Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER PO-3304

Appeal PA12-494

Cabinet Office

February 7, 2014

**Summary:** The appellant, a representative of an opposition political party, made a request to Cabinet Office for records in the Premier's office including emails, memoranda and Outlook Calendar invitations making reference to "Project Vapour" or "Project Vapor" during the calendar years of 2010, 2011, 2012. "Project Vapour" and "Project Vapour-Lock" were the code names given by the Premier's office to discussions relating to the closure of gas plants in Oakville and Mississauga, respectively. The appellant was advised that there were no records responsive to his request. He appealed the reasonableness of search to this office. The appellant also argued that the Premier's office had improperly narrowed his request by failing to include records containing the terms "Project Vapour-Lock" or "Project Vapor-Lock" within its scope. In addition, the appellant raised a number of issues concerning the records management and retention practices of the office of the former Premier. In particular, he alleged that responsive records had been improperly classified in contravention of applicable records retention schedules, and destroyed in contravention of the *Freedom of Information and Protection of Privacy Act*.

During this inquiry, the Commissioner released *Deleting Accountability*, a special report resulting from her investigation of a complaint about the recordkeeping practices of political staff. The Commissioner's report addresses the appellant's concerns about the records management practices of political staff, including the issue of whether electronic records of political staff in the office of the former Premier were inappropriately deleted.

In this order, the adjudicator finds that, in the circumstances, the Premier's office did not initially conduct a reasonable search in response to the appellant's request, and that it may have inappropriately narrowed the scope of the request by failing to include records containing the term "Vapour-Lock" (or "Vapor-Lock") in its search for responsive records. However, he

also finds that subsequent searches conducted as a result of other processes, particularly in response to the motions of a committee of the Legislative Assembly, have remedied any harms arising from the initial unreasonable searches. As the reasonableness of search is the sole issue in this appeal, and as it is unnecessary to remedy any harms by ordering further searches, the adjudicator dismisses this appeal.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 24; *Archives and Recordkeeping Act, 2006*, S.O. 2006, c. 34, Sched. A.

**Orders and Investigation Reports Considered:** Ontario, Information and Privacy Commissioner, *Deleting Accountability: Records Management Practices of Political Staff – A Special Investigation Report* (Toronto: Information and Privacy Commissioner, Ontario, June 5, 2013) and *Addendum to Deleting Accountability* (August 20, 2013); Order PO-3050.

## OVERVIEW:

[1] The appellant, a representative of an opposition political party in Ontario, made a request to Cabinet Office under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information from the Office of the Premier of Ontario (the Premier's office):

> Emails, Memoranda, Outlook Calendar Invitations making reference to "Project Vapour" or "Project Vapor" during the calendar years of 2010, 2011, 2012.

[2] In its response to the appellant, Cabinet Office advised that it had conducted a thorough search and found no records responsive to the request.

[3] The requester, now the appellant, appealed this decision.

[4] During the mediation stage of the appeal process, Cabinet Office provided this office with information about the search efforts made in response to the appellant's request. The efforts described included the coordination of searches by 22 staff members of the Premier's office, including by one staff member who had been inadvertently overlooked during the initial search request, and inquiries to determine whether the email account of a former employee still exists. Cabinet Office also provided information about recordkeeping practices in the Premier's office, including copies of records schedules entitled *Transitory Records* and *Premier's Office Records Schedule*.

[5] The appellant continued to take the position that records responsive to the request should exist. He further maintained that if records responsive to his request no longer existed, they were destroyed in contravention of the *Act*. In particular, the appellant alleged that any responsive records destroyed in accordance with the records

retention policies set out in *Transitory Records* and *Premier's Office Records Schedule* were improperly destroyed, as the records sought would not or should not have been classified as "transitory records" as defined in those documents.

[6] As the parties were unable to resolve the appeal through mediation, it was transferred to the adjudication stage for a written inquiry under the *Act*.

[7] As part of my inquiry, I invited Cabinet Office and the appellant to make representations on the issue of reasonable search. In addition, I invited Cabinet Office to respond to the appellant's allegations concerning the treatment of responsive records as transitory and of the improper destruction of responsive records.

[8] I received representations on these issues from the Premier's office and the appellant, which were shared in accordance with this office's *Practice Direction Number 7* and section 7.07 of its *Code of Procedure*. The Premier's office also submitted representations in reply to the appellant's submissions.

[9] At this stage of the inquiry process, the Ontario Information and Privacy Commissioner, Dr. Ann Cavoukian, released a special report resulting from her investigation of a complaint lodged by a Member of Provincial Parliament about the recordkeeping practices of political staff. As her report included consideration of the issue of whether the electronic records of political staff in the office of the former Premier had been inappropriately deleted, I sought the views of both parties on the impact, if any, that her investigation findings should have on the issues in the present appeal. Both parties provided submissions in response.

[10] I next received correspondence from the Premier's office concerning a separate though parallel records production process occurring in response to motions made by the Standing Committee on Justice Policy of the Legislative Assembly, which had been charged with reviewing issues relating to the cancellation and relocation of two gas plants in Ontario. As it appeared that the work of the committee is ongoing, and that some of the records sought by the committee may be relevant to the issues raised in the present appeal, I sought the parties' views on whether this appeal should be placed on hold pending completion of the committee's work. After receiving and considering the submissions of both parties on this matter, I decided to proceed with this appeal.

[11] In the discussion that follows, I find that the Premier's office did not initially conduct a reasonable search in response to the appellant's request. I also find that, in the circumstances, the Premier's office may have inappropriately narrowed the scope of the request by failing to include records containing the term "Vapour-Lock" (or "Vapor-Lock") in its search for responsive records.

