



OBA Submission on the
Proposed Policy on Management and
Retention of Pension Records by the Administrator

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Submitted to:
Attention: Pension Policy Unit
Financial Services Commission of Ontario
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Introduction

We are pleased to provide this submission on behalf of the Ontario Bar Association (“**OBA**”). The OBA represents close to 18,000 lawyers from a broad range of sectors, including those working in private practice, government, non-governmental organizations and in-house counsel. Our members have, over the years, analyzed and provided comments to the Ontario government on numerous legislation and policy initiatives.

Our Pension and Benefits Section has about 300 members representing various stakeholders within the pension and benefits industry. These stakeholders include pension and benefit plan administrators (including third party service providers), employers, unions, employees and employee groups, trust and insurance companies, pension and benefits consultants, and investment managers and advisors.

In December 2009, the Financial Services Commission of Ontario (“**FSCO**”) released a Proposed Policy on Management and Retention of Pension Records by the Administrator (the “**Proposal**”), which is intended to “discuss the long term commitments and responsibilities of the administrator of a pension plan in the management of pension plan records” and “to provide guidance for prudent records management and retention practices”.

We appreciate FSCO’s efforts to more fully define the duties and obligations of an administrator with respect to management and retention of plan records. Indeed, this is an area in which many of our members would like to see clear guidance from FSCO. However, our members have expressed serious reservations regarding the Proposal. Specifically, they are concerned about the following:

- The implication that plan records be kept indefinitely;
- The absence of clear guidance on what constitutes a “plan record”;
- The expectations placed on third party administrators; and
- The somewhat-unrealistic burden placed on administrators appointed by the Superintendent pursuant to Section 71 of the *Pension Benefits Act* (the “**PBA**”).

Given the above noted difficulties, which are described in greater detail below, we believe that the Proposal should not be implemented in its current form. Rather, we encourage FSCO to form a working group so that a records management and retention policy may be discussed and developed with the involvement of pension stakeholders. The OBA would be pleased to participate in any such process.

Indefinite Retention

Our members believe that the underlying purpose of the Proposal is to provide a helpful guide to administrators in fulfilling their role, and applaud FSCO in its efforts to provide such a guide. However, at page 2, the Proposal states:

“the administrator will generally be responsible for the records as long as there is the potential for claims related to pension entitlements by members, former members, any other persons who have an entitlement under the plan and their estates”

In so stating, the Proposal is essentially requiring indefinite retention of all plan records. This is especially troubling given FSCO policy A300-800, which recommends retaining certain plan records for the life of the plan and not until all potential for claims is exhausted. Our members believe indefinite retention to be an impractical, costly and unrealistic expectation. Our members believe that it is not necessary or desirable to require an administrator to keep everything, forever.

This aspect of the Proposal is particularly troubling to our members because the Proposal indicates that records management and retention is an administrative duty linked to Section 22 of the PBA. Given that a failure to administer a plan properly carries with it possible legal and financial liability and our submission that indefinite retention of plan records is not feasible, our members feel that the Proposal is inappropriate when measured against its purpose.

As a result, we believe that the Proposal should not be implemented in its current form. Instead, we encourage FSCO to develop a records management and retention policy, in consultation with pension stakeholders, that provides clear guidance to administrators on records management and retention, and specifically as to how long plan records ought to be retained.

Most administrators of small to mid-sized Ontario registered pension plans, and those tasked with carrying out the records management and retention function, are not equipped to determine what needs to be retained and for how long. Accordingly, any policy developed by FSCO should be very clear as to what records are to be retained and for how long. Specific suggestions on what might be contained in such a policy are contained below.

The Definition of “Plan Record”

The Proposal identifies “any documents related to the pension plan, regardless of physical format, that have been either created or received by or for the administrator during the operation of the pension plan” as plan records. Our members feel this definition is too broad and will cause confusion for administrators about which documents need to be retained, thus adding to plan administration expenses. Our members would like FSCO to develop a clear and comprehensive policy that lists the various types of plan records administrators are expected to retain. We note that the Proposal lists certain categories of documents, namely:

“documents that create and support the pension plan and pension fund; documents that pertain to the operation of the pension plan and pension fund; documents that pertain to the investment of the pension fund; and documents that pertain to individual plan members”

Our members would support further developing these categories. In addition, our members would like FSCO to identify the particular types of plan records that would fall within each category along with an appropriate minimum retention period for each such plan record.

