

Archival Legislation for Engendering Trust in an Increasingly Networked Digital Environment

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Abstract

This paper outlines some of the challenges posed to archival legislation in Commonwealth countries by the creation, management and preservation of records in increasingly complex digital environments, both when an archival law exists and is used, and when it does not exist at all, as is the case in Hong Kong. The authors argue that archival science can bridge the gap between the current archival legislation and its ability to address issues in the digital environment.

Introduction

The term legislation comes from the Latin word, *lex*, which refers to “written rules.” According to Macdonald, legislation is “written custom” (Macdonald, 1999, pp. 285), and, under the Anglo-Saxon legal tradition, statutes and statutory amendments explicitly document “custom made” rules and “(speak to) the process by which statutes reformulate a legal system’s general default rules into more precise prescriptions” (Macdonald, 1999, p. 288). These “precise prescriptions” should ideally conform to a set of attributes of the law. For example, the law itself must be stable and should provide individuals with a set of requirements before taking action (Choi, 2012). The law should also have foresight, in terms of being able to anticipate future events and situations so as to provide a legal framework for governance and for regulating behavior (Miranda, 2010).

However, in reality, these attributes of the law are said to be a “complex ideal that is even more complex to realize” (Choi, 2012). In the legal literature, there is recognition that the law is reactive with regard to changes in technology. Perry and Ballard (1993) state, “Unfortunately, our system of laws, with its heavy emphasis on the sanctity of *stare decisis* and common law, does not react quickly enough to what has become almost daily technological change... A risk is run whenever the law places too much reliance upon the past. This risk appears every time a technological change radically transforms society. Law and the judiciary are suddenly caught unaware and are unable to rely upon principles of law that could not have contemplated the technology before them” (p. 799). Similarly, in the archival literature, there is an acknowledgement that archival legislation tends to lag behind technological developments (Granstrom, n.d; International Council on Archives (ICA), 1997; Suderman, Foscarini & Coulter, 2005). The ICA Committee on Electronic Records (1997) observes that “legislation governing many aspects of information creation, management, use and preservation has not kept pace with the rapid change in technology and archives legislation is no exception” (p. 19). Archival researchers have also critiqued the archives acts in their respective countries as being ineffectual. Archives acts are described as being “weak,” “outdated,” “old and inconsistent” as well as being

reactive in nature since they “confirmed existing provisions rather than driving future expansion” (Berry, 1996; Hurley, 1994; The National Archives, 2003.; Shepherd, 2009).

Meeting the Digital Challenge Through Legislation

Governments around the world have embarked on cloud computing initiatives in order to achieve greater economies of scale for procurement of information technology services. From an information technology (IT) perspective, cloud computing is not a new technology but is a new form of service delivery and a new business model (Convery 2010).¹ In the UK, the creation of a private cloud delivery and service model, known as the G-Cloud programme, has been supported by the Department of Culture, Media and Sports (2009) for making the “Government IT marketplace more cost-effective, flexible and competitive” through “higher levels and standardisation and sharing of IT services across departments” (para 32). However, there are risks involved in the deployment, implementation and use of cloud computing. One significant risk is the lack of standards in cloud computing services, “which often use different, sometimes proprietary interfaces and programming languages” and this will create difficulties in terms of migrating records across systems and accessing them over time. There are also multiple players involved in the storage of records and delivery of services and this has implications on data privacy and for the continuous and secured access to information (Mondaq, Business Briefing, 2010). From a legal point of view, the greatest risk is that records may reside in a country different from that in which they are created and used and fall under its legislation and regulations (Schiller, 2011; Department of Finance and Deregulation, Australia, 2012).

