



Deleting Accountability: Record Management Practices of Political Staff –

A Special Investigation Report

June 4, 2013



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Executive Summary

One of the most important rights of citizens in a free and democratic society is access to information about government activities. Without a written record of how key government decisions are made, transparency is undermined and the basis for its policy choices may be shielded from public scrutiny.

In April 2013, my office received a complaint from a member of provincial parliament, alleging that Mr. Craig MacLennan, the former Chief of Staff to the former Minister of Energy, had a practice of routinely deleting all of his emails. The MPP took the position that this practice was inappropriate. Of particular concern was the fact that this former political staffer had been involved in discussions surrounding the cancellation of the gas plants which had attracted a great deal of media attention and was the subject of a review by the Legislature's Standing Committee on Justice Policy. The review by the Standing Committee on Justice Policy stemmed from a 2012 motion by the Estimates Committee, and a subsequent Speaker's ruling, for the production of documents related to the closure of the gas plants.

Upon receipt of this complaint, my office immediately launched an investigation. Of significant concern to both the complainant and my office was that, despite more than 56,500 pages of responsive records having been produced by the Ministry of Energy and the Ontario Power Authority (OPA), not one responsive record was produced by political staff in the Minister of Energy's office.

During the course of the interviews we conducted as part of our investigation, we met with the Secretary of the Cabinet. During this interview, we learned that in early 2013, staff in the former Premier's office had approached him, asking questions about how to permanently delete emails and other electronic documents. While the Secretary took steps to inform them of their obligations, I was very concerned with the prospect of inappropriate deletions of electronic records by political staff in the former Premier's office. As a result, I decided to expand the scope of my investigation.

Reflecting upon the issues raised by this investigation and the evidence we gathered, I became very concerned with the apparent lack of responsibility and accountability for records management practices within the offices of senior political leaders in this province.

Following my investigation, I concluded that the 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 (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. It truly strains credulity to think that absolutely no records responsive to the Estimates Committee motion and the Speaker's ruling were retained.

It is difficult to accept that the routine deletion of emails was not in fact an attempt by staff in the former Minister's office to avoid transparency and accountability in relation to their

work. Further, I have trouble accepting that this practice was simply part of a benign attempt to efficiently manage one's email accounts.

While I cannot state with certainty that there was inappropriate deletion of emails by the former Premier's staff as part of the transition to the new Premier in an effort to avoid transparency and accountability, I concluded that the email management practices of the former Premier's office were in violation of the obligations set out in the *ARA*.

This failure to comply with the records retention requirements of the *ARA*, coupled with a culture of avoiding the creation of written and electronic records, assists in explaining the apparent paucity of documents relating to the gas plant closures produced by the offices of the former Minister of Energy and the former Premier.

As a result of our investigation, I have made the following recommendations:

Ministry of Government Services

I recommend that the Ministry of Government Services:

1. Conduct a complete review of the Archives of Ontario records retention policies and practices that apply to the records management processes in ministers' offices and the Premier's office, having regard to the issues raised in this Report. Staff responsibility for retaining business records must be clearly set out, in an effort to ensure proper execution of the retention schedules. Particular attention should be paid to staff responsibility for retaining records originating with, and kept by, offices and branches within the ministries.

Office of the Premier

I recommend that the Office of the Premier:

1. Develop policies and procedures to ensure that ministers' staff are fully trained regarding their records management obligations – immediately following a change in ministers' staff, a change in government, or upon the hiring of any new staff within the office;
2. Require that a senior individual be designated in each minister's office and the Premier's office as the person who is accountable for the implementation of Archives of Ontario records management policies, and for ensuring that all new staff receive the appropriate training;
3. Issue a communiqué to all staff within the Premier's and ministers' offices regarding this Investigation Report. This communiqué should include a message that the Premier takes records retention requirements and the transparency purposes of *FIPPA* and the *ARA* very seriously, has an expectation that all staff will comply with relevant laws and policies, and requires that a senior individual be designated in each office to be accountable for the implementation of records management policies and procedures.

FIPPA/MFIPPA amendments

I recommend that *FIPPA* and *MFIPPA* be amended to address institutions' responsibilities to ensure that all key decisions are documented, to secure retention of records, and to add an offence for the wilful and inappropriate destruction of records. In particular, the amendments should:

1. Create a legislative duty to document communications and business-related activities within *FIPPA* and *MFIPPA*, including a duty to accurately document key decisions;
2. Require that every institution subject to *FIPPA* and *MFIPPA* define, document and put into place reasonable measures to securely retain records that are subject to, or may reasonably be subject to, an access request under *FIPPA* and *MFIPPA*, taking into account the nature of the records to be retained;
3. Prohibit the wilful destruction of records that are subject to, or may reasonably be subject to, an access request under *FIPPA* and *MFIPPA*; and
4. Make it an offence under *FIPPA* and *MFIPPA* for any person to wilfully destroy records that are subject to, or may reasonably be subject to, an access request under *FIPPA* and *MFIPPA*.

The Complaint

The Office of the Information and Privacy Commissioner of Ontario (IPC) received a complaint from a member of provincial parliament (MPP), alleging that Mr. Craig MacLennan, the former Chief of Staff to the former Minister of Energy (MacLennan) inappropriately deleted all his emails on the issue of the Oakville and Mississauga gas plants cancellation and relocation. The complaint also alleged that these actions violated the *Archives and Recordkeeping Act, 2006 (ARA)*, the applicable records retention schedules, and the principles of transparency and accountability promoted by the *Freedom of Information and Protection of Privacy Act (FIPPA)*.

The provincial government's decisions to close gas plants in Oakville and Mississauga were announced in October 2010 and September 2011, respectively. Subsequently, the Legislature's Standing Committee on Estimates (Estimates Committee) undertook a review of the costs of the gas plant closures. During hearings of Estimates Committee, the committee issued a ruling requiring the Ministry of Energy, the Minister of Energy and the OPA to produce records relating to the decisions. In response to the committee's ruling, it learned that the former Minister's office had no records responsive to the order for production. Subsequently, the issues were referred to the Standing Committee on Justice Policy (Justice Policy Committee) where MacLennan testified that he had a practice of deleting all of his emails.

Upon receipt of this complaint, my office immediately launched an investigation. During the course of the investigation, I requested an interview with the Secretary of the Cabinet to understand the relationship between political staff and the civil service. During our interview with the Secretary, he stated that, in January 2013, Mr. David Livingston, the former Premier's

Chief of Staff (Livingston) approached him, seeking administrative computer system passwords and information about how to permanently delete emails and other electronic documents.

I was deeply concerned about the possibility that these conversations may have indicated inappropriate conduct on the part of the political staff in the former Premier's office. I was also of the view that this information raised similar questions relating to the original complaint about the retention of public records under the *ARA*.

More importantly, at the same time that this information was being provided to my staff, adjudicators in my office were, and continue to be in the process of, conducting several inquiries into appeals filed by requesters who were seeking access to information from the former Premier's office about the closure of the gas plants. In those appeals, the former Premier's office has claimed that it has no records responsive to the access requests.

In my view, it was incumbent upon me to investigate all of these allegations to determine if there was an attempt by anyone in the former Premier's office to interfere with the freedom of information process and inappropriately delete records that may have been responsive to the freedom of information requests.

I must note that in these *FIPPA* appeals, the issue is whether a reasonable search was conducted for the records at issue. In this Report, I will not be commenting on the reasonableness of the searches conducted by the former Premier's office staff, as the adequacy of the searches will be dealt with in the context of the inquiries related to those appeals.

In light of the information provided to me by the Secretary, I decided to expand the scope of my investigation in order to determine whether any staff in the former Premier's office had engaged in inappropriate conduct in relation to the gas plant records in its possession.

Background

Chronology of the Gas Plants Cancellation and Relocation

The timing of some of the key decisions about retention and destruction of records by the public service and the political staff are very important to the analysis that follows. Consequently, before I set out the issues raised in this investigation, it is necessary to set out some of the key events and the timing of the events surrounding the decisions to close and relocate the gas plants.

On May 16, 2012, the Estimates Committee adopted a motion directing the former Minister of Energy, the Ministry of Energy and the OPA to produce:

All correspondence, in any form, electronic or otherwise, that occurred between September 1, 2010 and December 31, 2011 related to the cancellation of the Oakville power plant as well all correspondence, in any form, electronic or otherwise, that occurred between August 1, 2011 and December 31, 2011 related to the cancellation of the Mississauga power plant.

The Premier's office was not named in the motion and, as a result, was not asked to disclose any records.

On May 30, 2012, the former Minister of Energy declined to disclose the records requested by the Estimates Committee, citing "the confidential, privileged and highly commercially sensitive nature of the issues."

On July 13, 2012, 500 pages of emails, letters and PowerPoint presentations were released to the Estimates Committee.

