Guideline for Records Management
No. 5 - Recordkeeping and Outsourced Government Business

This Guideline is to be read in conjunction with Territory Records Office Standard for Records Management No.5 - Recordkeeping and Outsourced Government Business.
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INTRODUCTION

Good recordkeeping is a vital part of government accountability and must be closely aligned with business processes. This is true regardless of who is carrying out the activity. Agencies are able to outsource many of their business activities, but not the responsibility or accountability for those activities. Therefore, it is important that agencies think carefully about their recordkeeping needs and their responsibility and accountability requirements when planning outsourcing arrangements. It is particularly true when they outsource recordkeeping itself.

PURPOSE

This guideline is provided to assist all Territory agencies in meeting their recordkeeping responsibilities when outsourcing services or activities.

The purpose of this document is to provide a best practice guide to agencies which can be used when determining recordkeeping requirements for agency functions performed outside of the agency.
WHAT IS OUTSOURCING?

Outsourcing is the transfer of responsibility for a service or function conducted by a Territory agency to an external service provider. All outsourcing arrangements must be in accord with the ACT Government Procurement Framework.

Agencies must make full and accurate records of all of their activities, including those outsourced to external providers. In outsourced arrangements agencies must be careful to ensure recordkeeping responsibilities are specified in contracts.

There are four types of outsourcing arrangements that may be used by ACT agencies:

- outsourcing services on behalf of Government
- outsourcing services to Government
- outsourcing recordkeeping services
- internal outsourcing

Each of these types of outsourcing arrangements will have different records management implications for agencies. These are discussed below.

**Outsourcing services on behalf of Government**

At times, government agencies contract out to private organisations a service which is that agency’s responsibility. These are also called core functions. In these situations the contractor is usually providing the service on behalf of government or acting as the government’s agent. An example of this is the contracting to a private company of the collection of household refuse and recyclable waste.

Careful planning in relation to records when outsourcing or privatising is necessary to ensure the safe keeping and proper preservation and use of records.

It is necessary to undertake complex and legal processes to outsource or privatising an agency (or an activity or function of an agency). However, with both outsourcing and privatisation, the basis of the relationship between the parties to any such arrangement is the official documentation of the agreement between them. How the records of these functions and activities are managed is crucial to the successful management of the finalisation of any contractual or privatisation agreement.

When undertaking any planning for a contracting or privatisation exercise agencies must also be careful to not make the requirements of the contract too restrictive, as this may unduly limit the field of potential contractors or purchasers.

Where an agency enters into an agreement or arrangement with another party that requires that party to provide services on behalf of the government then the agency must have ownership of existing records and those made by the contractor in providing the service as well as ownership of the intellectual property in both existing and new records. The agency must insist that records are made, controlled and maintained according to the same standards that it uses to make, control and maintain records relating to services it carries out in the agency. All records must be transferred to the custody of the agency at the completion of the contract.
Outsourcing services to Government

Often agencies contract out their non-core or ‘housekeeping’ functions, such as financial, personnel, fleet or facilities management to private organisations. Even though these services have traditionally been undertaken by agencies they are not ‘core’ functions of Government. In these cases the contracted organisation is providing a service directly to government, not to its clients.

In situations where contractors are providing a service to government the ownership of the records may not be very clear. Generally, contracts should ensure that ownership should belong to the agency if the agency (or another contractor) would need the records to continue operations at the end of the contract, if the records establish the rights, entitlements or obligations of the government or an individual or if they have some other form of identifiable on-going utility to the government or individuals. The agency must insist that these records are made, controlled and maintained according to the same standards that it uses to make, control and maintain records relating to services it carries out in the agency. All such records must be transferred to the custody of the agency at the completion of the contract.

Other records that the contractor makes in carrying out the contract could remain the property of the contractor. For example, the contractor’s housekeeping records, such as the personnel files of staff undertaking the work, would normally be the contractor’s property. Depending on the circumstances agencies may or may not want to have a right of access to such records for specified purposes and may or may not want to mandate minimum recordkeeping standards for them. Such decisions should form part of contracts.

