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A Duty to Document

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A Duty to Document

Information access depends upon documentation. Accessing information, particularly within the context of contemporary institutions, necessarily means accessing documentation of some kind or another. It is especially important for access to information regimes that are legally mandated institutional frameworks meant to record, retain, and make available and accessible the information produced and used by public sector institutions. Indeed, these regimes require documentation in order to help ensure that public sector information actually exists in some kind of authentic, credible, and legitimate recorded form.

Thus, when public sector institutions have an access to information regime that is followed and respected, it should therefore mean that they have appropriate and robust documentary practices that produce and use the proper documents needed for their institutional operations and output. But such documentary obligations are not often clearly or explicitly stated or outlined, let alone enforced, in most access to information regimes specifically, or the public sector generally. In order for an access to information regime to be successful – that is, effective and efficient in its information provision to legitimate public requests – there should be a clear and explicit documentary obligation within the relevant information access laws or regulations or within the public institutions' records and information policies. Establishing and enforcing this documentary obligation – also called a duty to document – not only helps ensure that information access is possible, but also promotes accountability, openness, transparency, good governance, and public trust in public institutions.

This article furthers a discussion on the concept and practice of a duty to document. It presents a case study of Canada where there have been increasing efforts to establish a duty to document in federal access to information legislation and records and information management policies. Based upon the presentation “A Duty to Document”, delivered on 30 September 2016 at the Document Academy (DOCAM) 2016 conference at the University of North Texas in Denton, Texas, USA, and the article “Establishing a Duty to Document: The Foundation for Access to Information” in *Information Management*, this article's main objectives are to help advance the concept of a duty to document and identify its major aspects and principles; lay foundations for policy development for a duty to document, especially in records and information management contexts; and, advocate for, and begin to apply and establish, duty to document obligations and practices where appropriate for various public institutional routines and workflows.

The Need for a Duty to Document

In Canada there currently is no specific federal legislation, regulation, or policy mandating a duty to document. In other words, there are no legal, regulatory, or policy mechanism or obligation to create documents about government activities, decisions, procedures, and so on. The Office of the Information Commissioner (OIC) of Canada notes that there is no comprehensive and enforceable legal duty to create and preserve records documenting decision-making processes, procedures or transactions (2015). The OIC 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 an institution’s information holdings” (2015). In other words, without the creation of appropriate records, public institutions’ work and results can be compromised.

The lack of proper documentation has encouraged growing calls across various levels of the Canadian government for the establishment and enforcement of duty to document provisions in the relevant information access legislation and government’s records and information management policies. These calls, however, have been made for over twenty years; indeed, since the early 1990s, the country’s various information commissioners and officials have recommended legislating a duty to document. These calls have intensified over the last few years. In 2013, for instance, both the federal information and privacy commissioners jointly recommended to the federal government to legislate a duty to document for all public entities and their employees to record their activities, decisions, and procedures. The commissioners expressed concern about many cases of missing documents, or documents simply not turning up, in response to formal public requests for information access.

The need for a duty to document is not only a concern of government officials but also of many Canadians. According to a 2014 national poll conducted by Canadian Journalists for Free Expression, 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” (2014). During the 2015 federal election, moreover, a coalition of over twenty civil society organizations issued a joint statement calling on Canada’s federal political parties to (re)commit to the country’s access to information regime through its positive reformation. One of the main recommendations for reform is for the government to document its decisions, stating that the government must “commit to requiring public officials to document and preserve records of their

communications and decision-making, regardless of the medium of communication” (Canadian Journalists for Free Expression, 2015).

When public documents are not created, let alone preserved, access to information legislation and rights are undermined, and government accountability, openness, and transparency, in addition to public confidence and trust, are eroded. According to Suzanne Legault, 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 Access to Information Act are denied. This, in turn, prevents government accountability and transparency” (2016). Indeed, without adequate and proper documents, public institutions compromise their own authority and legitimacy because they will not be able to make credible and supportable decisions, fulfill legal obligations, maintain proper procedures, and preserve both their particular institutional memory and the broader historical record.

The apparent lack of appropriate and sufficient document creation, management, and preservation within the Canadian public sector presents many serious problems. As Marc Kosciejew explains, this lack of documentation, first, “weakens the Access to Information Act and its accountability framework. Second, it compromises public institutions’ abilities to be accountable, made evidence-based decisions, conduct sound activities, comply with relevant laws, and preserve institutional memory and the historical record. Third, and arguably most significantly, it undermines Canadians’ right of access to information” (2016a, 35). Thus, Canadian information and privacy officials are forcefully recommending that a duty to document become a legally enforceable obligation for most Canadian public institutions.

