

InterPARES Trust Project Report



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What Should the Duty to Document Be?

In the aftermath of Elizabeth Denham's investigation of deleted emails and duty to assist failures in the BC Government, she recommended that a duty to document be added to the *Freedom of Information and Protection of Privacy Act* (FIPPA), which would require public servants to create records of their activities. This recommendation is now under serious consideration in the BC government, and there are many merits to such a duty when it comes to government transparency and public trust. However, there are some issues which must be addressed about DtD, and this final report will examine some of them in the context of exploring exactly what the duty to document should look like.

Former Information and Privacy Commissioner David Loukidelis supported Denham's recommendation, noting that there have been repeated calls for duty to document legislation at several levels of government in the past. In his report on implementing Denham's investigation, he notes that from an information management standpoint, there's a clear connection between records and duty to document. As a result, any legislation will "necessarily involve archivists, or records and information managers, becoming involved to some degree in deciding what kinds of records should be created, by whom and how."¹ But this conclusion is not as straightforward as it may seem to people who are not information professionals. Traditional archival theory maintained a careful and deliberate separation between archivists and records creators. In order for records to stand as the best possible evidence and sources of truth, they had to be as unbiased as possible. Since a records creator (whether an individual or an organization) would naturally want to be remembered in a flattering light, they obviously weren't able to be objective; archivists, therefore, were able to step in as a neutral third party. Archivists were also cognizant of the power they held by being in charge of these primary sources, as they could potentially have a significant impact on historical narratives depending on how they handled the records in their care. The idea of archivists dictating which records should be created is antithetical to the foundational and traditional roles that archivists have occupied since the emergence of the profession.

With that said, there are compelling arguments to be made that archivists have never been impartial, and that electronic records have "eroded the practicality of maintaining any strict boundary between an organization creating records for its own purposes and archivists waiting for the organization to finish with the records before they can appraise and preserve them."² Australia and New Zealand have completely eliminated this distinction; their continuum model of records management includes a role for the archivist throughout a

¹ David Loukidelis, *Implementing Investigation Report F15-03*, 2015: 53.

² Ibid.

record's entire life cycle. Furthermore, it's entirely possible to manage the risk through well-developed policies which tie records creation requirements to organizational purposes and activities (rather than to the record manager's judgment), so while these concerns are worth acknowledging, Loukidelis does not consider them to be a significant barrier to implementing a duty to document.

A duty to document is not outside of the realm of possibility for archival and records professionals, but what should it look like? In 2006, the *Strengthening the Access to Information Act* report included a recommendation by then-Federal Information Commissioner Hon. John M. Reid: "Every officer and employee of a government institution shall create such records as are reasonably necessary to document their decisions, actions, advice, recommendations and deliberations."³ Crucially, he also proposed that a *sanction* be added to section 67.1 of the Act (emphasis original):

"67.1(1) No person shall, with intent to deny a right of access under this Act.
(a) destroy, mutilate or alter a record;
(b) falsify a record or make a false record;
(c) conceal a record;
(c.1) fail to create a record in accordance with section 2.1; or
(d) direct, propose, counsel or cause any person in any manner to do anything mentioned in any of paragraphs (a) to (c.1)."⁴

The report's authors felt that having a sanction in place posed a major issue for implementing a duty to document. The duty would have to be precise enough that public servants could understand exactly what was expected of them and when, and also narrow enough that sanctions could be applied consistently. It should be noted that the *AtIA* already imposes sanctions for destroying, altering, or concealing records for the purpose of denying access; anyone who obstructs access based on s. 67.1 is guilty of "(a) an indictable offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding \$10,000, or to both; or (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding six months or to a fine not exceeding \$5,000, or to both."⁵ So a sanction system exists already, and the question becomes whether it should also cover failure to create a record. The authors raise concerns about the appropriate sanction for such an offence, and the need to distinguish between poor recordkeeping and intentional obstruction: "Public servants who misunderstand the rules or who inadvertently fail to document an action or decision (perhaps they thought someone else at the meeting was taking

3 Canada. Department of Justice. *Strengthening the Access to Information Act: A Discussion of Ideas Intrinsic to the Reform of the Access to Information Act*. (Ottawa, 2006): 34

4 Ibid.

5 *Access to Information Act R.S.C.*, 1985, c. A-1. s. 67.1(2).

the minutes, or they were distracted and never returned to document their action) are not engaging in criminal behaviour.”⁶

There is no precedent in Canadian legislation for a duty to document, but there are administrative policies which lay the groundwork for such an idea. The federal Treasury Board policy’s Directive on Recordkeeping states that each department must “Ensure effective recordkeeping practices that enable departments to create, acquire, capture, manage and protect the integrity of information resources of business value in the delivery of Government of Canada programs and services.”⁷ The Directive is very explicit about the importance of identifying the value of information based on the functions of the department, and creating schedules that reflect that value when it comes to preservation, retention, and disposition. This is all fairly standard policy for records management; the duty to ensure that departments are creating the right records is effectively just another part of the process. Loukidelis also points out that British Columbia’s Information Management and Information Technology Management Policy includes an objective to “[c]reate and retain a full and accurate record documenting decisions and actions.” What does not exist is a duty—whether created by policy or law—to create records.⁸