[12] However, I also find that subsequent searches conducted in response to a second access request made by the appellant, and as a result of the separate but

parallel process now being conducted by the Standing Committee on Justice Policy, and the production and disclosure of records to the appellant as a result of both processes, have remedied any harms arising from these issues. I also conclude that the appellant's concerns about inappropriate classification and destruction of records by staff in the office of the former Premier have been fully addressed by Commissioner Cavoukian in her investigation report and addendum on these matters.

[13] Before elaborating on the reasons for my findings, I will provide some background to give context to the circumstances of this appeal, as the request relates to the highly-publicized decision of the government of the former Premier to close two gas plants in Ontario. Much of this account is derived from the Commissioner's Special Investigation Report, which I discuss in some detail below.

## BACKGROUND:

[14] In October 2010 and September 2011, the Ontario government, then led by Premier Dalton McGuinty, announced its decisions to close gas plants in Oakville and Mississauga, respectively.

[15] The Legislative Assembly's Standing Committee on Estimates subsequently undertook a review of the costs of the gas plant closures. In the course of its work, that committee passed a motion in May 2012 requiring the Ministry of Energy, the former Minister of Energy and the Ontario Power Authority to produce records relating to these decisions. While the Ministry of Energy and the Ontario Power Authority produced a number of records in response to the motion, the former Minister of Energy did not produce any records, either in response to the motion or to a subsequent Speaker's ruling issued in September 2012, which found a *prima facie* case for contempt by the former Minister and ordered him to comply with the motion.

[16] On October 4, 2012, the appellant filed the request to Cabinet Office that is the basis of the present appeal.

[17] On October 15, 2012, the then-Premier announced his resignation as Premier and the prorogation of the Legislature.

[18] After resumption of the Legislature in February 2013, the Legislative Assembly's Standing Committee on Justice Policy began its review of the contempt matter, as well as other issues relating to the tendering, planning, commissioning, cancellation and relocation of the gas plants. The testimony given at hearings of the Justice Policy Committee brought to light some issues in the records management practices of political staff. In particular, the former Chief of Staff to the former Minister of Energy

testified before the committee that he had had a practice of deleting all his emails while working in the office of the former Minister.[1]

[19] A Member of Provincial Parliament subsequently filed a complaint with this office, alleging that the former Chief of Staff to the former Minister of Energy had inappropriately deleted all his emails on the issue of the cancellation and relocation of the Oakville and Mississauga gas plants. The complaint also alleged that these actions violated the *Archives and Recordkeeping Act, 2006* (the *ARA*) – the legislation setting out document retention requirements for public servants and political staff in Ontario – and applicable records retention schedules, as well as the principles of transparency and accountability promoted by the *Act*.

[20] This office launched an investigation in response to the MPP's complaint. In the course of the Commissioner's investigation, she received information concerning the possibility of inappropriate deletion of electronic records by political staff in the office of the former Premier. As a result, the scope of her investigation was expanded to include the records management practices of staff in both the offices of the former Minister of Energy and of the former Premier.

[21] The results of her investigation were released in her June 2013 Special Investigation Report entitled *Deleting Accountability: Records Management Practices of Political Staff*.[2] In it, the Commissioner made findings critical of the email management and other records retention practices of political staff in the offices of the former Minister of Energy and the former Premier, and she made a number of recommendations to address these deficiencies.

[22] The Commissioner also commented on the failure of political staff to produce records responsive to committee motions and to certain access requests made under the *Act*, including the request that is the basis of this appeal. Noting that her investigation included a review of whether staff in the office of the former Premier had engaged in inappropriate conduct in relation to gas plant records in its possession, the Commissioner drew attention to the differences in scope and purpose of her investigation and the appeals process:

> … at the same time that this information [allegations of improper conduct by staff in the office of the former Premier] 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

---

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

[2] Ontario, Information and Privacy Commissioner, *Deleting Accountability: Records Management Practices of Political Staff* (Toronto: Information and Privacy Commissioner, Ontario, 2013) ["*Deleting Accountability*"].

> 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.[3]

[23] I turn now to consider the specific issues surrounding reasonable search that are the subject matter of this appeal. I will also briefly address why, as indicated in the excerpt from the Commissioner's report reproduced above, it is not necessary for me to consider the appellant's allegations of inappropriate records management by staff in the office of the former Premier.

## ISSUES:

A. What is the scope of the request?

B. Did the institution conduct a reasonable search for records?

C. Does this office have jurisdiction to make orders in relation to the recordkeeping practices of the office of the former Premier?

## DISCUSSION:

### A. What is the scope of the request?

[24] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;

[3] *Deleting Accountability*, see note 2, at page 4.

> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[25] This office has stated that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[4] Furthermore, to be considered responsive to the request, records must "reasonably relate" to the request.[5]

[26] The appellant takes issue with Cabinet Office's interpretation of his request. In particular, the appellant states that while his request specifies that he seeks records containing the terms "Project Vapour" or "Project Vapor," Cabinet Office should have interpreted his request to also include within its scope records containing the terms "Project Vapour-Lock" or "Project Vapor-Lock."

[27] The appellant explains that while it was not public knowledge at the time of his request, he has since learned that discussions relating to the closure of the Oakville plant were given the code name "Project Vapour" by the Premier's office, while those relating to the closure of the Mississauga plant were given the code name "Project Vapour-Lock" or "Vapor-Lock." The appellant states that he only requested records containing the code name applied to the former project because he was unaware, at the time of his request, of any substantive difference between "Project Vapour" and "Project Vapour-Lock." He submits that it would be "disingenuous" of Cabinet Office to claim that it did not know he would also be interested in records relating to the Mississauga gas plant. It is his position, therefore, that by failing to search for or to disclose records containing the terms "Project Vapour-Lock" or "Project Vapor-Lock," which he views as being equally responsive to his request, or to contact him to clarify any uncertainty as to the scope of the request, Cabinet Office failed to comply with the requirements of section 24(2) of the *Act*.