Members of the opposition were not satisfied with the 500 pages of documents that were produced, and on August 27, 2012, a member of the Estimates Committee sought a ruling from the Speaker on whether privilege had been breached by the failure of the former Minister to provide the documents ordered.

On September 13, 2012, the Speaker found in favour of members of the opposition that there was a *prima facie* case for contempt by the former Minister and, through the issuance of a Speaker's ruling, ordered the former Minister to comply with the Estimates Committee motion.

In response to the Speaker's ruling, on September 24, 2012, the Ministry and the OPA produced 36,000 pages of records to the Estimates Committee. Despite the number of records produced by the Ministry and the OPA, the former Minister of Energy produced absolutely no records in response to the ruling.

On October 12, 2012, the Ministry and the OPA disclosed an additional 20,000 pages of records to the Estimates Committee. The former Minister's office, however, had still not produced a single record.

Three days later, on October 15, 2012, the former Premier announced that he would resign as Liberal Party leader and Premier of Ontario as soon as the party held a leadership convention. A decision was also made by the former Premier at that time to prorogue the Legislature.

On March 7, 2013, the Justice Policy Committee began its review of the contempt matter against the former Minister as well as the issues relating to the tendering, planning, commissioning, cancellation, and relocation of the Oakville and Mississauga gas plants.

On April 9, 2013, during MacLennan's testimony before the Justice Policy Committee, the MPP asked MacLennan why there were no responsive documents in the Minister's office. MacLennan stated:

I'm saying to you that I didn't have any responsive documents. I regret that I didn't have any responsive documents. My colleague coordinated the search in the office. All I can speak to is what my work habit is, which is to keep a clean inbox. I always have worked that way. I don't know what my colleague's work habits are.¹

¹ Ontario Legislative Assembly, Official report of debates (Hansard), Standing Committee on Justice Policy, 40th Parl., 2nd Sess. (9 April 2013), 1500.

Further, when the MPP asked MacLennan whether he archived any of his emails, he responded: “I don’t know how to archive anything. I don’t know what that means.”

The Investigative Process

As I indicated above, upon receipt of the MPP’s complaint, I immediately launched an investigation to determine whether MacLennan’s practice of deleting all emails was appropriate or in violation of the retention schedules or the principles of transparency and accountability in *FIPPA*.

As part of this investigation, I made inquiries with the IT staff responsible for the management of the email system in use in the former Minister of Energy’s office to determine whether it was possible to retrieve any of the emails that MacLennan had deleted.

One of my initial concerns was that if there was any possibility of retrieving some of the emails, it was important to secure any data that was available at that time. To do this, I wrote to the current Minister of Energy directly and asked the Minister to take steps to secure any information in his staff’s archived or back-up systems, as of that date. I also asked that MacLennan’s desktop computer be secured. I received assurances from the Minister’s office that the electronic records of his staff, as of that date, had been secured; I also received assurances that MacLennan’s desktop computer was secured.

In addition, we contacted the Office of the Chief Privacy Officer and Archivist of Ontario who provided my staff with copies of all relevant records retention policies and a full explanation of the application of those policies to staff working in Ministers’ offices and in the Premier’s office.

As part of my office’s investigation into this complaint, we spoke with senior officials at the MGS, Cabinet Office, and the Premier’s office. My staff conducted interviews with the following individuals: the Secretary of the Cabinet, the CIO of the province, both the former and current chiefs of staff to the Minister of Energy, the former Chief of Staff to Premier McGuinty, the Executive Director of Policy in the Premier’s office, the current Chief of Staff to the Premier and senior IT staff responsible for administration of the email accounts for ministers’ office staff and the Premier’s office.

During the course of our investigation, we also reviewed the relevant provisions of the *ARA*, and the past and current training materials prepared for the staff of the Minister’s office and the Premier’s office regarding records management and retention practices, and obligations under *FIPPA*.

Throughout this entire investigation, my office received the full cooperation of all parties involved, including the Premier’s office, Cabinet Office, the MGS, current and former staff in the Minister of Energy’s office, and the Archives of Ontario staff. I appreciate the time taken and the information provided by these offices and by individual staff, as part of this investigation.

As noted above, I felt that it was important to determine whether there was a possibility that any of the deleted emails could be retrieved or reconstructed from any archiving system or back-up system that might be in use for records generated or received in the Minister of Energy’s

office and the Premier's office. Work of this nature requires the expertise of computer forensics specialists – expertise that is not available within my office – so we looked elsewhere.

To assist with my investigation, I was offered the assistance of Chuck Rothman, a specialist in electronic discovery and computer forensics who works with the firm of Wortzman Nickle Professional Corporation. Mr. Rothman is a member of the Sedona Conference Working Group 7, Technology and e-Discovery Canada, the eDiscovery Journal Peer Group, the High Technology Crime Investigators Association, Professional Engineers Ontario, and the Ontario Society of Professional Engineers. Mr. Rothman possessed the necessary expertise and conducted a review of the information and evidence provided by the MGS IT staff. He kindly provided independent and invaluable advice to my staff throughout this investigation. I am grateful to Mr. Rothman for his assistance, and to Susan Wortzman and Susan Nickle, of Wortzman Nickle.

Legislative Context

Freedom of Information and Protection of Privacy Act

FIPPA applies to Ontario's ministries and most provincial agencies, boards and commissions. It requires that government institutions protect the privacy of an individual's personal information, existing in government records. It also gives individuals the right to request access to government-held information, which may only be withheld if the information is captured by one of the specific exemptions and exclusions under *FIPPA*. Section 1 describes the purposes of *FIPPA* and states, in part:

The purposes of this *Act* are,

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
 - (i) information should be available to the public,
 - (ii) necessary exemptions from the right of access should be limited and specific, and
 - (iii) decisions on the disclosure of government information should be reviewed independently of government; and

Section 1 of *FIPPA* reflects the findings of the report of the Williams Commission, which ultimately led to the passage of *FIPPA* and later to its municipal equivalent.² The Williams Commission Report stated that enhanced participation in the democratic process in relation to government accountability, public participation, fairness in decision-making and personal privacy was the primary focus of freedom of information legislation.³ The Ontario Court of Appeal has affirmed this important purpose by stating that *FIPPA* and its municipal equivalent are designed to improve

² *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56

³ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980* (Toronto: Queen's Printer, 1980) at p. 85

the democratic process by ensuring the “open and very public operation of government at both the provincial and municipal levels.”⁴

Archives and Recordkeeping Act

Open and transparent government is at the heart of every strong democracy – it is essential to preserving freedom and liberty. Records management processes that require the retention of essentially all documentation are an essential part of the freedom of information process. To put it quite simply, if there is no requirement to retain documentation, then freedom of information legislation is rendered meaningless – full stop.

In Ontario, the requirement for public servants and staff who work in ministers’ offices and the Premier’s office (political staff) to retain documents is set out in the *ARA*. Much like *FIPPA*, transparency and accountability are cornerstones of the archiving system that was put in place by the government of Ontario. In fact, section 1 of the *ARA* describes the purpose of that act and states:

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 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.

The *ARA* came into force in September 2007. Among other things, it requires that “public bodies,” including ministries, ministers’ offices and the Premier’s office, have in place record schedules that set out the length of time that “public records” will be retained and the manner in which they will be disposed of.⁵ Under the *ARA* the records schedules are subject to the approval of the Archivist of Ontario.⁶

Section 13 of the *ARA* outlines the duties of a public body to retain, transfer, and dispose of their public records in accordance with the approved records schedule. Unless a public record is destroyed in accordance with an approved records schedule or with the written consent of the Archivist, the *ARA* prohibits the destruction of any public records. This requirement is captured in section 15(1) of the *ARA* which states:

A public record shall not be,

- (a) destroyed or damaged;
- (b) altered so as to delete information from it;

4 *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20, para. 45

5 Section 11(1) of the *Archives and Recordkeeping Act*

6 Section 12(1) of the *Archives and Recordkeeping Act*

- (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.

During the course of my interviews with both former and current political staff, despite the fact that this legislation applies to political staff in both ministers' offices and the Premier's office, I learned that there was little, if any, knowledge of its application and requirements.

Records Management in the Offices of Ministers and the Premier

Generally speaking, ministers' offices and the Premier's office's public records are those that are created or maintained by ministers and the Premier, in their capacities as ministers of the Crown. As noted above, these records form an important part of documenting the history of government and helping to promote transparency and accountability.⁷

There are two general categories of records in the office of a minister and the Premier: (1) public records and (2) personal, political, and constituency records. The requirement under the *ARA* to have records retention policies in place applies only to the first category of records, and not to the second.

