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State Records
of South Australia



Contracting and Official Records Standard

Standard

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Introduction

Adequate records management is a crucial part of all agency and government administration, risk management and accountability. It is the basis for establishing and maintaining documentary evidence of agency and government activities and decisions supporting good business practice.

Section 13 of the *State Records Act 1997* (State Records Act) states that every agency must ensure Official Records in its custody are maintained in good order and condition. Official Records are defined as being those records made or received by an agency in the conduct of its business.

To ensure that the accountability and efficiency of agency and government administration is not diminished as a result of contracting, agencies must ensure that contracting arrangements include records management practices that meet the Government's legislative obligations and requirements. Of particular importance are records that contain the personal affairs of any person. In cases where sensitive or personal information are included as part of the contract then records management terms and conditions must to be included.

Where an agency's business activity is conducted by contracted service providers the agency's records management obligations extend to those contracted service providers. Legal possession (and therefore ownership) of the records of the contracted business activity remains with the agency regardless of the custody arrangements. Agencies therefore have an obligation to define records management responsibilities of contracted service providers.

Scope

The intention of this Standard is to assist agencies bound by the State Records Act incorporate records management requirements into the contracting process. Application of the Standard will ensure agencies consider their obligations under the *Freedom of Information Act 1991* (FOI Act), the *Information Privacy Principles* (IPPs) and the State Records Act. Records created by contracted service providers, as a result of contracting with government, must be properly managed to ensure agencies meet their legislative obligations to the Government and the public in general.

This Standard is aimed at procurement staff, contract managers, records managers, legal practitioners, senior management and other stakeholders involved in the contracting process. Contracted service providers are not an intended audience, though they may find the policy documents of use.

There is no requirement that this Standard be applied retrospectively, unless it is determined otherwise by the agency. Its use should, however, be considered in the event a contract is renegotiated, extended, or the terms of the contract are to be varied in some way.

It must be noted that this Standard is not intended for use in cases of sale or privatisation of agency enterprises or activities. It also excludes grant-funding relationships and occasions where agencies resume full operational responsibility for a previously

outsourced activity. Agencies should seek separate advice from State Records of South Australia on the application of the State Records Act, the FOI Act and the IPPs in these instances.

This Standard aims to set minimum requirements but is not intended to constitute legal advice. The provisions of this Standard do not negate the need for agencies to seek Crown Solicitor's Office advice when entering into contractual arrangements.

While it aims to assist agencies when planning for any contractual arrangements, there may be instances where its application is limited or unnecessary.

This Standard is issued in accordance with sections 7(h) and 14 of the State Records Act.

Services on behalf of the agency

In all cases where the agency is planning to enter into a contract where a service is to be undertaken **on behalf** of the agency, agencies must consider including records management terms and conditions in the contract.

Services provided **on behalf** of agencies include those services that could have previously been considered core functions of the agency. For example, case management. In these instances it is most likely that the service would be considered as still being provided by the agency and therefore ownership and legal possession of the records associated with the service would be deemed to remain vested with the agency.

If ownership and legal possession of the records remains vested with the agency then the contract must contain records management terms and conditions.

Services to the agency

It is less likely that contracts entered into for services to be provided **to** agencies will require records management terms and conditions to be included in the contract.

Services **to** an agency may include support services previously undertaken by an agency but not considered a core function of the agency, for example cleaning contracts, purchasing contracts, fleet management or maintenance contracts. However, where records are required to be provided to the contracted service provider and ownership and legal possession of those records remains with the agency then parts of this Standard may apply, for example a research study commissioned by government may result in the creation of documents containing sensitive or personal information.

Services sponsored by the agency

Services **sponsored** by an agency refer to services funded by government that would not ordinarily be provided by the agency if not undertaken by the contracted service provider. It is unlikely that contracts or agreements entered into for these kinds of services will require records management terms and conditions to be included. For example, this may include services provided by non-government organisations (NGOs) for the provision of services to the homeless that the government funds.

In most cases the agency will not have ownership or legal possession of the records relating to the conduct of the business, nor will it be a core function of the agency.

Policy Statement

To ensure that the accountability and efficiency of agency and government administration is not compromised as a result of contracting, agencies must consider ensuring their contracts specify records management practices that meet government records management legislative requirements.