Outsourcing recordkeeping services

Agencies may choose to outsource their records management activities in the same way as they might any other housekeeping function.

Contracting records management to an external service provider does not, however, change an agency’s responsibilities for creating and keeping full and accurate records. Nor does it change the assessment of the agency’s record keeping requirements outlined in its Records Management Program. Agencies retain the responsibility for their recordkeeping in general and their Records Management Programs in particular, regardless of who is carrying out the work. Agencies therefore need to ensure that they retain sufficient knowledge and expertise in recordkeeping to ensure that the provider is meeting their business needs and that all staff have access to and understand organisational recordkeeping policies and procedures.

It is important that contracts for provision of records management services provide for agencies’ operational business needs and support their accountability requirements to government and the public.

Agency Records Management Programs should form the basis of any contract to outsource any or all parts of recordkeeping services. The Records Management Program includes an analysis of agency recordkeeping requirements, is required to be compliant with Territory legislation, standards and codes, and establishes the recordkeeping standards to which the agency commits itself. An outsourced records services provider must be able to adhere to these requirements of the agency’s Records Management
Program and be able itself to meet the standards and codes approved by the Director of Territory Records.

Section 16 of the Territory Records Act requires agencies to notify the Director of Territory Records of any arrangements to outsource any aspect of their records management activities. This notification must be given before such outsourcing takes place. The purpose of this requirement is to enable the Director of Territory Records to ensure that the proposed provider of the outsourced services is able to meet the requirements of the Act, standards and codes and the agency’s Records Management Program. Notification is required even if the provider of the outsourced services is another Territory agency.

The requirement to notify the Director of Territory Records relates to all parts of the Records Management Program including:

- the preparation of agency Records Management Programs;
- development of agency records disposal schedules;
- development and maintenance of the agency’s recordkeeping system;
- record creation and control;
- storage, retrieval and movement of records;
- training for records management;
- disaster prevention and recovery;
- public access; and
- records disposal.

In order to assist agencies in locating suitable providers of outsourced recordkeeping services the Director of Territory Records may establish and publicise a panel of approved suppliers.

**Internal outsourcing**

In some circumstances, Territory agencies ‘outsource’ tasks to other areas of government on a commercial basis. Examples of this type of arrangement include where ACT Record Services provides records management services to many Territory agencies, where Shared Services provides Personnel and Finance services for agencies, or where the Government Solicitor’s Office provides legal services to other agencies.

In these situations it is important that both parties understand who will make and manage the records of the activity. It is preferable that recordkeeping arrangements are the same as in any other outsourcing arrangement.

The contracting agency responsible for the activity must have control over the records that would be needed to continue the activity after a contract ceases, while the contractor agency should retain control over the housekeeping records it needs to make to provide the service.
PRINCIPLES FOR OUTSOURCING

Principle 1: Planning

Agencies must ensure that responsibilities for making, maintaining and disposing of records of outsourced functions and activities are included in the planning process and subsequent contracts and agreements. Where these things are not specified in the contract, agencies may find it difficult to re-acquire the records they need at the end of the contract. They may also find it difficult or impossible to access records when needed for administrative purposes or when required during litigation.

Outsourcing arrangements must therefore make specific provision for the management of records, and agencies must plan for the inclusion of recordkeeping clauses in the contract when they begin negotiations with potential contractors. Good records management planning will also assist agencies to manage outsourcing contracts. Agencies will be unable to plan effectively for outsourcing if they do not have in place a Records Management Program and approved Records Disposal Schedules to guide the management of records either by the agency or a contractor.

In order to ensure that it is meeting its responsibility to make and keep full and accurate records of its activities an agency is required:

- to make and maintain adequate records relating to outsourcing arrangements.

In order to ensure that outsourcing arrangements make specific provision for the management of records, planning for outsourcing should ensure that contractors and other outsourced service providers are required:

- to make adequate records relating to the outsourced function;
- to maintain those records adequately; and
- to dispose of records only as specifically agreed.

Making and maintaining adequate records relating to outsourcing arrangements

Agencies must keep appropriate records about the process of outsourcing and managing the contract.