The provincial *Information Management Act*, which replaced the *Document Disposal Act* in 2016, established the role of a chief records officer whose mandate includes promoting the preservation of government information, approving information management schedules, maintaining the digital archives of government records, and promoting effective information management within government bodies.⁹ Recently an amendment has been proposed to the *IMA* that would allow the chief records officer to (emphasis added) “...issue directives and guidelines to a government body in relation to a matter under this Act, including, without limitation, the following:

- (a) the digitizing and archiving of government information;
- (b) the effective management of information by the government body;
- (c) the creation of records respecting the government information referred to in section 19 (1.1) [responsibility of head of government body], including, without limitation, directives and guidelines respecting the types of records that constitute an adequate record of a government body's decisions.”¹⁰**

This amendment would, again, not be a legislated duty to document, but instead a set of directives and guidelines; however, it still dictates “without limitation” what defines an

⁶ *Strengthening the Access to Information Act*, 35.

⁷ *Directive on Recordkeeping*, <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=16552>

⁸ Loukidelis, *Implementing Investigation Report F15-03*: 56.

⁹ *Information Management Act SBC 2015*, s 3,
<http://www.bclaws.ca/civix/document/id/complete/statreg/15027#section3>

¹⁰ <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/40th-parliament/6th-session/bills/first-reading/gov06-1>

adequate record of government action. This is yet another example of how government bodies have been increasingly leaning into this new concept that accurate records are defined beforehand rather than arising naturally; the normal and ordinary course of action is clearly not enough to guarantee accurate and reliable records of government activity.

What would be involved in implementing a duty to document? Significant policy work would be required across the government, including a possible overhaul of the BC government's existing records classification systems, ARCS and ORCS.¹¹ In the long term, policy changes would drive operational changes. "The need to record whatever matters law and policy stipulate—i.e., the specified 'deliberations', 'meetings', 'actions', 'decisions', and so on, however defined—is likely to have implications for staffing numbers. The scale of this would, naturally, depend on what law and policy demand."¹² With a duty to document law, there would be no point in creating new kinds of records if they were not properly managed; therefore, Loukidelis anticipates potential staffing implications because more information managers might be required in order to properly manage increased volumes of records. Finally, the costs of storage and retrieval might increase, due to new kinds and larger volumes of records being created.

Even with these considerations in mind, the failure to document key actions can have significant consequences for the government. Furthermore, Loukidelis says: "Government is likely, when it assesses the matter, to discover that existing legislation or policy either expressly or implicitly require or provide incentives for creation of an array of records."¹³ The *Financial Administration Act*, for instance, does include language which prompts the creation of several different kinds of records; good administrative practices will also naturally result in records creation. So a duty to document may overlap with existing legislation, and would even give a solid foundation and guiding principles to make the existing practices even more effective.

Ultimately, the biggest question about a duty to document is where it should go in the existing legislation. Denham recommended adding it to FIPPA, but there are arguments to be made against this option. The Information and Privacy Commissioner of Newfoundland and Labrador conducted an extensive review of their *Access to Information and Protection of Privacy Act*, and included a section on the option to create a duty to document clause. The ATIPPA covers records that have already been created, and does not address how they should be managed; that is covered in a separate piece of legislation, the *Management of Information Act (MOI)*, which outlines the requirements for retention and disposition schedules, and the

¹¹ Loukidelis, *Implementing Investigation Report F15-03*: 56.

¹² Ibid.

¹³ Ibid., 57.

report's authors ultimately recommended that a duty to document be added to MOI, not ATIPPA.¹⁴ The 2006 federal report came to a very similar conclusion (emphasis added):

“The duty of public servants to adequately record their decisions and actions is generated by the need for the documentation of the business of government and the requirement for good information management. *It is only indirectly related to providing the public with access to such records.* In order to effectively serve the broader purpose, it may be appropriate to position the duty with other information management requirements. After examining how other jurisdictions have dealt with this issue, it appears that the duty could be best placed in the *Library and Archives of Canada Act*. In that way, the rules governing both the creation of records and their eventual disposal, which are presumably based on many of the same principles, would be brought together.”¹⁵

It is likely that British Columbia’s duty to document will end up being part of FIPPA, as per Commissioner Denham’s recommendation. Placing it into that particular Act does have implications about the role and purpose of records and record creation; if records are required to be made for the purpose of future public access, that violates the long-held principle that records are documents created or received in the normal course of business and set aside for future reference. Instead, records become things which are made for the purpose of future public access via freedom of information request. However, the nature of recordkeeping has changed dramatically, especially with the explosion of digital records; the old frameworks are constantly being questioned and revisited, and the strict definitions of what records are and why they are made are perhaps just as fluid.

¹⁴ Canada. Newfoundland and Labrador. Wells, C., Letto, D., & Stoddart, J. *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act: Volume II | Full Report*. (March 2015).

¹⁵ *Strengthening the Access to Information Act*: 34-35.