Definitions

“Agency”¹ means

- (a) the Governor; or
- (b) a Minister of the Crown; or
- (c) a court or tribunal; or
- (d) a person who holds an office established by an Act; or
- (e) an incorporated or unincorporated body –
 - (i) established for a public purpose by or under an Act; or
 - (ii) established or subject to control or direction by the Governor, a Minister of the Crown or any instrumentality or agency of the Crown; or
- (f) a department or other administrative unit of the public service; or
- (g) the police force; or
- (h) a municipal or district council; or
- (i) a person or body declared by the regulations to be an agency,
and includes a former agency and an agency that ceased to exist before the commencement of this Act, but does not include –
- (j) a House of Parliament or a committee of the Parliament or a House of Parliament; and
- (k) a present or former officer of a House of Parliament; and
- (l) a present or former member of a House of Parliament (other than a Minister in respect of records made or received in his or her capacity as a Minister); and
- (m) a present or former member of the staff of a House of Parliament or the joint parliamentary service;

Consultant – a person or entity who is engaged by an [agency] for a specified period to carry out a task that requires specialist skills and knowledge not available in the [agency].

¹ Section 3, *State Records Act 1997*

The objectives of the task will be achieved by the consultant free from direction by the [agency] as to the way it is performed and in circumstances in which the engagement of a person under normal conditions is not a feasible alternative.²

Contracted service provider – a third party that enters into a contract with an agency to provide goods and/or services required by that agency for its operations.

Note: this definition recognises the similarities to the definition of ‘contractor’ but focuses on the performance, under contract, of core business.

Contractor – operates as an independent business entity that takes responsibility for risks, but other key characteristics can include performance of core business tasks generally under the supervision of an employee of the agency not materially different from those of employees working in the same area. Further explanation can be found in the Department of Treasury and Finance Accounting Policy Framework. This document can be found at www.treasury.sa.gov.au³.

Custody – responsibility for the care and physical possession of Official Records rests with the contractor, but ownership and legal possession remain with the agency.

Dispose of – an Official Record means –

- (a) destroy or abandon the records; or
- (b) carry out an act or process as a result of which it is no longer possible or reasonably practicable to reproduce the whole or a part of the information contained in the record; or
- (c) transfer or deliver the ownership or possession of or sell the record, or purport to do so,

but does not include to transfer or deliver the record to State Records or between one agency and another;⁴

Legal possession – legal rights in relation to the Official Record remain with the agency, despite any changes in the custody arrangements in relation to the Official Record.

Official Record⁵ – means a record made or received by an agency in the conduct of its business, but does not include-

² Accounting Policy Framework, VI Definitions, Department of Treasury and Finance. See www.treasury.sa.gov.au

³ Accounting Policy Framework, APSII General Purpose Financial Reporting Framework, Department of Treasury and Finance. See www.treasury.sa.gov.au

⁴ Section 3, *State Records Act 1997*

⁵ Section 3, *State Records Act 1997*

- (a) a record made or received by an agency for delivery or transmission to another person or body (other than agency) and so delivered or transmitted; or
- (b) a record made by an agency as a draft only and not for further use or reference; or
- (c) a record received into or made for the collection of a library, museum or art gallery and not otherwise associated with the business of the agency; or
- (d) a Commonwealth record as defined by the *Archives Act 1983* of the Commonwealth, as amended from time to time, or an Act of the Commonwealth enacted in substitution for that Act; or
- (e) a record that has been transferred to the Commonwealth.

Ownership – see legal possession

Permanent value record – a record that has archival value and will be retained permanently for research by the general community subject to appropriate access restrictions.

Physical possession – see custody

Record – ⁶

- (a) written, graphic or pictorial matter; or
- (b) a disk, tape, film or other object that contains information or from which information may be reproduced (with or without the aid of another object or device)⁷.

Temporary value record – a temporary record that does not have archival value and may be destroyed when a prescribed retention period has elapsed.

Trans-border data flow – the flow of data from an entity in one jurisdiction to an entity in another jurisdiction

Variation to this Standard

State Records may update or alter this Standard from time to time as authorised by the Director of State Records, in consultation with the State Records Council and with approval by the responsible Minister. All agencies subject to the State Records Act will be informed of any such alterations or updates.