Agencies should examine the terms and definitions in a contract closely. Records may not be mentioned specifically in the contract, but be intended by those drafting the contract to be included within the scope of the term “assets”.

Without precise clarification of what constitutes “assets”, the opportunity could arise for ambiguity in the treatment of agency records. In the absence of consideration of records as “assets”, the agency should be advised to ensure that the contract specifically clarifies the rights and responsibilities of all parties with respect to agency records.

Outsourcing contracts can be in effect for long periods. It is possible that the staff who negotiated the contract will not be the staff responsible for administering and monitoring it later. Because of this accurate records should be made and maintained of:

- the tender evaluation process;
• negotiations about service level agreements, performance standards and related matters;
• performance reports submitted by contractors and/or assessments of performance against the contract by agencies;
• details of contract variations;
• details of problems or disputes that arise during the course of the contract and their settlement.

**Ensuring that contractors make adequate records relating to outsourcing arrangements**

Contracts should require outsourcing providers to make and maintain records to show that the contract is being performed to expectations. The requirements should ensure that agencies have the right to inspect such records.

For example should a contract require a provider to have a certain number of staff then the contract should compel the contractor to keep records relating to its staffing, and for those records to be accessible by the agency for the purpose of monitoring compliance.

All contracts for outsourcing should require the contractor to provide regular reports on the conduct of the contract. The nature of these reports, including the level of detail required, should be identified and included in the contract.

Agencies should also make any arrangements necessary to manage any intellectual property issues that may during the term of the contract.

In the event a sub-contractor is employed by the contractor during the term of the contract, the contract should include terms and conditions which ensure the sub-contractor is bound by the same requirements as the initial contractor.

Roles and responsibilities for records management within the agency should be assigned to appropriately skilled staff members in order to manage any ongoing records management issues that may arise as a result of or during the term of the contract.

**Ensuring that contractors make adequate records relating to outsourced functions**

Section 14 of the *Territory Records Act 2002* requires agencies to ‘make and keep full and accurate records’ of their activities. This requirement applies as much to outsourced activities as to activities undertaken by agencies themselves.

It is important therefore to ensure that all contracts and outsourcing agreements explicitly require providers to ‘make and keep full and accurate records’ of the outsourced activities. Agencies must ensure that contractors understand that they are required to make exactly the same records to manage, document and account for the administration of outsourced activities as the agency itself would make if the activity had not been outsourced.

As private sector contractors are unlikely to have the same broad understanding of Territory recordkeeping requirements as an agency, the detail of what constitutes ‘full and accurate records’ must be spelt out as part of the contract or agreement.

Agencies’ recordkeeping needs will have been identified through the analysis that they undertook in producing their Records Disposal Schedules as part of their Record Management Programs (see *Territory Records Office Standard for Records Management No.2 - Appraisal*). These needs must form part of any contract or other arrangement for
outsourcing activities. The level of specificity to be provided in the contract will vary with the circumstances, but the following should be taken into account:

- legal requirements (what records agencies are legally required to make and keep);
- administrative requirements (what records are likely to be required as evidence of activity);
- business requirements (what records agencies need to document and facilitate the transaction of business, not just during the period of the contract but into the future);
- community expectations (what records stakeholders reasonably expect would be made and kept to document their rights and interests or as a historical record).

The types of records that must be made to satisfy accountability and performance measurement requirements may need to be specified in a schedule to the outsourcing contract.

In some cases it may also be necessary to specify the format in which the contractor must make the records. For example if records are to be interfiled with other records maintained by the agency then they must be in an identical format. If records which are to be returned to an agency at the end of the contract are to be made electronically, the electronic format needs to be specified so that the records will be compatible with the agency’s information and communications technology systems.

**Ensuring that contractors maintain records adequately**

In contractual or other agreements involving the performance of a government function by an external service provider or privatised entity, it is important to clarify issues surrounding the ownership of records and the information they contain. Failure to do so can severely restrict the business capabilities of the parties involved and expose the government/agency to considerable risk.