[28] In its representations on behalf of Cabinet Office, the Premier's office states that clarification of the request was not required because it was sufficiently clear on its face: the request specified both the time period to be searched and the type of records to be searched, as well as the specific phrases to be searched. Accordingly, records responsive to the request comprised any emails, memoranda or Outlook Calendar

[4] Orders P-134 and P-880.
[5] Orders P-880 and PO-2661.

invitations and entries made within the specified time frame and containing either the phrase "Project Vapour" or "Project Vapor" in the record's title or within its content.

[29] In response to the allegation that its interpretation of the request was disingenuous, the Premier's office notes that the appellant represents a political party that is well-versed in making access requests, and that it frequently makes requests for records relating to specific issues or matters, or that contain a particular term or phrase. It submits that as the appellant's request was not a general request for records relating to the cancellation and relocation of gas plants, but was rather a focused request for records containing a specific phrase (with two spelling variations provided), it clearly set out the boundaries of relevancy, and contained no defect requiring Cabinet Office to contact the appellant for clarification or to assist him in reformulating the request.

[30] The Premier's office notes that section 24(2) of the *Act* only requires an institution to clarify a request when it is ambiguous or where the requester does not sufficiently describe the record sought. It submits that, by contrast, the interpretation urged by the appellant would require Cabinet Office to correct a "defect" in the appellant's research or knowledge that led to the formulation of an otherwise clear and unambiguous request; it argues that such an interpretation is inconsistent with the legal intention and effect of section 24(2).

[31] Further, on the topic of "defects in research or knowledge," the Premier's office questions the appellant's assertion that he was unaware, at the time of his request, that "Project Vapour" and "Project Vapour-Lock" refer to two different matters. The Premier's office reports that records produced to the Standing Committee on Estimates in 2012 contain references to code names assigned by the Ontario Power Authority and the Ministry of Energy to the two gas plant initiatives, and that these records reveal that matters relating to the Oakville and Mississauga plants were known by the Ministry of Energy as "Project Vapour" and "Project Vapour Lock," respectively. The Premier's office goes on to state that, since the appellant represents an opposition political party, it "presume[s] that this request was made after the appellant reviewed the records" produced to the Standing Committee on Estimates that revealed this information.

[32] I accept the Premier's office's characterization of the appellant as a sophisticated requester with experience making access-to-information requests, including focused requests for specific information. However, without evidence that the appellant had, in fact, at the time of his request been aware that the terms "Project Vapour" and "Project Vapour-Lock" refer to two different matters, and in light of the appellant's explicit disavowal of this knowledge, I will not presume that the appellant was aware of this distinction when he made his request.

[33] I also find persuasive the fact that in February 2013, after receiving Cabinet Office's decision on the request made in the present appeal, the appellant's political

party filed another request to the Premier's office – this one worded much more broadly, for access to:

> All emails, memoranda, correspondence from the Premier's Office and Cabinet Office making reference to "Project Fruit Salad," "Project Apple," "Project Banana" or any other "code words" associated with the cancellation/relocation of the Oakville and Mississauga Gas Plants.

[34] The code names specified in the February 2013 request are those that the Ontario Power Authority applied to the gas plant initiatives and, according to the Premier's office, are code names that were revealed (along with the Ministry of Energy's code names for these projects) in records provided to the Standing Committee on Estimates in 2012. Adopting the presumption made by the Premier's office would seem to lead to the conclusion that while the appellant was aware that each gas plant was known by a different code name, and that different institutions applied different code names to the two projects individually and in combination, he only sought access in October 2012 to those records relating to the Oakville gas plant, and, moreover, only to the subset of those records employing the code name applied to that project by the Ministry of Energy, and not to any records relating to the same project but employing any of the other code names applied by another institution. It would appear that it is only later, in February 2013, that the appellant sought access to records relating to both gas plants, without restriction based on code names.

[35] Whatever the likelihood of this scenario, I accept that in October 2012, at the time it received the appellant's request, it was open to Cabinet Office to consider the appellant's request as being clear and unambiguous on its face, and thus to find it unnecessary to seek clarification of the request from him. The request specified two variations of spelling for one particular search term, and it was made by an appellant with experience in making access requests. I accept the Premier's office's interpretation of Order P-880 of this office as holding that "the wording of the request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. In other words, an institution is not required to interpret the scope of a request beyond that which has been requested, nor make offers to expand or alter the scope of a request."

[36] However, as noted above, Order P-880 also stands for the proposition that a liberal interpretation of a request best serves the purpose and spirit of the *Act*. In the circumstances of this appeal, given my findings below on the reasonableness of the initial searches conducted by the Premier's office, and in light of the subsequent release of numerous records, some of which are clearly responsive to the appellant's request, I am of the view that an insufficiently liberal interpretation of the appellant's request may have contributed to the failure of the Premier's office to produce a single responsive record in this appeal.

[37] Here I find relevant the fact that the appellant's specified search terms ("Vapour" and "Vapor") are encompassed within the disputed terms ("Vapour-Lock" and "Vapor-Lock"), and that numerous records containing both terms have since been located and released through other processes. Whether the appellant formulated his October 2012 request with knowledge of the distinction between the two sets of terms or not, I find his argument persuasive that a reasonable search would have turned up responsive records, including records containing both terms, and that any uncertainty at that point as to the scope of the request should have been clarified by Cabinet Office. If Cabinet Office was truly of the view that the appellant was aware of the difference between the two sets of code names, a simple conversation to verify the narrow scope of the request would have removed any doubt. However, if Cabinet Office was uncertain as to whether the appellant was aware of this difference, I am of the view that it erred by simply processing the request as narrowly defined, without clarifying its scope with the appellant. In either case, Cabinet Office should not have drawn the conclusion that the appellant was aware that two different code names were in play, and that he had consciously decided to ask for records relating to only one plant.