In order to mitigate some of these challenges, some countries have updated their legislations related to privacy, data protection and intellectual property (Business Software Alliance, n.d). For example, the Australian government has recently introduced a *Privacy Amendment (Enhancing Privacy Protection Bill) 2012* to enable better protection of personal and sensitive information in online transactions.² At the same time, several national archives, including those of Australia and the United States, have issued policies and guidelines on the outsourcing of digital data and how to manage records in a cloud computing environment. However, these policies and guidelines need to be supported by a strong archival legislation, as legislation is the highest form of public policy. Already in 1998, the Australian Law Reform Commission noted that the *Archives Act 1983* needed a comprehensive framework for recordkeeping, particularly with regard to the outsourcing of government functions (para 3.23). Thus, there is an urgent need to update archival legislation and to set up a legislative framework to address issues relating to the proper creation, maintenance and preservation of trustworthy digital records.

As noted by the Association of Commonwealth Archivists and Records Managers (Parer, 2002), archival legislation should reflect emerging issues, which affect the creation and preservation of

¹ The National Institute of Standards Technology (2011) defines cloud computing as a “model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g.: networks, servers, storage, application and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction” (p.2).

² The text of the bill can be accessed via http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r4813 (last accessed 20 July 2012).

records. However, most national archives in Commonwealth countries have a legislation based on the UK Public Record Act of 1958 (Roper & Millar, 1999), an act written for a paper based records environment and unable to meet the challenges posed by the digital environment (The National Archives, n.d, p.9). Even with respect to the paper environment, one weakness of archival legislation in Commonwealth countries is that it lacks an integrative framework for the lifecycle management of records, and ignores the record's creation and maintenance stages (ICA 2006; Roper & Millar, 1999). Of course, this makes the legislation especially inadequate in the digital environment. Since the preservation of digital records starts at creation, archival legislation should clearly articulate the shared roles and responsibilities of the creator and the preserver along the entire life cycle of the records. Archival legislations in Commonwealth countries, particularly the UK, Canada and Singapore, generally specify the roles and responsibilities of the national archives in terms of acquisition, preservation and provision of access to public records. In Canada and Singapore, the archival legislations say that the national archives play an advisory role in the development and implementation of a records and information management programme in the government. These acts, however, do not stipulate the roles and responsibilities of government agencies as record creators, apart from stating that they should seek approval from the archival authority before destroying public records.

An example of the consequences of this situation is in the words of the Information Commissioner of Canada, who, in a 2009 report entitled *A Dire Diagnosis for Access to Information in Canada*, wrote: "The poor performance shown by institutions is symptomatic of what has become a **major information management crisis**. A crisis that is only exacerbated with the pace of technological developments. Access to information has become hostage to this crisis and is about to become its victim. There is currently no universal and horizontal approach to managing or accessing information within government. Some institutions don't even know exactly what information they are holding." (emphasis in original) (http://www.infocom.gc.ca/eng/med-roo-sal-med_spe-dis_2009_4.aspx). To avoid these crises, archival legislation should not only clearly delineate the role of the national archives in preservation but also give the archives responsibility for issuing records creation and recordkeeping directives. The need for shared responsibility of creator and preserver along the records lifecycle derives from the fact that "management of digital records must proceed from a comprehensive understanding of all phases or stages in the lifecycle of records, from the time they are generated, through their maintenance by their creator, and during their appraisal, disposition and long-term preservation as authentic memorials of the actions and matters of which they are a part" (Duranti & Preston, 2008, p.734). Furthermore, since the reliability of records is dependent on the "completeness of the record's form and the amount of control exercised on the process of its creation", archival legislation should specify that government agencies must exercise due diligence in outsourcing government records to third party service providers, ensuring that adequate measures are in place for the agency to exercise control over the identity and integrity of its records.³ This is especially pertinent in a cloud computing environment, where multiple copies of digital records abound (Stuart & Bromage, 2010). These multiple copies are created as a result of the transmission of data from one infrastructure to another, sometimes with little or no audit trail, and from the fact that users often make multiple copies of the records that can exist in "different iterations across different jurisdictions" (Mason & George, 2011).

³ ICA International Terminology Database, <http://www.web-denizen.com/> (last accessed 20 July 2012).