The issue of ownership of agency records, extends not only to records of the agency that may be transferred to the external service provider or privatised entity, but also to records created by the external service provider or privatised entity during the life of the agreement or contract.

For records generated as a result of such activity, agencies may have obligations to manage them as if the agency was performing the work itself, and to manage these records for the life of the agreement and beyond. For this reason it is important that agencies ensure contractual arrangements define ownership and management of records.

Agencies should ensure that no existing record of permanent value is transferred to the ownership of an external service provider or privatised entity. Temporary custody may be allowed provided that the agreement or contract contains specific guarantees for the proper management, and eventual return of the permanent value records to the custody of the relevant agency or archival authority.

Records relating to the outsourced function once made, need to be maintained whether the records are in the possession of the agency or the contractor. The way records are maintained will affect:
• their value as a tool for the government and community to hold the agency accountable for the performance of the processes and the tasks being undertaken by the provider;
• their value as a means of holding the contractor accountable for the performance of the contract; and
• their later accessibility.

Records and the descriptive information about them must be maintained in an appropriate and secure environment so that they cannot be altered or destroyed without proper approval.

The Territory Records Office Standard for Records Management No.7 – Physical Storage of Records provides advice that will equally apply to a contractor for the management of records while in their custody.

Contracts and agreements must therefore specify the standards of maintenance expected. Issues that need to be considered for inclusion in contracts are outlined in more detail below under Principle 2, Responsibility, but include:

• ownership of records;
• ownership of intellectual property;
• creation and maintenance of descriptive and contextual information about the records;
• storage requirements, including environmental standards;
• security of both records and their content;
• authorization and control of access;
• matters relating to disposal; and
• return of records and related information to the agency at the end of the contract.

The standard for these matters which an agency’s Records Management Program imposes on the agency itself is a guide to the appropriate standard to be demanded of a contractor.

It may be appropriate to include the standards for maintenance of records as a schedule to the contract.

**Ensuring that contractors dispose of records only as specifically agreed**

 Agencies are required to ensure that records are disposed of only in accordance with Territory Records Act. No Territory record can be destroyed unless the destruction is in accordance with approved Records Disposal Schedules approved by the Director of Territory Records.

In order to discharge their responsibility in this matter, agencies must ensure that contractors do not dispose of any records other than in accordance with appropriate schedules. The only way to be certain of ensuring this is to specify in contracts and agreements the records disposal practices permitted and those not permitted.

It is good practice to specify that contractors must not destroy any records made or kept as part of the outsourced activity and instead have all records returned to the agency for proper disposal. However, this may not always be practical. For example the routine destruction of records which are regularly superseded by updated records and which are not referred to again after being replaced might be permitted. However agencies must
make certain that they have covered such outsourced activities in their Records Disposal Schedules.

If contractors are allowed to destroy any records of the activity, the contract must specify:

- which records can be destroyed;
- under what conditions;
- under what Records Disposal Schedules;
- what records must be made to document destruction; and
- how compliance with Records Disposal Schedules will be monitored.

The contract must also make clear that no records may be destroyed, irrespective of any other authorization, if it is likely that:

- they will be needed for any legal action or inquiry; or
- they contain information that may allow people to establish links with their Aboriginal or Torres Strait Islander heritage.
Principle 2 - Responsibility

While it is possible to outsource carriage or delivery of a government function or service, it is not possible to outsource responsibility.

The Commonwealth and ACT Ombudsman refers to the concept of the ‘principal agency’ in outsourcing arrangements. In outsourcing situations the agency must remain the ‘principal agency’ and retain responsibility for the outcome of the contract. This means that agencies remain accountable for the outsourced service and the way it is carried out, including the way records are made and managed under the contract.

As part of their responsibility as the principal agency in outsourcing arrangements, agencies should ensure that contracts and other outsourced service arrangements take into account the issues of:

- custody of records;
- ownership of records;
- storage of records;
- access to records; and
- ownership of intellectual property in the records.

