

Australian Capital Territory

Territory Records (Standard for Records Management Number 5: Recordkeeping and Outsourced Government Business) Approval 2009 (No 1)

Notifiable instrument NI2009—15

made under the

Territory Records Act 2002, s 18 (Approved standards and codes for records management)

1. Name of Instrument

This instrument is the Territory Records (Standard for Records Management Number 5: Recordkeeping and Outsourced Government Business) Approval 2009 (No 1)

2. Approval

I approve the Standard for Records Management Number 5: Recordkeeping and Outsourced Government Business

3. Commencement

This instrument commences on the day after notification.

4. Revocation

I revoke Notifiable Instrument NI2003-231 notified 1 July 2003.

David Wardle
Director of Territory Records
5 January 2009



Australian Capital Territory
Territory Records Office
STANDARD



Standard for Records Management

Number 5 - Recordkeeping and Outsourced Government Business

PURPOSE

To set principles and minimum compliance measures for ensuring that recordkeeping in outsourced government business arrangements meets proper standards.

AUTHORITY

This Standard is produced in accordance with section 18 of the *Territory Records Act 2002*, which allows the Director of Territory Records to approve Standards or Codes for agency records management. Under section 17 of the *Territory Records Act 2002* an agency's Principal Officer may only approve a Records Management Program that complies with the Standards and Codes set by the Director of Territory Records.

Section 17(2) of the *Territory Records Act 2002* allows a Principal Officer to approve a Records Management Program that does not comply with an approved Standard or Code only if the Director of Territory Records agrees in writing that non-compliance is necessary for the operational needs of the agency.

Section 22(2) of the *Territory Records Act 2002* requires that an agency must ensure that its records that are in someone else's possession are held under arrangements that provide for the safekeeping, proper preservation and return of the records. Section 16 of the *Territory Records Act 2002* requires agencies to include in their Records Management Programs arrangements for notifying the Director of Territory Records about any agreements entered into with an entity that is not an agency to carry out any aspect of its records management.

This Standard must be reviewed as soon as practicable 5 years after its commencement.

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 business activities. Therefore, it is important that agencies think carefully about their recordkeeping needs and their responsibility and accountability requirements when planning outsourcing arrangements.

Outsourced activity records must be managed as if the agency were undertaking the activity itself. Agencies must make provision in their contracts to ensure that they gain legal and beneficial ownership and custody of records from service providers.

The activities of service providers can lead to financial, legal or management issues for agencies. It is therefore essential that records created by a service provider during the performance of a contract adequately document its activities and protect the position of the agency through the provision of full, accurate and accessible records.

In relation to records created or used by external service providers, agencies can meet this obligation by either delegating the recordkeeping responsibility to the service provider and ensuring the appropriate records are transferred according to an agreed schedule; or ensuring the agency creates its own records of the work performed by the service provider. This may include keeping copies of correspondence with the service provider, creating file notes of conversations and taking minutes of meetings.

The best course of action to ensure that full and accurate records of outsourced activity are created will be determined by whether the agency is developing a contract with the service provider or whether an existing contract contains adequate records management clauses..

BACKGROUND

There are four types of outsourcing arrangements that will have slightly different records management implications for agencies.

Services on Behalf of Government

At times, government agencies contract out core functions to private organisations. In these situations the contractor is usually providing the service on behalf of government or acting as the government's agent.

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 outsourcing contracts.

In situations where an agency is providing services on behalf of government, the agency must have both legal and beneficial ownership of existing records and those made by the contractor in providing the service. All of these records must be transferred to the custody of the agency at the completion of the contract.

Services to Government

Often agencies contract out their non-core or 'housekeeping' functions, such as financial, personnel, fleet or facilities management to private organisations. In these cases the contracted organisation is providing a service directly to government.

In situations where contractors are providing a service to government the legal and beneficial ownership of the records may not be very clear. Generally, if a record will be required by the agency or by another contractor to carry out the work at the end of

the contract, then it must be owned by the agency and transferred to the agency's custody at the end of the contract. 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. As stated, the records about property maintenance must be owned by the agency. 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.

It is very important that the legal and beneficial ownership of records is made clear in any outsourcing contract.

Recordkeeping Services

Agencies may choose to outsource their records management activities in the same way as they might any other housekeeping function. However, in all such outsourcing arrangements agencies retain the responsibility for their recordkeeping in general and their Records Management Programs in particular, regardless of who is carrying out the work. Also the contractor to whom the records management activities are outsourced must comply with the *Territory Records Act 2002*. When selecting a contractor to provide records management services. Agencies must ensure that the contractor is able to meet the Standards and Codes approved by the Director of Territory Records.

Agencies must also notify the Director of Territory Records of any arrangements to outsource any aspect of their records management activities, including the use of contractors to assist with the preparation of agency Records Management Programs.

Internal Outsourcing

In some circumstances, Territory agencies 'outsource' tasks to other areas of government. 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.

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 it needs at the end of the contract.

Outsourcing arrangements must 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. It will be very difficult for agencies to plan for outsourcing if they do not have in place a Records Management Program or approved Records Disposal Schedules to guide the management of records either by the agency or a contractor.

Compliance with Principle 1

Making

Because agencies are responsible for work carried out on their behalf, they need to ensure that contractors understand what records must be made to enable and to account for the administration of the task. Recordkeeping needs will have been identified through the analysis that agencies carried out to produce Records Disposal Schedules (see *Territory Records Office Standard for Records Management No.2 - Appraisal*). 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.

A compliant agency can demonstrate that:

- clear instructions are provided in the contract about the types of records the contractor must make in carrying out the contract; and
- where appropriate, specific types of records to be made are included as a schedule to the outsourcing contract.