⁶ Section 3, *State Records Act 1997*

⁷ Section 3, *State Records Act 1997*

Further contact

Further contact in relation to this Standard can be made to:

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Linked documents

All of the following documents are available at the State Records of South Australia website at www.archives.sa.gov.au.

Adequate Records Management: Meeting the Standard, State Records of South Australia.

Managing Records through Administrative Change, State Records of South Australia.

Appraisal of Official Records – Policy and Objective, State Records of South Australia.

Records of Temporary Value: Management and Storage Standard and Guideline, State Records of South Australia.

The Principles

The objective of this Standard is to ensure that the records of agencies are adequately managed throughout the contracting process. The primary means by which this records management obligation can be met is by including records management terms and conditions in the contract.

Principle 1: Planning

Contract planning includes consideration be given to ensure all documentation incorporates provisions for making, maintaining and disposing of records of contracting activities.

Explanation

The basis of the relationship between an agency and a contracted service provider is the official documentation of the agreement between the parties. Both the initial tender and the contract are important means for the communication of records management requirements.

Agencies must ensure that adequate records management planning has been undertaken and well documented prior to finalising any contractual arrangements. This planning must include consideration of records management terms and conditions for inclusion in the contract. This can become more critical when dealing with sensitive or personal information.

Agencies that do not consider including records management arrangements during the planning process, and in the agreements and contracts (where necessary), may find it difficult or impossible to reacquire records when needed for administrative or legislative purposes.

In meeting its obligations:

- the agency should undertake a risk assessment with specific consideration given to the complexity of the contract and the sensitivity of the information
- the agency should consult with all relevant bodies or parties, including but not limited to:
 - the agency's Records Manager
 - the agency's Privacy Officer
 - the agency's Accredited FOI Officer
 - the Crown Solicitor's Office (or other appropriate legal counsel) and
 - the agency's accredited purchasing unit and contract management staff.
- The agency should undertake research to discover any documents and/or agency experience that would assist them in drafting the tender and contract documentation.
- The agency should ensure that procedures are in place to handle issues relating to contracts where information may traverse jurisdictional borders. This may be a factor when contracting with offshore subsidiary companies and offshore parent

companies. (In some jurisdictions there is a requirement for special considerations for trans-border data flow of personal information).

Principle 2: Ownership and Custody

Ownership and custody of Official Records made or received by contracted service providers is determined.

Explanation

The agency must own and legally possess all Official Records made or received that it needs to maintain transparency and accountability. The contract must also include custody arrangements for those records.

Identification of record ownership and legal possession and custody must be done via the contract.

Where an agency provides an Official Record to a contracted service provider to enable it to perform a service and the contract requires the provider to return the record, the agency will retain legal possession of the record. Despite physical possession being temporarily transferred from the agency to the contracted service provider, legal possession at all times remains with the agency. In almost all cases an agency would expect any Official Record transferred to the physical possession of a contracted service provider to be returned to the agency at the completion or termination of the contract.

However, where the contracted service provider is not required to return the record, legal possession will have passed to the provider and disposal will have occurred. This kind of disposal can only occur if a Transfer of Ownership and Custody Schedule (TOCS) has been prepared by the agency and approved by the State Records Council.

In meeting its obligations:

- the agency must ensure the contract specifically identifies ownership and custody arrangements for the following:
 - Official Records relating to the contracted service that remain the property of the agency, including records created during the contract
 - Official Records where ownership will be transferred to the contracted service provider and when this will happen
 - Records created by the contracted service provider as a result of the service provided under the contract which will become Official Records and therefore the property of the agency.
- the agency must ensure transfer of ownership of records (from agency to contracted service provider or from contracted service provider to agency), is done via the use of a current TOCS approved by the State Records Council
- the agency must consider ensuring that the contract specifies ownership of intellectual property in the records, including existing records and records created during the term of the contract
- agencies should endeavour to consider (as much as possible) the risks associated with transferring physical possession of Permanent value records to a contracted service provider. Where Official Records of permanent value are in the physical

possession of the contracted service provider the agency must apply any conditions necessary to ensure their protection and their safe return to the agency.

Principle 3: Creation & Control

Contracted service providers must comply with records management requirements for Official Records determined by the agency.