Public records include, for example, the records of the ministers' and the Premier's political staff which relate to managing or administering portfolio responsibilities. Some examples of public records are:

- Records of internal deliberations involving a minister and his or her staff on matters relating to the minister's portfolio;
- Communications between ministers on matters relating to the portfolio of the minister possessing the records;
- Communications on matters directly relating to the minister's portfolio with individuals and groups external to the government; and
- Records relating to the minister's activities as a member of Cabinet and its committees.

The Archives of Ontario has facilitated the adoption of common records retention schedules by providing ministers and the Premier with a template schedule that they may choose to adopt. The adoption process consists of the new minister and the Premier signing and returning the template to the Archives of Ontario. If a minister decides not to adopt the template developed by the Archives, the minister must prepare a records schedule and submit it for approval to the Archivist.

⁷ Any reference to ministers or ministers' offices and the Premier or the Premier's office shall be treated as including parliamentary assistants, their staff and ministers' and Premier's office staff.

In the case of the former Minister of Energy and the former Premier's office, the Archives of Ontario template schedules were never adopted. Nor did these offices prepare alternative records retention schedules that would have been approved by Archives of Ontario, in accordance with the *ARA*. Therefore, contrary to sections 11 and 12 of the *ARA*, the former Minister's office and the Premier's office did not prepare records schedules for submission to the Archivist for his approval. In fact, I was advised that despite having been provided with copies of relevant templates, these offices operated in the absence of approved records retention schedules. However, I am also advised that the Archives of Ontario and MGS have always operated on the assumption that the template schedules did apply and it appears that the failure to adopt the templates developed by the Archives was simply an oversight. Thus, for the purposes of this Report, my analysis of the records retention practices of the former Minister of Energy and the former Premier's office will refer to the records retention templates developed by the Archives of Ontario.

The two schedules are similar in that both schedules exclude transitory records and personal, political and constituency records from the retention requirements. Both schedules also exclude, what is at times referred to as a "reference copy," "surplus duplicates" or, in the case of the Minister's Public Records policy, "copies of records kept by other offices or branches within the Ministry." I will refer to these as "surplus duplicates" throughout this Report.

Transitory records are described as a type of public record that has no ongoing value beyond an immediate basis and which may have been used to prepare a subsequent record.

Ministers' and the Premier's personal, political, and constituency records are those generated by ministers in their capacity as members of the Legislature and as private citizens.

It is critical to note that, in all cases, it is the content of the record that determines the classification, not the format. Therefore, electronic records, including emails, require the same level of scrutiny as other records in order to determine their appropriate classification. To be clear, simply because a communication takes place by way of email does not automatically mean that this communication is to be treated as a transitory record.

According to the *Common Records Series - Minister's Public Records*, public records other than transitory records and personal, political, and constituency records, and surplus duplicates must be retained for a period of five years and then transferred to Archives of Ontario.

According to the *Premier's Office Records Schedule*, certain public records must be retained until the resignation of the Premier and then transferred to Archives of Ontario. Other public records must be retained for a period of four years before they are transferred to Archives of Ontario. Administration files (financial records and human resources records) are kept for a period of six years and are then destroyed.

Generally, both of these retention schedules include exclusions for surplus documents which, as noted above, are copies of documents belonging to other offices and branches within the government and therefore held elsewhere. As a result, if staff in either the ministers' offices or the Premier's office determined that another government branch or department was retaining the

records, there would be no requirement under these records retention policies for the minister's office or the Premier's office to retain additional copies.

Transition to a New Premier

Because our investigation raised the question of whether staff in the former Premier's office had inappropriately deleted electronic records as part of the transition to a new Premier, I reviewed the requirements set out in the *Premier's Office Records Schedule* relating to such transitions.

The schedule does not set out the procedures that should be followed in the event of a change of Premier, where there is no change in government. However, I understand that the former Premier determined that records should be handled in the same way that they would be if there had been a change in government. As a result, the schedule required:

The Secretary of the Cabinet to take custody of all records pertaining to the Premier's role as a member of the Cabinet. As part of this process, paper records are to be boxed and labelled and electronic records are to be copied and labelled with the name of the software used to make the copies. After they are copied for delivery to the Secretary, the original electronic records are "wiped clean" from the computers.

Issues, Initiatives Management and Parliamentary Assistant's Program Management Files are boxed, copied and sent to the Archives. After being copied for delivery to the Archives, the electronic copies are "wiped clean."

The remaining office records remain in the office to support the ongoing business needs of the new Premier until their in-office retention period expires. At that point, they are transferred to the Ontario Government Records Centre where they are either transferred to Archives or destroyed.

Training

The Archives of Ontario supports public bodies in their record scheduling activities and manages the tracking of over 14,000 archivist-approved record retention schedules. It has also developed supporting tools, guides and related training and education materials.

In the course of my investigation, I reviewed the following training and communications materials prepared by the Archives of Ontario and its legal counsel:

- *Freedom of Information and Protection of Privacy Act* dated August 2012,
- *Things you need to know: Overview for Ministers' Office Staff* dated April 22, 2013,
- *Vital Information for Ministers' Staff: If only I'd known about this!!* dated November 1, 2003.

Training for political staff is delivered in two ways. Whenever there is a change in minister or government, the Archives of Ontario provides ministers' offices with a package of information to assist them in managing the retention and disposition of public records. These packages are

generally provided to Deputy Ministers' offices for inclusion in the transition binders that are prepared for new ministers. These packages include:

- an overview of the recordkeeping in a Minister's office,
- a proposed file classification plan for Ministers' public records,
- the *Common Records Series for Ministers' Public Records*,
- an information bulletin, "A Guideline to the Disposition of Ministers' Records,"
- the *Common Records Series for Transitory Records*, and
- a template for adopting the Archives of Ontario common records and transitory records series.

In addition, MGS staff are available to provide face-to-face training when a new minister is appointed. However, in practice, this face-to-face training is only offered sporadically.

Issues

The issues raised by this complaint are:

1. (a) Was MacLennan's practice of deleting all emails received in compliance with his obligations under the applicable records retention schedules and the *ARA*?

(b) Are MacLennan's deleted emails retrievable from any electronic records back-up tapes or archiving systems?
2. Did MGS have appropriate policies and procedures in place to assist political staff in complying with their obligations under the *ARA* and the applicable records retention schedules?
3. Did staff in the offices of the former Minister of Energy and former Premier receive appropriate training to ensure that they understood their obligations under the *ARA* and the applicable records retention policies?
4. Was there any inappropriate deletion of emails by the former Premier's office, during the transition to the new Premier?
5. Did the former Premier's office comply with its obligations under the *Premier's Office Records Retention Schedule* and the *ARA*?
6. Was there a culture of avoiding the creation of written documentation on the gas plant issue?
7. Who was accountable within the former Minister's office and the former Premier's office for records management?

Discussion

Issue 1(a): Was MacLennan's practice of deleting all emails received in compliance with his obligations under the applicable records retention schedules and the ARA?

MacLennan was interviewed by staff in my office. He was the Chief of Staff to two Ministers of Energy between January 2010 and August 2012. He also served as an acting Chief of Staff to a minister for a period of 6 months; in 2005 and 2006 he worked for the Minister of Aboriginal Affairs as his Chief of Staff. During his interview, he provided the following information in relation to his work with the former Minister of Energy:

- He had a longstanding practice of deleting **all** emails, including emails stored in his sent and trash folders, or recycling bin in order to keep a clean inbox and to comply with limits he believed IT staff had set on the content of the email account;
- He did not utilise a central filing system in the Minister's office for paper records because he did not keep any paper records;
- He was not aware of the records management practices of other staff in the former Minister's office at that time;
- He said that his preference was for verbal communications; accordingly, in relation to the gas plant file, the majority of his communications with the Premier's office, the OPA and other individuals or organizations was said to be oral;
- He says he now understands that this practice of deleting all emails was wrong and he regrets having followed this practice; and
- His records management practices were not an attempt to avoid production of records in response to the request from the Estimates Committee or any freedom of information requests.

The fact that any member of a minister's political staff would think it appropriate to delete all email records, without exercising any judgement regarding the content of those records and the possible need to retain them pursuant to the applicable retention schedules is, quite frankly, unbelievable. It is also a matter of great concern.

MacLennan was of the view that the majority of the email records he received were copied to multiple parties and so these records would be retained by others including ministry staff. Indeed, he noted that over 56,000 pages of records were eventually produced to the Estimates Committee – included in those records were emails sent, received or copied to him.

He was not aware of an obligation on his part to retain any emails sent and received by him, on which ministry staff were included. It was his practice to rely on ministry staff to keep copies. However, I note that his practice of deleting all emails did not involve the exercise of **any** judgement as to whether or not copies had been retained by other staff. He simply deleted **all**

emails. This indiscriminate practice does not account for the fact that any communications he had with the former Premier's office, stakeholders or other staff in the former Minister's office, which were not copied to ministry staff, may not have been retained by those staff.

