

Can We Keep the Horses in the Barn? Investigation Report on Alberta Environment's Destruction of Records after the 2015 Provincial Election

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On January 7, 2016, the Office of the Information and Privacy Commissioner of Alberta (OIPC) and the Public Interest Commissioner (PIC) released their *Investigation Report on alleged improper destruction of records by Alberta Environment and Sustainable Resource Development after the 2015 Provincial Election* (Investigation Report). When reading the highlights of the Investigation Report's recommendations, one hopes that the current government might implement and retain some rules and practices that deter future events of this nature.

After the Alberta provincial election in May, 2015, there were a number of media reports about destruction of records during the transition to a new government (Investigation Report, at para 2). The OIPC issued a news release on May 7, 2015 to inform and remind Albertans of the provisions of the *Freedom of Information and Protection of Privacy Act*, [RSA 2000, c F-25](#) (FOIP Act) dealing with record destruction, while noting that some of the records were not subject to the same rules (Investigation Report, at para 6). On May 12, 2015, a disclosure of wrongdoing was made to the PIC under the *Public Interest Disclosure (Whistleblower Protection) Act*, [SA 2012, C P-39.5](#), alleging that staff members of the Department of Sustainable Resource Development (ESRD) were instructed to move all briefing material into the Action Request Tracking System (ARTS), and all records would then be deleted (Investigation Report, at para 3). On May 13, 2015, the OIPC and the PIC announced that they would jointly investigate allegations that records within ESRD may have been destroyed in an unauthorized manner (Investigation Report, at para 9).

The joint investigation identified three issues:

- (1) Were records in the Minister's [of ESRD] office destroyed in compliance with rules relating to the destruction of records?
- (2) Were records in ARTS destroyed in compliance with rules relating to the destruction of records? Were reasonable safeguards in place to protect against the unauthorized destruction of records?
- (3) Did any person wilfully alter, falsify or conceal any record, or destroy any records subject to the FOIP Act, or direct another person to do so, with the intent to evade a request for access to the record in contravention of the FOIP Act?

Destruction Rules

The Investigation Report (at paras 23 to 67) describes the then existing Alberta Government's rules regarding records retention and disposition schedule. Records in the custody and control of the government cannot be destroyed unless they can reasonably be identified as records that are in a pre-approved records schedule (Investigation Report, at para 24). Three types of records schedules govern records destruction and retention: operational (e.g., specific records of functions and activities of core services of a government department); administrative (e.g., housekeeping or administrative activities that support operational activities); and transitory (e.g., records that are not official records and have no further value or usefulness). The records held by Cabinet Ministers are also subject to rules, but they are divided into two categories: personal and constituency records not governed by the FOIP Act, and departmental and cabinet records, which are covered by the FOIP Act, but may be excepted from disclosure (Investigation Report, at para 36). The Investigation Report also analyzes the records management practices of the ESRD, both of the Department and the Minister's office (at paras 39 to 45). The Investigation Report reproduced a Records Disposition Table of activity of ESRD from April to May 2015:

Table 1: Records Disposition Activity at ESRD, April-May, 2015

ESRD ORGANIZATIONAL UNIT	MONTH	FROM LOCATION	# BOXES DESTROYED
Executive Office	April	Direct Disposal	32
Executive Office	May	Direct Disposal	344
Financial Services	April	Alberta Records Centre	14
Financial Services	May	Direct Disposal	1
Finance and Administration	April	Direct Disposal	2
Finance and Administration - Information Communications Technology	April	Direct Disposal	8
People Services	April	Alberta Records Centre	4
Regional Office - Edmonton	April	Direct Disposal	2
Fish & Wildlife - Wetaskiwin - INACTIVE	April	Alberta Records Centre	1
Fish and Wildlife Division	April	Direct Disposal	2
Fish and Wildlife Division - Peace and Upper Hay	April	Direct Disposal	12
Fisheries & Wildlife Mgmt.-INACTIVE	May	Direct Disposal	15
Forest Management-ACTIVE	April	Direct Disposal	52
Forestry Division - Forest Industry Development	April	Direct Disposal	26
Forestry Division - Forest Management	May	Direct Disposal	1
Forestry Division - Forest Protection	April	Direct Disposal	124
Forestry Division - Smoky (Grande Prairie)	April	Direct Disposal	17
Lands Division	May	Direct Disposal	3
Total:			660

The Investigation Report also examines whether the rules for records disposition were applied consistently and whether the interpretation of the rules was sound and appropriate (at para 62). The destruction of 344 boxes of records from the Executive Office in May 2015 was examined to see if these records were destroyed following routine and authorized protocols. The Investigation Report (at para 114) was concerned about several aspects of this event. Some of the documents that were destroyed were not scheduled with proper approvals. Other records destroyed were not properly inventoried and did not contain any authorizations for the destruction protocol that was applied. In addition, the Investigation Report notes that the timing of the destruction of 344 boxes of executive records one day following the election raised questions about their destruction (at para 115).

While the Investigation Report noted that there was no evidence that records were destroyed to keep them from the incoming government, there was also no evidence to support the reasons for the change in the records retention disposition schedule that was applied to the records, which resulted in their destruction (at para 115).

The Investigation Report concludes on the first issue (at para 67) that the records destruction schedules are overlapping, confusing and difficult to interpret and apply to records generated by or for a Minister or Deputy Minister.

