

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-4200-I

Appeal MA18-199

Peterborough Public Health

May 18, 2022

**Summary:** This second Interim Order follows Interim Order MO-3970-I in which Peterborough Public Health (PPH) was ordered to conduct a further search for records responsive to the appellant's request for access to information on the Peterborough and District Farmers' Market stall operators and exemption from the *Food Premises Regulation* for the years 2013 to 2018. Also, in Interim Order MO-3970-I, the adjudicator deferred her decision on the fee estimate and fee waiver issues in the appeal.

After receiving Interim Order MO-3970-I, PPH conducted a further search for responsive records and disclosed additional records to the appellant. PPH also decided to waive its fee in the appeal, resolving the deferred fee estimate and fee waiver issues.

In this second interim order, the adjudicator finds that PPH has not complied with Interim Order MO-3970-I and she orders it to: (a) conduct additional further searches for records responsive to the appellant's request for materials related to PPH's assessment of whether the Farmers' Market qualified for exemption from the *Food Premises Regulation* from 2013 to 2018; (b) provide affidavits from individuals with direct knowledge of these additional searches; (c) provide affidavits from individuals with direct knowledge of all the searches it has conducted to date, in accordance with further directions she will provide to PPH by correspondence following the issuance of this second interim order; and, (d) produce copies of specific records referred to in its affidavit relating to its search efforts to date. Finally, the adjudicator reserves her right, under section 41(8) of the *Municipal Freedom of Information and Protection of Privacy Act*, to summon and examine any person who may have information relating to the issues in the appeal.

**Statutes Considered:** *Municipal Freedom of Information and Protection Privacy Act*, R.S.O. 1990, c. M.56, sections 4.1, 17 and 41(8).

**Orders and Investigation Reports Considered:** Interim Order MO-3970-I.

## OVERVIEW:

[1] This second Interim Order, which follows Interim Order MO-3970-I, addresses the ongoing issues with Peterborough Public Health's (PPH) search for records responsive to the appellant's request and its failure to comply with Interim Order MO-3970-I. The appeal arises from the appellant's request for the following records related to the Peterborough and District Farmers' Market (the Farmers' Market) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

- all reports from the Peterborough and District Farmers' Market Association (PDFMA) identifying all stall operators and the stall operators identified as 'producers who are primarily selling or offering for sale their own products'
- any other relevant materials upon which PPH bases its assessment as to whether or not the Farmers' Market is considered exempt from the *Food Premises Regulation*<sup>1</sup> covering the calendar years of 2013 to [January 19, 2018].

[2] PPH decided to withhold the stall operator lists, claiming that they contain personal information belonging to the stall operators and were exempt under the mandatory personal privacy exemption in section 14(1) of the *Act*, and the appellant appealed. In Interim Order MO-3970-I, I found that the lists do not contain the personal information of the stall operators and, consequently, the records are not exempt from disclosure under section 14(1) of the *Act*. I also addressed the appellant's challenge of the reasonableness of PPH's search for records responsive to his request and agreed with the appellant that PPH had not conducted a reasonable search for responsive records. In order provisions 1-7 of Interim Order MO-3970-I, I wrote:

1. I do not uphold PPH's decision to withhold the 61 pages of records at issue in this appeal and I order PPH to disclose them, in their entirety, to the appellant by **December 2, 2020** but not before **November 27, 2020**.

2. I order PPH to conduct further searches for all records upon which it bases its assessments as to whether the Farmers' Market is exempt under the *Food Premises Regulation*. PPH shall search for all inspections and assessment field notes and reports, stall operator questionnaires, PPH office notes, summaries, meeting notes, and correspondence between

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<sup>1</sup> O. Reg. 493/17 under the *Health Protection and Promotion Act*.

PPH staff and other institutions and/or third parties, in paper and electronic form.

3. I order PPH to provide me with an affidavit or affidavits sworn by individuals who have direct knowledge of the searches, which are to include at a minimum the following information:

(a) The names and positions of the individuals who conducted the searches.

(b) The steps taken in conducting the searches.

(c) The types of files searched and the results of each search.

4. I order PPH to provide me with the affidavits and the results of its further searches by **December 2, 2020**.

5. If PPH locates additional records responsive to the request through its further searches, I order it to issue an access decision to the appellant in accordance with the *Act* treating the date of this interim order as the date of the request.

6. The timelines in order provisions 1 and 5 may be extended if PPH is unable to comply in light of the Covid-19 situation, and I remain seized to consider any resulting extension request.

7. I also remain seized to address any issues arising from order provisions 1 to 5 above, and to determine the fee and the issue of fee waiver in this appeal.