I was not able to determine the number of emails and other records that were deleted by MacLennan, that had not been copied to ministry staff, and which were therefore no longer available for disclosure to the Estimates Committee. However, the Secretary of the Cabinet was able to shed some light on this question during our interview.

The Secretary of the Cabinet was appointed by the former Premier in 2011. He is the senior civil servant in the province, reporting directly to the Premier. He serves two main functions: he works with the government of the day to organize and implement its decisions and policies; and he also serves as the head of the public service. In this role, he has administrative and financial responsibilities associated with running the public service. All Deputy Ministers report through him to the Premier.

The Secretary of the Cabinet's position is established under the *Public Service of Ontario Act, 2006*. As head of the Public Service of Ontario, his authority extends over staff employed in ministries and certain government agencies. The *Public Service of Ontario Act, 2006* also governs the separate employment of public servants in ministers' offices and the Premier's office. These individuals, referred to throughout as political staff, do not report to the Secretary of the Cabinet; rather, they report to and are accountable to their ministers and to the Premier's Chief of Staff.

In the course of my interview with the Secretary of the Cabinet, I asked about the role of the public service in relation to the search for, and the production of, records responsive to the Estimates Committee motion and the subsequent Speaker's ruling. I learned that staff in the Deputy Minister of Energy's office offered their assistance to the former Minister's office to help them comply with these orders.

I noted to the Secretary that the former Minister of Energy's office did not produce records responsive to the Estimate's Committee motion, and asked why the Minister's office did not have records. He stated that it had not occurred to him or his staff that there would not be records. When I specifically asked whether it was reasonable to expect that the former Minister's office would have had records responsive to the Estimates Committee's motion and the Speaker's ruling, he stated that it was reasonable to believe that there would have been communications among political staff, including with others outside of government, that would be subject to these orders.

While I will comment on the training offered by the civil service to political staff and the guides/communications materials that have been prepared by the Archives of Ontario below, the Secretary of the Cabinet indicated the following:

- Political staff are subject to a constant turnover;
- Political staff are familiar with their obligations under *FIPPA* to produce records and to retain records subject to a *FIPPA* request;

- Political staff would be acutely aware of information management issues.
- These issues form part of the fabric of their everyday work; and political staff would know the difference between sloppy recordkeeping and records destruction.

Based on the information provided to me, it is difficult for me to accept that there was no attempt by staff in the former Minister's office to avoid transparency and accountability in relation to their work. Furthermore, it is difficult for me to accept that the practice was part of a benign attempt to comply with a requirement of IT staff to keep the volume of records in an email account within specified limits. The practice of indiscriminate deletion of all emails sent and received by MacLennan is inconsistent with the *ARA* and the records retention schedule developed by the Archives of Ontario for ministers' offices. In addition, I find that this practice undermines the purposes of *FIPPA* and the transparency and accountability purposes that are at its foundation, and the foundation of the *ARA*.

I find it strains credulity to think that in relation to a significant government initiative such as the closing of the gas plants, no records documenting the decision-making process were ever created, and that no records whatsoever responsive to the Estimates Committee motion and the Speaker's ruling, such as emails, were retained. Even assuming that many relevant emails were copied to ministry staff who had the responsibility for their retention, or were of a transitory nature, it is simply not credible to suggest that there were no emails or other records generated on this important public initiative, that clearly should have been retained.

Email is an integral part of doing business today and has replaced a large number of telephone calls, memos, and letters. While this may be obvious to most, it would appear that a large part of the problem in this investigation is that MacLennan claimed not to have understood that email is a form of communication that must be managed no differently than any other record. The responsibility of political staff to manage records remains the same regardless of whether they are in paper or electronic form. It is simply unbelievable that MacLennan would have no understanding of this. Similar to paper records, the retention responsibilities relating to emails depends on the content of the emails. Judgement must therefore be exercised in determining whether to retain or delete any particular email. The management of email records must be integrated with other information management practices for records in the custody or under the control of government.

In light of all the circumstances outlined above, I find that MacLennan's records management practices were in violation of his obligations under the records retention policies applicable to the former Minister's office. To address these concerns, I will recommend that *FIPPA* and the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* be amended in a number of respects. Specifically, it should be mandatory for every institution to define, document and put into place reasonable measures to securely retain records that are subject to or may reasonably be subject to an access request under *FIPPA* and *MFIPPA*. In addition, *FIPPA* and *MFIPPA* should prohibit the wilful destruction of records that are subject to, or may reasonably be subject to, an access request under *FIPPA* and *MFIPPA*, and failure to comply should be an offence under those acts.

Issue 1 (b): Are MacLennan’s deleted emails retrievable from any electronic records back-up tapes or archiving systems?

While the complaint filed raised many questions regarding records retention practices, in view of the serious nature of the allegations and the public interest in the closure of the gas plants, I felt that it was very important to determine whether it was possible to retrieve any of the deleted emails.

As noted above, immediately upon receipt of this complaint, my office wrote to the Minister of Energy and asked him to take immediate action to ensure that any records in electronic form were secured and preserved. When we subsequently learned that the current Chief of Staff was using the desktop computer that had been in use by the former Chief of Staff, MacLennan, we also asked that the desktop be preserved and that no one be allowed to use that computer until further notice from our office. In response to our request, the desktop computer was promptly removed from the office of the Minister’s Chief of Staff and secured in the office of the Deputy Minister, with MGS providing immediate confirmation of having done so.

We must preface our review of the email systems in place in the former Minister of Energy’s office with an essential first step – the need to dispel a myth, one that I too, recently held: The prevailing view is that the retrieval of deleted emails is always possible, regardless of how old they may be. Unfortunately, that is not the case, and we will outline the reasons why in the analysis that follows. In some circumstances, dating back in time, it is simply not possible to retrieve deleted emails, intact.⁸

The Ministry of Energy’s IT systems are administered by MGS through the Information and Information Technology (I&IT) office. The Office of the Corporate Chief Information Officer, part of MGS, provides corporate leadership for I&IT in the Ontario government. The Office of the Corporate Chief Information Officer includes:

- Corporate Security Branch,
- Information, Privacy, and Archives Division,
- Infrastructure Technology Services (“ITS”),
- Innovation, Controllershship and Strategy Division.

In conducting our investigation, we met with the executive lead from ITS whose responsibilities include:

- Managing and delivering I&IT common infrastructure and telecommunications products and services; and
- Supporting mission and business critical applications across the Ontario Public Service.

⁸ Depending on the IT system in place and how it is configured, if massive amounts of resources were devoted to retrieving a deleted email, then there may be a remote possibility of doing so, but even then, the chances of recovering any deleted emails are remote. We were advised that, most likely, only a few remnants of information might be recoverable, but without any context or reference associated with them – literally, digital crumbs.

The ITS representative was very familiar with the OPS enterprise email system and back-up systems that support the Minister of Energy. I received his full cooperation during our investigation.

In the course of our meetings with MGS and the ITS representative, we obtained the following information:

1. An explanation of how the Ministry of Energy and former Premier's office email system operates, including how emails are saved and accessed;
2. A description of the back-up system in place at the Ministry of Energy and former Premier's office, and the frequency with which back-ups are made;
3. The possibility of retrieving any emails deleted during the relevant period (dating back to early 2010) through the back-up systems in place at the Ministry of Energy and former Premier's office;
4. For emails irretrievable through the back-up system, the feasibility of reconstructing any data on the IT system into a readable format; and
5. For emails irretrievable through the back-up system, the feasibility of reconstructing any data remanence from a desktop computer into a readable format.

The OPS enterprise email system

The ITS representative informed us that the same email system is in place at the Ministry of Energy (including in the Minister's office) and at the former Premier's office. This enterprise email system is integrated and managed at the MGS data centre in Guelph, Ontario. This highly secure data centre is an information technology facility built to house ministry mission and business critical applications and information for the OPS.

The enterprise email system includes a Microsoft 2010 exchange email server that sends and receives emails. Emails are stored on a Redundant Array of Independent Disks (RAID) server which consists of a multitude of disks. The data from one email is not written to one single disk; rather email data is broken up into fragments with each fragment stored on a different disk. The data from these disks is then duplicated to several other disks for redundancy and availability purposes. The RAID system keeps track of all fragments of any record, and reconstitutes complete records (such as emails) when they are accessed.

MGS does not employ any archiving system to retain emails outside of the Microsoft Exchange email system but emails may be backed-up on tape. Although Microsoft Exchange has an optional feature whereby deleted emails are retained for a short period of time, this feature is not used on the MGS email system. **As such, once an individual deletes an email from his or her email account, the email is irretrievable, subject to any back-up tapes that may have retained the email.** This account was supported by our independent forensic consultant.