[38] In the result, however, any harms arising from an unduly narrow interpretation of the appellant's October 2012 request have been remedied through other processes. Both the appellant and the Premier's office refer to the disclosure of records to the appellant in response to the more broadly worded request made in February 2013 (including of records responsive to the request made in the present appeal), as well as the voluminous disclosures made as a result of the work of the Justice Policy Committee on these matters. Given this, I am satisfied that I need not address this matter any further in this order.

## B. Did the institution conduct a reasonable search for records?

[39] The main issue in this appeal is the reasonableness of the search conducted by the Premier's office for records responsive to the appellant's October 2012 request.

[40] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.[6] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[41] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[7] To be responsive, a record must be "reasonably related" to the request.[8]

---

[6] Orders P-85, P-221 and PO-1954-I.
[7] Orders P-624 and PO-2559.
[8] Order PO-2554.

[42] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[9]

[43] A further search may be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[10]

[44] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[11]

## ***Representations***

*Representations of the Premier's office*

[45] As part of my inquiry, I asked Cabinet Office to provide information about all steps taken in response to the appellant's request, including specific details about the nature of searches conducted. The Premier's office provided this information in its representations and in accompanying affidavits sworn by the Freedom of Information and Issues Coordinator for Cabinet Office (the FOIC) and by the former Special Assistant to the former Premier (the Special Assistant). The search efforts detailed in these materials indicate the following:

- The search was coordinated by the FOIC and two senior staff members (including the Special Assistant) then employed in the office of the former Premier.

- The search coordinators identified those staff members within the office of the former Premier whose records should be searched, based on these staff members' senior roles within the office of the former Premier, or their proximity to the former Premier. In total, the records of 22 individuals, including the Premier, were searched.

- Each staff member conducted his or own search, in accordance with specific and detailed instructions for search provided by the Special Assistant; the Special Assistant conducted the search of the former Premier's records. Each searcher confirmed having searched all email folders (including inbox, sent items, personal folders, deleted email folders and calendar entries and invitations), electronic files, recycle

[9] Orders M-909, PO-2469, PO-2592.
[10] Order MO-2185.
[11] Order MO-2246.

bins and hard copy files for records containing the terms "Project Vapour" or "Project Vapor." No responsive records were located.

- Business records of departing staff are expected to be transferred to their successors prior to their departure. Accordingly, any records of former staff existing in the files given to their successors would have been searched by current staff members.

- Email accounts of former staff are typically decommissioned, and the information contained in the accounts purged, sometime after their departure. The email accounts of the former Chief of Staff to the former Premier, the former Principal Secretary to the former Premier, and the former Deputy Director of Policy were deleted in June and August 2012, following their departures. In accordance with the protocol described above, business records contained in these email accounts are expected to have been transferred to each staff member's successor prior to his departure. Accordingly, any email records of former staff given to their successors would have been searched by current staff members.

- The FOIC made inquiries to the Manager of Field Services in Infrastructure Technology Services, Ministry of Government Services, about the possibility of retrieving the emails of these three former staff members from back-up tapes maintained for the Premier's office. The FOIC was advised that back-up tapes for the Premier's office are maintained for disaster recovery purposes and not for archiving or records management purposes – back-up takes are only maintained for ten days and then overwritten. Accordingly, the email accounts of these former staff members, which were deleted prior to the date of the appellant's request, could not be retrieved from back-up tapes.

[46] The Premier's office also provided information about the records retention schedules applicable to it, including copies of documents entitled *Premier's Office Records Schedule* and *Transitory Records*. In particular, the Premier's office notes that certain classes of records, such as policy and program files belonging to other offices and branches within government, and transitory records (defined as records of no ongoing business value), are not required by these schedules to be maintained by the Premier's office. The Premier's office denies the appellant's allegations of improper destruction of responsive records, and submits there is an alternate explanation, based on the records classifications set out in these schedules, for why certain records that appear to be responsive to the appellant's request were not located by the Premier's office, but were later produced by the Ministry of Energy and the Ontario Power Authority to the Standing Committee on Estimates.

[47] According to the Premier's office, these records (some of which the appellant provided in support of his allegations of improper destruction) may have been classified by staff in the office of the former Premier as being transitory records, given their administrative nature or short-term value, or as policy and program files belonging to other offices and branches of government (for example, to the Ministry of Energy or the Ontario Power Authority), and as such not required to be retained by the Premier's office. It also speculates that the treatment of such policy and program files in these schedules may have informed the approach of former staff in deciding which files did not need to be maintained, and in selecting which records constitute business records requiring transfer to a successor, before these staff left the office of the former Premier.

[48] In sum, the Premier's office submits that while it may be open to the appellant to disagree, on a case-by-case basis or in general, with the classification and ultimate disposition of records by staff in the office of the former Premier, the sole issue in the present appeal is whether staff conducted a reasonable search for responsive records, and not the adequacy of the recordkeeping practices in the office of the former Premier more generally. On the issue of reasonable search, the Premier's office submits that it has provided evidence to demonstrate that it conducted a reasonable search in the circumstances.