Custody of records

It may be necessary to transfer some existing records to the contractor in order to assist in continuity of services. It is important that agencies do not lose control over records by transferring custody and that the contractor takes proper care of records while they are in its custody. To this end the contract should make clear that custody of the records and not ownership of them is being transferred to the contractor. It should also specify exactly what records are to be transferred and in relation to them:

- rights of reasonable access to the records by the agency or its authorised agents;
- arrangements for the return of the records at the completion or termination of the contract, or at any other reasonable time;
- requirements for the appropriate management and maintenance of the records;
- arrangements for protection of the security of the records;
- requirements for the prevention of any unauthorized disclosure of information from the records;
- limitation on the use of the records to legitimate purposes under the terms of the outsourcing arrangement; and
- prohibition on the destruction or other disposal of records without explicit authority.

In many cases providing copies of relevant records (or parts of records) to the contractor would be a practical alternative to transferring original records and would meet all the needs of the contractor in performing the services.

In some cases, it may be appropriate and efficient to retain records in agency custody and provide access to the records by the contractor as required.

A record should be kept of which records are transferred to the contractor, as well as which records are returned to the agency or, where permitted and agreed, destroyed by the contractor. This is to ensure that the records can be located if required and to ensure that
all records are returned at the end of the contract. If copies of records are provided to contractors the contract should specify what will happen to those copies at the end of the contract.

Ownership of records

Unless ownership of records is clearly spelt out in contracts there may later be doubt about ownership, and records which an agency assumes to belong to it may in fact belong to the contractor. Ownership of records that were transferred to the contractor in order for it to carry out the outsourced activity may unwittingly have had their ownership transferred as well. Records made by the contractor for the purpose of the contract may also belong to the contractor even though they contain information documenting rights and entitlements of citizens.

If there is doubt about the ownership of records, agencies may find it difficult to re-acquire the records they need at the end of the contract. They may also find it difficult or impossible to access records when needed for administrative, financial, legal, evidential or other purposes. Valuable and important records may be destroyed or lost. The Territory Records Act 2002 and the Freedom of Information Act 1989 do not apply to records owned by contractors.

For these reasons, agencies should ensure that they own all the records that they need for ongoing business purposes and to maintain accountability to the government and to the people. This means that all records created by agencies that have been provided to the contractor, and any records created by a contractor in the performance of the contract which would provide essential evidence of service delivery, should belong to the agency.

Not every record made by a contractor, however, needs to be owned by the agency. As a general rule a record will be owned by the agency if:

- it was available at made before the contract was signed;
- it will be required to continue the activity at the end of the contract – either by the agency or by a subsequent contractor; or
- it will be needed to document the rights and entitlements of the government or Territory citizens

Other records that the contractor makes in carrying out the contract could remain the property of the contractor. For example, housekeeping records such as the personnel files of staff undertaking the work, would normally be the contractor’s property.

It is therefore important to define clearly who will own which records. Ownership of records which will be made or maintained by contractors should be determined before outsourcing takes place and reflected in tender documents and contracts. All legal agreements should state clearly the ownership of any records resulting from the performance of the contract.

Where the services outsourced are core services provided on behalf of government the contract must specify that ownership of all existing or new records created by the contractor belong to the agency and that they are Territory Records.

Where the services outsourced are non-core services provided to government it is not always appropriate that contracts should give ownership of all or any records to agencies. The contract should ensure that ownership should belong to the agency if:
• the agency (or another contractor) would need the records to continue operations at the end of the contract;
• the records establish the rights, entitlements or obligations of the government or an individual;
• the agency would need to refer to the records for any reason; or
• the records have some other form of identifiable on-going utility to the government or an individual.

For example, if a contractor is providing building maintenance services, then after the contract has ceased, it is likely that the agency will need to access all maintenance and servicing schedules. This information will be needed so that the agency or another contractor can plan ongoing maintenance or understand what was done in the event of any later problems arising. However, if the agency hires vehicles from one contractor and later switches to another contractor, it does not really need to know what maintenance was carried out on the vehicles of the previous provider. These records should remain the property of the contractor.

The disposal action outlined for each class of records in the TARDiS or in agency functional records disposal schedules outlines how long records should be kept after action is completed. This information may help agencies decide the likely use of the records and therefore assist in determining if it is appropriate for the agency to insist on ownership of them.

