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State Records
of South Australia



Public Access Determinations

Guideline

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Introduction

Public access is provided to official records held in government archives across Australia. In South Australia, State Records and its predecessors have administered public access to official records in its custody since 1920.

The office of State Records is established by the *State Records Act 1997* as the principal repository of official records of government which are no longer required by agencies for current administrative purposes.

In consultation with the Director of State Records (hereafter the Director), an agency is responsible for making public access determinations for its official records when transferring them to the custody of State Records. Agencies are also responsible, at the request of the Director, for the review of access determinations for records already in custody.

In considering access to records that are not yet open for public access, agencies need to be aware of their legal obligations as stipulated in the State Records Act, the *Freedom of Information Act 1991*, the *Evidence Act 1929*, any other relevant Act and in accordance with the *Information Privacy Principles* (issued as Cabinet Instruction 1/1989).

The purpose of this guideline is to assist agencies in the development of public access determinations for official records in the custody of State Records or about to be transferred. Determinations that agencies may have made in accordance with a previous version of this guideline only need to be reviewed if the agency considers that it would be prudent to do so.

Permanent and Temporary Records

There are two categories of official records – permanent and temporary.

Permanent records are those with an archival value that are required to be retained indefinitely, whilst temporary records are those that may be destroyed when a prescribed retention period has elapsed.

State Records does not provide storage and related services for temporary official records. Agencies are responsible for the management, storage and access of their temporary value records within the policy and standards framework established by State Records.

This guideline refers only to official records:

- with an archival value already in the custody of State Records or
- to records at the time of transfer to the custody of State Records.

Agencies can also use this guideline to determine access to records in their custody or in temporary storage. However there is no requirement to submit a determination to State Records in these cases.

Custody of Official Records

In accordance with the State Records Act, official records of state and local government agencies and authorities need to be delivered into the custody of State Records.

- when the agency ceases to require access to the record for current administrative purposes
- 15 years after the record came into existence, whichever first occurs.

Public Access Determinations

Public access determinations made by agencies enable State Records to ensure appropriate access is given to official records in its custody.

A public access determination does one of three things:

- declares a record to be immediately open to public access or
- declares a record to be open only after a certain period (eg open after 20 years) or
- declares a record to be indefinitely closed.

A record determined to be open to public access is available for viewing at one of State Records' Research Centres without any requirement for the researcher to gain approval from the agency responsible for the record.

Where an agency has not made a public access determination for its records, State Records is not able to restrict access to these records and will consider such records open. The Director is only able to restrict access to official records for reasons of preservation or for other administrative purposes.

Applications for access from the public or another government agency to view official records in the custody of State Records, which are not yet open and have a public access determination, will be referred to the responsible agency. The responsible agency will then decide whether or not to allow access on a case by case basis. Where access is sought by a member of the public and the responsible agency is subject to the *Freedom of Information Act (SA) 1991*, the agency should make a decision without the need for a formal Freedom of Information application.

Where the Agency decides to restrict access to the record, the public should be informed that they can apply for access under Freedom of Information if the Agency is bound by the Freedom of Information Act. In doing this, agencies should note that the objects of the Freedom of Information Act are to promote openness and accountability in government with an emphasis on the disclosure of information over non-disclosure.

Agencies not bound by the Freedom of Information Act, should provide access to records where possible in the spirit of openness and accountability in government.

Making a Public Access Determination

Public access determinations stipulate that records are immediately open to public access or open after a specified number of years or closed indefinitely.

Public access determinations for records that are not immediately open for public access on transfer to State Record's custody stipulate the number of years before they become available for public access.

Following are recommendations to assist agencies in making a public access determination.

Records Immediately Open to Public Access

For records that are of a non-personal and/or non-sensitive nature it is recommended that they be open to public access on transfer to State Records. Generally, if an agency believes that information in the particular records would be provided under Freedom of Information, then it is recommended that they be transferred to State Records with an open access determination.

Records in this category include, but are not limited to:

- electoral rolls
- local government council minutes
- public registers and databases where open inspection is legislated
- records which are already twenty years old and that do not contain information that warrants a continuing restriction on access.

Records Open After 10 or 20 Years

Under the Freedom of Information Act, Cabinet and Executive Council documents can be released if they are older than 20 years. In addition to this, Premier and Cabinet Circular 31 (PC031) provides that under freedom of information certain types of Cabinet documents can be released if they have been submitted to Cabinet and are older than 10 years. Since Cabinet and Executive Council documents are deemed to be among the most sensitive in government, it is considered that most official records of government do not warrant a period longer than 20 years before they are open to public access (with the exception of records containing personal information).

Under PC031, Cabinet documents open after 10 years may include:

- Cabinet Submissions
- Cabinet Notes (pinks)
- Cabinet Office Briefing Notes (red) to the Premier
- Cabinet Office Briefing Notes (blue) to all Ministers
- Cabinet Agendas

Records open after 20 years may include, but are not limited to the following:

- all records of Cabinet
- records of Executive Council
- records containing intergovernmental communication gained in confidence between the Government of South Australia or a local government council and another commonwealth, state, territory or local government
- internal working records including minutes of committees, meetings and working groups
- records affecting the economy of the State
- records affecting financial or property interests of the State
- records concerning operations of agencies, including agencies engaged in commercial activities
- records affecting business affairs of any agency – includes information concerning business, professional, commercial or financial affairs of any agency
- records containing confidential material, which would not be deemed to be a breach of an existing or prior contract.