*The appellant's representations*

[49] The appellant provides three main reasons for his assertion that the Premier's office failed to conduct a reasonable search. First, he points to the disclosure of records responsive to his October 2012 request through other processes. Second, he asserts that the intentional destruction of records precludes any possibility of a reasonable search having been conducted, and "inherently violates the *Act*." Lastly, he disputes the Premier's office's submission that any destroyed records were transitory or policy and program files originating in another branch of government, and thus disposed of in accordance with applicable records schedules. The appellant also disputes the Premier's office's characterization of the scope of the inquiry in the present appeal, and asserts that this office has jurisdiction to inquire into the classification and disposition of records by staff in the office of the former Premier. In later representations, the appellant puts it this way: "[O]ne of the central issues in this appeal is whether Cabinet Office denied the existence of requested records or deleted records which should have been retained and disclosed … One of the purposes of this appeal is to ask the IPC to investigate the improper destruction of records by the Premier's Office."

[50] I will address the appellant's submissions on deliberate destruction and other issues concerning the recordkeeping practices of staff in the office of the former Premier – matters to which the appellant devoted a significant part of his submissions – separately, under Issue C. Here I will only address the appellant's submissions directly related to the issue of reasonable search, which is the main issue in this appeal.

[51] In support of his assertion that records responsive to his request exist but were not disclosed to him, the appellant cites a number of records from among the approximately 56,000 pages produced by the Ministry of Energy and the Ontario Power Authority to the Standing Committee on Estimates in September and October 2012. Among these are records concerning gas plants issues in general, and some referring to "Project Vapour" in particular, that were circulated to or from staff members in the office of the former Premier who were identified as having conducted the searches at issue in the present appeal. The appellant also cites a number of the records that were disclosed to his political party in response to the more broadly worded request made in February 2013. Among the records disclosed in response to that request are records that the appellant identifies as being responsive to his October 2012 request.

*Reply representations of the Premier's office*

[52] In reply to the appellant's evidence that records that should have been disclosed in response to his October 2012 request were disclosed in response to the February 2013 request, the Premier's office notes that the second request was a broader request for records containing all code names associated with both gas plants. The Premier's office also explains why two of the records disclosed in response to the later request, which contain the term "vapour" and which the appellant argues are responsive to his October 2012 request, were not disclosed in response to his request: these records are not Cabinet records, but rather records prepared by staff in the Office of the Government House Leader. Accordingly, these records were not held by the office of the former Premier, and were not located in the search. Furthermore, as caucus records, these records are not subject to the *Act*. The Premier's office notes that this explanation was provided to the appellant in its decision letter responding to his second request; it reports that nonetheless both records were voluntarily provided to the appellant by the Government House Leader's office, at the direction of the current Premier.

[53] The Premier's office does not directly address in its reply representations the appellant's submissions about the responsiveness of records disclosed by the Ministry of Energy and the Ontario Power Authority through the Standing Committee process, although it does so perhaps indirectly by reference to the basis for treating certain records as transitory or as belonging to other branches of government, and to the protocols for deleting email accounts of former staff.

## ***Subsequent developments***

*Parties' representations on Deleting Accountability*

[54] Shortly after receipt of these representations, the Commissioner released *Deleting Accountability*, her Special Investigation Report on the email management

practices of political staff. I sought representations from the parties on the impact, if any, that the investigation findings may have on the present appeal.

[55] The appellant expresses agreement with the Commissioner's findings that inappropriate deletion of electronic records by political staff is a violation of the *Archives and Recordkeeping Act, 2006* and also undermines the principles of transparency and accountability that guide the *Act*. He asserts that the deliberate destruction of the email records of the three former staff members in the office of the former Premier are further instances of the type of conduct denounced by the Commissioner in her report. He also states that testimony given before the Standing Committee on Justice Policy indicates that responsive records were deliberately destroyed as a result of a direct order from the former Chief of the Staff of the former Premier. Although he acknowledges that the Commissioner recommended in her report that the *Act* be amended to prohibit the wilful destruction of records in certain circumstances, he asserts that the *Act* already prohibits this conduct, and proposes that I make a finding in this appeal that responsive records were intentionally destroyed in violation of the *Act*.

[56] The appellant also reiterates a number of the arguments made in his previous submissions, including the allegations of inadequate records management and inappropriate classification of records in the office of the former Premier.

[57] While I will address the appellant's submissions about recordkeeping practices in the office of the former Premier under Issue C, I note here that the Commissioner did not make the definitive findings on deletion of records in the office of the former Premier that have been attributed to her by the appellant. Instead, the Commissioner said:

> 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.[12]

[58] The Premier's office submits that issues concerning recordkeeping practices of political staff have already been addressed by the Commissioner in her investigation

[12] *Deleting Accountability*, see note 2, at pages 1-2.

detailed in *Deleting Accountability*. It notes that the Commissioner recognized in her report that the issue of reasonable search is a separate matter that is being addressed by this office through the inquiry process, including in the present appeal.

*Release of Addendum to Deleting Accountability*

[59] On August 20, 2013, the Commissioner released an *Addendum* to *Deleting Accountability*, to address certain developments occurring after the release of her June 5 report – in particular, the retrieval of a substantial number of email records, including 39,000 emails from the account of the former Chief of Staff to the former Minister of Energy, which the Commissioner had been led to believe were irretrievable.

[60] These email records were produced by the Ministry of Government Services in response to a June 25, 2013 motion made by the Standing Committee on Justice Policy after hearing from the Commissioner about her investigation. As the Commissioner notes in her *Addendum*, as a result of what appear to have been significantly greater efforts expended by the Ministry of Government Services to locate records in response to the committee motion, a large volume of emails related to the cancellation and relocation of the gas plants was retrieved from ministry servers. These included deleted records that were not located by ministry staff during the Commissioner's investigation of this matter.

[61] The Commissioner issued her *Addendum* to correct the conclusion made in her report which was based on information provided by ministry staff respecting the ability of ministry staff to retrieve certain deleted emails, and to explain the circumstances surrounding the disclosure of new information to the Standing Committee on Justice Policy. While I will discuss the impact of the production of additional potentially responsive records to the present appeal, it is important to note that despite this development, all the other findings and all the recommendations in *Deleting Accountability* remain valid and unchanged.