The expanded concept of disposal is particularly relevant where a function or activity of an agency is being carried out by an external service provider. The physical custody may be transferred to an external service provider, however the legislative disposal requirements remain with the originating or controlling agency unless specific provision has been made and agreed otherwise.

It is equally applicable where a function or activity is transferred to a privatised entity and public records may move outside their originating or controlling government agency or legislative jurisdiction.

An agreement must specify the responsibilities binding upon an external service provider or privatised entity before any disposal function or authority is conferred upon that entity or provider.

The creating or controlling agency and / or the external service provider or privatised entity may need to be made aware that transfer of ownership, custody, or sale of public records is considered to be a disposal action and that they must exercise equal control over such disposal activities as those that involve the physical destruction of records.

Irrespective of where it is decided that ownership should lie, the issue must be directly addressed in contracts and agreements so that there is no doubt of the ownership of any material resulting from the agreement.

**Storage of records**

Agencies should expect contractors and providers to look after records in the same way that they do themselves.
Contracts should require providers to:

- store records securely and safely;
- protect records from deterioration, misuse and disaster;
- handle and transport the records in a safe and secure manner; and
- return the records at the end of the contract.

The standard for storage and care of records which an agency’s Records Management Program imposes on the agency itself is a guide to the appropriate standard to be demanded of a contractor. The *Territory Records Office Standard for Records Management No. 7 – Physical Storage of Records* provides advice on this matter.

**Access to records**

Agencies should ensure that the contract specifies that they have reasonable access to all records that are in the custody of the contractor. This should extend to other agencies that may have an interest in the records (such as the Auditor-General and the Ombudsman). It should also ensure that it is possible for agencies to recover records that are needed by them for business.

Access to records that are the property of agencies must also extend to access by the public under the *Freedom of Information Act 1989*. After 1 July 2008 it must also extend to access by the public under the *Territory Records Act 2002*.

Public access to Territory records held by the contractor must be no less than if the records were held by agencies. It is preferable that agencies continue to administer access for these purposes in the same way as they would if they continued to have custody of the records. The contract must make clear the agency’s right to have access to records, and records returned to it as required, for these purposes.

The contractor must not provide any direct access to agency records for members of the public. All requests for access must be handled by the agency.

All contracts for outsourcing should also allow for reasonable access by agencies to records owned by the contractor relating to the contract. This will enable the agency and the Auditor-General to fully ascertain the benefits gained by the outsourcing process and to monitor the conduct of the contract. Such access may need to continue for some period after the end of the contract. This period should be specified in the contract.

Contractors may require access to records in the custody of the agency to enable them to fulfil their responsibilities under the contract. They may also need access for other purposes to records that they had made and subsequently returned the agency. An example could be a need to check work performed by the contractor’s staff. If such access is required it should also be specified in the contract.

Official records owned by an agency contain information that may be accessed for the current operational needs of the agency, for research by the agency and members of the public.

Some records may include sensitive information which needs to be appropriately managed, especially in terms of who can access the information. It is therefore important that consideration be given to how access to public records will occur both during and after the life of an outsourcing or privatisation arrangement.
Questions of ownership and custody of records may also arise during a reversal of privatised entities back to the control of the public sector.

When contemplating outsourcing or privatisation arrangements, an agreement needs to be reached between the parties involved that ensures compliance with the provisions of relevant legislation, including FOI and Privacy that require or restrict access. Access conditions established under the contract should then be applied consistently and equitably.

**Ownership and use of intellectual property**

It is important to specify who owns the intellectual content of the records. Agencies would normally need to be able to use in any way they wanted the intellectual property in records created by contractors for them. In order to ensure this, the ownership of intellectual property to be brought into existence under the contract needs to be specified in the contract.

In many cases contractors will need to use agency owned intellectual property in order to perform the outsourced activities. This would include information in existing records transferred to the custody of the contractor for example. Contractors’ rights to use this intellectual property and the restrictions on their use of it should also be specified in the contract. Normally these restrictions should ensure that their use of intellectual property is confined to use for the purposes of the contract and that contractor rights to it do not survive the end or termination of the contract.

