[34] The ministry provides estimates of the number of records that were uploaded to its internal SharePoint site and provides descriptions of the type of records, their format and examples of the subject matter of the records.

[35] The ministry describes how the records collected as part of the Auditor General's audit process on the internal SharePoint site were shared with the Auditor General's office. These records are being preserved on the ministry's SharePoint site for the purposes of conducting searches in response to access requests made under the *Act*.

[36] The ministry states that access to its internal SharePoint site is restricted to specified individuals for the purpose of uploading records and providing records to the Integrity Commissioner's office and the Auditor General's office.

[37] The Assistant Deputy Minister states that they reviewed the information and documents on the internal SharePoint site prior to signing the affidavit on November 2, 2023, and confirms that the site continues to preserve information and documents related to the Greenbelt amendment.

[38] The ministry explains the steps taken by the Ministry of Public and Business Service Delivery's Infrastructure Technology Services (ITS) to extract copies of Ontario.ca email mailboxes of a number of current and former staff members and employees involved in the work to amend the Greenbelt Plan. The ministry describes when these data extractions were carried out and the files provided to the Auditor General's office.

[39] In addition, the ministry describes the steps taken by ITS to ensure the integrity of the extracted copies of the email mailboxes. This evidence includes details of the format of the extracted files and methods used to verify that files have not been tampered with. The ministry explains that extracted copies of the Ontario.ca mailboxes do not contain any data that may have been permanently deleted prior to the copies of the mailboxes being made.

[40] The extracted data is stored with ITS. The Assistant Deputy Minister states that at the time of signing the affidavit, they had requested that copies of the stored data be provided to the ministry for the purposes of conducting searches for records in response to the access requests made under the *Act*, including the request giving rise to this appeal.

### ***Steps taken to recover emails from political staff***

[41] The ministry explains that on October 18, 2023, the Director of the Ministry's Corporate Services Branch requested access to Ontario.ca email mailboxes of a number of former staff members in the minister's office. This access was requested for the purposes of conducting searches for records responsive to access requests received under the *Act*. On October 19, 2023, ITS granted access to the requested mailboxes.

[42] The ministry also describes steps taken to retrieve any records related to government business contained in the personal email or messaging accounts of a former political staff member from the minister's office.

### ***Recovery of deleted data***

[43] The ministry's affidavit includes evidence relating to its ability to recover deleted data and its attempts to recover records relating to the amendment to the Greenbelt. This evidence is based upon information provided by ITS's Senior Manager and Chief Information Officer/Assistant Deputy Minister.



[44] The ministry explains that when a user deletes an item in the OPS email system using one of the local applications, this moves the item from the folder in which it was stored to the "Deleted Items" folder, where it remains for 30 days. If no other action is taken by a user, the item remains recoverable for the 30-day period. Items are recoverable by accessing the mail account.

[45] If a user empties the Deleted Items folder or deletes an item from that folder, then the deleted item(s) move to the "Recover Deleted Items" folder for 30 days. If no other action is taken by a user, the deleted item is recoverable from this folder during the 30-day period. Deleted items are recoverable via access to the mail account.

[46] The ministry explains that when the 30-day period expires, or if a user manually deletes items from the Recover Deleted Items folder before the expiry of the 30-day period, the item is deleted from the OPS Exchange online system. Once deleted from the OPS Exchange online system, data is no longer recoverable by ITS staff.

[47] The ministry states that as part of its searches of extracted data stored by ITS described in paragraph 40 above, it will conduct searches for responsive records in the Deleted Items folders and Recover Deleted Items folders of the extracted Ontario.ca mailboxes.

### **Analysis and finding**

[48] I am satisfied that the ministry's affidavit is from an individual who has had direct involvement in the collection of records in response to access requests made under the *Act* and the ministry's response to the Auditor General's audit and the Integrity Commissioner's inquiry processes.

[49] The Auditor General's observations regarding the use of personal emails by political staff and the regular deletion of emails raised concerns regarding the preservation of records in the context of access to information under the *Act*. The preservation of records is essential to the effective exercise of access rights under the *Act* (including the right of appeal to the IPC) and the principles of transparency and accountability upon which they are based.

[50] For the reasons that follow, I am satisfied that steps have been taken to secure the preservation of records relating to the decision to amend the Greenbelt plan and that may be responsive to the request giving rise to this appeal. For the most part, these measures have been taken by the ministry as part of its response to the Auditor General's audit and, to a lesser extent, the inquiry by the Integrity Commissioner and access requests made under the *Act*.

[51] In my view, the creation of an internal SharePoint site to which records were uploaded in the early stages of the Auditor General's audit process achieved timely collection of potentially responsive records. In addition, restricting access to the SharePoint site to specified ministry personnel for specified purposes provides a degree

of security regarding the preservation of records.

[52] I accept the ministry's evidence about the volume of access requests that it has received following the announcement of the government's decision to amend the Greenbelt plan and that, by November 2023, over 90 requests were for access to information relating to the decision. The ministry's evidence is that these requests, together with the audit and inquiry processes, relate to the same subject matter and involve similar records. I have reviewed the request for records received by the ministry from the Auditor General, which is reproduced in the ministry's affidavit. I am satisfied that the subject matter of the Auditor General's request is the same as the request giving rise to this appeal, namely records relating to the withdrawal of lands from the Greenbelt.