[3] Following the issuance of Interim Order MO-3970-I on October 28, 2020, PPH conducted a further search and located additional records responsive to the request. PPH provided me with an affidavit, sworn by the Director of Public Health Programs, Chief Nursing Officer and Privacy Officer of PPH (the Director), to which it attached all of the responsive records it located during its further search (the affidavit or PPH's initial affidavit). PPH advised me that it did not have a copy of the original 61-page package of records at issue in this appeal (containing the lists of stall operators), despite having provided the 61 pages of records to the IPC at the outset of the appeal. Because PPH no longer had a copy of the records at issue, the IPC provided PPH with a copy of the 61-page package of its records. PPH then disclosed the affidavit, including the attached additional responsive records and the original 61 pages of records to the appellant, on December 21, 2020.

[4] I invited the appellant to review the affidavit and the results of PPH's additional search, and provide representations on whether he believed PPH had complied with the order provisions of Interim Order MO-3970-I and conducted a reasonable search. On

April 30, 2021, the appellant submitted detailed representations in which he challenged the reasonableness of PPH's search for responsive records and argued that PPH failed to comply with order provisions 1 to 5. On June 1, 2021, I decided to give PPH an opportunity to reply to five specific concerns raised by the appellant and invited PPH to provide reply representations on its compliance. Around this time, PPH advised me that it had decided to waive its fee in this appeal. Because the fee is no longer an issue before me, I will not mention it further in this second interim order.

[5] PPH provided a reply on June 21, 2021. I shared PPH's reply with the appellant. The appellant then provided representations in response to PPH's reply on July 20, 2021. In his July 20 representations, the appellant raised serious concerns about PPH's record retention practices, its failure to preserve responsive records, and its deletion of the entire email account of the PPH manager, who is no longer employed by PPH. The PPH manager in question was the PPH's Freedom of Information Coordinator at the outset of this appeal and the manager responsible for PPH's *Food Premises Regulation* exemption decisions (the Manager). I sought supplementary reply representations from PPH on its record retention practices and its failure to preserve responsive records. PPH submitted supplementary representations on its record retention practices on August 31, 2021, addressing its deletion of the Manager's email account.

[6] In this second Interim Order, I find that PPH has not complied with Interim Order MO-3970-I. I order it to conduct an additional further search for records responsive to the appellant's request for materials related to PPH's assessment of whether the Farmers' Market qualified for exemption from the *Food Premises Regulation* from 2013 to 2018, and to provide affidavits detailing these further searches. I also order PPH to provide affidavits from individuals with direct knowledge of the searches it has conducted to date, in accordance with further directions I will provide by correspondence following the issuance of this second Interim Order. Additionally, I order PPH to produce copies of specific records mentioned in PPH's initial affidavit. Finally, I reserve my right, under section 41(8) of the *Act*, to summon and examine any person who may have information relating to the issues in the appeal.

## **DISCUSSION:**

### **Preliminary Issues**

#### ***Concerns about PPH's conduct that can not be addressed by the IPC***

[7] In his lengthy representations, the appellant expresses numerous concerns about PPH's conduct that are beyond the scope of this appeal and my jurisdiction under the *Act*. For example, he asserts that PPH has "demonstrably failed to practise evidence-informed decision-making" because it granted unwarranted exemptions from the *Food Premises Regulation* to the Farmers' Market in situations where the criteria for exemption were not met. I have no authority to address issues related to PPH's

responsibilities under the *Food Premises Regulation*.

[8] Thus, while I have reviewed the appellant's complete representations, I will not address them in their entirety in this second Interim Order. I will only address the appellant's representations that are relevant to the issues before me under the *Act*, including the appellant's assertion that PPH "recordkeeping is in complete disarray and does not comply with provincial standards or guidelines." This latter assertion is of particular concern considering the actions, detailed below, that PPH took or failed to take to locate and preserve records responsive to the appellant's request.

***Privacy issue raised by the appellant that is not addressed in this Interim Order***

[9] The appellant accuses PPH of breaching his privacy by identifying him by name in the affidavit. He states that while the identity of a requester is required on the initial freedom of information request form, there is no practical reason or justification for PPH to inform anyone of his identity, including other PPH staff. As the appellant says, the affidavit provided by PPH identifies him by name. It also states that the affiant swore the affidavit "for the purpose of responding to the direction provided relating to Appeal Number MA18-199 and for no improper purpose." The appellant is right to note that the affidavit could have referred to him as 'the appellant' or 'the requester.' While this privacy issue is not directly before me, I remind PPH that a requester's identity should be shared internally only to the extent reasonably necessary.