In some circumstances agencies may need to use intellectual property of the contractor. As agencies would normally ensure that they owned intellectual property created by the contract, this would usually be intellectual property owned by the contractor before the start of the contract. An example of this could be a proprietary system owned by the contractor and used for undertaking the outsourced activities. Agencies rights to use the contractor’s intellectual property should also be explicitly specified in the contract. Such rights would normally be limited to use for the purpose of the contract and for the period of the contract and a reasonable period after the expiry of the contract in order to ensure adequate transition of the activities back to the agency or to another contractor.

It may also be appropriate for contracts to include conditions about the release of information to third parties.
Principle 3: Compliance with recordkeeping standards

All Territory recordkeeping must comply with the Territory Records Act 2002 and the Standards and Codes released under it, regardless of whether agencies perform the task directly or contract another organisation to perform the task on their behalf. As agencies remain responsible for their outsourced activities, it is important that they ensure that contractors carrying out activities on their behalf are aware of their responsibilities under the Act and manage their records accordingly. The best way to do this is to ensure that the contract between the agency and the contractor makes specific provision for recordkeeping requirements and compliance measures.

Requiring contractors and providers to comply with the requirements of the agency’s Records Management Program would fulfil this responsibility. All agencies are required to have approved records management programs. The Territory Records Office Standard for Records Management No.1 – Records Management Programs outlines the requirements of these.

Agency records management procedures include details of:

- the agency’s recordkeeping system;
- when records should be created;
- how and when records should be captured and controlled in the recordkeeping system;
- how records are to be registered, classified or indexed and what other descriptive and contextual information is to be recorded about them;
- where records are to be located;
- how records are to be stored;
- how to find records;
- how records are to be accessed, by whom and for what purposes;
- how records are to be moved;
- issues relating to disaster prevention and recovery; and
- how records are to be disposed of.

If the contract specifies that contractors must adhere to an agency’s Records Management Program, copies of the agency Records Management Policy and Procedures would need to be provided to the contractor.

Agencies need to consider carefully which parts of their records management procedures they would want to compel adherence to by contractors. Records management programs include procedures for disposal, for example, and agencies that do not wish contractors to implement any disposal activity themselves would need to specify that contractors were not to use this section of the procedures. The contract could oblige the contractor to follow the procedures in relation to the making of records, their capture and control in the recordkeeping system, their location, storage, movement, security and business access but not in relation to appraisal, disposal and public access.

In order to comply with this principle, agencies that did not want to compel adherence by contractors to the agency records management program would have to develop a detailed schedule of recordkeeping requirements as part of the contract.

Compelling adherence to recordkeeping standards is particularly important at the end of the contract. Unless the contract contains specific instructions about recordkeeping
during the transition out period it may be difficult to ensure that sufficient documentation about the records is available so that their context is apparent and comprehensible. It may also be difficult to ensure the orderly transfer of records back to agencies or to another contractor to continue the service or activity.

Additional issues that are often overlooked at this time but need to be addressed include:

- The issue of records storage upon expiration or termination of the contract or agreement until the records are returned to the agency.
- The relevant interim arrangements if a service provider changes e.g. after review tender process is complete and an alternative to the original service provider is the successful tenderer.
- When will records be returned; either at the completion of the contract or periodically over the course of the contract.
- The process for returning records, including issues of boxing, listing, security, sentencing and disposal, and transportation.
- The process for the safe return and migration of all equipment / technology dependent records, including electronic copies of agency records on networks, disks and tapes.
- The provisions for transfer or disposal of records between entities when a third party entity is replaced by another to perform the same function.
- Any restrictions on the external service provider using information from records for commercial profit or other purposes, during, and at contract termination.
CHECKLIST OF COMPLIANCE

Agencies will comply with the requirements of Territory Records Office Standard for Records Management No.5 – Recordkeeping and Outsourced Government Business if:

- in relation to ensuring that contractors make adequate records, they:
  - provide clear instructions in the contract about the types of records the contractor must make in carrying out the contract; and
  - where appropriate, include, as a schedule to the outsourcing contract details of specific types of records to be made.