This documentary obligation must establish a positive duty for these institutions and their employees to create, manage, and preserve appropriate documents of their activities, decisions, and procedures. According to Legault, “a legislated duty to document, with sanctions for non-compliance, protects access to information rights by: creating official records; facilitating better governance; increasing accountability; and ensuring a historical legacy of government decisions” (2016). It is important to note, however, that this documentary obligation does not mean creating more documents for the sake of documentation. It instead means the creation of the right documents. As Kosciejew states, “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” (2016a, 35). Further, as Legault argues, a duty to document must be accompanied by appropriate sanctions for non-compliance. These sanctions, which must be commensurate with the kind and degree of non-compliance, will help ensure that this documentary obligation is enforceable and, consequently, respected, adhered and complied to, and maintained.

Best Practice: The New Zealand Public Records Act 2005

New Zealand’s federal Public Records Act 2005 is a strong example of best practice insofar as a duty to document is concerned. It enshrines a specific documentary obligation to create, maintain, and preserve government documents. It can therefore serve as a useful precedent for Canada and other governments’ interested in and needing to strengthen their access to information laws, records and information management policies, and overall accountability, openness, and transparency. It is helpful to present this legislated provision in full in order to help show its detailed scope.

This Act clearly states that there is a “requirement to create and maintain records”. The documentary obligations include, first, that “every public office and local authority must create and maintain full and accurate 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 subsequent reference, all protected records that are in its control, until their disposal is authorised by or under this Act”.

Thus, according to this Act, every public institution must document its activities, decisions, and procedures as part of their regular and routine operations. This positive duty does not mean the creation of more documents but, instead, the creation of the appropriate documents necessary for the daily work of government. This documentary obligation also requires that documents are created, maintained, and preserved in accessible forms in order to be retrievable and usable.

A Duty to Document Framework

A duty to document provision would be an important contribution to helping ensure public sector accountability, openness, transparency, good governance, and

trust. Indeed, “it is essential that a duty to document is enshrined in relevant federal legislation and further strengthened in sound [records and] information management policies and procedures to help ensure comprehensive application across different jurisdictions and levels of the public sector” (Kosciejew 2016a, 36).

Kosciejew presents a framework of four major components that should be included in a robust legislated duty to document (2016a, 36). These four major components are creating appropriate documents, establishing standards for records and information management procedures, making it regular and routine practice, and enforcing sanctions for non-compliance.

First, creating appropriate documents involves the recording, describing, and explaining the *what* and *why* of public institutions’ activities, decisions, and procedures. Creating the appropriate documents does not mean creating more documents but, instead, creating the right ones.

Second, the establishing of standards for records and information management procedures would help ensure that documents are accurate, authentic, authoritative, and complete.

Third, this documentary obligation must be made part of regular and routine practice, particularly within records and information management procedures. Making it part of routine practice would not only help ensure the creation, organization, and management of the appropriate documents, but also help ensure that they are accessible, reliable, retrievable, and usable.

Fourth, there must be enforceable, and reasonable, sanctions for non-compliance. These sanctions must be commensurate with the kind and degree of non-compliance. There must be sanctions when documents are not created, maintained, or preserved either unintentionally or intentionally. Kosciejew argues that this documentary obligation consequently “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” (2016a, 36). For example, public officials or staff who misunderstand this duty or unintentionally fail to comply with it are not meeting administrative standards; thus, a sanction commensurate with their contravention could be some kind of administrative disciplinary measure. Public officials or staff who intentionally ignore or manipulate this duty, however, are potentially engaging in criminal

practices; thus, a sanction commensurate with their contravention could be some kind of demotion, dismissal, or appropriate criminal charges.

Establishing a Duty to Document

Documentation is a crucial component of any kind of information access. It is particularly important for access to information legislation and records and information management practices. Establishing a duty to document would need to include the creation of appropriate documents, setting proper records and information management standards, implementing it as part of regular and routine government practices, and enforcing reasonable sanctions for non-compliance. According to Koscijew, a duty to document “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” (2016a, 37). Indeed, a duty to document helps strengthen and advance government accountability, openness, transparency, trust, and good governance and, in turn, it helps ensure the respect for the principle and practice of access to information.

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