The back-up system

The MGS IT staff use back-up tapes to digitally record data onto magnetic tape, including emails that have not been deleted from an individual's email account. The back-up system is configured so that daily snapshots of emails in a user's account are backed-up to tape, for one day. This means that if an email existed (i.e., wasn't deleted from a user's "deleted items" folder) at the end of the day, it would be copied to that day's tape. However, the daily tapes are put into a pool of tapes to be overwritten at the end of the next day (i.e. the data on back-up tapes is only available for one 24-hour period.) The result is that there is no daily back-up tape containing emails from 2010 and 2011.

In addition to daily back-ups, information in an email account is backed-up onto tape on a monthly basis, on the last Friday of each month. These monthly back-up tapes only capture emails that are present in the email account on the last Friday of every month and are held for a period of one year. If an email is deleted from the account prior to the last Friday of the month, that email would not be captured in the monthly back-up tape. Therefore, there is no monthly tape for emails captured in email accounts as of Friday, December 31, 2011, as the tape would have only been retained until December 2012 and then returned to the pool of tapes for overwriting.

With respect to the Premier's office, back-up tapes are made each weekday evening and are maintained for only ten days. At the end of the ten days, the tapes are put into a pool of tapes to be overwritten. Like the circumstances with the back-up tapes for the former Minister's office, there is no daily back-up tape containing information in the relevant time period.

Minister's staff are expected to make a judgment call as to how an email should be treated, pursuant to the records management policies applicable to ministers' staff, before deleting or saving an email. Email users cannot rely on the back-up system in place as an archiving or records retention tool – it is only intended to act as a disaster and system recovery tool for that day's emails.

During our investigation, MGS IT staff were able to confirm that there were no back-up tapes containing emails created during the relevant time period – any tapes would have been overwritten as part of the usual back-up system.

The feasibility of data recovery from the MGS IT system

We queried MGS IT staff about the possibility of reconstructing an email that had not been overwritten on the email RAID server.

MGS IT staff described the difficulty and complexity of reconstructing data from a search in the email RAID server into a useable file. Specifically, MGS IT staff stated that while searching for a deleted email from yesterday would require a great deal of effort, searching for data from two or three months ago would be "fruitless, as the data no longer exists." MGS IT staff further stated that reconstructing the data from a search in the RAID server into a useable file would be "tantamount to reconstructing a single shredded document from a bin of shredded documents." These views were supported by our independent forensic consultant, who confirmed their veracity.

MGS identified other significant challenges to recovering emails from the email RAID server and back-up tapes once an email had been deleted:

1. There are hundreds of disks [in the email RAID server] and each email would be divided into multiple fragments and spread over several disks. All deleted fragments of a particular email would need to be located, recovered and manually reassembled. Given that there are many emails deleted daily on the MGS servers, the likelihood of locating all the fragments of one particular email is practically nil;
2. The disks hold that day's worth of data. As noted, the data is written to tape and is overwritten daily. As such, as more time passes, the likelihood of data recovery is drastically reduced. According to MGS IT staff, the likelihood of recovering data that is six months old – resulting in it being overwritten approximately 180 times – is inconceivably low; and
3. The OPS email system was modernized in 2012/13. The disks from the old email environment have been completely destroyed, shredded and recycled following the OPS IT asset disposal process.

The feasibility of data recovery from a desktop computer

In consultation with our independent forensic consultant, we also made inquiries to determine whether deleted emails could possibly be found as a result of a search of MacLennan's desktop computer.

Emails may be manually saved or automatically cached on a hard drive. Given that there were no responsive emails on MacLennan's desktop computer, and that he had a practice of deleting all his emails, we inquired about the possibility of recovering deleted emails from his desktop computer that may still have remained on the computer's cache.

Desktop computers generally have one hard drive for storage that may be searched for emails. MGS IT staff advised that if emails were cached on the hard drive of the desktop computer, they would be overwritten almost immediately, given the size of an email cache. Once data has been overwritten on the hard drive, it generally cannot be retrieved. This view was confirmed by our independent forensic consultant.

Given that the desktop computer used by MacLennan was in continuous use since his departure, it is most likely that any emails that may have been cached on the hard drive during the relevant period would have been overwritten.

During our investigation we also looked into the possibility that MacLennan or other staff in the Minister's office may have configured his email system to automatically store copies of email files locally on his computer. Generally, if so configured, messages, calendar, and other data items would be saved directly on the desktop computer in .PST files. MGS IT staff agreed to review the desktop computer to determine whether this had occurred. After a thorough investigation of the desktop computer, we were advised that no .PST files were found. Our independent forensic consultant agreed that in these circumstances, it is not unusual to find that no .PST files or emails exist on the desktop computer.

Issue 2: Did the MGS have appropriate policies and procedures in place to assist political staff in complying with their obligations under the ARA and the applicable records retention schedules?

As noted above, when a new minister is appointed, Archives of Ontario provides the Deputy Minister with information relating to records retention requirements and policies. Archives of Ontario relies on the Deputy Minister to provide this information to the minister and his or her staff. Central to the policy materials that are provided regarding records retention are the *Government of Ontario Common Record Series – Ministers’ Public Records* dated August 2011 and *Government of Ontario Common Record Series – Transitory Records* dated December 8, 2008.

I have reviewed the above-noted documents and find them to be satisfactory. These schedules offer meaningful direction on the scope and purpose of records retention policies and include concrete examples of each category of record defined in the policy. The one shortcoming in the policy, that I will address below, is the lack of clarity regarding the treatment of surplus duplicates.

The *Ministers’ Public Records* schedule clearly sets out the rationale for a government records retention policy, the legislative authority of the Archivist of Ontario, a definition of a public record, and the process for adoption of the schedule. The schedule also includes a description of those records that are excluded from the schedule, namely, Ministers’ personal, political and constituency records, administrative records and transitory records. Mirroring the language used to describe a public record in the ARA, the schedule states:

These series apply to public records created, maintained or used by ministers, parliamentary assistants and their staff in the course of managing and administering their portfolio responsibilities. ...

The *Archives and Recordkeeping Act, 2006* applies to any record created or received by a minister in relation to his or her official portfolio responsibilities. In this regard, the ARA defines such records as “public records.”

On page 10 of the schedule, under the heading “Excluded Records,” the definition of transitory records is provided and states:

Transitory records are records of temporary usefulness in any format or medium, created or received by a public body in carrying out its activities, having no ongoing value beyond an immediate and minor transaction or the preparation of a subsequent record. They are of such short-term value that they are not required to meet legal or fiscal obligations, initiate, sustain, evaluate or provide evidence of decision-making, administrative or operational activities.

Note that transitory records are not the same as duplicate sets of records that are maintained by an office where there is a need to keep duplicate sets of records to serve a business purpose. These duplicate sets of records are to be scheduled and not treated as transitory records. [italics added]

My understanding of this passage is that *duplicate records do not qualify as transitory records where there is a need to keep duplicate sets to serve a business purpose*. It clearly states that duplicate sets of records should be retained, but only if they serve a “business purpose.” There is no explanation of what the term “business purpose” means, and no example of how that would be applied in practice. However, it clearly indicates that some duplicate sets of records should be kept within a minister’s office.

Potentially adding further confusion, each record class includes an exclusion that appears to apply to duplicates. For example, “series 100” is described as the Ministers’ Subject Files. It excludes “*Copies of these records kept by other offices and branches within the ministry or in Cabinet office.*” “Series 200” is described as Ministers’ Correspondence. It excludes “*Reference copies of other types of correspondence originating with and kept by offices and branches within the ministry.*” Therefore, on the one hand, there is a requirement to keep duplicate records if they serve a “business purpose,” but on the other hand, each record series appears to exclude copies of records kept by other branches within the ministry. For duplicate records that serve a business purpose, these two principles appear to be in conflict.

Further, even if staff in the ministers’ offices are not required to retain records that are kept by other branches within the ministry, it is unclear how they would know who was keeping what record. Who would be responsible for monitoring this or raising awareness on the need to retain, at the very least, a single copy of such records?

While there may be some lack of clarity regarding the treatment of duplicate records, these schedules were not a factor that appeared to have contributed to the complete absence of records management systems in the Minister’s office because MacLennan indicated that he was not even aware of their existence.

However, having identified these potential sources of confusion, I believe that the records retention schedules would benefit from a review by the Archives of Ontario and will be making recommendations in this regard.

Issue 3: Did staff in the offices of the former Minister of Energy and the former Premier receive appropriate training to ensure that they understood their obligations under the ARA and the applicable records retention policies?

As indicated previously, MacLennan served as Chief of Staff with various ministers over a period of four years. During that extended period of time, he did not recall receiving any training or information on records management obligations or freedom of information legislation. Nor did he recall seeing the Archives of Ontario materials in any of the transition binders that were provided to him.