In essence, both the creators of public records and the national archives should be cast by archival legislation as “agents of accountability”. Sztompka (2000) writes that these agencies “elicit or enforce trustworthiness of the objects of primary trust. They provide insurance of trustworthy conduct by putting pressure (facilitating, controlling, or sanctioning) on persons, roles, institutions, or systems that are the targets of our primary trust” (pp. 47-48). If we extend Sztompka’s statement and think of digital record making, recordkeeping and record preservation systems as “targets of our primary trust”, then both records creators and the archives have a role to play in terms of developing, monitoring and enforcing procedural controls over records creation, maintenance, disposal and preservation. In order to support trust in records, archival legislation should identify these “agents of accountability” and state their responsibility in ensuring proper controls for the creation, management and preservation of records. However, there must also be proper controls to ensure that trust can also be placed upon records creators and archivists. To achieve this, archival legislation should establish means of verifying that records creators and preservers fulfill their responsibilities according to accepted professional standards. For example, the Scottish *Public Records Act 2011* states that government agencies should submit a records management plan to the archival authority.⁴ The archival authority, in turn, is required to submit an annual plan to the Scottish Ministers on the records management plans submitted by each agency. The archival authority needs to include details such as the result of records management reviews it conducted, as well as the “names of any authorities that have failed to comply with any of the requirements of an action notice together with details of the alleged failures” (Public Records Scotland Act, 2011, para 12, part 3).

Archival legislations in Commonwealth countries such as United Kingdom, Canada and Singapore tend to include a clause stating that government agencies should seek permission from the national archives before destroying public records. One limitation of such a clause is that it associates appraisal with the destruction of records rather than with preservation. Archival legislations also require that records be transferred to archival custody several decades after they have become inactive (Foscarini, 2007; Hurley, 1994). Although records may be transferred to archival custody earlier than the stipulated time, the lengthy time frame included in the legislation implies that preservation requirements tend to be part of the end of the record’s lifecycle, while it is now commonly accepted that the appraisal of records should occur during the early stages of the records’ lifecycle in order to address issues related to the authenticity of digital records and the feasibility of preserving the records over time (Appraisal Task Force, InterPARES 1, 2001). This is also in line with the chain of preservation concept according to which “all the activities to manage records throughout their existence are linked, as in a chain, and interdependent” (Eastwood, Preston & Hofman 2008, p. 230).

Finally, archival legislation tends to define records and archives in ways that are contingent to the time and the context of the legislation, rather according to the nature of the material. For example, the archival legislation in Australia defines a commonwealth record as “a record that is the property of the Commonwealth or of a Commonwealth institution” (Archives Act, 1983). Although in a digital environment, especially when records are outsourced to a service provider,

⁴ The National Archives of Scotland merged with the General Register Office for Scotland in April 2011 to become an entity known as the National Records of Scotland. The *Public Records (Scotland) Act 2011* is accessible via <http://www.nas.gov.uk/documents/PublicRecordsScotlandActPublished.pdf> (last accessed 21 July 2012).

where which instantiation of the same entities belongs to whom can be a contentious issue, this kind of definition constitutes a problem, also in traditional environments it is not useful. The Australian Law Reform Commission (1998) mentioned that there were cases where public records fell into the hands of private individuals, and it was difficult to prove that the Commonwealth owned the records. As such, the Commission recommended using a provenance based definition for public records so that “recovery powers would no longer be subject to uncertainty by reason of doubts regarding the ownership of the records” (para 8.19). A different problem is presented by the way several archival laws define archives: such definition is linked to the passage of time, or to the transfer to an archival institution, or to the use made of the records. Such definitions reinforce the segregation of records management from archives preservation and focus physical placement (Lemieux, 1992, p. 156). Therefore, it is essential that records and archives be conceptually defined in archival legislation as this would also support the identification of the digital entities that fall under the rule of law.

