

# Establishing a Duty to Document: The Foundation for Access to Information

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**A**ccess to information is a bedrock principle of democratic governments and their public agencies and entities. It helps ensure that democratic governments are, and remain, accessible, open, and transparent to their citizens, and it helps enable citizens to more fully engage with, monitor, and hold them to account. Access to information depends upon these public institutions to document their activities and decisions. When they do not, then the citizens' right of access is ultimately denied.

Public accountability and trust, in addition to institutional memory and the historical record, are undermined without the creation of appropriate records. Establishing and enforcing a duty to document promotes accountability, openness, transparency, good governance, and public trust in public institutions.

This article begins a discussion on the concept and practice of a duty to document. It presents a case study of Canada where various federal, provincial, and territorial information and privacy commissioners, along with other public officials, have recommended that a duty to document be enshrined in access-to-information legislation and related statutes and regulations.

The article's main aim is to help illuminate the importance and implications of a duty to document in both access laws and records and information management (RIM) policies to help ensure accountability, transparency, and trust for good governance practices.

## A Growing Movement

Across Canada, calls are increasing for the inclusion and implementation of a duty to document in relevant access legislation. For example, since the early 1990s, federal information commissioners have recommended a legislated duty to document in di-

verse venues, including their offices' annual reports, Access to Information Act reviews, and presentations to the House of Commons Standing Committee on Access to Information, Privacy, and Ethics.

Over the past couple of years, moreover, federal, provincial, and



territorial information and privacy commissioners have made similar recommendations. In 2013, for instance, the federal information and privacy commissioners issued a joint statement urging Ottawa to establish a legislated duty to document for all public institutions to record their actions and decisions. In 2015 in British Columbia, the information commissioner's submission to the provincial special committee reviewing the province's access and privacy laws urged that government to impose a duty to document. Similarly, that same year, committees reviewing provincial access and privacy laws in Quebec and in Newfoundland and Labrador called on their respective governments to impose duty-to-document provisions.

### A Documentary Obligation

The Canadian federal Access to Information Act establishes access rights to public records of the federal government and its agencies and a formal framework for making and processing access requests. This federal act relies on robust RIM practices to help ensure that Canadians' access rights are handled appropriately. But when public records are not created, let alone preserved, these access rights are undermined, thereby eroding accountability, transparency, and public confidence and trust.

According to the Office of the Information Commissioner of Canada, "access to information relies on good recordkeeping and information management practices. When records are not created or appropriately preserved to document decisions, rights under the Act are denied. This, in turn, prevents government accountability and transparency."

Presently in Canada there is no specific legislation or regulation that mandates a duty to document. There is no legal or procedural responsibility to create records describing

governmental activities, decisions, transactions, etc. The Office of the Information Commissioner argues that "without such a duty [to document], there is a risk that not all information related to the decision-making process is being recorded or appropriately preserved in [public institutions'] information holdings." In other words, without the creation of appropriate records, public institutions' work and results are compromised.

A recent joint resolution of some major actors in the field of Canadian access and privacy legislation expressed concern about a seemingly growing trend of irretrievable records

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– that is, records not turning up in response to formal access requests from the public for various reasons, including that they were never created.

These public officials argue that this apparent lack of records presents serious problems. First, it weakens the Access to Information Act and its accountability framework. Second, it compromises public institutions' abilities to be accountable, make evidence-based decisions, conduct sound activities, comply with relevant laws, and preserve institutional memory and the historical record. Third, and arguably most important, it undermines Canadians' right of access to information.

These public officials therefore recommend that recording governmental activities and decisions becomes a legally enforceable obligation enshrined as a duty to document. It must be emphasized, however, that a duty to document does not mean creating *more* records; instead, it means creating and preserving *the right* records

– those that are or should already be a part of regular and routine practices of open, good governance. Further, a duty to document must be enforceable through full implementation, effective oversight, and sanctions for non-compliance.

### The Current Patchwork of Requirements

In Canada there is now a patchwork of statutory requirements at different governmental levels to create specific kinds of records in particular circumstances. Indeed, at each governmental level, there are many sets of documentary requirements.

At the municipal level, for example, there are various duty-to-document provisions in municipal laws and regulations. Ontario's Municipal Act, for instance, mandates that local municipalities record their decisions, resolutions, and other proceedings.

At the federal level, there are duty-to-document provisions in various legislative and regulatory areas. For example, federal employment laws and regulations, including the Employment Equity Act and the Employment Insurance Act, oblige the federal government, as an employer, to create and maintain employment and pension records.