**Did PPH conduct a reasonable search for responsive records?**

[10] 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.<sup>23</sup> In provisions 2 and 3 of Interim Order MO-3970-I, I ordered PPH to:

2. ...[C]onduct further searches for all records upon which it bases its assessments as to whether the Farmers' Market is exempt under the *Food Premises Regulation*. PPH shall search for all inspections and assessment field notes and reports, stall operator questionnaires, PPH office notes, summaries, meeting notes, and correspondence between PPH staff and other institutions and/or third parties, in paper and electronic form.

3. ...[P]rovide me with an affidavit or affidavits sworn by individuals who have direct knowledge of the searches, which are to include at a minimum the following information:

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<sup>2</sup> Orders M-909, PO-2649 and PO-2592.

<sup>3</sup> Order PO-2554.

- (a) The names and positions of the individuals who conducted the searches.
- (b) The steps taken in conducting the searches.
- (c) The types of files searched and the results of each search.

***PPH's further search***

[11] In the affidavit provided in response to Interim Order provisions 2 and 3, the affiant attests:

- She is PPH's Director of Public Health Programs, Chief Nursing Officer and Privacy Officer, a position she has held since 2018. She has personal knowledge of certain facts in the affidavit, and where she does not have personal knowledge, she has relied on information provided by others.
- The Manager, who held the position of PPH Manager, Environmental Health in 2018 and who responded to the appellant's access request, is no longer employed by PPH and PPH is unable to provide an affidavit from him that confirms the specific steps he took in searching for responsive records.
- She reviewed the Manager's notes and spoke with other PPH staff — the Medical Officer of Health, the Director of Corporate Services and the Executive Assistant — and based on these conversations, she believes the Manager searched for responsive records in PPH's 'street file' (a physical file organized by municipal address), paper files and HealthSpace (PPH's Environmental Health database). However, she is not able to confirm what verbal discussions the Manager may have had regarding the search for records.
- She had PPH's IT Helpdesk search for email exchanges from 2013 to 2018 between the email address of the Farmers' Market contact who supplied vendor lists to PPH, the Manager, and the six Public Health Inspectors employed by PPH throughout that time period. IT located responsive records: 2013 and 2014 Vendor Lists and two emails, which she attaches as Exhibit "A" to the affidavit.
- She was informed by a different PPH Manager that two Public Health Inspectors were identified as primarily responsible for the inspections of the Farmers' Market between 2013 and 2018. One of the two Inspectors ceased being employed by PPH in March 2018. The second Inspector remains employed by PPH.
- She emailed the remaining Public Health Inspector and asked him to conduct another search for all inspections, field notes and reports, stall operator questionnaires, any office notes, summaries, meeting notes, and correspondence between him and the Farmers' Market between 2013 and 2018. She also asked

him to search in HealthSpace for digital lists of vendors for the Farmers' Market between 2015 and 2016.

- She reviewed the physical file for the appellant's request in 2018, and it contains vendor lists for 2017 and 2018.
- She also reviewed the street file for the Farmers' Market, and it contains vendor lists for 2017 and 2018, and two lists with 2018 Farmers' Market members and their addresses.
- Through the searches described above, she obtained all of the records that are responsive to the request. These are: 12 pages of records for 2013, 13 pages for 2014, 5 pages for 2015, 10 pages for 2017, 40 pages for 2018 and an undated, 10-page vendor list. She attaches all of these records as Exhibit "B" to the affidavit.
- The Farmers' Market is inspected at least annually pursuant to the *Food Premises Regulation*. She believes that information concerning which Farmers' Market producers primarily sell their own products is provided by the Farmers' Market Association in lists that are supplied to PPH. She states that, to date, PPH has had no reason to doubt the veracity of the information supplied in these lists.

[12] The affidavit includes approximately 100 pages of Exhibits, consisting of the additional records located, as described above.

### ***The appellant challenges the reasonableness of PPH's further search***

[13] After receiving and reviewing the original 61 pages of records at issue and the affidavit, along with the additional records, the appellant challenged the reasonableness of PPH's further search. He argued that PPH did not search for records upon which it based its assessment of whether the Farmers' Market is considered exempt from the *Food Premises Regulation* covering the calendar years of 2013 to 2018, as it was directed to do in order provision 2 of Interim Order MO-3970-I.

[14] The appellant stated that none of the records in Exhibit "B" contains information on which PPH based its assessment of whether the Farmers' Market is exempt. He pointed out that none of the records in Exhibit "B" can be considered additional records responsive to the request because they are either duplicates of the 61 pages of disclosed records, outside the relevant time period of 2013-2018, or without dates altogether. The appellant asserted that PPH has not identified or disclosed a single record verifying the exemption criteria were met, despite the PPH's position that the Farmers' Market was exempt from the *Food Premises Regulation*.