The Executive Director of Policy in the current Premier’s office, who worked in the Premier’s office under the former Premier, was also interviewed. He advised us that he did not receive any training on records management obligations until April 2013, shortly after this investigation was undertaken. However, he recalled receiving some *FIPPA* training at some point between 2003 and 2006.

Records management training is important in any work environment so that staff have the required practices at the forefront of their minds as they engage in the day-to-day functions of their jobs. It should be second nature to them.

There are some unique aspects to the work of staff in the ministers' offices that heighten the importance of training. There is a significant and regular turnover of staff. There is also major staff turnover whenever a change in government or a shuffle of ministerial responsibilities occurs.

In addition, there is some complexity to the nature of the records and the applicable regulatory requirements. Staff must understand the difference between political or constituency records, and public records. Another important consideration is the pace of work in a political office. All former and current chiefs of staff interviewed described the pace of government as being extremely fast.

Given all these considerations, it is important to have understandable and easily accessible policies and training in place. The timing of training and the frequency with which it is offered must recognize the sensitive nature of the information that ministers encounter, the fact that turnover in the office occurs regularly, the extremely fast pace of the working environment and the complex nature of the regulatory environment.

As noted above, in response to a request for copies of the training material currently in use, my staff were provided with the Ministry of Energy's *Minister's Kit* dated January 2013, and three PowerPoint presentations entitled, *Freedom of Information and Protection of Privacy Act*, dated August 2012, *Things you need to know: Overview for Ministers' Office Staff*, dated April 22, 2013, and *Vital Information for Ministers' Staff: If only I'd known about this!!*, dated November 1, 2003.

In this investigation, I was told that training was offered to political staff on records management and related issues in mid-April of 2013, after our investigation pointed out the shortcomings in staff's knowledge in this area. The Archives of Ontario also has plans to develop additional training for ministers' office staff in relation to records management. The plan is that this training will be scenario-based, with concrete examples used by the Archives of Ontario to ensure a more in-depth understanding of the records retention requirements.

In my view, the training materials provided to my office are very good. I commend the Archives of Ontario and MGS for the time and effort that went into the development of these comprehensive and easy to understand documents. However, it is important to note that, although MGS may produce excellent training packages and make them available to political staff, it does not have the authority to **require** political staff to be trained. The impetus to make training mandatory must come from the political level itself.

I have seen many government organizations with strong policies and training materials in place to convey the policies to staff. However, all too often these same organizations have failed to adequately implement these policies. For example, last year, my office was invited to conduct an investigation into the loss of a USB key containing the unencrypted personal information of between 1.4 and 1.2 million persons. The key was being used by Elections Ontario staff to

update the electoral list following the last election. As a result of my investigation, I found that the privacy policies and procedures were not translated into practice – which meant that the policies were of little effect in protecting the privacy of the individuals who entrusted their personal information to Elections Ontario.

In September 2012, I issued a paper addressing this very issue – *A Policy is Not Enough: It Must be Reflected in Concrete Practices*. In that paper, I reiterated that while strong policies are necessary, on their own, they are simply insufficient. In order for policies to be effective, they must be operationalized within an organization – not by chance, but by design. In my paper, I set out seven steps that organizations should consider implementing in order to effectively translate their policies into practice.

While the focus of this paper was on privacy policies, I note that at the core of these seven steps is the requirement to develop and conduct education and awareness training programs, and to require that staff participate in these programs. In the context of records retention policies, the basic principles are the same – there is a need for rigorous and regular training on those policies.

Based on the interviews conducted, none of the former political staff said they had received any training on records retention requirements. To be clear, this was not because of a lack of training material and information on records retention responsibilities. This view was also contradicted by the Secretary of the Cabinet, who indicated that political staff were fully aware of their obligations in this area.

I am especially concerned that given the apparent high rate of turnover for political staff, and the hiring of new staff whenever ministerial responsibilities change, there is no mandatory training required on records management practices for these individuals. In my view, training of new staff should occur at the earliest possible opportunity – the minute they walk in the door. As the public service cannot compel political staff to attend training sessions or read the guidance documents that are provided, the responsibility for this must lie with the Premier's office.

Having regard to all of these circumstances, I will make recommendations regarding the timing and frequency of records management training, that I will set out below.

Issue 4: Was there any inappropriate deletion of emails by the former Premier's office, during the transition to the new Premier?

It is important to repeat that the Estimates Committee motion and the Speaker's ruling did not seek production of records from the former Premier's office on the gas plant closures. The only issue being addressed here is whether there was an attempt to inappropriately delete emails in the former Premier's office, in or around January 2013, as part of the transition to the new Premier. I will comment on the practices of the former Premier's office staff in relation to the retention of emails as part of their daily practice later on in this Report.

The retention of records in the Premier's office is governed by the *Premier's Office Records Retention Schedule*, which is published by the Archives of Ontario and is consistent with the ARA. The purpose of this schedule is to assist the Premier and the Premier's staff in taking

appropriate actions regarding the retention and disposal of government records in the custody of the Premier's office. Adherence to this schedule should not be undermined as it is the only way of ensuring that official government records in the office of the top government official for the province are retained as long as they are needed to guide government decision-making and to protect the public interest.

Among other topics, *the Premier's Office Records Retention Schedule* outlines how records are to be disposed of in the event of a change in Premier. The schedule states that following the resignation of a Premier, the Secretary of the Cabinet will take custody of all those records which pertain to the Premier's role as a member of the Cabinet. This transfer of records to the Secretary of the Cabinet is necessary to ensure their preservation, integrity, and confidentiality, while permitting them to be made available, where appropriate, in the future.

The schedule also specifically outlines how electronic records are to be transferred at the time of transition, stating that "[c]areful measures should be taken to ensure the security of electronic records and the transfer of all these records to the Cabinet Secretary, such as ensuring that all disks are transferred or, in a networked environment, that all access rights are placed under control of the Cabinet Secretary." The schedule also states that once this transfer is complete, original records should then be erased in such a way that they cannot be recreated (e.g., "hard disks on personal computers should be reformatted or otherwise wiped clean").

In the case of the Premier's Issues and Initiatives Management files, which are files involving stakeholder relations, legislative activity records and policy and program files, the same process is followed for copying electronic records but the records are sent to the Archives of Ontario, as opposed to the Secretary.

As I noted above, among the interviews conducted by my office in this investigation, was an interview with the Secretary of the Cabinet. During our interview with the Secretary, we learned that in early 2013, after the former Premier had announced his resignation and prior to the appointment of his successor, Livingston had approached him asking for administrative system passwords and information regarding "how to wipe clean the hard drives in the Premier's office."

The Secretary of the Cabinet noted that this request was of concern to the extent that the wiping of hard drives, without properly saving records, could be inconsistent with the Premier's office obligation to maintain records. He responded to the inquiry by stating that if the former Premier's staff were considering deleting any records, they needed to first consider their legal obligations regarding the requirement to produce records in legal proceedings and the requirement to preserve records under the ARA. To this end, he connected Livingston to the CIO for further information about records management on transition.

The CIO confirmed that he had been contacted by Livingston in late January 2013, asking for the administrative computer system passwords so that they could transfer electronic records from the desktop computers of staff to portable electronic devices and "wipe clean" the computers as part of the transition process. The CIO understood that the purpose of this query was to ensure that if these computers were redistributed, any data on them would not be available to individuals receiving them. The CIO had some initial concerns about whether he could provide

these passwords, and then he learned that the former Premier's office actually already had these passwords in its possession.

The CIO explained to my office that he had no concerns about being approached by Livingston about permanently "wiping clean" the computers on transition, provided they were meeting their obligations, as this very process was one that was contemplated and outlined in the *Premier's Office Records Retention Schedule*. During our interview, the CIO also stated that at no time did he ever believe that the inquiries from Livingston regarding the most effective way to "wipe clean" the computers on transition were being made for an improper purpose.

In order to provide Livingston with complete information in response to his questions, the CIO consulted with senior officials at MGS, and responded to Livingston's request for information by way of a detailed email dated January 31, 2013. This email included a copy of the *Premier's Office Records Retention Schedule* and a list of the steps that could be taken to properly deactivate and erase current email accounts of departing staff, as well as any records maintained on their computer hard drives. The email also stated:

As we discussed, before taking these steps, care must be taken to ensure compliance with the *Archives and Recordkeeping Act* and applicable records schedules to preserve business records of the government of Ontario. The Premier's Office is included in these requirements and has its own applicable schedule. I've enclosed it for your reference. The Premier's Office Records Schedule provides for the destruction of only "transitory records," which are records that have no long term business value.

The Premier's Office Records Schedule establishes a disposition process of records in the Premier's office in the event of a change of a Premier. Under the Schedule, records relating to the administration of the Premier's office, such as the Premier's office correspondence and business planning and budget files are to be transferred to the Archives of Ontario. Similarly, policy and program files developed in the Premier's office are also to be transferred to the Archives.

