

Backgrounder on A Duty to Document

Why a duty to document?

Access to information rights depend on public agencies documenting their key activities and decisions. Every year, information commissioners across Canada investigate complaints where requested records do not exist because they were never created. An emerging culture of oral decision making undermines public accountability, the historical record, and citizens' trust.

Records management in the 21st century is challenged by new communications technologies, the volume and variability of records, and developments such as bring-your-own-device arrangements. These developments make document retention and accessibility more complicated.

A duty to document addresses these concerns by establishing a positive duty for public servants and officials to create a full, accurate and complete record of important business activities. Records should be properly preserved so that they remain authentic, reliable, and easily retrievable when subject to access to information requests.

By creating records that explain the 'what' and 'why' of public agency decision making, a duty to document promotes accountability, transparency, good governance and public trust.

Canadians care about a duty to document

A 2014 national poll commissioned by Canadian Journalists for Free Expression found that 75% of respondents either agree or somewhat agree that "Federal employees should be required by law to create a permanent, retrievable record of their deliberations and decision-making at work, even when these take place using non-written forms of communication."¹

During the 2015 federal election, a coalition of 22 civil society groups issued a joint statement calling on Canada's major federal parties to commit to reforming Canada's access to information system. One of their main recommendations was the adoption of a requirement for "public officials to document and preserve all records of their decision-making."²

¹ Canadian Journalists for Free Expression. "Do Canadians Care About Free Expression" CJFE Review 2014, at: http://www.cjfe.org/poll_what_do_canadians_think_about_free_expression

² Canadian Journalists for Free Expression. "Joint Statement: Fix Canada's Broken Access to Information System" at: http://www.cjfe.org/joint_statement_fix_canada_s_broken_access_to_information_system

What would a duty to document look like?

A duty to document should be a legislated requirement to create records, not just a policy. This legal requirement could be incorporated into existing information management laws or access to information and privacy statutes.

A duty to document does not need to be onerous. The focus is not on the creation of more records, but rather on the creation and retention of the right records. The documents to be created will depend on the business needs of public agencies and community expectations.

In order to be effective, the duty to document must be accompanied by strong records management practices and standards, and independent oversight with sanctions for non-compliance.

Canadians can turn to a number of tested, international models of duty to document legislation, including the United States, New Zealand and some Australian states.³

Are there examples of a duty to document in Canada?

Some Canadian laws include requirements to create records in specific circumstances. For example, Ontario's *Municipal Act* requires municipalities, local boards and committees to record resolutions, decisions and other proceedings.⁴ And the Treasury Board of Canada Secretariat has a policy directive requiring deputy heads 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".⁵

However, there are no legal obligations to document in any federal, provincial or territorial access to information or information management laws. This is why Information Commissioners are recommending a comprehensive and codified duty to document that includes oversight and enforcement.

³ 44 United States Code §3101

Section 17 of the New Zealand *Public Records Act 2005*, at:

<http://www.legislation.govt.nz/act/public/2005/0040/latest/DLM345729.html>

Section 12 of the New South Wales *State Records Act 1998*, at:

http://www.austlii.edu.au/au/legis/nsw/consol_act/sra1998156/.

Section 7 of the Queensland *Public Records Act 2002*, at:

<https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/PublicRecA02.pdf>

Section 12 of the State of Victoria *Public Records Act 1973*, at:

[http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/LTObject_Store/LTObjSt3.nsf/DDE300B846EED9C7CA257616000A3571/BD40624FF1104271CA257761002AAA5C/\\$FILE/73-8418a035.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/LTObject_Store/LTObjSt3.nsf/DDE300B846EED9C7CA257616000A3571/BD40624FF1104271CA257761002AAA5C/$FILE/73-8418a035.pdf)

⁴ Section 239(7) of the *Municipal Act, 2001*, at: <http://www.ontario.ca/laws/statute/01m25#BK306>

⁵ Treasury Board of Canada Secretariat. "Policy on Information Management", at: <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12742§ion=HTML>

The role of Canada's Information and Privacy Commissioners in promoting a duty to document

Federal information commissioners have recommended a legislated duty to document since the early 1990s in annual reports, reviews of the Access to Information Act, and presentations to the House of Commons Standing Committee on Access to Information, Privacy and Ethics.

Provincial and territorial commissioners have made similar recommendations. In 2013, Canada's Information and Privacy Commissioners issued a joint resolution that urged governments to create a legislated duty requiring all public entities to document matters related to deliberations, actions and decisions.⁶

Calls for reform continue to come from experts across the country. In 2015, the committee reviewing Newfoundland and Labrador's access and privacy legislation called on that government to impose a duty to document.⁷

In British Columbia, the Commissioner has urged government to adopt a duty to document in several reports and in her submission to the Special Committee reviewing the province's access and privacy legislation in 2015.⁸

And in Quebec, la Commission d'accès à l'information has called for a duty to document as part of the modernization of that province's public sector access to information law.

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⁶ Resolution of Canada's Information and Privacy Commissioners and Ombudspersons. "Modernizing Access and Privacy Laws for the 21st Century" at: https://www.priv.gc.ca/media/nr-c/2013/res_131009_e.asp

⁷ Letto, Doug, Jennifer Stoddart, and Clyde Wells. "Report of the 2014 Statutory Review: Access to Information and Protection of Privacy Act Newfoundland and Labrador", March 2015 at, <http://www.parcnl.ca/news/committeereport>

⁸ OIPC BC, "Submission to the Special Committee to Review the Freedom of Information and Protection of Privacy Act", November 18, 2015, at, <https://www.oipc.bc.ca/special-reports/1884>