*Parties' representations on the impact of the work of the Standing Committee on Justice Policy*

[62] Throughout the course of the present appeal, the separate process before the Standing Committee on Justice Policy has been ongoing. Since the referral of the gas plants matters to the committee in February 2013, it has passed over thirty motions for the production of documents from various offices of government, including the Premier's office, the Government House Leader's office, the Ministry of Government Services and Cabinet Office. These motions have resulted in the production of a large volume of records, including records that would appear to be responsive to the appellant's October 2012 request. As a result, in September 2013, I sought the parties' views on the impact of the ongoing work of the Standing Committee to the adjudication of the present appeal.

[63] The Premier's office notes that the work of the Standing Committee on Justice Policy is a separate legal process from this inquiry, and submits that the volume of records produced to the committee in response to its motions should not be treated as *prima facie* evidence of unreasonable search by the Premier's office. The ongoing production of records in response to committee motions may, however, be relevant to the question of whether further searches are required in this appeal, particularly in light of the fact that the records produced to the committee are available to the appellant in his capacity as representative of an opposition political party.

[64] The Premier's office identifies six Standing Committee motions as being most relevant in this regard, as they required the production of records containing specific search terms, including Vapour, Vapor, Vapourlock and Vaporlock. It particularly refers to a May 7, 2013 motion of the Justice Policy Committee, requiring the Premier's office to produce "[a]ll documentation and correspondence, electronic or otherwise, between January 1, 2010 and May 07, 2013, related to the cancellation and relocation of the power plants in Oakville and Mississauga, including but not limited to documents containing any and all proxy names or code names" for these projects, including Project Vapour and Project Vapour Lock.

[65] The details of the search conducted by the Premier's office in response to this motion are set out in a May 21, 2013 submission to the committee chair by the current Chief of Staff to the current Premier. He indicates the following:

- The search was coordinated by senior staff in the Premier's office, with the assistance of staff in Cabinet Office.

- All current staff in the Premier's office were required to conduct the search. The Government House Leader's office was also included in the search, although it is not formally part of the Premier's office. In addition, the email accounts of 52 individuals formerly employed in the Premier's office were reactivated by IT staff in Cabinet Office, and searched by a senior staff person in the Premier's office.

- Staff were provided with detailed instructions for conducting a complete search for records, and a mandatory staff meeting was held to answer questions about the search. Staff were provided with a list of search terms (including Vapour, Vapor, Vapour Lock, Vapor Lock, Vapourlock and Vaporlock); they were also asked not to restrict their search to documents containing the search terms, but to search for all relevant records, including records related to the work of the Justice Policy Committee.

- Staff searched their email accounts, personal and shared drives and paper records, from January 1, 2010 to the date of the motion (May 7, 2013).

[66] Fifteen boxes of responsive records were located as a result of the above search, and provided to the Standing Committee on May 22, 2013. The Premier's office understands that the appellant has received copies of these records, as well as the Chief of Staff's written account of the search.

[67] The Premier's office also describes other searches undertaken in response to committee motions that may have produced responsive records sent to or received from staff in the Premier's office, including: searches conducted by Cabinet Office; searches conducted in the Ministries of Finance and Energy and the Ontario Power Authority; and a centralized electronic search by the Ministry of Government Services of available email accounts and personal drives of certain named individuals formerly or currently employed in the Premier's office. The Premier's office also notes that further records may be produced as a result of other committee motions directed to other government ministries and agencies. All located records have been or will be made available to the appellant.

[68] The appellant submits that records that have been disclosed or that will be disclosed through the parallel but distinct process undertaken by the Standing Committee on Justice Policy does not excuse the failure of the Premier's office to conduct a reasonable search in response to his request. He takes issue with the failure of the Premier's office to have searched deleted or destroyed records in response to his request, as he submits the production of deleted records responsive to his request through the Justice Policy Committee process is substantive proof that such a search should have been conducted.

[69] More generally, the appellant suggests that a request for email records should be interpreted to include a request for all emails, regardless of where they are stored and whether they have been deleted – he thus submits that a reasonable search would include a search of deleted emails, email accounts and back-up tapes. In support of his assertion, the appellant cites Order PO-3050 of this office, in which I found that deleted emails within the time frame of the request were within the scope of a request made for all records, including email records. The appellant states that the fact that deleted records were searched and produced to the Standing Committee demonstrates that there was reason to believe that responsive records had been destroyed. He concludes that by not searching for deleted records in response to his request, the Premier's office arbitrarily narrowed the scope of its search, making it unreasonable.

[70] The appellant also takes the position that any search conducted where destruction of records has occurred "is by its very nature not a reasonable search," and that a failure to make this finding will permit government institutions to flout the *Act* by

improperly destroying records. The appellant goes on to reiterate his arguments from his earlier representations, including about the scope of his request, which I have addressed above, and allegations of improper classification and deletion of records and "intentional denial" of the existence of responsive records by the Premier's office, which I will address under Issue C of this order.

### *Analysis and findings*

[71] Both parties recognize that the mandate of the Standing Committee on Justice Policy to review the gas plants matters is much broader in scope than the inquiry conducted by this office in the present appeal. They also agree that searches undertaken by various ministries and offices in response to committee motions have resulted, and may continue to result, in the production of records responsive to the appellant's October 2012 request. The parties disagree on the effect this subsequent production should have on my adjudication of the main issue in this appeal.