In conclusion, there is a need to articulate comprehensive archives laws, which constitute a holistic framework for the management and preservation of records throughout their lifecycle. A study conducted on policies controlling digital resources found that even those institutions that have the legal mandate to manage and preserve the records created by their own community do not always establish rigorous policies and procedures controlling such activities. This is partly because “there is not an explicit obligation at the regulatory level, mandating to draft a policy on digital materials preservation” (Guercio, Lograno, Battistelli, Marini, 2003). Furthermore, even when such policies exist, they tend to be perceived as “entirely optional” and are “scarcely used” (Guercio, Lograno, Battistelli, Marini, 2003). Archival legislation can thus provide the framework for the development of national policies and procedures for record making, recordkeeping and preservation. However, beyond providing the basis for the development of records-related policies and standards, archival legislation needs to be anchored to archival theory. Concepts such as the chain of preservation and the theory of provenance should serve as guiding principles for archivists in reviewing and revising their archival legislation. Such principles will enable archivists to address changes in the records environment caused by digital technology and the changing nature of public administration.

A Tragedy for Hong Kong’s Public Records: Hong Kong Does Not Have An Archival Law

While the inadequacy of existing archival legislation is particularly evident in the context of digital records environments, as is the tendency of legislators to entrust much of the control on the creation and management of reliable, accurate and authentic digital records/data to evidence law, and law on privacy, security, intellectual rights, and the like, there are cases of complete absence of any archival legislation. One such case is Hong Kong, where such absence opens the possibility of dire scenarios for the preservation of public records.

What are public archives?

For accurate answers to questions like 'How did we get here from there?' and 'What exactly happened back then - 100 years ago, 50 years ago, 25 years ago - a citizen should be able to consult his country's public archives. Memory may prove faulty, with gaps or blanks. History

books and newspapers could present a distorted, politicized or misinterpreted view of what happened. Archives, however, are the original records of the event at the time it occurred preserved for posterity.

Public archives record birth and citizenship, confirm death and ownership, verify rights and obligations, detail government policies and decisions and serve legal, operational, research and cultural purposes. Public archives are also an important component of the community's collective memory.

The need for an archives law

All responsible governments need to document policies, decisions, activities, and how they conduct business, deliver services and evaluate outcomes, in order to sustain efficient operations, protect rights and obligations and ensure accountability and transparency. In short, to ensure good governance.

In a modern state, it is part of a government's public duty to ensure the proper creation, management, protection and preservation of public records. To achieve these ends, modern states and jurisdictions, almost without exception, have enacted an archives law.

What an archives law will achieve

An archives law is a critical pre-requisite for the effective management of records and archives. It establishes the regulatory framework within which appropriate records and archives systems can be created and provides the authority and funding necessary for their implementation.

A government that listens to its people and wants to act responsibly enacts an archives law in order to:

- ensure that public officers create and keep records that accurately and fully document government decisions and actions in support of government transparency and accountability, thus promoting trust and public participation in government.
- achieve efficiency and cost effectiveness in the management of government records, which facilitates the carrying out of government functions.
- identify and safeguard records of enduring value for preservation as vital assets and the shared heritage of the community.
- ensure that convenient and fair public access is provided as a statutory right not only as a privilege.

Hong Kong refuses to enact such a law

Incredible but true, Hong Kong does not have an archives law. Nor does the government plan to have one. This is both surprising and exceedingly puzzling given that Hong Kong always claims to be "the world's most modern Asian city", and prides itself on its judicial independence, its adherence to the rule of law and its unique achievements after 1997.