Explanation

Records management requirements include the creation and control of records. Combined with the other principles in this Standard the requirements of creation and control will ensure that the agency meets its accountability and legislative obligations.

In meeting its obligations:

- the agency must identify in the contract any legal requirements to create documents
- the agency must identify in the contract those documents that need to be created to ensure continuity of business and ensure its accountability and statutory obligations are met
- the agency should ensure that the contracted service provider establishes control systems for both paper and electronic agency-owned records before any records are transferred to the contracted service provider
- the agency must ensure that irrespective of format (electronic or paper-based), records created, generated or received by the contracted service provider are managed in an appropriate manner.

It should be noted that in accordance with section 3 of the State Records Act electronic records made or received by an agency in the conduct of its business are considered Official Records.

Principle 4: Disposal

Official Records made or received by a contracted service provider are disposed of in accordance with the State Records Act or other relevant legislation.

Explanation

Agencies have a responsibility to ensure that Official Records are disposed of in accordance with the State Records Act. Therefore, regardless of the application of this Standard, all agencies need to have appropriate disposal coverage in place irrespective of whether the agency's Official Records are administrative or operational.

When the agency retains legal possession of Official Records, as per Principle 2, it also retains responsibility for compliance with the State Records Act as it relates to disposal. In instances where legal ownership of the document is to be transferred to the contracted service provider a TOCS is required.

Additionally, some South Australian legislation contains specific retention, disposal or other records management provisions. Agencies must make themselves aware of any such requirements for the legislation they administer and their statutory responsibilities.

Physical Destruction

State Records recommends agencies consider the risks and costs associated with having a contracted service provider manage the physical destruction of records owned by the agency. It may assist the agency in ensuring that Official Records owned by the agency and in the custody of the contracted service provider are not knowingly or inadvertently destroyed by the contracted service provider if it is deemed that the agency manages the destruction process.

However, if after considering the risks associated with the contracted service provider managing physical destruction of records the agency chooses to allow the provider to manage the process, it must be managed in accordance with requirements of the State Records Act, and have the approval or authorisation of the agency.

In addition to creating Temporary value records, it is possible that during the life of the contract the contracted service provider will create Permanent value records. Contracted service providers need to be made aware that Permanent value records are to be transferred to State Records after they are no longer required for administrative purposes or they are 15 years old (which ever occurs first) in accordance with agency requirements and the State Records Act. Such cases need to be negotiated with State Records before transfer is approved.

In meeting its obligations:

- any disposal of Official Records owned by the agency must be done in accordance with the State Records Act
- the agency must ensure transfer of ownership of Official Records is managed via a current TOCS approved by the State Records Council
- the agency must ensure the contract contains arrangements for the management of the physical destruction of Official Records (either by the agency or the contracted service provider)
- the agency must ensure that the contracted service provider maintains documentation for records that have been destroyed by the contracted service provider on behalf of the agency.

Principle 5: Access

The same level of access to Official Records must be available to the public regardless of who is delivering the service.

Explanation

Official Records are not only retained for their administrative use but also to meet legal and community requirements and expectations. Agencies need to ensure that it is possible to recover, or have access to records, that are needed by the agency for legislative and business purposes. This includes the provision of access to records under the FOI Act, and any other legislative access requirements specific to the business of the agency.

Agencies should also consider that the contracted service provider might need access to records held by the agency to ensure continuity of service. That is, they may need access

to records used by a previous contracted service provider to continue the delivery of a service to the public in a seamless fashion.

In meeting its obligations:

- the agency must ensure arrangements are made between the agency and the contracted service provider concerning access to records. For example:
 - access conditions relating to records owned by the agency but in the custody of the contracted service provider
 - access conditions relating to records owned by, and in the custody of, the agency, but to which the contracted service provider requires access
 - access conditions relating to records owned by the contracted service provider, but to which the agency may require access
- agreement is reached between the agency and the contracted service provider that ensures the agency is able to comply with any legislative requirements for access, including FOI and any other legislative instrument that requires or restricts access
- access conditions and rights established under the contract are applied consistently and equitably.

Principle 6: Storage

Storage of Official Records made or received by a contracted service provider is addressed and resolved during the contracting exercise.

