

Duty to Document

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The right of access

- In Canada, the *Access to Information Act* provides a right of access to information contained in records
- The right of access has quasi-constitutional status
- In *Dagg v. Canada Minister of Finance*, [1997] 2 SCR 403, the Supreme Court of Canada stated:

“The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry.”

- In *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23, the Supreme Court of Canada explained:

“Section 2(b) guarantees freedom of expression, not access to information. Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government.”

What is the Duty to document?

- A legal duty to create and preserve records documenting the decision-making processes, procedures or transactions
- Canada's *Access to Information Act* does not have a legal duty to document
- Without a legal duty to document, there is a risk that not all information related to the decision-making process is being recorded or preserved appropriately
- The Information Commissioner, along with her provincial and territorial counterparts across Canada, frequently resolve complaints with missing records where institutions either:
 - Fail to document
 - Destroy records related to decisions

Quick statistics

Missing records complaints statistics in Canada:

- 2011-2012: 283 complaints (27% of refusal complaints that fiscal year)
- 2012-2013: 428 complaints (41%)
- 2013-2014: 469 complaints (38%)
- 2014-2015: 432 complaints (39%)
- 2015-2016: 541 complaints (40%)
- 2016-2017: 499 complaints (43%)
- 2017-2018 (to end of October): 332 complaints (47%)

Value of the Duty to Document

- An obligation to document the decision-making process protects the right of access by:
 - Creating official records
 - Facilitating better governance
 - Increasing accountability
 - Ensuring a historical legacy of government decisions

Recommending a legal duty to document

- The Information Commissioner of Canada, along with her provincial and territorial counterparts, have called on their respective governments to adopt a legal duty to document in three separate joint resolutions
 - *Statement of the Information and Privacy Commissioners of Canada on the Duty to Document, 2016*
 - *Protect and Promote Canadians' Access and Privacy Rights in the Era of Digital Government, 2014*
 - *Modernizing access and privacy laws for the 21st century, 2013*
- The Information Commissioner, in a Special Report to Parliament, recommends adopting a legal duty to document along with a duty to report any unauthorized destruction or loss of information with mandatory notification to the Information Commissioner

Commissioner's recommendations

- The Information Commissioner recommends a spectrum of appropriate sanctions for non-compliance, such as
 - Criminal offences
 - Monetary penalties
 - Disciplinary proceedings

Why are these recommendations important?

The triple delete scandal in British Columbia, Canada:

- In 2015, a BC government staffer revealed that more than a dozen emails were deleted in November 2014 following an access to information request related to the Highway of Tears, a stretch of road where many indigenous women have gone missing or been murdered

Criminal charges related to gas plants in Ontario, Canada:

- Two Ontario government staffers allegedly orchestrated a plan to delete government emails and other records that shed light on the government's plans to cancel the building of two gas-fired power plants
- The two staffers are currently on trial facing criminal charges

Pin-to-pin investigation

- **Pin-to-pin messaging investigation by the OIC:**
 - The Office of the Information Commissioner of Canada reviewed the practices of 11 government institutions relating to instant messaging on government-issued wireless devices
 - The OIC concluded that most of these messages were not manually saved or stored on email servers
 - The Information Commissioner concluded there is a real risk that information that should be accessible by requesters could be irremediably deleted or lost when institutions use these technologies as part of decision-making
 - The Commissioner made several recommendations, including:
 - That Parliament amend the *Access to Information Act* to include a comprehensive legal duty to document
 - That the government implement a policy to disable instant messaging on government-issued wireless devices (except in necessary situations where technical safeguards are in place)

Progress in Canada

- In March 2015, the Information Commissioner tabled a special report to Parliament on the modernization of Canada's *Access to Information Act*, including embedding a legal duty to document in Canada's legislation
- Following her special report, the Parliamentary Committee tasked with studying Canada's *Access to Information Act* studied the Act and tabled its own report with 32 recommendations in June 2016, including also a legal duty to document to the Act
- The Government of Canada introduced Bill C-58 in June 2017, *an Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*
- Bill C-58 does not add a duty to document to the *Access to Information Act*

Issues raised by duty to document

- How do we implement a legal duty to document?
- What should be documented? Only decisions? The deliberations and considerations?
- Who should be responsible and accountable for the documentation?
- How long should these records be held for?
- Who should have oversight over this duty?

Questions?

Thank you

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