### ***Interim Order Provision 1***

[15] The appellant submitted that PPH did not comply with Interim Order provision 1

because it disclosed the relevant records to him on December 21, 2020, almost three weeks after the ordered date of December 2, 2020. Further, the appellant argued that PPH did not comply because it could not disclose the records at issue independently and was only able to disclose the records after the IPC provided it with a copy of the records. The appellant argued that PPH's failure to preserve records relevant to an active access to information appeal is evidence of its failure to implement reasonable and effective record preservation policies.

*Interim Order Provisions 2-5*

[16] The appellant questioned why PPH did not provide affidavits from other staff members with direct knowledge of various aspects of the search they were instructed by the affiant to conduct. The appellant argued that PPH's failure to provide affidavits from each individual, attesting to the steps they took in conducting the searches, does not comply with provisions 3(b) or 3(c) of Interim Order MO-3970-I.

[17] Regarding provision 4, the appellant stated that PPH failed to comply with it because it did not provide multiple "affidavits" as specified. Finally, the appellant argued that PPH did not conduct a reasonable search because additional records responsive to the request must exist but were not identified or disclosed. In support of his position, the appellant stated that if PPH inspectors did verify that the Farmers' Market qualified for exemption, it is reasonable to believe that PPH has records upon which such assessments were based. However, he noted PPH has not produced a single record verifying the exemption criteria were met. He also noted that PPH has not identified a single record upon which it could rely to justify its exemption decision despite the fact that the 61 pages of records ordered disclosed plainly demonstrate the *Food Premises Regulation* exemption criteria were never met.

[18] The appellant also noted that PPH publishes an "Inspection History" that identifies six dates of routine inspections of the Farmers' Market during the relevant time. He argued that PPH must have records of these inspections, which records must include the date of inspection and the name of the inspector and the inspector's findings; however, PPH produced only one "Food Premises Inspection Report" from September 19, 2015 for the relevant time. The appellant argued that the existence of this single Inspection Report, and the comments in it stating "Please see the inspection reports for all premises selling hazardous food...", provide reasonable grounds to believe that five other inspection reports should exist.

[19] The appellant also pointed out that paragraph 10 of the affidavit identifies a sole Farmers' Market contact from whom vendor lists were received and confirms that vendor lists for 2013 and 2014 were found attached to emails from this individual. However, neither Exhibit "A" nor "B" contains the emails in question.

[20] The appellant challenged PPH's decision to restrict the scope of its search to email records of a limited sub-set of individuals, notably excluding the Medical Officer of



Health. The appellant expressed concern about PPH's inability to search for responsive records in the email accounts of former PPH employees on the basis that their email accounts have been "deleted" — according to information disclosed by PPH in Exhibit "A." (Four relevant former employees for the purposes of this appeal are the Manager and three inspectors). The appellant submitted that Exhibit "A" reveals that the search was not for all email records with content responsive to the request but was more limited in scope and restricted to finding emails between a limited number of specific PPH staff and a single representative of the Farmers' Market. The appellant claimed that there are reasonable grounds to believe that additional records responsive to the request exist in communications between PPH staff and/or between PPH staff and external individuals other than the single Farmers' Market representative identified by PPH in its further search. For example, PPH must have communicated the exemption status from the *Food Premises Regulation* to representatives of the Farmers' Market, given the significant financial and logistical advantages the exemption confers on the Farmers' Market. The appellant questioned why PPH has not identified or disclosed any records that reflect such communications.

[21] The appellant also noted that Exhibit "A" to the affidavit indicates that PPH's backup email records are "overwritten" every two weeks. He argued that it is not reasonable for a government body to overwrite email backups every two weeks because that is not a reasonable retention period. He added that this practice raises serious concerns about the integrity of PPH's recordkeeping policies and practices, exacerbating concerns raised by PPH's loss of records relating to order provision 1. He further noted that PPH's policy of deleting email accounts of former employees and overwriting email backups after two weeks meant that when the Medical Officer of Health was set to retire sometime in 2021, some 13 years of her email communications would be overwritten and lost forever. The appellant argued that the Medical Officer of Health's communications should have been searched for responsive records, as should have been the communications of other PPH board members, the market manager and individual stall operators.