- in relation to ensuring that contractors maintain records adequately, they:
  - provide clear instructions in the contract about how records will be maintained by the contractor.

- in relation to ensuring that contractors only dispose of records according to appropriate authorities, they:
  - specify in the contract the agency’s relevant approved Records Disposal Schedules currently in use;
  - specify in the contract which types of records, if any, the contractor is authorized to destroy during the period of the contract and the method of destruction;
  - clarify in the contract that no destruction of records is authorized if it is likely that the records will be needed for any legal action or inquiry; and
  - set out in the contract the measures the agency will use to ensure compliance.

- in relation to ensuring that contractors comply with all requirements relating to custody of records, they:
  - where possible, transfer only copies of existing records to the contractor;
  - specify in the contract which original records may be given to the contractor;
  - specify in the contract which records must be returned to the agency and when they are to be returned; and
  - specify in the contract how records will be protected from alteration or damage while in the custody of the contractor.

- in relation to ensuring that contractors comply with all requirements relating to ownership of records, they:
  - specify in the contract which party will own each class of records at the end of the contract;
  - clarify in the contract how continuity of service and the rights and entitlements of individuals and the Territory will be protected in ownership arrangements;
  - clarify in the contract any restrictions on the contractor’s use of information in the records; and
  - specify in the contract who owns the intellectual property in any records made as part of the contract.

- in relation to ensuring that outsourcing arrangements do not have any negative impact on the agency’s or the public’s right to access records, they:
specify in the contract the records to which agencies are entitled to have access during and after the contract period;
put in place in the contract arrangements for providing public access to records under the Freedom of Information Act 1989 and the Territory Records Act 2002 as appropriate;
where appropriate, specify in the contract the information technology format in which the records are made and maintained in and how this will be managed over time.

in relation to ensuring that records are adequately controlled, they:
.specify in the contract any particular requirements for records description and control, as well as the measures agencies will use to ensure compliance;
.make the contractor aware of the requirements of the Territory Records Act 2002 and the Standards, Codes and Guidelines produced under it; and
.include in the contract instructions or standards to ensure that sufficient contextual documentation of the records is available at the end of the contract.
DEFINITIONS

Agency

The Executive, an ACT Court, the Legislative Assembly Secretariat, an administrative unit, a Board of Inquiry, a Judicial or Royal Commission, any other prescribed authority, or an entity declared under the regulations of the Territory Records Act 2002 to be an agency.

Appraisal

The process of evaluating business activities to:

- determine which records need to be captured;
- how long the records need to be kept to meet business needs; and
- meet the requirements of organisational accountability and community expectations.

Business Classification Schemes

A hierarchical scheme for identifying and defining the functions, activities and transactions an agency performs in the conduct of its business, and the relationships between them.

Principal Officer

The Chief Executive of an administrative unit, or its equivalent in other types of agencies.

Records

Information created, received, and maintained as evidence and information by an organisation or person, in pursuance of legal obligations or in the transaction of business. This recorded information must be maintained or managed by the agency to provide evidence of their business activities. Records can be in written, electronic or any other form.

Records of an Agency

Records, in writing, electronic or any other form, under the control of an agency or to which it is entitled to control, kept as a record of its activities, whether it was created or received by the agency.

Records Disposal Schedule

A document approved by the Director of Territory Records, which sets out the types of records an agency must make and how long they must be kept.
Records Management Program

A document which complies with section 16 of the Territory Records Act 2002 by setting out the means by which an agency will manage its records, and is approved by the agency’s Principal Officer.

Recordkeeping Systems

Information systems that capture, maintain and provide access to records over time. While the term is often associated with computer software, Recordkeeping Systems also encompass policies, procedures, practices and resources which are applied within an agency to ensure that full and accurate records of business activity are made and kept.
REFERENCES AND FURTHER READING


Government Procurement Act 2001


Standards Australia 2002, Information and documentation – records management (AS ISO 15489) Standards Australia, Homebush, NSW.


Territory Records Act 2002


