

InterPARES Trust Project Report



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What Is the Duty to Document?

Historical recordkeeping laws rarely, if ever, included a positive duty to document rule which required the creation of specific types of records. Duty to document, in the context of the currently proposed BC legislation, is a much more recent phenomenon, and while it has never been implemented in Canada the idea has been proposed many times over the past few years, at several different levels of government. It is worth examining this recent context to understand what DtD looks like for modern government organizations in Canada.

The Hon. John M. Reid was the Information Commissioner of Canada from 1998 until 2006. In 2001, his annual report focused in part on the problems of accountability in the federal government, and the need for reform of the *Access to Information Act (AtIA)*. While it applies to national government instead of provincial, it is nonetheless a glimpse into the recent history of duty to document and helps to establish a precedent for its potential implementation. The AtIA provides a “right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public.”¹ Like British Columbia’s FIPPA, the AtIA allows the public to make freedom of information requests to obtain public records of governing bodies; and, also like FIPPA, the AtIA has suffered from its own fair share of gaps which have allowed a culture of secrecy and poor records management practices to flourish.

In the first chapter of his report, Reid quotes the outgoing Auditor General, Denis Desautels, about the lack of good information management policies in government: “The problem of failing to disclose bad news is being compounded by the poor quality of records kept in departments. Part of this can be attributed to a certain paranoia over Access to Information rules and the traditional reluctance of senior public servants to keep records of direction from Ministers or discussions of why decisions were made.”² This is not a unique phenomenon; in Newfoundland and Labrador’s *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*, the authors noted that the UK Justice Committee found a chilling effect in the Blair government, where ministers would find a medium that was not covered under freedom of information laws and conduct business affairs using that medium in order to avoid having formal records.³⁴

1 *Access to Information Act R.S.C.*, 1985, c. A-1. <http://laws-lois.justice.gc.ca/PDF/A-1.pdf>: 1.

2 John M. Reid, *Annual Report Information Commissioner 2000-2001* (Ottawa, ON: Minister of Public Works and Government Services Canada 2001, 2001): 15.

3 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).

4 This culture of “oral government” is still a relevant problem, and is cited in Elizabeth Denham’s *Access Denied* report as a problem that could be solved by a mandated duty to document.

On the federal level, Reid advocated for “fundamental shifts in culture, policy, law and information-based services”⁵ in order to enhance government information management; his first proposed key change is “a legal “duty to document” an institution’s organization, functions, policies, procedures and transactions and to include such records within institutional records systems – especially in the case of electronic records.”⁶ However, this is easier said than done. “The duty to document important business activities and maintain records in a system of records as an essential element of responsible public administration are often neglected and the related legal framework is inadequate.”⁷ Relatedly, Reid points out that the government does not have an adequate framework to clearly identify the importance of and responsibility for recordkeeping.

Why are things so muddled? “As a matter of course, individuals and departments create and acquire records to document and support their business functions, legal requirements and other needs. In a large and increasingly complex government bureaucracy, however, it can no longer be assumed that departments are consistently creating and keeping appropriate records.”⁸ There are many contributing factors to this issue:

- a lack of clear instruction on when and how to document activities. This is made even worse by the multiple communication options available (email, fax, letters, voice mails, etc);
- increasingly informal communications environment and shared work environments means that sometimes there isn’t a clear record of an important decision, and that people aren’t sure who is responsible for creating a record;
- While there is a general trend in other jurisdictions to be more explicit about records creation, the existing legal framework for federal information management implicitly assumes that the information already exists and that appropriate records are being created and maintained. As a result, officials will sometimes anticipate the likelihood of a record being accessed by the public, and thus won’t actually create anything at all;
- When they do exist, documentation standards tend to reflect a risk management approach; they are written with disaster scenarios in mind, covering a range of possibilities from mundane inconveniences to major career-ending scandals, but this point of view is very limited in scope and does not provide enough guidance to compel consistent records creation.