The federal Treasury Board's policy on RIM, for instance, requires that government institutions record their activities and decisions to account for their decision-making processes and operations, reconstruct policy and program developments, support workflow continuity, and help facilitate independent audit and review. Further, the Treasury Board has a policy requiring deputy

heads of governmental departments to ensure “that decisions and decision-making processes are documented to account for and support the continuity of departmental operations, permit the reconstruction of the evolution of policies and programs, and allow for independent evaluation, audit, and review.”

The Financial Administration Act imposes a duty to document the financial administration of the government. Specifically, this act prescribes obligations for account keeping of public money and property, and it imposes

records of its affairs, in accordance with normal, prudent business practice, including the records of any matter that is contracted out to an independent contractor.”

Second, “every public office must maintain in an accessible form, so as to be able to be used for subsequent reference, all public records that are in its control, until their disposal is authorised by or under this Act or required by or under another Act.”

And, third, “every local authority must maintain in an accessible form, so as to be able to be used for

mental to any access-to-information framework because it helps establish and support clear workflows and operations, sound decision-making, strong program and service delivery, and accountability.

Fourth, a duty to document needs to be enforceable. There need to be reasonable sanctions for non-compliance and for instances of records being intentionally altered, falsified, mutilated, destroyed, or concealed.

Making this obligation [duty to document] a part of RIM helps ensure these records are accessible, reliable, retrievable, and usable for present and future purposes.

duties on various public servants to maintain financial records and prepare financial statements, annual reports, etc., regarding public accounts.

These related, but different, rules and regulations are steps in the right direction; however, they are only piecemeal approaches and less desirable than a comprehensive one.

### The New Zealand Model

It is essential that a duty to document is enshrined in relevant federal legislation and further strengthened in sound IM policies and procedures to help ensure comprehensive application across jurisdictions and levels of the public sector.

New Zealand’s federal Public Records Act 2005 serves as a useful precedent for the Canadian case and elsewhere because it establishes a requirement to create and maintain records. It is helpful to present this codified requirement in its full form to show its detailed scope.

According to this act’s recordkeeping requirements, first, “every public office and local authority must create and maintain full and accurate re-

subsequent reference, all protected records that are in its control, until their disposal is authorised by or under this Act.”

Arguably, this act would be strengthened if it included reasonable sanctions for non-compliance.

### Duty to Document Components

A legislated duty to document should ultimately include four major components. First and foremost, it must oblige the creation of appropriate records with the aim of describing the “what” and “why” of public institutions’ activities and decisions.

Second, a duty to document requires practical RIM standards that help ensure these records are accurate, authentic, authoritative, and complete.

Third, a duty to document must be embedded within RIM practices to help routinize the creation, organization, and management of these records. Making this obligation a part of RIM helps ensure these records are accessible, reliable, retrievable, and usable for present and future purposes. Indeed, robust RIM is funda-

### Special Considerations

There are several implications of a legislated duty to document that require closer attention and clarification. This duty, for instance, must be clear and precise enough that public servants properly understand when, what, and how their activities and decisions need to be recorded. They must also understand when, what, and how their documentation efforts, or lack thereof, may contravene this duty.

This obligation must be clear enough that non-compliance sanctions are specific and commensurate with the particular contravention. To begin, there must be a clear distinction between generally poor recordkeeping practices and intentionally bad and/or criminal practices. The possible penalties for non-compliance include disciplinary measures and criminal charges.

Public servants who misunderstand this duty or unintentionally fail to document appropriately are not necessarily engaging in criminal practices; instead, it is more likely they are not meeting administrative standards. Thus, a sanction commensurate with their contravention should probably be disciplinary measures.

But public servants who deliberately fail to create – or who alter, falsify, mutilate, destroy, or conceal – a record would be engaging in criminal practices. Thus, a sanction commensurate with their contravention should probably be dismissal and appropriate criminal charges.

## Going Forward

A duty to document does not need to be complicated or cumbersome. When it is incorporated into existing access-to-information legislation and RIM practices, it can become an effective and efficient routine – not to create *more* records, but to create the *right* records. Further, it needs to be enforceable with reasonable sanc-

tions for non-compliance and other contraventions.

This documentary obligation helps protect access rights by creating appropriate and necessary public records, facilitating more open and transparent governance, increasing accountability, fostering public confidence and trust, and contributing to institutional memory and historical

legacy of government activities and decisions. A duty to document, therefore, helps strengthen the business and operations of public institutions and, in so doing, the fundamental democratic principle and practice of access to information. **END**

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