Compliance with Destruction Rules

To determine whether there was compliance with the destruction rules, the investigators looked at what directions were given from the Executive Council, Service Alberta, and department leaders about managing or destroying departmental ARTS records in preparation for the possible transfer of government. Further, they looked at the authorities and measures taken for managing retention and destruction of all records at ESRD, including those in ARTS (Investigation Report, at para 71). The Investigation Report concluded that the security arrangements made by SRD to protect against unauthorized destruction of records in ARTS were not reasonable (at para 91). However, no information was found to support the allegation that ESRD records were transferred to ARTS and then destroyed in this case. It was the general confusion surrounding ARTS records that directly contributed to the concern that the records may have been inappropriately destroyed (Investigation Report, at para 93).

Wilful Alteration, Falsification or Concealment of Records

Alberta Party's MLA Greg Clark announced on May 8, 2015, that he was making several FOIP requests in an attempt to stop any shredding of government records (Investigation Report, at para 10). On the same day, Premier Notley directed all employees of Government of Alberta departments to suspend all document shredding (Investigation Report, at para 11).

To address allegations that there may be wrongdoing, the investigators reviewed the requests for access made to ESRD under the FOIP Act, and also reviewed the responses to the requests both before and after the May 5, 2015 election (Investigation Report, at para 96). The investigators determined that they did not find any indication that anyone in ESRD contravened subsections 92(1)(e) or 92(1)(g) of the FOIP Act (Investigation Report, at para 101). However, with respect to the records destruction process in general at ESRD, the Investigation Report (at para 112) concludes that program support, monitoring and accountability was inadequate, and presented an unreasonable level of risk that records may be destroyed in contravention of the Records Management Regulation.

Summary of Conclusions

The Investigation Report held that the destruction of 344 boxes of executive records was not in compliance with the rules that relate to the destruction of records under the *Government Organization Act*, [RSA 2000, c G-10](#), and the *Records Management Regulation*, [Alta Reg 224/2001](#) (at para 130). The investigators were unable to establish whether records were destroyed at the Minister's office so they could not establish whether any records were destroyed in contravention of rules at that location after the May 5th election (at para 131).

Second, there was no evidence found of violations of FOIP Act subsections 92(1)(e) or 92(1)(g) with respect to FOIP requests received by ESRD in April and May of 2015 (Investigation Report, at para 132).

Third, security arrangements made by ESRD to protect against unauthorized destruction of records were not reasonable or sufficient (Investigation Report, at para 133).

Fourth, there was no evidence during the investigation of destruction of ARTS records during or following the current transition of government (Investigation Report, at para 134).

Recommendations

The Investigation Report made 16 recommendations to ESRD (and by Government of Alberta departments responsible) (at para 135):

1. Develop program standards, processes and tools to ensure the capture, integrity and continuity of digital records within the information management framework.
2. Enhance the authority and resources of the Senior Records Officer role within a department to support higher quality of, and consistency in, records management. There may be opportunities to explore how this role could complement the FOIP officer role, as the two functions are closely related, to ensure optimal compliance with the FOIP Act.
3. Review and rationalize all operational records schedules (ORS) to reduce complexity, inconsistency and redundancy, and better document rationale for policy.
4. Consider revising, or replacing ARDA [Administrative Records Disposition Authority] with a new schedule that addresses the challenges we identified in scheduling records appropriately.
5. Conduct a full review of records schedules and their implementation for executive records across government.
6. Review and revise the transitory records schedule to more clearly restrict its use to duplicate and short-term information, and reconcile the goals of this policy with the concept of "copy sets".
7. Ensure records schedules provide direction and guidance to officials as they are making decisions about creating and keeping documents as active records, not restricted to gaining approval for records they are proposing for transfer or destruction.

8. Develop precise service-level standards measuring the quality of records scheduling at the department level.
9. Establish Service Alberta and the Provincial Archives of Alberta as monitors of departmental implementation, with reporting requirements.
10. Identify gaps, and clarify policies, procedures and responsibilities to ensure records are identified, preserved and appropriately restricted at all times, and especially during a period of government transition.
11. Identify and address gaps in the monitoring of records management activities in the Minister's office.
12. Complete the review of ARTS and AR documentation already underway, to ensure full record sets are appropriately preserved for this system.
13. Update the privacy impact assessment prepared for ARTS in 2003 to address changes to the system, and submit it to the Office of the Information and Privacy Commissioner for review.
14. Increase awareness of, and continue to train, Government of Alberta employees and staff members in Minister's offices, with regards to the crucial importance to adhere to information management rules.
15. Make all operational records schedules available for public review online, which would promote clarity, consistency and full accountability about decision-making for assigning retention policy to government records.
16. Ensure there are appropriate sanctions for officials or departments found to have destroyed or handled records in contravention of the RM Regulation, such as destroying records without authorization, applying records schedules inappropriately, or failing to create and maintain records that support business operations and evidence-based decision-making.

Commentary

While there was some notice of problems with records destruction protocols in this case, and there were some destruction practices that may raise eyebrows (e.g., 344 boxes in May), it seems that there is no one really being held accountable for the shortcomings of the process. Even if evidence of wilful destruction had been found by the investigation, the ultimately responsible persons are not in office any more and do not have to answer for their actions.

If the important philosophical purposes of the FOIP Act and regulations are to ensure transparency and accountability, it seems that at best we have closed the barn door after the horses have bolted. Perhaps the OIPC should consider investigating whether its recommendations are accepted and implemented throughout the Government of Alberta. It would seem that subsections 72(3) and 53(1)(b) of the FOIP Act authorize the OIPC to “investigate matters relating to the application of the Acts, whether or not a review is requested.” Hopefully, with the guidance and oversight of the OIPC, the current government can round up the horses and return them to their stalls.

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