At this time it is prudent to wonder if there is existing precedent for duty-to-document legislation. Reid’s 2001 report points to several international examples; the US *Federal Records Act* contains a duty to document requirement, and the United Kingdom also requires

5 Reid, *Annual Report Information Commissioner 2000-2001*: 15.

6 Ibid., 16.

7 Ibid., 26.

8 Ibid., 27.

that records “should be complete and accurate enough to facilitate audits and examinations, protect legal and other rights, and demonstrate that the records are credible and authoritative.”⁹ The *State Records Act* of New South Wales includes a records management obligation that “Each public office must make and keep full and accurate records of the activities of the office.”¹⁰

Canada is not totally devoid of duty to document precedents; in 2006, a federal report entitled “Strengthening the Access to Information Act” included a section on adding a duty to document, and noted existing statutory requirements for records creation in the public sector. The *Financial Administration Act* imposes a general duty to document the financial administration of the government, compelling various persons to keep financial records and statements in order to maintain accountability to the public. The federal government, as an employer, also has a duty to keep employment and pension records pursuant to the *Employment Equity Act* and the *Employment Insurance Act*.¹¹ Reid mentioned the Treasury Board’s powers under the *Financial Administration Act* in his 2001 report: “[the] Treasury Board’s Management of Government Information Holdings policy (MGIH) makes brief mention of the need to “sufficiently document projects, programs and policies to ensure continuity in the management of government institutions and the preservation of a historical record.” While this suggests good practice, it has little weight and provides minimal direction.”¹²

In the 2001 report, Reid proposes that a duty to document be added to the AtIA, but is not clear on his ideal wording; however, the 2006 report included a section calling for the addition of a positive duty to document, including specific language: “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.”¹³ Reid, in his last year as the Information Commissioner, also proposed adding a sanction to section 67.1 of the AtIA (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

9 Ibid., 28.

10 *State Records Act* 1998 No 17, Part 2 s. 12 (1).

11 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): 33-34.

12 Reid, *Annual Report Information Commissioner 2000-2001*: 27.

13 *Strengthening the Access to Information Act*: 34.

(d) direct, propose, counsel or cause any person in any manner to do anything mentioned in any of paragraphs (a) to (c.1).”¹⁴

The report acknowledged that there were several significant issues which would need to be addressed in order for this duty to document to work. First, it had to be precise enough that employees would clearly understand what was expected of them and be able to distinguish when the duty was applicable and when they would be contravening it; second, the duty had to be narrow and specific enough that sanctions could be consistently and appropriately applied.

Reid’s call for a legislated duty to document is not as out-of-date as one might think; the most recent annual report from the Office of the Information Commissioner of Canada also calls for a legislated duty “requiring public entities to document matters related to their deliberations, actions and decisions.”¹⁵ As the Commissioner notes, this is the third time that federal and provincial commissioners have jointly called for a duty to document resolution, citing reports from 2014 and 2013 as examples. In 2005 the BC Freedom of Information and Privacy Association published *Proposed Reforms of BC’s Freedom of Information and Protection of Privacy Act*, which included the following top priority: “Build principles of public access into the creation, preservation and destruction of records, including: ...a positive duty to create and maintain records of key government decisions, orders, actions, deliberations and transactions; and ...penalties for improperly tampering with or destroying records to avoid disclosure.”¹⁶ And finally, Elizabeth Denham recommended that FIPPA be amended to include a legislative duty to document, in order to avoid the scandals which rocked the provincial government in 2015: “The public has a right of access to records for the purpose of making public bodies accountable. But this right can only be exercised if a record exists. It is predicated on the creation of records that document the affairs of government.”¹⁷ As with previous reports on the federal and provincial level, this proposed legislation would make records creation a requirement, and potentially impose punishments in the event that employees failed to fulfill this obligation. But the exact wording and location of a duty to document must be considered very carefully, and there are issues to address which will be explored in the final report.

¹⁴ Ibid.

¹⁵ Office of the Information Commissioner of Canada, *Annual Report 2015-2016* (Gatineau, QC: Minister of Public Works and Government Services 2016): 44.

¹⁶ BC Freedom of Information and Privacy Association, *Proposed Reforms of BC’s Freedom of Information and Protection of Privacy Act* (Vancouver, BC: BC Freedom of Information and Privacy Association 2005): 1.

¹⁷ Elizabeth Denham. *Access Denied: Record Retention and Disposal Practices of the Government of British Columbia*. (Victoria, 2015): 60.