[22] The appellant explained that the purpose of his request was to understand what relevant materials PPH relied on to conclude that the Farmers' Market met the criteria for exemption from the *Food Premises Regulation* for the five-year period from January 2013 to January 2018, and to gain insight into PPH's continuing practices with respect to granting *Food Premises Regulation exemptions*. He reiterated that PPH has not identified or disclosed a single record verifying the exemption criteria were met, despite the PPH's position that the Farmers' Market was exempt from the *Food Premises Regulation*.

#### ***Five supplementary questions and concerns about PPH's further search***

[23] On June 1, 2021, I sent PPH a letter inviting its representations on five specific concerns raised by the appellant in challenging the reasonableness of PPH's further search. These concerns are:

1. PPH should have provided affidavits from all of its staff members with direct knowledge of various aspects of the search they were instructed by the affiant to conduct.
2. The records found by PPH indicate additional responsive records must exist that PPH has not identified or disclosed, including five additional Food Premises Inspection Reports.
3. PPH inappropriately limited the scope of its search to email records involving a certain sub-set of its staff, notably excluding the Medical Officer of Health, and it should search for any records responsive to the request that the Medical Officer of Health has, including any responsive communications.<sup>4</sup>
4. PPH should search for records responsive to the request by searching for any records that have content responsive to the request, and not by limiting the scope and restricting the search to emails between a limited number of PPH staff and one representative from the Farmer's Market. PPH should search for any responsive records between its staff, and between its staff and other individuals (i.e. Farmers' Market board members, the Farmers' Market manager, and any individual stall operator) that it has. PPH should also search for any responsive records that involve a specific email address belonging to the Farmer's Market secretary.
5. PPH should be able to search its departed Manager's emails, which PPH should not have deleted when it knew it had an outstanding request for access to information and an access appeal before the IPC. PPH inappropriately failed to preserve these relevant records as it was required to do under the *Act*.

### ***PPH's reply to the appellant's five concerns***

[24] On June 20, 2021, PPH provided a letter responding to my letter of June 1, 2021. In response to concern #1, PPH argues that it is not necessary to produce affidavits from multiple individuals that would provide the same information as was laid out in the affidavit PPH provided. PPH explains that the affiant, as the Director of Public Health Programs, is now the individual with direct knowledge of the initial search, and direct knowledge of and control over the further search for responsive records. It adds that the law allows an affiant to swear an affidavit based on their own personal knowledge or on information that is provided to them by others that they believe to be true; the affiant clearly laid out in her affidavit the individuals she contacted and from whom she received information.

[25] In response to concern #2, PPH states that certain Food Premises Inspection Reports were inadvertently included in the initial response to the request, even though these were not relevant to the request. PPH argues that the inspection of food premises

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<sup>4</sup> In my letter, I mistakenly called the Medical Officer of Health the "Medical Director of Health."

to ensure compliance with the *Health Protection and Promotion Act* and the *Food Premises Regulation* involves a wholly different matter, which is unrelated to the request.

[26] In response to concern #3, PPH states that the affidavit confirms that the affiant spoke with PPH's Medical Officer of Health and based her further review of the request and the file on that conversation.

[27] In response to concern #4, PPH argues that it has conducted a full search of all of its files for responsive records. PPH asserts that there are no further records to disclose. PPH explains that any emails received from or sent to outside parties would have come from staff members, whose emails have already been searched, where possible.

[28] In response to concern #5, PPH states that it received the initial access request in 2018 and responded to it, but its decision was appealed. PPH states that, unfortunately, by the time it received the first interim order, Interim Order MO-3970-I, directing a further search in October 28, 2020, the Manager had left PPH and his emails had been inadvertently deleted. PPH adds that it has reviewed this issue internally and taken steps to address the situation so that any emails, regardless of whether they relate to a request under the *Act*, are not inadvertently deleted when an employee leaves PPH.

### ***The appellant's ongoing concerns***

[29] I shared PPH's June 20<sup>th</sup> reply with the appellant. On July 20, 2021, the appellant provided additional representations responding to PPH's reply to the five concerns, which I summarize below:

1. PPH has not provided affidavits from the individuals who have direct knowledge of the searches, including their names and positions, and attesting to the steps taken in conducting the searches, the types of files searched and the results of each search. The affidavit provided was sworn by an affiant who admits to having personal knowledge of only certain facts and to relying on third hand information allegedly provided to her by others. The affidavit contains vague references to requests, directions, discussions and responses with others, without any supportive confirmatory documentation.
2. PPH failed to accurately or adequately respond to the concern that additional responsive records, including additional Food Premises Inspection Reports and records about the Farmers' Market exemption status, should exist. PPH mischaracterized and mistakenly restricted the scope of the request and appeal to vendor lists and completely ignored the second part of the request for all other records upon which PPH relied to grant exemption from the *Food Premises Regulation*. The appellant repeats his position that the Food Premises Inspection

Report disclosed contains comments and references that point to the existence of additional records likely to be responsive to his request. He says that he continues to have reasonable grounds to believe the other five inspection reports, dated over the relevant time span, similarly include references to other records likely to contain details reasonably related to his request.