[72] First, I accept the Premier's office's submission that given the number and breadth of motions made by the Justice Policy Committee and directed to various government bodies, the volume of records produced through the committee process should not be treated as *prima facie* evidence of unreasonable search. I find, however, that in the circumstances of this appeal, there are sufficient other grounds for me to find that the initial searches conducted by the Premier's office in response to the appellant's request were unreasonable.

[73] In its first set of representations in this appeal, the Premier's office provided a detailed account of the search efforts undertaken in response to the request, and of the records retention practices applicable to it that may explain its failure to have located any responsive records. While these search efforts do not, on their own, necessarily lead to a conclusion that the search was unreasonable, I find that the context surrounding the appellant's request is relevant to the question of reasonableness of search.

[74] In *Deleting Accountability*, the Commissioner found that there was a practice of indiscriminate deletion of all emails by the former Chief of Staff to the former Minister of Energy, and she expressed her disbelief that this practice was simply part of a benign attempt to efficiently manage email. Similarly, while she could not "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," she found that the email management practices in the office of the former Premier were deficient.[13] Her subsequent observations about the failure of the former Minister's office to produce any records in response to the May 2012 motion of the Standing

[13] *Deleting Accountability*, see note 2, at page 2.

Committee on Estimates are equally applicable to the circumstances of the present appeal. She said:

> 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.[14]

[75] Leaving aside for now the matter of the adequacy of recordkeeping practices in the office of the former Premier, I find that the failure to locate even one responsive record should have raised questions about the reasonableness of the searches conducted. Although the Premier's office offers explanations based on the classification of records for why no responsive records were located, I agree with the Commissioner that even assuming many records were properly classified as being transitory, or as belonging to other branches of government, it is simply not credible to suggest that absolutely no records on this high-profile matter would have been retained by the office of the former Premier. At a minimum, its searches returning zero records might have raised questions within the Premier's office about the adequacy of its search efforts, or prompted consideration of whether it was properly interpreting the scope of the appellant's request. Both parties also agree that records responsive to the appellant's request have since been produced through the work of the Standing Committee on Justice Policy. On these bases I find that the initial searches conducted by the Premier's office in response to the appellant's request were unreasonable.

[76] I note that I arrive at this finding without accepting the appellant's assertion that a reasonable search for email records necessarily requires that an institution conduct a search for deleted emails. In my Order PO-3050, cited by the appellant in support of the proposition that the "inherent scope of a request for emails refers to <u>any</u> email, regardless of where the email is stored," I found, in circumstances where the possibility that responsive emails had been lost was raised at the mediation stage, that it was reasonable for the scope of a request for email records to be expanded to include deleted emails. I also indicated, however, that this would not be a general expectation in all requests for email records, and that such a finding would be made on a case-by-case basis.

---

[14] Ibid, at page 15.

[77] As noted above, in this case, the fact that no responsive records were identified as a result of the initial search conducted by the Premier's office should have alerted staff to the need to perform a more robust search, including a search for deleted emails. This conclusion is supported by a number of additional facts.

[78] For example, as noted in the Commissioner's *Addendum to Deleting Accountability*, the existence of a second tier of storage for emails known as the "Enterprise Vault," where emails greater than 30 days old are stored was known. Staff were also aware that the decommissioning of email accounts on the departure of staff often failed to include the deletion of these secondary storage accounts, resulting in the existence of "orphaned Enterprise Vault Files." In fact, at the time of the release of the Commissioner's *Addendum*, there were approximately 30,000 orphaned Enterprise Vaults in existence. Orphaned Enterprise Vaults relevant to the appellant's request were not searched until after the release of the Commissioner's initial *Deleting Accountability* report in June 2013 and relevant records were discovered. It is not unreasonable to have expected such a search to have been performed in response to the appellant's request.

[79] Further, I have noted above that the representations of the Premier's office state that the FOIC made inquiries of IT staff about the possibility of retrieving emails of former staff members from back-up tapes. The FOIC was informed that no responsive records would be found on back-up tapes and a search was not performed. However, as detailed in the *Addendum to Deleting Accountability*, this conclusion was reached by relying on policies and retention schedules rather than an actual search of back-up tapes. When a search was in fact performed, potentially responsive records were discovered. Again, given that the initial searches conducted in response to the appellant's request found no responsive records, it is not unreasonable to expect an actual search of back-up tapes to have been conducted, rather than a simple review of tape retention schedules.

[80] As I have found that the initial searches conducted by the Premier's office were unreasonable, I will next consider whether I should order further searches. On this matter the production of records responsive to the appellant's request through other processes is relevant.

[81] As both parties acknowledge, a number of records responsive to his request have been disclosed to the appellant in response to the second, more expansive request filed by his political party in February 2013, and in response to motions made by the Standing Committee on Justice Policy after these matters were referred to it in February 2013. I agree with the Premier's office's submission that the ongoing production of records as a result of the work of the Standing Committee is relevant to the question of whether further searches are required in this appeal. I find particularly relevant the detailed account of the May 2013 search of the office of the current Premier, provided by its current Chief of Staff, which I am satisfied establishes that a

reasonable effort has been made to identify and locate records, including records responsive to the appellant's request. Of significant relevance is the large volume of records that have been disclosed as a result of these more extensive search efforts.

[82] Thus, while I find that the initial searches conducted by the Premier's office were not reasonable, based on subsequent developments, I am satisfied that reasonable searches for records responsive to the appellant's request have since been conducted, and that the harms arising from the inadequate initial searches have been remedied by the resulting production of records to the appellant.

## C. Does this office have jurisdiction to make orders in relation to the recordkeeping practices of the office of the former Premier?

[83] I will now briefly consider the matters described by the appellant as going beyond the issue of reasonable search. These are summarized by the appellant as follows:

- That responsive records should have been classified as policy and program files originating in the Premier's office. The appellant submits that given his evidence of the central decision-making role of the Premier's office in the negotiation of the closure of the gas plants, it is "not plausible" that all responsive records could have been transitory records or policy and program files originating in another branch of government.