Non-Personal Records Closed for Longer than Twenty Years

An agency may consider a particular record, or set of records, not suitable for release after 20 years because the information (other than personal information) continues to be deemed sensitive despite the passage of time. In this particular instance, the agency should consult with the Manager, Reference and Access Services at State Records for advice on making a suitable public access determination.

All records, irrespective of sensitivity, should be open after 100 years unless legislation prohibits disclosure of the information contained in them. If an agency feels that a record, or set of records, should be withheld from public access indefinitely, and there is no legislative requirement for restriction of access, they should consult with the Director of State Records.

Records Containing Information of a Personal Nature

Certain records may need to be restricted if they contain:

- matter concerning the personal affairs of any person (living or dead) or
- allegations or suggestions of criminal or other improper conduct on the part of a person (living or dead), the truth of which has not been established by judicial process or
- matter consisting of information concerning a person who is a minor (under the age of 18 years) or of legal disability (mental illness, impairment or infirmity) or that person's family or circumstances, and
- the disclosure of such information would be considered unreasonable.

The following sections outline recommendations for the opening of records containing personal information to the public.

Records of a personal nature open after 30 years

It is suggested that a public access determination of open after 30 years be applied to low-level information of a personal nature. Low-level information would include such details as name, address, age, occupation, personal description, length of sentence (if convicted of an offence), and next of kin (name only). This kind of information is often found in summary records such as registers and databases.

Records of a personal nature open after 60 years

Records containing medium-level personal information may be given a determination of open after 60 years. Medium-level information may appear in summary formats such as registers and databases but may also occur in other records and include such details as:

- next of kin (full details)
- other third party details, eg children's names, addresses and relationships
- other private information relating to employment, which may include disciplinary matters, details of complaints or allegations, person's financial affairs.

Records of a personal nature open after 100 years

Records that contain detailed or very sensitive personal information on identified individuals may be given a determination of open after 100 years. Such records may include, but are not restricted to, case records, medical records, psychiatric reports, etc.

Records Relating to Aboriginal People

When making public access determinations for records relating to Aboriginal people, agencies will need to be aware of culturally sensitive materials that may be considered offensive to particular individuals or groups. State Records can provide advice in relation to culturally sensitive information in accordance with Section 7(f) of the State Records Act. Agencies are encouraged to contact the Manager, Reference and Access Services prior to completing an access determination.

Records That May Be Subject to Legal Professional Privilege

Some records relating to the provision of legal advice, such as a legal opinion supplied by the Crown Solicitor's Office or from a legal practitioner external to government, may be subject to legal professional privilege. These records should not be open to public access, unless they have previously been released to the public. If an agency believes that some of the records they have created fall into this category they should ensure that:

- legal advice is sought, to determine whether access can be given. This may require a legal professional officer to examine the records
- records determined to be subject to legal professional privilege, are transferred to State Records in a separate consignment (ie not included with records that will be open to the public immediately or in the future) and
- the access determination form refers to legal professional privilege and the indefinite closure of the records.

Embargoed Records

Records that are embargoed cannot be determined open until a specific event takes place such as the proclamation of legislation or particular action by the Government. Embargoed records are still subject to the Freedom of Information Act and can be considered for release under that legislation.

Records Closed Indefinitely

Records can be determined to be closed indefinitely. There needs to be a compelling reason why a record should be kept closed to the public. Access would only be available through permission from the agency or through access under FOI.

Review Process

Where public access determinations are recommended as being greater than 20 years, agencies need to bear in mind that sensitivity of information diminishes over time. In some cases information ceases to be sensitive within a day of its documentation. In other cases sensitivity will diminish over a period of decades.

From time to time, State Records may contact an agency and ask them to review a public access determination for a series, or a consignment of records, already in State Records' custody. It may be that the sensitivities that were apparent at the time the access determination was originally made have since diminished significantly. Vice versa, if State Records considers that sensitive information in a set of records in its custody is not adequately protected by the public access determination in place, it will draw this matter to the attention of the responsible agency for consideration.

Other Considerations

Transferring mixed information types in a series to State Records

A series that consists of mixed information, eg a correspondence series that contains a mixture of personal information and administrative information, needs to be divided into separate consignments. Each consignment would have its own access determination. A consignment containing personal information records might be considered suitable for access after 60 years but a consignment containing more general administrative information, eg policies and procedures, etc. could be open to public access after twenty years. If these records were

transferred as a single consignment many of the records would not be available for public access for much longer than necessary.

There are two points in time when records requiring a longer period before becoming available for public access are easily identified:

- at the time of creation of the record
- at the time of sentencing of the record.

Public Access Determination Form

State Records has developed a Public Access Determination Form which agencies need to complete and submit before physically transferring records to the custody of State Records, or when reviewing access determinations of records already in the custody of State Records.

The form is available from the State Records website at <http://www.archives.sa.gov.au>

Glossary

State Records has produced an extensive Glossary of Records Management Terms, which can be accessed and downloaded from the Recording Government - Adequate Records Management section of the State Records website at <http://www.archives.sa.gov.au>