3. Notably absent in the affidavit is any mention of searches for responsive email communications involving the Medical Officer of Health. This is despite the fact that the appellant has provided documentary evidence of many instances of direct communications from the Medical Officer of Health in which she made statements that could only have been made by her relying on communications and consultations with other PPH staff for which there must be records in PPH's custody. For example, the appellant points to an email from the Medical Officer of Health dated August 7, 2018 to him in which she states, "We took your concerns into consideration and carried out a re-inspection ... the inspection confirmed that the eligibility criteria for an exemption as a "farmers market" have been met and maintained[.]" The appellant questions why PPH has not identified or disclosed any records of the re-inspection the Medical Officer of Health cites or any records of communications between her and other PPH staff that she relied on to arrive at this conclusion and to communicate this conclusion to him.
4. PPH has been unable or unwilling to produce a single record offering evidence that the granting of the *Food Premises Regulation* exemption as a farmers' market was justified. The appellant believes this demonstrates PPH is derelict in its duty and has put public health at risk.
5. PPH's admission in the affidavit that its standard practice is to overwrite email backup after about two weeks is troubling. It raises serious concerns about PPH's records retention practices. PPH is required to have reasonable record retention policies and practices, and is obligated to preserve records that are, or may be, subject to an outstanding access request and appeal.

***Concern #5 – PPH's deletion of email accounts during the course of this appeal***

[30] On August 5, 2021, I sent another letter to PPH seeking additional information on concern #5 and its acknowledgement that it deleted the emails of the Manager during the course of this appeal. In my letter, I stated that PPH's response does not address the record deletion and retention concerns raised by the appellant and noted in my letter of June 1, 2021. I set out section 4.1 of the *Act*, which addresses measures to ensure the preservation of records:

**4.1** Every head of an institution shall ensure that reasonable measures respecting the records in the custody or under the control of the institution are developed, documented and put into place to preserve the

records in accordance with any recordkeeping or records retention requirements, rules or policies, whether established under an Act or otherwise, that apply to the institution.

[31] I asked PPH to consider its duty to preserve records under section 4.1 of *MFIPPA* and any other applicable recordkeeping or retention requirements, rules or policies that apply to PPH, in answering questions about its record preservation measures. I asked PPH to provide copies of its documented records preservation measures at the time of the request and throughout the request and appeal, and to explain how these changed. I also asked whether PPH ensured it had reasonable measures in place to preserve its records, in accordance with its duty to do so under section 4.1 of *MFIPPA*, and, if so, how it inadvertently deleted the Manager's email account. I asked PPH to provide direct affidavit evidence from the individual who deleted the Manager's emails while a freedom of information request and appeal were pending, including details of when, why and how the emails were deleted, and at whose direction. Finally, I asked PPH to provide complete details regarding the response to concern #5 in PPH's submissions of June 21, 2021, that it had conducted an internal review of the inadvertent deletion and took steps to address the situation so that emails are not inadvertently deleted when an employee leaves PPH in the future.

[32] PPH provided its responses in a letter dated August 31, 2021. Along with its responses, PPH provided ten documents regarding its organizational procedures for record filing, storage, retrieval, retention and destruction, and the "Guideline on Minimum Retentions for Health Unit Records" dated December 2012 and published by the Association of Local Public Health Agencies. PPH explained that it had had policies and procedures in place at the time of the request and that it had updated its policies and procedures for record retention in 2019; however, it has now identified the need for a procedure for digital files and it will develop additional procedures for the storage and destruction of electronic records.

[33] Regarding its deletion of the Manager's account, PPH states that, as a result of the appeal and its review of documents in June 2021, it identified a gap in its retention of emails for certain accounts between September 2017 and October 2019. Prior to September 2017, PPH retained and backed up all of its electronic records on onsite servers and stored a backup at a second location. In September 2017, PPH moved to the Microsoft Office 365 platform, and "with this new system in place, when an email account was terminated, the attached email files were deleted." Between September 2017 and October 2019, eight email accounts were terminated, resulting in the inadvertent loss of all the associated email files in those eight accounts. PPH explains that its IT department and its managers misunderstood the email account deletion process — while the IT department believed that managers would filter out relevant emails prior to the email account being deleted, the managers believed that only the email profile would be deleted with associated emails being preserved. In the case of the Manager's email account, PPH states that on September 5, 2019, IT staff asked the Executive Assistant to confirm that both the Director of Programs, and the Director of

Operations, approved the list of eight former staff whose email accounts would be deleted, including the Manager's email account.