- That responsive records should not have been destroyed, and their destruction was in violation of the principles and purposes of the *Act*.

- That the IPC has jurisdiction to inquire into whether records were properly characterized as transitory and whether records were improperly destroyed.

[84] The appellant says he "can only surmise that these records were intentionally destroyed in order to avoid the possibility of public disclosure pursuant to either the order of a standing committee or an access to information request." He therefore requests that an investigation be conducted into these matters, and, more generally, that the Commissioner "investigate the broader practices of the deletion of electronic records by political staff in the Ontario government."

[85] I asked the Premier's office to comment on the relevance of these other matters raised by the appellant. The Premier's office describes issues concerning recordkeeping in the office of the former Premier, including the alleged improper classification and destruction of records, as being collateral to the main issue in this appeal. The Premier's office also disputes the appellant's characterization of these matters as being

contraventions of the *Act*, and with his assertion that this office can and should make orders to correct deficiencies in an institution's recordkeeping practices as part of an inquiry into reasonable search. It submits that the appellant has conflated the issue of reasonable search, the sole issue in this appeal, with other matters outside the scope of this inquiry.

[86] As the Commissioner noted in *Deleting Accountability*, the retention and management of public records is governed by the *Archives and Recordkeeping Act, 2006* (the *ARA*), and not the *Act*. She recognized, however, that the transparency and accountability purposes of the *Act* depend on public records being maintained in accordance with the *ARA*.

[87] The Commissioner identified that the inquiry process under the *Act* is the appropriate avenue for addressing the issue of whether an institution has conducted a reasonable search for records in accordance with the requirements of the *Act*. Her separate review of the recordkeeping practices of political staff, including staff in the office of the former Premier, is detailed in *Deleting Accountability* and the *Addendum*. Her investigation resulted in a number of findings on the issues raised by the appellant in the present appeal. Among other things, she found:

- That the practice of indiscriminate deletion of all emails is a violation of the *ARA* and applicable records retention schedules.

- That the email management practices in the office of the former Premier were also in violation of the *ARA*.

- That practices in violation of the *ARA* also undermine the purposes of the *Act*, and the transparency and accountability principles that underlie both the *ARA* and the *Act*.

[88] The Commissioner concluded that the failure of the offices of the former Minister of Energy and the former Premier to comply with the records retention requirements of the *ARA*, coupled with a culture of avoiding the creation of written and electronic records on the gas plants issues, assists in explaining the paucity of records produced by these offices in response to committee motions. It also explains the failure of the Premier's office to locate any responsive records during its initial searches in the present appeal.

[89] The Commissioner's investigation also addressed the appellant's concerns about inappropriate classification and destruction of records in the office of the former Premier. While the Commissioner could not definitively find that there had been inappropriate deletion of records in the office of the former Premier, she found it

unlikely that all records relating to the gas plants initiatives could have properly been classified so as not to require their retention:

> 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.[15]

[90] The Commissioner also raised this matter in her opening statement to the Standing Committee on Justice Policy at its June 25, 2013 hearing to consider her *Deleting Accountability* report. In response to earlier testimony of the former Chief of Staff to the former Premier in which he suggested that rules requiring destruction and deletion of records prompted him to delete all his emails, she argued against the routine classification of email records in this manner:

> [E]mail records are not necessarily transitory or duplicate records. Their context must be reviewed before they may be deleted, in order to determine whether they should be retained, in accordance with the retention schedules. In other words, the content of the email, as with any document, is what determines whether it should be retained or deleted – substance over form. This was made abundantly clear in the retention schedules and in the training materials developed by the Ministry of Government Services.
>
> There are clear requirements to retain records relating to the following areas: policy development, program development, stakeholder relations, legislative activity and Minister's and Premier's correspondence. These are critical categories of documents, particularly when government is dealing with important issues of public policy. It is simply not credible that documents falling within these categories would not have been in the possession of political staff, at some point in the decision-making process, or that staff would not be aware of their obligation to retain any of these documents. By adopting a "delete all" email policy, political staff were not addressing the requirement that government business records must be retained, with the exception of transitory, personal or duplicate records.[16]

---

[15] *Deleting Accountability*, see note 2, at page 28.

[16] Information and Privacy Commissioner/Ontario, *Opening Statement for Standing Committee on Justice Policy - Commissioner Ann Cavoukian June 25, 2013* (speech) (Toronto: Information and Privacy Commissioner/Ontario, 2013) at 6-7.

[91] Given all the above, I am satisfied that the appellant's concerns about the recordkeeping practices of staff in the office of the former Premier have been fully addressed by the Commissioner in her investigation report and addendum on these matters, and that I do not need to revisit these issues.

[92] I note in closing that the Commissioner made extensive recommendations to address the deficiencies she identified in the email management and other records management practices of political staff. These recommendations propose improvements to recordkeeping and records management across the public service, including a complete review of records retention and management policies and practices applicable to all ministers' offices, improved training for political staff, and amendments to the *Act* and its municipal counterpart to address institutions' responsibilities concerning recordkeeping and records management. These recommendations, if implemented, should go some way toward addressing the appellant's broader concerns about records management practices throughout the public service.

[93] In light of all the foregoing, I dismiss the appellant's appeal.

## ORDER:

I find that, in the circumstances, the Premier's office did not initially conduct a reasonable search in response to the appellant's request. I also find that subsequent searches have remedied any harms arising from the initial unreasonable searches.

As the reasonableness of search is the sole issue in this appeal, and as it is unnecessary to order further searches, I dismiss this appeal.

Original Signed By: February 7, 2014
Brian Beamish
Assistant Commissioner