

Access Law and Lost Records: A Commentary on “In Search of the Chill”

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RÉSUMÉ Dans son commentaire, l’auteur tente de réfléchir sur la proposition que la *Loi sur l’accès à l’information* a entraîné la perte de documents en examinant deux articles qui discutent des effets de la législation des droits d’accès sur les créateurs des documents et sur la gestion des documents dans le domaine public. Il applique les éléments apportés dans les deux articles au secteur de l’éducation post-secondaire et en suggère d’autres pour considération. Il conclut qu’aucune preuve substantielle n’existe pour démontrer que la *Loi sur l’accès à l’information* a affecté négativement la création de documents et leur gestion. Cependant, les tactiques de résistance à l’accès aux documents existent bel et bien.

ABSTRACT This commentary reflects on the proposition that records have been lost as a consequence of access to information law. It examines two articles that discuss the effect of legislated access rights on public sector records creators and record-keeping. The commentator applies the factors discussed in both articles to the post-secondary education sector and suggests further ones for consideration. The commentary concludes that no substantial body of evidence exists proving access to information law has had a chill effect on records creation and management but affirms the tactics of resisting access to records does exist.

The article by Kerry Badgley, Margaret J. Dixon, and Paulette Dozois tests an assertion made by Jay Gilbert in his article “Access Denied: The *Access to Information Act* and its Effect on Public Records Creators.”¹ Gilbert proposes that the 1983 federal *Access to Information Act* had an adverse impact on the creation of records and record-keeping in the federal government. Badgley et al. question if in fact this is correct. The authors share some common ground. All agree that a culture of secrecy is rooted deep in federal political and bureaucratic circles, that it existed long before the 1983 law was introduced, and that secrecy persists to this day. At this point the similarities end. The general difference between the articles is merely breadth of focus and emphasis. Gilbert asks the more general question: How did the *Act* affect corporate

1 *Archivaria* 49 (Spring 2000), pp. 84–123.

behaviour with respect to administering access to information rights? The impact on records is one manifestation of that behaviour. Badgley et al. ask a more narrowly defined question: How did the *Act* affect federal government record-keeping? It is on the specific issue of records that the authors' points of view conflict.

Gilbert applies a model of organization theory to study change in the post-1983 access to information environment. His critical analysis clearly enumerates the number of ways in which overall corporate behaviour blunts the public's right of access to information. He finds that the federal government response to the law clearly falls into the first order of change wherein an organization resists meaningful change. Resistance takes the form of reorientation and rebuttal. On the one hand the government reorients itself by contracting out, delegating, or transferring functions to private sector organizations or arm's-length agencies. Either way the effect is the same. Records are removed from the scope of the *Act* thereby denying the public access to them. On the other hand, attempts to rebut the law take a variety of adversarial responses. These include delay through the liberal use of time extensions, inflating fees, broadly interpreting and applying exemptions to the right of access, instilling conditions that negate access to information and privacy coordinators as internal agents of change, and the failure by central agencies to provide strong supportive leadership. The explanation for these circumstances is the attitude that legislated access rights disturb the bureaucracy's traditional culture. That culture is one in which custodians of information feel ownership for the records, think the records they create are their personal purview, and resent any outside access as an intrusion that challenges their professional conduct.

Gilbert identifies two further means by which public access to government information is rebutted: first, no longer creating records or at least writing less candid records, and second, deliberately destroying or altering records. This is the point on which the articles intersect.

Other studies conclude that there was a negative impact after the 1983 federal law came into effect. This change for the worse takes a variety of forms including, it is thought, record-keeping. The authors of both articles reviewed annual reports of the federal information commissioners who find that the quality of records and record-keeping practices is in decline. In an apparent cause and effect relationship, the commissioners attribute thwarting the federal access to information law as the reason why some records are no longer created or are less informative than in the past. A number of highly publicized incidents in which records were altered or destroyed are cited supporting this contention. These include revelations during the Somalia Commission Inquiry that documents were altered or destroyed by the Canadian military in a deliberate bid to mislead the public. Also pointed to is the Krever Inquiry into Canada's tainted blood supply system. It unearthed the fact that the Canadian Blood Committee made a conscious decision to destroy records that were

detailed evidence of its deliberations and decisions. Therefore, based on limited anecdotal evidence, it is believed that diminished record-keeping is a victim of the *Act*. A few specific examples are generalized and held as proof by the commissioners that the law is a chilling effect on the creating of records, on what records are created, and on their quality, alteration, or destruction.² But is it pervasive? Or are these exceptional, albeit disturbing cases?

Badgley et al. describe the findings and conclusions of a 2001 National Archives study on this very point. It is a qualitative review of records from before and after the *Act*'s promulgation. Five criteria were used to measure the *Act*'s effect on record-keeping. They are: 1) the quantity of records; 2) the scope of issues and information documented in the records; 3) the narrative content of the records; 4) the degree of corporate control over the record-keeping system in which the records are maintained; and 5) other relevant factors. But for two notable exceptions, no appreciable change in record creation and record-keeping practice was found over time. And with respect to the exceptions, they occur both before and after 1983. It seems, therefore, that the 1983 law had no significant impact on record-keeping practices. The reason is, they explain, because the same culture of secrecy existed equally before and after 1983 – a point on which Gilbert agrees. Badgley et al. conclude, therefore, that federal government record creators distinguish between what records they need to document their activities versus public access to those records. It appears access to information does not affect record-keeping and examples such as the Somalia and the Blood Committee incidents are anomalies and not the rule.