[34] PPH does not provide direct affidavit evidence from the individual who deleted the Manager's email account and associated emails. Instead, it states that the "IT ticket" that gave the direction to close the email accounts came from the Director of Programs and was received by the Computer Technology Analyst. Neither the Analyst nor PPH can verify, however, whether the Analyst physically completed the deletion. PPH states that, if necessary, the Director will swear an affidavit attesting to the fact that she approved the deletion of the eight email accounts and that, at that time, she believed this related to the email profiles and not the attached emails. PPH states that in October 2019, it upgraded its system to Veeam for Office 365, which does not permit deletion of emails and automatically retains emails for 10 years. It adds that the backup of all files across PPH is done nightly, and the backups retain all data, except for the deleted emails for eight former staff members that occurred on September 5, 2019 covering the period of September 2017 to September 2019.

[35] PPH identifies three factors that contributed to the deletion of the emails:

1. Electronic documents, such as emails, were not explicitly identified in the records retention policy. Despite this, these documents had been retained up to September 2017, even after an employee left the organization.
2. The lack of communication to and understanding by management staff of the automatic deletion of emails when closing an account, which became a moot issue in October 2019 when it upgraded to Veeam for Microsoft Office 365. (Veeam does not permit the deletion of emails and automatically retains them for 10 years.)
3. The change in program platform to Microsoft Office 365 and document storage was brought forward to the Privacy Committee, but the focus of the discussion was the security of the storage and potential for site storage to be in the USA. The issue of email deletion with a closed account was not highlighted.

[36] PPH states that its IT department has clarified that "emails are now stored on active servers and backed up every other night." It adds, "What is overwritten is the previous backup, not the emails themselves. Any issues related to how storage occurred under the Office 365 platform were remedied by the upgrade to Veeam for Office 365 in September 2019." Regarding the Medical Officer of Health's emails specifically, PPH confirms that all of her emails are backed up and will continue to be retained. PPH says that by having this new software program in place, PPH exceeds the required "current plus seven years" requirement by keeping the emails for 10 years, at which point they are deleted automatically, unless they are transferred to another server or storage site.

### ***Analysis and finding***

[37] The information before me from the parties leads me to share the appellant's ongoing concerns about the reasonableness of PPH's search for responsive records and its records retention practices. I agree with the entirety of the appellant's comprehensive and careful representations on the myriad deficiencies in PPH's response to Interim Order MO-3970-I. Regarding the adequacy of PPH's initial affidavit, I note that the IPC often accepts evidence that relies on second-hand knowledge of searches; however, I am not prepared to accept that kind of evidence here considering PPH's failures and missteps during the course of this appeal.

[38] In particular, I share the appellant's concern about PPH's deletion of the Manager's email account during the course of this appeal, and its loss of all responsive records that were likely contained in that email account. Along with the Manager's email account, the email accounts of three Public Health Inspectors were also deleted in their entirety on September 5, 2019 — a fact confirmed in an email exchange between PPH's affiant and an IT representative in Exhibit "A" to the affidavit. Like the deleted Manager's account, the deleted email accounts of the three Public Health Inspectors likely contained records responsive to the appellant's request for "any other relevant materials upon which PPH bases its assessment as to whether or not the Farmers' Market is considered exempt from the Food Premises regulation." Although PPH maintains that the deletion of the Manager's and three Public Health Inspectors' email accounts was inadvertent — the result of an erroneous belief on the part of PPH's management that deletion of an email account resulted in the deletion of the email profile but not the complete email history of the account — I will require more sworn evidence, as discussed below, before accepting that to be the case.

[39] In this regard, I note that the Manager who was PPH's Freedom of Information Coordinator when the appeal started, and who was also responsible for PPH's *Food Premises Regulation* exemption decisions, located only 61 pages of responsive records in 2018. The Manager then left his employment with PPH sometime before the issuance of Interim Order MO-3970-I in 2020. During that same time, PPH deleted the complete email accounts of eight staff members, including the account of the departed Manager and the accounts of three Public Health Inspectors, all four of which very likely contained records responsive to the appellant's request. Finally, despite order provisions 3 and 4 of Interim Order MO-3970-I, PPH failed to provide any affidavits from the Manager, from any of its Public Health Inspectors, or from the Medical Officer of Health about its searches or about the email account deletions. Instead, PPH submitted an inadequate affidavit from an affiant who does not have direct knowledge of PPH's searches for responsive records or of any of the troubling instances of records destruction set out above.