The CIO informed my office that other than to thank him for the information in a brief telephone call, he did not hear anything further – either directly or indirectly – from Livingston about deleting electronic records.

As part of our investigation into the circumstances surrounding the discussions leading up to the January 31, 2013 email, my staff also met with Livingston. During our meeting, we learned the following:

- Livingston joined the Premier's office in May 2012, at a time when many of the staff in the Premier's office had been working in that office for over a decade. Any records management practices in place at that time were longstanding – Livingston did not feel that it was important for him to inquire into the existing practices.

- His discussions with the CIO and the Secretary in January were motivated by a concern that email accounts for departing staff must be decommissioned to avoid the possibility that old accounts would continue to accumulate emails after staff had departed.
- The conversation was not motivated by an attempt to inappropriately delete emails or other electronic records.
- In his conversations with the CIO, he learned that his staff already had the administrative passwords they needed to “wipe clean” the electronic records.
- Much of his time preparing for the transition was spent assembling transition binders for the new Premier. He has no recollection of how the records in the Premier’s office were saved or archived by staff in the Premier’s office.
- He did not recall providing his staff with copies of the email addressed to him from the CIO setting out the steps that needed to be taken in order to ensure compliance with the *Premier’s Office Records Retention Schedule*. He did not supervise or instruct staff regarding records retention processes.
- His view was that there was a robust process for handling freedom of information requests in the former Premier’s office that he was familiar with. He added that in his opinion, there was a culture of full compliance with freedom of information requests.

Information provided to my office by Livingston, the Secretary, the Executive Director of Policy in the former and current Premier’s office, and the CIO was consistent in one regard – none of these individuals had any specific knowledge or information about the inappropriate deletion of electronic records occurring as part of the transition.

Indeed, when it became apparent that the former Premier’s office was preparing to decommission the email accounts as part of the transition, I was advised that the MGS IT group took immediate steps to secure the email accounts in the former Premier’s office to ensure that the records in those accounts, as of that date, were preserved. Moreover, I have been informed by MGS IT staff that the email system in the former OPO operates on the same system that is in place at the Ministry of Energy. Therefore, it would not be reasonably possible to retrieve any emails that may have been deleted during the relevant time period.

It should be noted however, that the detailed email from the CIO containing specific instructions on how to deal with records from the Premier’s office and their preservation, was not shared with any other staff.

Having regard to all of the information gathered, while I cannot state with certainty that there was an inappropriate deletion of emails by the former Premier’s staff as part of the transition to the new Premier, it is difficult to escape that conclusion. I share the Secretary of the Cabinet’s concerns raised by the questions asked of him in mid-January regarding the permanent deletion of emails. However, the communications between the CIO and Livingston provide no concrete basis to conclude that information had been improperly deleted. Nonetheless, the information obtained during this investigation clearly indicates that, as a general policy, staff of the former

Premier's office were not complying with their obligations under the *Premier's Office Records Retention Schedule*.

Issue 5: Did the former Premier's office comply with its obligations under the Premier's Records Retention Schedule and the ARA?

As indicated earlier, my office is currently processing appeals under *FIPPA* relating to records in the former Premier's office. Speaking broadly, in these appeals, the appellant seeks access to records in the former Premier's office that relate to the gas plant decisions. In the context of those appeals, the Premier's office has taken the position that there were no responsive records in its custody and control and has offered the following explanation:

- The *Premier's Office Records Retention Schedule* does not require the Premier's office to maintain policy and program files belonging to other offices and branches within the government where these records are held elsewhere within government. Nor is the former Premier's office required to maintain any records that qualify as transitory records or records that pertain to minor administrative messages.
- Where other institutions have the policy or program lead on a file, staff in the Premier's office believed that staff with the program lead would maintain all the relevant records. This is consistent with the general practice in government that the "program owner" is responsible for maintaining business records relating to their specific initiatives, including records approval and directions received from senior and elected officials and their staff. In fact, the Ministry of Energy and the OPA have already disclosed to the Justice Policy Committee over 56,500 pages of records – including emails that were either sent or received by the former Premier's staff and the former Minister's staff.

During our meeting with Livingston, we learned that his information management practices were very similar to those of MacLennan. In particular, he generally did not retain paper records. He assumed that other individuals would have received most of the records sent to him and that he was therefore in possession of "surplus duplicates." He also deleted his emails daily.

Livingston did not find it unusual that no one in the Premier's office had records responsive to the freedom of information requests. He stated that effective May 2012, when he assumed his position as Chief of Staff, the Premier's office was being "informed" but was not "involved" in the gas plant closure issues.

While it may not be reasonable to expect a senior staff person like Livingston to spend his time saving records and personally ensuring that the progress of a file was well documented, one would expect that someone in the office would be responsible for performing this task. There must be systems in place within an organization for the retention of important records, especially in the Premier's office. This is essential to the organization of any office, not to mention the head office.

Therefore, while I would not expect Livingston to personally manage the records that crossed his desk, I would expect his staff to do so and have the appropriate systems in place. If he did not have any specific knowledge of those systems, as he claims, it is reasonable to expect that

he would have had some general knowledge of those systems, in the office for which he was responsible.

In addition, while it may have been reasonable to assume that staff in the program area responsible for a file would maintain the relevant records, there is no explanation of who would maintain the records of communications within the Premier's office, between the Premier's office and other ministers' offices, and between the Premier's office and stakeholders and other external parties. It is not reasonable to conclude that all records generated or received within the Premier's office relating to the gas plant issues were either personal or constituency records, transitory records, or records that were maintained by ministry staff. This is simply beyond belief.

I was dismayed to be told the following by Livingston:

- He did not know who was responsible and accountable for records management;
- There was no formal structure in place for records retention/management – or if there was, he did not know about it;
- He had no idea how staff in that office managed their email accounts or other record holdings.

The current Executive Director of Policy, who worked in the former Premier's office, stated the following:

- Each policy person had their own filing cabinet;
- The volume of emails political staff receive is very high;
- He did not find it unusual that staff in the former Premier's office did not have any records responsive to the particular freedom of information requests relating to the gas plants. He said that people had different ways of keeping records; there was no policy, as far as he was aware at the time, and he did not implement one among his staff.

Having considered all of the evidence, I am satisfied that the *Premier's Office Records Retention Schedule* and the *ARA* was not adhered to. The simple existence of a "delete all emails" policy is proof that no judgement was brought to bear on whether emails were business records subject to the retention policy, as compared to transitory records. Clearly, no system was put in place to ensure that the responsibilities laid out in the *Premier's Office Records Retention Schedule* and the *ARA* were met.

Issue 6: Was there a culture of avoiding the creation of written documentation on the gas plant issue?

It is truly troubling and hard to believe, quite frankly, that there is any reasonable explanation for the fact that the Minister of Energy's office could produce absolutely no records in response to the Speaker's ruling. The same comment applies to the former Premier's office having so few records that were responsive to two freedom of information requests touching on these decisions.

For example, with the media attention focused on these issues, one would have expected, at a minimum, that documents would have been generated within the Premier’s office and the Ministers’ communications team relating to these stories.

In our interviews with MacLennan and the staff in the Premier’s office, we learned that there was definitely a “verbal culture” in these political offices relating to the gas plant closures.

We were told by MacLennan and Livingston that while there were frequent in-person meetings with the various players involved on the gas plant file, the only information that would generally be captured in writing would be an email proposing a meeting. MacLennan explained that the Minister’s office was a “very verbal office.” He would encourage his staff to talk through an issue face-to-face, instead of using a form of written documentation. We were told that the former Minister’s office kept a particularly hectic pace and that staff were always trying to manage high-profile issues and “put out fires.” He candidly stated that records management would have been one of the last things on the minds of political staff.

This verbal culture may have been prevalent within the former Premier’s office as well. Livingston stated that meetings were held every morning but no notes were ever taken. In his view, verbal communications were sufficient and there was no need to document the information exchanged.

As to the reason why no written records were ever created – whether to increase efficiency or to prevent any of these materials from seeing the light of day and forming the subject of a freedom of information request, one thing is clear – the culture within the former Minister of Energy’s office and former Premier’s office was predominantly a verbal one. This practice causes us great concern. Without a written record of how key government decisions are made, the government can avoid disclosure and public scrutiny as to the basis and reasons for its actions.

On March 4, 2013, Elizabeth Denham, the Information and Privacy Commissioner for B.C., issued a report entitled, *Increase in No Responsive Records to General Access to Information Requests: Government of British Columbia*.⁹ This investigation was conducted in response to a complaint about the number of “no responsive records” replies by the Government of British Columbia. Much like the circumstances in this investigation, Commissioner Denham found evidence of the practice of “verbal government,” where business was undertaken verbally and in a records-free way.

