



Records Advice

No 57

Records and documents required for legal proceedings

ACT government agencies have obligations in relation to recordkeeping under the *Territory Records Act 2002*. An agency must preserve its records and must not destroy or dispose of its records other than in accordance with the approved Records Disposal Schedule.

ACT Government agencies must not destroy records that are, or may reasonably be, required in legal proceedings. In a situation where a court or tribunal has issued a subpoena, or any other court process for the production of documents, those documents must not be destroyed.

In addition, an agency must not dispose of any records where it is aware of possible legal action for which the records may be required as evidence.

Court orders or subpoenas

Records Managers should be aware that Courts and Tribunals may require production of documents as well as records. *The Freedom of Information Act 1989* uses the term document rather than record. Information within an agency that has not been placed on official files may fall within the scope of 'documents'.

Where an agency is involved in litigation, court processes such as court orders, orders for discovery or subpoenas will usually be sent to an agency from the ACT Government Solicitor's Office. However these court processes may be served directly on an agency. The instructions will set out the type and range of records sought and any supporting documentation needed. Once Records Managers have identified the relevant material, the appropriate clearances need to be received from within the agency before the requested material is made available.

Where a record has been legally disposed of, details of the destruction of the record and the Records Disposal Schedule that authorised the destruction should be provided in response to the court order or subpoena.

It is important that agencies only respond to a request for access to records if they have functional responsibility for the record. Recipients of a Court order or subpoena must forward the request for the record to the owner of the record if they only have custody of the record (such as InTACT, Shared Services or ACT Record Services).

Possible legal proceedings

A Records Disposal Schedule generally specifies retention periods. That is, how long records are to be retained by the agency before being destroyed or retained as Territory Archives.

Retention periods set down in a schedule are minimum periods only and an agency may keep records for a longer period if considered necessary for business requirements. Reasons for longer retention could include legal requirements, administrative need or agency directives. **An agency must not dispose of any records where it is aware of possible legal action for which the records may be required as evidence.**

Generally if a record that is subject to later proceedings has been lawfully destroyed under an approved Records Disposal Schedule before its need for legal proceedings were apparent, then agencies will be able to argue that such destruction was legally undertaken.

Records Management

Records should all be managed in functionally approved files or folders to facilitate the identification of the required material. It is essential that Records Managers know the location of all agency records at all times.

Agency Records Managers can mitigate the liability of government if agency records and copies of the record are regularly and routinely appraised, sentenced and, where appropriate, disposed of according to approved ACT Government Records Disposal Schedules.

Further Assistance

If you receive a court order or subpoena, or become aware that agency documents may be relevant to legal proceedings (whether current or impending), contact the ACT Government Solicitor who can provide assistance in determining what records and documents are to be supplied and whether copies or originals are to be made and supplied or kept within the agency.

Agencies are also encouraged to advise the Director of Territory Records when issued with a court order or subpoena.