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OCTOBER 27, 2015

## CLIENT BULLETIN

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### **OIPC INVESTIGATES PUBLIC BODIES' RECORDS RETENTION & DISPOSAL PRACTICES**

The Office of the Information and Privacy Commissioner (OIPC) recently released Investigation Report F15-03, based on investigations into three government ministries—the Ministry of Transportation and Infrastructure, the Ministry of Advanced Education, and the Office of the Premier—on their records retention and disposal practices. Specifically, the Commissioner focused on the public bodies' duty to assist applicants under section 6(1) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), which requires the head of a public body to make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

The Commissioner found that certain government practices the investigations uncovered were in serious contravention of section 6(1) of FIPPA. These practices included, "triple deleting" emails (moving emails to the "Deleted Items" folder, then to "Recover Deleted Items" folder, and then manually and permanently deleting emails from that folder), overly narrowed interpretation of access requests, destruction of non-transitory government records, and negligent searches for records.

The Commissioner stated that under section 6(1) of FIPPA, an employee's "Deleted Items" folder must be searched as part of any access request because emails in this folder are readily retrievable by performing an automated search. Where there is a reasonable belief that there are responsive documents in that file, it may also be necessary to perform a search of the "Recover Deleted Items" folder where emails from the "Deleted Items" folder are moved to. The public bodies' obligation to search destroyed records that were backed up will depend on the situation; under ordinary circumstances, the duty to assist will not require such a search as it is too costly and time-consuming to be considered reasonable.

In light of the above, the Commissioner stressed the need for public bodies to provide mandatory records management training to all employees. The Commissioner also recommended that public bodies configure settings in their email servers to prevent employees from permanently deleting government emails and to ensure all records are backed up. The Commissioner made a number of recommendations that have more general application:

- 1) Review access to information processes to ensure that requests for records are communicated by email in a timely manner and properly documented.

*A system should be put in place that results in access requests being emailed to all employees with potentially responsive records as soon as possible, and to keep reliable electronic records of the responses of individual employees.*

- 2) Clarify access requests with applicants where necessary to ensure that the requests are not interpreted too narrowly and to maximize the likelihood of producing records that are responsive to the applicant's request.

*The duty to assist an applicant under s. 6(1) of FIPPA requires such clarification where appropriate.*

- 3) Develop a clear guidance for employees on how to conduct a thorough search for potentially responsive records to an access request through access to information training.

*Searching for records on a phone, a tablet, or similar device is not a reasonable means of conducting a search; a reasonable search is one that is performed from a desktop or a laptop.*

- 4) Provide mandatory records management training to all employees, that includes the identification of transitory and non-transitory records and the process for retaining and destroying records.

*It is a record's content and context that determines whether a record is transitory, rather than its form. Transitory records include convenience copies, unnecessary duplicates and working materials and drafts once the finished record has been produced. Non-transitory records include decision records, instructions and advice (showing how decisions were reached), as well as documentation of a policy matter or how a case was managed.*

- 5) Configure settings in email servers to prevent employees from permanently deleting emails and to ensure all government emails are captured in monthly backups.

The recommendations specifically relating to the Commissioner's interpretation of section 6(1) of FIPPA (Recommendations 1 & 2 above) are now essentially incorporated into the public bodies' duties under FIPPA. While the others are recommendations, without necessarily the force of law, local government practices that significantly deviate from these recommendations are likely to attract criticism or concern from the OIPC.

***Maria Kim***