In the report, Commissioner Denham notes that a number of Information Commissioners have called for the creation of a legislated duty for institutions to document matters related to deliberations, actions and decisions. Commissioner Denham stated:

Among the reasons for instituting a legislated duty to document include good governance, historical legacy of government decisions, and the protection of privacy and access to information rights. Without a legislated duty to document, government can effectively avoid public scrutiny of the rationale for its actions.

⁹ Denham, Elizabeth (Information and Privacy Commissioner for British Columbia), Investigation Report F13-01: Increase in No Responsive Records to General Access to Information Requests: Government of British Columbia, (March 4, 2013) at 3.

She goes on to note that the legislated duty to document is a critical element of the open government movement and an important element of proactive disclosure.

I could not agree more with the concerns expressed by Commissioner Denham and her views about the impact of this practice on proactive disclosure. Two years ago my office introduced the concept of “Access by Design” – proactively disclosing government records to the public – “pushing” them out. The third of seven principles espouses the view that Openness + Transparency = Accountability. This is based on the fact that it is not possible to hold governments accountable, if government activities are hidden from public view. Any attempt by government to make decisions without documentation reflecting the decision-making process is fundamentally flawed and undemocratic.

As indicated above, I find that there was a culture of avoiding the creation of written documentation on the gas plants issue. Accordingly, I will be recommending that the government create a legislative duty within *FIPPA* and *MFIPPA* to document key decisions, thereby committing to accountability and transparency in relation to government activities for the benefit of all Ontarians.

Issue 7: Who was accountable within the former Minister’s office and the former Premier’s office for records management?

My investigation has revealed a complete lack of accountability and responsibility for the implementation of records management policies in the former Minister of Energy’s office and in the former Premier’s office. Based on the interviews conducted during this investigation, there is every reason to believe that the lack of accountability was not limited to these two offices alone.

As this Report makes clear, political staff claimed to be unaware of their responsibilities under the *ARA*, including the need to distinguish between emails that should have been retained as public records, and those that were transitory. Practices were adopted that were contrary to the *ARA*, and to the spirit of openness and transparency. Despite routine staff turnover and the availability of excellent training material, no regularized training ever took place. Finally, it is clear that there was no individual in the former Minister’s office or the former Premier’s office with the specific responsibility for records management and ensuring that political staff were aware of the requirements of the *ARA* and *FIPPA*.

In my paper entitled, *A Policy is Not Enough: It must be Reflected in Concrete Practices*, referred to above, I recommended that organizations appoint a privacy “go to” person who can answer questions about privacy and be responsible for responding to privacy breaches. I also note that the role of management does not end with the creation of a privacy policy – that is where it begins. It is worth repeating here that ensuring that the policy is reflected in concrete practices, that are actually implemented, and having the policy communicated to staff will be key to its success.

In the context of records management, this requirement to establish a “go to” person is equally imperative to ensure that there is a level of responsibility and accountability, commensurate with the importance of the regulatory requirement to retain government records. Employees need a resource to clarify and manage their records management obligations, as they arise. Management needs to signal to employees that it takes the requirement to retain records very seriously.

I am deeply concerned about the lack of responsibility and accountability for records management within the offices of senior political leaders in the provincial government. It is critical that there be a designated individual in each minister's office, as well as in the Premier's office, responsible for ensuring that staff are fully trained and aware of their records management responsibilities. Accordingly, I will be recommending that the Premier require that a senior individual be designated in each minister's office and the Premier's office as the person accountable for the implementation of Archives of Ontario-approved records management policies, and for ensuring that all new staff receive the appropriate training.

In addition, I will be recommending that the Premier issue a communiqué to all political staff regarding this Report. This communiqué should include a message that the Premier takes the issues regarding records retention seriously and that a senior individual will be designated in each office to be accountable for the implementation of records management policies and procedures.

Conclusions

In summary, I have made the following conclusions in this investigation:

1. The former Chief of Staff's records management practices at the Minister of Energy's office were in violation of his obligations under the records retention schedules and the *Archives and Recordkeeping Act*.
2. After consulting with an independent computer forensics consultant, we confirmed that the recovery or reconstruction of emails deleted in the offices of the Minister of Energy, during the relevant time period, dating back to 2010, was not reasonably possible.
3. Staff in the offices of the former Minister of Energy and the former Premier did not receive appropriate training to ensure that they understood their obligations under the *Archives and Recordkeeping Act*.
4. The office of the former Premier did not comply with its obligations under the *Premier's Office Records Retention Schedule* and the *Archives and Recordkeeping Act*.
5. While I cannot state with certainty that emails had been deleted improperly by the former Premier's staff during the transition to the new Premier in an effort to avoid transparency and accountability, it strains credulity that no one knew that the practice of deleting all emails was not in compliance with applicable records management and retention policies.
6. A culture of avoiding the creation of written documentation existed within the offices of the former Minister of Energy and the former Premier, relating to the gas plant issue.
7. There was no one in the offices of either the former Minister of Energy or the former Premier who was accountable for records management practices and ensuring that political staff were aware of the requirements of the *Archives and Recordkeeping Act* and the *Freedom of Information and Protection of Privacy Act*.

Recommendations

In light of the conclusions contained in this Report, I have made the following recommendations.

Ministry of Government Services

I recommend that the Ministry of Government Services:

1. Conduct a complete review of the Archives of Ontario records retention policies and practices that apply to the records management processes in ministers' offices and the Premier's office, having regard to the issues raised in this Report. Staff responsibility for retaining business records must be clearly set out, in an effort to ensure proper execution of the retention schedules. Particular attention should be paid to staff responsibility for retaining records originating with, and kept by, offices and branches within the ministries.

Office of the Premier

I recommend that the Office of the Premier:

1. Develop policies and procedures to ensure that ministers' staff are fully trained regarding their records management obligations – immediately following a change in ministers' staff, a change in government, or upon the hiring of any new staff within the office.
2. Require that a senior individual be designated in each minister's office and the Premier's office as the person who is accountable for the implementation of the Archives of Ontario records management policies, and for ensuring that all new staff receive the appropriate training.
3. Issue a communiqué to all staff within the Premier's and ministers' offices regarding this Investigation Report. This communiqué should include a message that the Premier takes records retention requirements and the transparency purposes of *FIPPA* and the *ARA* very seriously, has an expectation that all staff will comply with relevant laws and policies, and requires that a senior individual be designated in each office to be accountable for the implementation of records management policies and procedures.

FIPPA/MFIPPA amendments

I recommend that *FIPPA* and *MFIPPA* be amended to address institutions' responsibilities to ensure that all key decisions are documented, to secure retention of records, and to add an offence for the wilful and inappropriate destruction of records. In particular, the amendments should:

1. Create a legislative duty to document communications and business-related activities within *FIPPA* and *MFIPPA*, including a duty to accurately document key decisions;

2. Require that every institution subject to *FIPPA* and *MFIPPA* define, document and put into place reasonable measures to securely retain records that are subject to or may reasonably be subject to an access request under *FIPPA* and *MFIPPA*, taking into account the nature of the records to be retained;
3. Prohibit the wilful destruction of records that are subject to, or may reasonably be subject to, an access request under *FIPPA* and *MFIPPA*; and
4. Make it an offence under *FIPPA* and *MFIPPA* for any person to wilfully destroy records that are subject to, or may reasonably be subject to, an access request under *FIPPA* and *MFIPPA*.

Commissioner's Message

I do not need to emphasize how disturbing the intentional deletion of government business records is in a free and democratic society. As I have stated in this Report, the practice of deleting records undermines the very foundation of freedom of information legislation, and the principles of government transparency and accountability that the legislation supports. I am reminded of the comment made by the Honourable Ian Scott, the Attorney General of Ontario, between 1985 and 1990, on the introduction of Ontario's *FIPPA* in the Legislature. He stated:

We do not, and never will, accept the proposition that the business of the public is none of the public's business.

As my Report indicates, I find it very difficult to believe that there was a credible reason for the former Minister of Energy's Office not retaining **any** records that were responsive to either the Estimates Committee motion or the Speaker's ruling. The reasons I have been provided for staff keeping a "clean inbox," namely – concerns about their email account reaching its capacity, are not convincing. I am disappointed that, despite strong freedom of information laws and comprehensive records retention schedules, senior political staff in the former Minister of Energy's office did not feel inclined to preserve government business records, nor did staff in the former Premier's office take steps to ensure that their email management practices were consistent with the *Archives and Recordkeeping Act*. In this day and age, ignorance is no excuse. Transparency of government activities, reflected in their records, is essential to freedom and liberty.



Ann Cavoukian, Ph.D.
Commissioner

June 4, 2013

Date

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