[53] Notwithstanding the measures in place to secure preservation of records as part of the audit and inquiry processes and in response to requests made under the *Act*, these steps may not have successfully addressed concerns regarding the irretrievable loss of responsive records.

[54] However, I make no finding regarding whether the measures in place to secure preservation of the records on the ministry's internal SharePoint site were adequate to preserve *all* records in the ministry's custody or control that are responsive to the request giving rise to this appeal. This issue is not presently before me but will be addressed as part of the substantive appeal on the merits.

### ***Personal emails of political staff***

[55] The Auditor General observed that political staff used their personal email accounts as a conduit for government email correspondence with lobbyists and other external parties.<sup>4</sup> The ministry describes the steps taken to retrieve these records from a former staff member. However, the ministry has not retrieved any additional records. Accordingly, there remains a risk that responsive records held in personal email accounts of former staff may be irretrievably lost.

[56] The IPC has previously issued guidance to institutions on managing staff use of instant messaging and personal email accounts to do business.<sup>5</sup> This guidance emphasizes the importance of mitigating the risk of records held in personal email or messaging accounts being irretrievably lost. The IPC's strong recommendation is that institutions prohibit staff from using personal accounts for business purposes.

[57] I acknowledge that this message has been reinforced by the Premier's Chief of Staff and the Secretary of the Cabinet in their memorandum to all Chiefs of Staff in ministers' offices and all Deputy Ministers directing them and their staff to use only

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<sup>4</sup> *Special Report on Changes to the Greenbelt*, Section 4.14 Use of Personal Email Accounts Contrary to Public Service Cybersecurity Guidelines, at page 67.

<sup>5</sup> *Instant Messaging and Personal Email Accounts: Meeting Your Access and Privacy Obligations* IPC Guidance, June 2016

government email accounts for work related emails.

***Deleted emails on OPS accounts***

[58] Regarding the deletion of emails by political staff, I accept the evidence from the ministry regarding limitations to retrieving data, including email data, that has been permanently deleted from OPS email accounts. However, this position underscores the importance of effective and up to date record retention schedules, as required by the *ARA*.

[59] The Auditor General noted that email correspondence relating to the ministry's undertaking to make changes to the Greenbelt was not exempt from the *ARA* and should not have been deleted.<sup>6</sup>

[60] In a previous investigation into the record management practices of political staff ("Special Investigation Report, 2013")<sup>7</sup>, the IPC reviewed whether deleted emails were retrievable from back-up tapes of electronic records or archiving systems in the office of the then-Minister of Energy. The evidence of the ITS representative summarised in Special Investigation Report, 2013 reflects similar evidence as that provided to me in this appeal. It appears that now, as in 2013, permanently deleted emails are irretrievable unless a back-up copy has been retained. There is no evidence before me that back-up copies of OPS email mailboxes are made on a regular basis.

[61] It is beyond the scope of this appeal to make specific findings about political staff compliance with their duties under the *ARA* or the approved record retention schedules. However, the ministry's affidavit evidence that "records can only be disposed of in accordance with an approved records schedule" appears to be at odds with the Auditor General's observation and the information from ITS regarding the permanent deletion of email data in OPS email accounts. Ultimately, it is not the ministry's email back-up practices but rather its response to the Auditor General's audit that has resulted in extracted data from OPS email accounts being preserved to minimise the risk of records being irretrievably lost or destroyed for present purposes.

[62] In Special Investigation Report, 2013, the IPC made recommendations reinforcing the need for proper execution of retention schedules and ensuring compliance with schedules by all staff. From my review of the ministry's affidavit evidence provided in this appeal, I find those recommendations are as relevant today as they were a decade ago. Accountability for implementing record management policies and procedures, together with the policies and procedures themselves, is vital to achieve the transparency that is the foundation of the access regime of the *Act*.

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<sup>6</sup> *Special Report on Changes to the Greenbelt*, Section 4.15 Record-Retention Policies for Political Staff Communications Needs Reinforcing, at pages 67-8.

<sup>7</sup> *Deleting Accountability: Records Management Practices of Political Staff*, A Special Investigation Report, IPC, June 5, 2013.

[63] I acknowledge that following the release of the Auditor General's report, the need to preserve records in accordance with record retention policies and the importance of only using government email accounts to conduct government business have been reinforced. I also note that in the public response to the Auditor General's report, the Premier's Chief of Staff confirmed changes to staff training to enhance awareness and adherence to proper record retention practices and exclusive use of government email.<sup>8</sup>

[64] In addition to these steps and to ensure the ongoing effectiveness of the ministry's record management policies and practices, I adopt and repeat the following recommendations made in Special Investigation Report, 2013.

[65] I recommend that the Minister's office and the Deputy Minister's office continue to:

- Develop policies and procedures to ensure that staff are fully trained regarding their records management and retention obligations;
- Emphasize that records retention requirements and the transparency purposes of the *Act* and the *ARA* are to be taken seriously and that there is an expectation that all staff will comply with relevant laws and policies; and
- Require a senior individual be designated to be accountable for the implementation of records management policies and procedures.

**ORDER:**

For the forgoing reasons, no further order is made and appeal file PA23-00098 is closed.

Original Signed by: \_\_\_\_\_  
Katherine Ball  
Adjudicator

April 8, 2024 \_\_\_\_\_

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<sup>8</sup> *Special Report on Changes to the Greenbelt*, at pages 16-17.