



## **The Right to Information Requires a Duty to Document**

### **Introduction<sup>1</sup>**

On 28 September 2016, Catherine Tully, Nova Scotia's Information and Privacy Commissioner, marked International Right to Know Day with a statement calling for a modest but important improvement to the province's transparency framework. She suggested a ban on public officials using private email accounts, personal cell phones and tablets for carrying out government business.<sup>2</sup> The problem with using private communications platforms to advance public policy work will immediately be apparent to anyone who has been paying attention to Hillary Clinton's travails south of the border. If public policy work is carried out using private communications tools, it is likely to fall through the cracks of the province's right to information rules, since officials responding to requests typically only search official databases, and private communications tools may not even be set to preserve information the way official ones are.

In response to this common-sense suggestion, Nova Scotia's Premier, Stephen McNeil, stunned reporters by telling them that he routinely used phones, rather than email, precisely to ensure that there would be no paper trail available for access to information requesters.<sup>3</sup> Although the idea of keeping important public policy deliberations off the record is anathema to participatory democracy, it should come as no surprise to anyone familiar with provincial politics. Nonetheless, the Premier's open and utterly unapologetic admission to the practice, essentially a public statement of opposition against core notions of transparency, was unprecedented.

The Information and Privacy Commissioner responded to Premier McNeil's statements by calling for the government to establish a legal duty to document. The Right to Know Coalition wholeheartedly supports this recommendation, and has developed this Report to explain what the duty to document is, and why it is important for Nova Scotians.

### **What is the Duty to Document?**

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<sup>2</sup> "Personal email and government work should never mix, says Nova Scotia watchdog", CBC News Nova Scotia, available at: <http://www.cbc.ca/news/canada/nova-scotia/foipop-email-texts-access-information-catherine-tully-1.3779161>.

<sup>3</sup> "Stephen McNeil's use of phone to ensure secrecy worries privacy czar", CBC News Nova Scotia, available at: <http://www.cbc.ca/news/canada/nova-scotia/access-to-information-privacy-secrecy-access-law-premier-1.3785949>.

For a democratic society to properly function, citizens need the ability to access timely, accurate and complete information about the operations of their government. This rationale is a major component underlying the recognition of the right to information as an international human right<sup>4</sup> and, within Canada, as a constitutional right.<sup>5</sup> In Nova Scotia, the right to information is facilitated by the *Freedom of Information and Protection of Privacy Act (FOIPOP)*.<sup>6</sup> However, every right to information system relies on there being adequate record keeping in the first place. The most progressive access procedures in the world will be useless if public officials fail to provide an adequate paper trail documenting their decisions. As Suzanne Legault, the Information Commissioner of Canada, noted: “Access to information relies on good recordkeeping and information management practices. When records are not created or appropriately preserved to document decisions, rights... are denied. This, in turn, prevents government accountability and transparency”.<sup>7</sup>

In order to ensure that the right to information is meaningful, many jurisdictions enshrine a specific duty to document, which means that every public office or local authority must create and maintain full and accurate records that can be accessed by the public. Specifically, the duty to document calls on public officials to document their organization, functions, policies, decisions, decision-making processes, procedures, and essential transactions. It is particularly important for public officials to keep records of in-person conversations and phone calls. The duty to document also requires public officials to refrain from using personal emails or non-traceable modes of communication to make government decisions.

This is not a particularly challenging, nor a particularly radical idea. Indeed, it is already broadly supported. A poll in 2014 found that 75% of Canadians agreed or somewhat agreed with the proposition that the public should have access to a permanent record of public officials’ deliberations and decision-making processes, regardless of whether the decisions were deliberated in written or non-written forms.<sup>8</sup>

## **The Current Law in Nova Scotia**

There is no positive duty to document under the current law in Nova Scotia. Although the *FOIPOP*, as well as other relevant legislation, provides details for how government records should be managed and disclosed, it provides little guidance on the creation of records. For example, the *Government Records Act*<sup>9</sup> requires the heads of government departments to create “records schedules”, described in the *Act* as a “comprehensive description and classification of all records of a public body with a plan governing the life cycle of the records from creation or receipt to disposition or permanent preservation”. While this does help facilitate organization of and access to records, its efficacy is limited as it does not require government bodies to create

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<sup>4</sup> United Nations Human Rights Committee, General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 18.

<sup>5</sup> *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

<sup>6</sup> *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5.

<sup>7</sup> “An Opportunity to Lead: Duty to Document”, Suzanne Legault: Information Commissioner of Canada, available at: [suzannelegault.ca/2016/03/31/duty-to-document/](http://suzannelegault.ca/2016/03/31/duty-to-document/).

<sup>8</sup> “Do Canadians Care About Free Expression”, Canadian Journalists for Free Expression, available at: [www.cjfe.org/poll\\_what\\_do\\_canadians\\_think\\_about\\_free\\_expression](http://www.cjfe.org/poll_what_do_canadians_think_about_free_expression).

<sup>9</sup> *Government Records Act*, SNS 1995-96, c 7.

records in the first place. The records schedules can only be as comprehensive as the records informing them.