Hong Kong's public records management system: a fiasco

Unlike the management of public funds and civil servants, which are regulated by legal rules, the management of public records is performed under internal administrative arrangements through the Government Records Service (GRS), a division of the Administration Wing of the Chief Secretary for Administration's Office. The GRS operates with serious limitations:

- The GRS does not have any regulatory powers. It cannot require any government agencies to make their records available for appraisal or transfer. Without records regulations, government bureaux and departments are free to observe or disregard GRS guidelines. There is no procedure for imposing penalties on public officers who do not create or manage records properly.
- The selection of records as archives only takes place when they are no longer required for use by the government agency. The alleged need to retain records for continuing use is employed as an excuse not to transfer records to the GRS, which finds it hard to discover what public records were created, how and where they are kept, or if they have been wrongly disposed of. As a matter of fact, agencies are increasingly reluctant to turn over records for selection and preservation and the GRS can do nothing about it.
- Thousands of classified records identified for permanent retention as archives have not been processed by agencies to permit public access. Many archives temporarily on loan to bureaux and departments are not returned to the GRS.
- The absence of archives law induces disrespect for the archival profession. The position of GRS Director was created at the level of Principal Archivist, the highest in the Archivist grade. Since the mid-nineties, the post of Principal Archivist has been filled by an officer of the Executive grade with no professional training and inexperience in the management of public records. Only 2 of the 8 Archivist grade officers are professionally qualified and none is in a senior management position. As records and archival works are not legal obligation imposed on the government, there is no consequences whatsoever if the system is managed professionally or not.
- The lack of professional capacity in the GRS further stifles archival works. Nowadays, information technology is increasingly employed in record keeping. Electronic records may be readily altered and are easily deleted. To ensure that electronic records remain authentic, accessible and usable requires records management systems and professional expertise. In the absence of professionally qualified staff in GRS, no appropriate guidance has been issued for the management and preservation of electronic records.
- The government and the public are equal stake-holders in the successful identification of corruption and misfeasance, and eradication of mismanagement. Both would benefit from the mandatory management of public records and their preservation as public archives. The absence of adequate records prevented the Government from being able to explain the loss of revenue of some \$160 million, resulting from the non-payment of land premiums for change-of-use at Discovery Bay in 2006, that was revealed by the Director of Audit's investigation. More recently, the loss or absence of accurate tree inspection records by the Leisure and Cultural Services Department contributed to mismanagement of old trees. This was only discovered when a 19-year old student was killed in Stanley by a falling diseased tree.
- There is no obligation on any of the 200 public bodies, such as the Hospital Authority, the Housing Authority, the Urban Renewal Authority and Monetary Authority, to properly manage records and transfer archival records to the GRS for preservation and public access. The activities of these bodies have a considerable impact on society and should be subject to public scrutiny. Without the law, such a scrutiny and control cannot be exercised.
- In the absence of an archives law, policy records from major public offices – the Chief Executive's Office, the Central Policy Unit, Invest Hong Kong, the Monetary Authority and ICAC – have never been sent to the GRS for archival appraisal or preservation. Without

such records the history of significant events such as the 1997 reunification with China, and the introduction of the ministerial system in 2000, and how the employment terms and conditions of political appointees were set and their selection made will never be known.

- Access to archival records is managed through the *Public Records (Access) Rules of 1972*, as amended in 1996, which are issued by the Chief Secretary, who has extensive discretion to refuse access to public records even after the expiration of the closed period of 30 years. There is no mechanism for appealing against decisions to withhold access.
- Being administrative guidelines, the Access Rules can easily be changed by the government. They are not legally enforceable and are over-ridden by competing laws, such as the Census and Statistic Ordinance, which requires the compulsory destruction of raw census data and thus impairs genealogical research and social studies.
- In fact, in a recent audit review conducted by the Audit Commission, numerous cases of mismanagements and duty remissness have been shockingly revealed. According to the audit report (*Report No 57 of the Director of Audit – Chapter 10: Records Management Work of the Government Records Service*), GRS practically fails in every single aspect of its operation.

The death knell for Hong Kong's public records had been rung, it is entirely up to the Hong Kong SAR Government official to respond or not. It is hoped that the government is not only listening but will take steps to enact an archives law without delay. Otherwise, Hong Kong will have no choice but turn into a society without memory, history, and culture. Hong Kong will have no future!

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