

Information Note
Office of the Chief Information Officer

Title: Legislating a Duty to Document

Issue: To provide an update on the status of the duty to document, as recommended by the ATIPPA Statutory Review Committee.

Background and Current Status:

- During the 2014 statutory review of the *Access to Information and Protection of Privacy Act* (ATIPPA), the ATIPPA Review Committee heard presentations and received submissions from various stakeholders. The Information Commissioner of Canada, Suzanne Legault, recommended the Province implement a legal duty to document decisions, “including information and processes that form the rationale for that decision.”
- The Information and Privacy Commissioner of Newfoundland and Labrador also addressed the duty to document with the Committee and supported the view expressed in a joint resolution by Canada’s information and privacy commissioners by recommending “the creation of a legislated duty on public bodies to document any non-trivial decision relating to the functions, policies, decision, procedures and transactions relating to the public body.”
- On March 2, 2015, the ATIPPA Statutory Review Committee submitted their report to Government making two recommendations related to the duty to document:
 - “Government take the necessary steps to impose a duty to document, and that the proper legislation to express that duty would be the *Management of Information Act*, not the ATIPPA.” (Recommendation 79)
 - “Implementation and operation of this new section of the *Management of Information Act* be subject to such monitoring or audit and report to the House of Assembly by the OIPC as the Commissioner considers appropriate.” (Recommendation 80)
- The Office of the Chief Information Officer (OCIO) administers the *Management of Information Act* and has responsibility for these recommendations.
- The *Management of Information Act* already establishes a requirement to create records: “A permanent head of a public body shall develop, implement and maintain a record management system for the creation, classification, retention, storage, maintenance, retrieval, preservation, protection, disposal and transfer of government records.” (Section 6 (1))
- The *Management of Information Act* applies to all core government departments as well as most Public Bodies – some 170 entities of varying sizes and complexity.
- In 2017, British Columbia introduced a legislated duty to document and is the only jurisdiction to do so. The wording of the amendment closely matches existing wording in the Newfoundland and Labrador *Management of Information Act* with an emphasis on creation of records.
- The BC legislation has been criticized by the opposition parties and the BC Information and Privacy Commissioner as not going far enough. The ability to direct a government entity to create records rests internally with the Chief Records Officer; however these groups would like to have that power reside with an external, independent body such as the Privacy Commissioners Office.

Analysis:

- Significant work has been undertaken by the OCIO relating to the duty to document, including: jurisdictional research, draft policy and guidance, draft training materials, draft changes to the information management policy framework, and draft legislative language.
- Following this work and initial consultations with Information Management (IM) Directors and Assistant Deputy Ministers, the following challenges were identified:
 - Little precedent – there are few cases of implementation of this as a legislated duty, therefore rollout to the affected Public Bodies would take time;
 - Records – in order to implement, there is a need to identify which records need to be created to support each program/service at an individual employee level;
 - IM Maturity – IM programs in government are at varying stages. A legislated requirement would place additional pressure on public bodies and audits would likely reflect existing weak IM practices;
 - Training and Awareness – there would be a significant need for broad training and awareness to ensure all employees are aware of legislated requirements and to minimize penalties for omission or commission failures;
 - Other Impacts – further analysis would be needed to determine potential impacts to collective agreements and policing requirements (e.g. if criminal penalties); and,
 - Cost – the OCIO estimates the cost of implementation to be approximately \$4.3 million, including an initial set-up of \$2.4 million, and on-going incremental operating costs of \$2 million.
- The OCIO has carefully considered several options to implementation including: 1) introducing legislation in the short term; or 2) building existing IM programs with a proclamation of legislation in the future. Given the challenges, the OCIO has determined the best approach is #2 - to continue to build existing IM programs in the near term with a focus on legislated implementation in the future.

Action Being Taken:

- The OCIO has begun a series of activities to improve awareness and IM practices in Government including the following:
 - IM Evaluation – a formal process which builds on a prior assessment that evaluates IM program growth in all departments, specific feedback on strengths and weaknesses and plans to improve IM are provided;
 - Awareness – a formal notification to all public bodies of their requirements under the *Management of Information Act* and to notify them of available tools to build their IM programs; and,
 - Enhancing Tools – updating and providing training on practices and guidance surrounding the requirement to create records.
- Once these core elements have been put in place, a line of business review will likely be required by all public bodies to allow them to clearly define and understand their records and establish practices around documentation.
- Subsequently, the legislation would be drafted and training and awareness activities would be implemented.

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