For illustration purposes, we have included a chart below similar in format to what our members would welcome as part of a FSCO policy on records management and retention.

TYPE OF PLAN RECORD	DOCUMENT	MINIMUM RETENTION PERIOD
Documents that create and support the pension plan	Plan text	[Appropriate retention period to be determined]
	Amendments to the Plan text	
Documents that create and support the pension fund	Restatements of the Plan text	
	Trust agreement/ Group annuity contract	
Documents that pertain to the operation of the pension plan	Amendments to the trust agreement/ Group annuity contract	
	Annual Information Returns	
Documents that pertain to the operation of the pension fund	Third party contracts with consulting firms	
	Monthly balance statements	
Documents that pertain to the investment of the pension fund	Statement of investment policy & procedures	
	Investment management agreements	
Documents related to the plan member	Signed Termination Statements	

In addition to the foregoing, our members suggest that those records applicable to defined benefit or defined contribution plans be delineated, as the list of plan records generated differs depending on plan design.

Finally, our members believe that administrators should have a reasonable transition period to make any changes to their current practices necessary to comply with any new policy, and grandfathered where the administrator's policy with respect to historical documents does not accord with the retention period developed by FSCO.

Third Party Service Providers

The Proposal recognizes that some plan administrators choose to delegate day-to-day administration tasks to third party service providers. In such circumstances, those third party service providers will collect and store many plan-related records. However, we submit that in some areas, the Proposal may be in conflict with the practical realities of such relationships.

For example, the Proposal would see each plan administrator develop a comprehensive records management and retention policy; however, third party service providers are unlikely to agree to review and address the specifics of every administrator's records management and retention policy. Not only would such a requirement be exceedingly difficult to manage, but it would also lead to a significant increase in the costs of plan administration as measures are taken to compare, reconcile and modify various records management retention policies, with little corresponding benefit to the administrator or plan members. Our members see this as another reason why clear guidance from FSCO on records management and retention is necessary.

Another issue with respect to third party service providers concerns proprietary documents created in the course of administering a plan. While third party service providers generally agree to return plan-related records to an administrator upon termination of a service contract, this would typically exclude information and documents proprietary to the third party service provider; that is, there may be records that are created for the purposes of plan administration, but which, if disclosed, would result in serious harm to the business of the service provider. What is viewed as proprietary will vary from provider to provider, but may include (for example) procedural manuals, system-generated worksheets and profiles, working notes, test cases, etc. We suggest that such documentation be excluded from any records management and retention policy.

Administrators appointed by the Superintendent

The Proposal indicates that any entity acting as the administrator becomes responsible for plan records. In the event that a plan administrator is unable or fails to act in the winding-up of a pension plan (e.g. where the administrator is bankrupt), and another is appointed by the Superintendent pursuant to Section 71 of the PBA, the Proposal implies that the appointed administrator becomes responsible for all plan records, both historical and current. This responsibility is problematic for an appointed administrator both in terms of the potential liability that may arise as well as the costs that will inevitably be incurred.

Given the circumstances surrounding an appointment, in most instances the plan records inherited by an appointed administrator will be incomplete. In other cases, plan records will be virtually non-existent. One can easily imagine scenarios where an appointed administrator could be exposed to liability. For example, a deferred/former member could claim an entitlement to a pension, providing the appointed administrator with evidence of past employment or membership. In such a case, the appointed administrator who does not have the appropriate plan records to confirm or refute such a claim would be exposed to liability.

Our members therefore suggest that any policy instituted by FSCO address the unique position in which administrators appointed by the Superintendent find themselves with respect to plan records.

The OBA thanks FSCO for the opportunity to provide comments on the Proposal. We would be pleased to assist FSCO in refining the Proposal so as to make it clear, unambiguous, and helpful to administrators.

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