Explanation

Decisions in relation to records storage arrangements could potentially result in the loss or damage of records. To lessen the likelihood of this occurring whilst records are in the custody of a contracted service provider, agencies must ensure that storage arrangements are included in the contract.

It is also vital that the contract include arrangements for any ongoing storage of records at the termination or completion of the contract. Failure to do so may result in records being destroyed or misplaced through the perception that they are no longer the concern of the contracted service provider at the conclusion of the contract.

Storage of non-current Temporary value records must be managed in accordance with the *Records of Temporary Value – Management and Storage Standard*, issued by State Records.

In relation to the storage of Official Records of permanent value by contracted service providers, agencies must be aware that Permanent value records are to be transferred to State Records after they are 15 years old or sooner if no longer required for administrative purposes. However, it may be more appropriate to specify that transfer of these records to the custody of State Records should occur sooner, in consultation with State Records.

In meeting its obligations:

- agencies should determine the degree and detail of documentation required in relation to Official Records in the custody of the contracted service provider

- agencies must ensure the records are stored in such a manner that they can be easily retrieved
- agencies should ensure contracted service providers have a disaster management plan that includes recovery of records
- agencies should ensure that records are handled appropriately for their format and protected from physical harm.

Principle 7: Security

Security of Official Records made or received by a contracted service provider is addressed and resolved before and during the contracting exercise.

Explanation

Electronic and physical security of records is important. Agencies must ensure that Official Records owned by the agency are sufficiently protected by storage methods, equipment and handling procedures, disaster response plans and security measures.

Agencies must also ensure that any personal information in their custody is handled in accordance with the IPPs or the *Code of Fair Information Practice* as used by the Department of Health and the Department of Families and Communities.

Further information on the physical security of records can be found in the *Records of Temporary Value – Management and Storage Standard*, issued by State Records at www.archives.sa.gov.au.

Further information on security classifications on documents can be found in the *South Australia Recordkeeping Metadata Standard*, issued by State Records at www.archives.sa.gov.au.

In meetings its obligations:

- agencies must ensure:
 - that security measures implemented by the contracted service provider to protect areas or systems in which the records are stored are appropriate to the security classification of the records in accordance with the current government security standard
 - there is protection against unauthorised access to both the physical and digital records
 - the tender and contract documents include reference to the current government security standard for the physical security protective measures.
- the contracted service provider has procedures and appropriate technology measures in place to ensure the protection of records in the event of a physical or technological accident, emergency or disaster, that are relevant to the degree of risk in the event of damage or loss.

Principle 8: Monitoring and Audit

Arrangements for monitoring and audit of the contracted service provider's records management practices are defined.

Explanation

An effective records management program should be regularly measured. This includes the records management practices undertaken by the contracted service provider. Monitoring of the contracted service provider's records management program ensures that action can be taken by the agency to ensure the provider meets their obligations.

In meeting its obligations:

- the agency must take into consideration the risks associated with limiting any monitoring requirements in the contract
- the agency must consider the frequency and method of which monitoring of the control system will be conducted.

Principle 9: Contract Completion

Records management issues are addressed upon completion of the contract.

Explanation

It is unlikely that the contracted service provider will want to devote time and effort to records of an activity that it is no longer performing, unless there is a contractual requirement to do so.

Agencies must ensure that the completion and post completion stages of the contract in relation to records management are well regulated, monitored and specified in the contract. This includes situations where the contract is extended or renegotiated with significantly different conditions. Failure to do so could result in lost information and increased risk of exposure to legal liabilities.

Records returned by a contracted service provider to an agency at the completion of a contract need to remain accessible and useable. In the case of records in electronic format they will need to be transferred/migrated to a State Government compliant system to ensure this.

Transfer of Permanent value records to the custody of State Records must be done in accordance with State Records requirements.

In meeting its obligations:

- agencies should consider:
 - when the records will be returned – either at the completion of the contract or periodically over the course of the contract
 - the process for returning the records
 - the process for the safe return of all equipment / technology dependent records, including electronic copies of Official Records on networks, disks, tapes

Glossary

State Records has produced an extensive Glossary of Records Management terms. This can be accessed and downloaded from the Adequate Records Management publications

section of the State Records website

<http://www.archives.sa.gov.au/management/glossary.html>