[40] Among the significant errors and failures on the part of PPH is its loss of its copy of the 61 pages of records at issue in this appeal. PPH's failure to preserve its copy of the records at issue and the deleted email accounts is inconsistent with its duty under

section 4.1 of the *Act* to ensure it has reasonable measures to preserve records in its custody or control. PPH's explanation that it now has a software and email backup system that retains all emails for 10 years is not reassuring considering what appears to be a PPH's disregard of its duty to preserve records. I will require more evidence from PPH in order to fully understand what led to its loss of records and to assess whether it has taken appropriate steps in response.

[41] Finally, I agree with the appellant that PPH unduly restricted the scope of its email record searches, likely resulting in its failure to identify and locate additional responsive records. It is reasonable to expect that PPH has records upon which it based its assessment that the Farmers' Market was considered exempt from the *Food Premises Regulation* for the years 2013 to 2018. This is supported by the references in the already-disclosed records regarding the five inspections noted by the appellant and the re-inspection referenced by the Medical Officer of Health in her email of August 7, 2018. The appellant provided detailed descriptions of the records that he believes should exist based on his review of the records that I ordered disclosed and based on his own communications with various PPH staff and executives before he commenced this appeal. These details from the appellant establish a reasonable basis to conclude that additional records responsive to the appellant's request exist. Despite this and despite order provisions 2 through 4 of Interim Order MO-3970-I, PPH has not located any additional responsive records and it has not adequately explained its inability to locate additional responsive records. Justifiably, the appellant questions the absence of any responsive email communications involving the Medical Officer of Health, or relating to PPH's assessments regarding the granting of the *Food Premises Regulation* exemption to the Farmers' Market.

[42] I find PPH failed to comply with provisions 1 through 5 of Interim Order MO-3970-I. Accordingly, I will order PPH to conduct a second further search for records responsive to the appellant's request for relevant materials between 2013 and 2018 on the basis of which PPH assessed the Farmers' Market to be exempt from the *Food Premises Regulation*. In order to obtain the necessary information to determine whether PPH's search for responsive records was reasonable and whether PPH satisfied its record preservation duty, I may also require additional affidavits. Furthermore, I may need to summon the appropriate PPH staff using my powers under section 41(8) of the *Act*, and require them to attend before me and give sworn evidence relating to the outstanding issues in this appeal.

### **INTERIM ORDER:**

1. I do not uphold PPH's further search for records responsive to the request. I order PPH to:
  - a. conduct additional further searches for all records upon which it based its assessments that the Farmers' Market was exempt under the *Food Premises*



*Regulation* between 2013 and 2018. PPH shall search for all inspections and assessment field notes and reports, stall operator questionnaires, PPH office notes, summaries, meeting notes, and email and other correspondence, whether in paper or electronic form:

1. Between all PPH staff, and specifically including the Medical Officer of Health,
  2. Between any and all PPH staff, on one hand, and representatives of the Farmers' Market (its manager, any stall operators, and any members of its board), on the other, and specifically including the secretary at the email address noted by the appellant, and
  3. Between all PPH staff and any other third parties.
- b. provide me with affidavits sworn only by individuals who have direct knowledge of these additional further searches, which are to include at a minimum the following information:
1. The name and position of the individual who conducted the searches,
  2. The steps taken in conducting the searches, and
  3. The types of files searched and the results of each search.
2. I order PPH to provide me with the affidavits and the results of its additional further searches, ordered under provisions 1(a) and (b) above, by **June 18, 2022**.
3. I order PPH to provide me with a copy of the following documents, referenced in the affidavit sworn by the Director, by **June 18, 2022**:
- a. The "file notes" of the Manager (paragraph 3 of the affidavit).
  - b. The complete emails between the Director and PPH IT Helpdesk regarding the "ticket" she submitted on November 2, 2020 (paragraph 10).
  - c. The complete emails mentioned in the email of November 4, 2020 at 10:32 AM (that appears in Exhibit 'A') that were "moved into a folder in [the Director's] idrive called "Ticket 7697"." (paragraphs 11, 12 and 13)
  - d. A list of PPH's annual inspection dates of the Farmers' Market for the years 2013 to 2018 (paragraph 17).
4. Further directions about any additional affidavits I require from PPH will follow in letter form. I also reserve the right, under section 41(8) of the *Act*, to summon

and examine any person who may have information relating to the issues in this appeal.

5. I remain seized to address any issues arising from order provisions 1 to 4 above.

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

\_\_\_\_\_ May 18, 2022