The fact that the access to information law has no apparent impact on records is attributed to a variety of factors. First amongst these reasons is that many records are created of necessity in response to legal, regulatory, or administrative policy requirements. It is indeed ironic that compliance with the obligation to create records contrasts starkly with the subsequent failure to give access to those same records. A second reason Badgley et al. give is administrative and operational continuity. Records are needed to overcome the disruption created by organizational change and staff turnover. Accountability is yet another factor. This is the public sector's version of the popular television program "Survivor." It occurs when a bureaucrat working in a political environment decides it is better to have a record than to have no record at all.

2 The Commission seemingly makes a broad assertion that is based primarily on examples involving the alteration or destruction of records. It further contends that poor records management causes decisions not to be recorded by government officials. But detailed and convincing evidence is missing to substantiate the claim that government employees consciously and deliberately choose not to create records or create less substantive records. The Commission's claims that officials weigh the need for a clear record against the prospect of public access to it appear to be purely speculative.

The truest form of reality is the human instinct to survive – the theory of fight or flight. The motivation for creating and keeping records may be for reasons of ethics, protection, or reputation. The ethical reason for keeping records is when one knows the right thing to do, does the right thing, and documents it. Vulnerability and the need for records that keep one out of trouble drive protection. And reputation is explained by the desire to create a lasting record of one's place in history. Finally, there is the belief system. The prevailing belief is that the records created either are not sensitive or are so sensitive that they are certain to be protected by a provision of the *Act*. Badgley et al. offer a final piece of anecdotal evidence to support their conclusion. Access to information and privacy staff at the National Archives confirm that over the past 20 years they observe no change in the content of records reviewed that were created before and after the federal law came into play.

I would add two more reasons to explain why access to information legislation has little or no adverse effect on record creation. Record-keeping is an instrument of control. First, as a business tool records help manage complex issues by bringing organization and order to complicated situations. Also, information in records empowers the individuals who hold it and enables control over those who do not have it. My second reason is privacy protection. At least for records and record-keeping systems designed to collect, keep, and process citizens' personal information, I believe legislated privacy standards are compelling public bodies to improve their documentary practices. They are expected to make their record-keeping systems privacy compliant. Moreover, these records often describe individual legal rights, entitlements, or obligations that corporate bodies are required to document whether by law or policy.

On balance, for all the aforementioned reasons, the need of records is more compelling than the need to administer access to them. The risk of no records as evidence of one's activities is greater than the trade off, the legislated right of access to those records. It seems this is especially true when, as Gilbert demonstrates, the approach is simply to continue long-standing practice to delay, subvert, and deny access to federal government information.

Applying the circumstances learned from these studies to my own organization, that of a university, I see some similarities. Universities pride themselves on being open, transparent, and inclusive institutions. They also are autonomous, self-governing communities of scholars that are protective of their independent status. This feature is characteristic not just of the corporate body but especially of individual academics. It breeds a highly decentralized and individualistic organizational culture in which some faculty do not accept change to long-held views and values about the records they create and keep, especially when required by a legislated authority outside the university such as an access to information or privacy law. They view this challenge to a traditional style of self-governance as interference. At best, these circumstances can fos-

ter an attitude of resistance, and at worst a reactionary defiance. Like the federal government bureaucracy, the traditional corporate culture of the university environment is also one in which some custodians feel they own the records and resent any outside access as an intrusion that challenges faculty independence. In some post-secondary education institutions strong and supportive leadership by university administration is missing and the coordinator's role may be undermined. Also, the adversarial tactics described by Gilbert are sometimes employed to make public access to university records difficult. But like Badgley et al., and for all of the same reasons they describe, I see no evidence, either by omission or commission, that provincial access to information law is having a negative impact on the quality of records and record-keeping. As a university records manager and archivist I see no appreciable change in the quality of records created. Indeed, records embarrassing to the university have been created since the inception of provincial law and disclosed in response to FOI requests a number of times – this despite many admonishments to create records with access in mind. Records that employees are required to create by policy, that document entitlements and obligations, that are a measure of accountability, that support governance, and that satisfy administrative and legal needs continue to be produced as before. Increasing demand for records services even demonstrates an effort to improve the systematic management of current records. Admittedly, my own example is more anecdotal than based on scientific study.

The articles by Gilbert and Badgley et al. offer important insights into the implications of access to information law on public records. They agree that the culture of secrecy persists, that problems of reorientation and rebuttal are real, that unauthorized records destructions does happen. But they disagree that federal access to information law has adversely affected records creation and management; and the evidence advanced by Badgley et al. indicates no correlation. The authors also acknowledge that several factors affect their studies. They include the impact of new data and communications technology; the lack of documentation standards; organizational downsizing; and the unpredictable nature of human behaviour and what motivates record creators given a particular set of circumstances. To this list I would add employee attitudes (appreciation, understanding, acceptance) about the importance of records as a corporate resource; the existence, scope, and quality of record and information management programs within an organization; and the extent to which employees are trained in the required processes and practices.

Badgley et al. note that one of the difficulties in the National Archives study was how one was to know if records are missing if they were not there in the first place. The fact that the same basic records are found over time suggests this is not a concern. However, this may give qualified comfort only because the National Archives study examined mostly paper records. As record professionals we know the transient nature of the electronic documentary medium

has already affected what record survives from the past 20 years. Could the confluence of digital information and the impact of access to information law mean records are indeed being altered or destroyed without a trace and anyone knowing? Or is this possible correlation between the law and the record medium also more imagined than real?

Through their studies, Gilbert and Badgley et al. add to our knowledge and understanding of the relationship between access to information law and records-keeping. I agree with our authors that more study is needed across jurisdictions and sectors. Also, investigation is needed of the other factors noted above. Interviews with record creators at various levels in the organizational hierarchy as well as information and technology professionals will shed more light and help us build a better understanding of these issues. Perhaps future studies will explore these other considerations and situations, providing further answers about the degree to which it is access to information law, an organization's records management infrastructure, or other factors that has an impact on records creation.