Both the *Government Records Act* and the *FOIPOP* have broad definitions of what constitutes a “record”. Under the *FOIPOP*, a record “includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records”. This definition is useful as it is broadly inclusive of modes of communication that automatically create records, such as email and text messages. It is also consistent with a policy statement released by the Office of the Information and Privacy Commissioner in September 2016, which expressly includes any form of instant messaging under the definition of records. This applies to phone-based messaging services like SMS and BBM, online messaging services like Facebook, as well as dedicated messaging apps like WhatsApp.<sup>10</sup>

It is worth noting that, under the *FOIPOP*'s definitions, emails, messages and other records stored on private accounts should be accessible to requesters. In their September report, the Office of the Information and Privacy Commissioner noted that communication conducted through personal accounts may be deemed to be under the “custody or control” of the government and therefore subject to government records policies depending on the context and content of the communication.<sup>11</sup> Once again, this ruling exposes a troubling potential gap between law and practice, since information stored on private accounts will rely on their creators volunteering them for disclosure.

## **The Broader Context**

The challenges around guaranteeing adequate record-keeping to make the right to information meaningful are, of course, not unique to Nova Scotia. However, a consideration of the broader context demonstrates how far behind the curve we have fallen. In the United States, a duty to document was enshrined in federal law as early as 1968. This rule applies to each federal agency and requires that they make and preserve records containing adequate and proper documentation of agency decisions, procedures, and essential transactions.<sup>12</sup> Many States, such as Florida, apply similar principles to their agencies.<sup>13</sup>

New Zealand's Public Records Act, in place since 2005, states 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”.<sup>14</sup> The language in the Act is expansive and clear, and also notes that “records of any matter that is contracted out to an independent contractor” are also

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<sup>10</sup> “Instant Messaging and Personal Email Accounts: Meeting Your Access and Privacy Obligations”, Office of the Information and Privacy Commissioner, available at:

[foipop.ns.ca/sites/default/files/publications/OIPC%20Instant%20Messaging%20Guide%20-%20September%202016.pdf](http://foipop.ns.ca/sites/default/files/publications/OIPC%20Instant%20Messaging%20Guide%20-%20September%202016.pdf).

<sup>11</sup> *Ibid.*

<sup>12</sup> 44 USC § 3101.

<sup>13</sup> Fla. Stat. sec. 119.01 et. seq. Available at: [www.nfoic.org/florida-foia-laws](http://www.nfoic.org/florida-foia-laws) ].

<sup>14</sup> *Public Records Act 2005* (NZ), 2005, s 17.

within the Act's ambit.<sup>15</sup> Multiple Australian jurisdictions have had the duty to document in place for nearly twenty years. For example, the State of New South Wales legislated on the matter 18 years ago, when it enacted records management obligations that required each public office to make and keep full and accurate records of the activities of the office.<sup>16</sup>

## **Recommendation**

For a long time, it has been clear to many in Nova Scotia that the *FOIPOP* is badly broken, and requires serious, structural improvements. Indeed, Premier McNeil himself committed to this when running for office just three years ago, though his opinions seemingly shifted as soon as he was elected.<sup>17</sup> Nonetheless, what we are proposing here is far simpler, and more easily achieved. A duty to document is a simple, short, and non-controversial provision that could be inserted seamlessly into Nova Scotia's existing legal framework. Although it is by no means the only improvement which is necessary to bring the *FOIPOP* up to code, it would solve a glaring and ongoing problem and, at the very least, be an important step by which Premier McNeil could show the people of Nova Scotia that he is not openly hostile to the public's right to information, that there is at least some political will which underpins his professed belief in transparency.

To assist in this process, we have drafted a provision based on those found in comparable legislation in force elsewhere, which we believe strikes a fair balance between holding public officials to account in their decision-making processes, while not making the process of governance overly cumbersome. We urge the government of Nova Scotia to insert the following provision into the *FOIPOP*:

### **Proposed Duty to Document**

Every public office or local authority must create and maintain full and accurate records, in an accessible form, so as to be able to be used for subsequent reference, containing adequate and proper documentation of the office or authority's organization, functions, policies, decisions, decision-making processes, procedures, and essential transactions.

- (1) The "decision-making process" shall include the selected outcome and all options considered in reaching said outcome, as well as all discussions or deliberations regardless of their level of formality.
- (2) This includes records of any matter that is contracted out by a public office or local authority to an independent contractor.

**For further information about the Right to Know Coalition, please visit our website: [www.nsrightrighttoknow.ca](http://www.nsrightrighttoknow.ca), or find us on Facebook at: [www.facebook.com/righttoknows/](https://www.facebook.com/righttoknows/) and on Twitter @NSRightToKnow.**

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<sup>15</sup> Ibid.

<sup>16</sup> *State Records Act 1998* (NSW), s 12(1).

<sup>17</sup> "Premier 'subverting' spirit of access to info laws, says democracy group", CBC News Nova Scotia, available at: <http://www.cbc.ca/news/canada/nova-scotia/access-information-foipop-mcneil-election-promise-2013-1.3786641>.