The agency should ensure that the contract has clauses that:

- specify that records of outsourced activity are to be managed in accordance with the agency's requirements;
- specify the obligations of the service provider in relation to the creation and management of records. This could include legislative and regulatory compliance; storage, maintenance and retention of records; preservation of electronic records; access to records, including privacy requirements; and security of records.
- establish agency legal and beneficial ownership of the records and the intellectual property contained in the records; specify the transfer of required records from the service provider to the agency in a prescribed manner and at defined intervals; and

- specify the transfer of required records from the agency to the service provider in a prescribed manner and at defined intervals.

Maintaining

Records relating to the outsourced function once created, need to be maintained whether the records are in the possession of the agency or the contractor. 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.

These records must be maintained in a manner that allows for accountability of the processes and the tasks that are being undertaken. The maintenance of the records may have a bearing on their later accessibility. Agencies must ensure that contractors make records using information technology that is compatible with agencies systems so that the records are accessible once the contract has ceased.

A compliant agency can demonstrate that:

- clear instructions are provided in the contract about how records will be maintained by the contractor.

Disposing

No Territory record can be destroyed unless the destruction is in accordance with approved Records Disposal Schedules. This is also true for records of outsourced government activities, and agencies must make certain that they cover such outsourced activities when producing their Records Disposal Schedules. 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 is not always appropriate. If contractors are allowed to destroy any records of the activity, the contract must specify which records can be destroyed and under what Records Disposal Schedules. The contract must also include mechanisms for monitoring compliance with Records Disposal Schedules.

A compliant agency can demonstrate that:

- the contract specifies the agency's relevant approved Records Disposal Schedules currently in use by the agency;
- the outsourcing arrangement specifies which types of records, if any, the contractor is authorised to destroy during the period of the contract and the method of destruction;
- the contract makes it clear that no destruction of records is authorised if it is likely that the records will be needed for any legal action or inquiry; and
- the contract sets out the measures the agency will use to ensure compliance.

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 government 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.

The records of outsourced activity must be managed as if the agency were undertaking the activity itself. It is essential that agencies define the legal and beneficial ownership of the records and the custody, possession and transfer arrangements in their contracts in order to meet their recordkeeping obligations.

Compliance with Principle 2

Custody

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 the contractor takes proper care of records while they are in its custody.

A compliant agency can demonstrate that:

- where possible only copies of existing records are transferred to the contractor;
- contracts specify which original records may be given to the contractor;
- contracts specify which records must be returned to the agency and when they are to be returned; and
- contracts specify how records will be protected from alteration or damage while in the custody of the contractor.

Ownership

As a general rule, any record that an agency made before the contract was signed must be returned to that agency at the completion of the contract. Any record that would be required to continue the activity at the end of the contract – either by the agency or by a subsequent contractor – must also remain the property of the agency. Any record needed to document the rights and entitlements of the government or Territory citizens must also be returned to the agency and remains the property of the agency. Housekeeping records that the contractor makes in support of carrying out the contract, for example, the personnel files of staff undertaking the work, would normally remain the property of the contractor.

It is also important to specify who owns the intellectual content of the records. Contracts must be clear on any restrictions that are placed on how the contractor uses any information contained in the records. These restrictions must take account of Information Privacy Principles and any other relevant standards.

A compliant agency can demonstrate that:

- contracts specify which party will own each class of records at the end of the contract;
- continuity of service and the rights and entitlements of individuals and the Territory are protected in the legal and beneficial ownership arrangements;
- any restrictions on the contractor's use of information in the records is made clear in the contract; and
- contracts specify who owns the intellectual property in any records made as part of the contract.

Access

The issue of access to records during and after the contract is closely linked to the issue of ownership. In general, agencies must ensure that the outsourcing contract allows them to have access to the records that they own. In some cases, it may be desirable to allow agencies to have access to records owned by the contractor in order to facilitate monitoring of performance, this should be negotiated on a case-by-case basis. There will also be situations where the contractor requires access to records held by agencies. These records should normally be identified in planning for the contract, and access can often be arranged through custody procedures as described above.

Access to records that are the property of agencies must also extend to access by the public under the *Freedom of Information Act 1989* and, if appropriate 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 under these Acts in the same way as they would if they continued to have custody of the records. If the contractor is to have a role in administering public access to records, it is important that adequate provision is made for these arrangements in the contract.

The way in which the contractor makes and maintains the records may have a bearing on their later accessibility. Agencies must ensure that contractors make records using information technology that is compatible with agencies systems so that the records are accessible once the contract has ceased. The contract must also specify arrangements for migrating records from one software or hardware environment to another in order to maintain accessibility over time.

A compliant agency can demonstrate that:

- contracts specify the records to which agencies are entitled to have access during and after the contract period;
- the contract puts in place arrangements for providing public access to records under the *Freedom of Information Act 1989* and the *Territory Records Act 2002* as appropriate; and
- where appropriate, contracts specify the information technology format that the records are made and maintained in and how this will be managed over time.

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 agencies 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.

Compliance with Principle 3

Control

All records for which agencies are responsible, including the records of outsourced activities, must be made and kept according to the Standards and Codes produced under the *Territory Records Act 2002*. This means that the contractor must comply with the *Territory Records Office Standard for Records Management No.3 - Records Description and Control* when making records that will remain the property of the agencies. This may be especially important at the end of the contract when records are to be transferred either to agencies or to another contractor to continue the service or activity. Specific instructions may be needed in the contract to ensure that sufficient documentation about the records is available so that their context is apparent and comprehensible.

A summary table describing the control process is provided below:

| Contract Content | During the Performance of the Contract | At the termination and/or completion of the contract |
|---|---|--|
| The contract defines the agency as the legal and beneficial owner of the records created during the performance of the contract and includes a records transfer schedule. | The outsourced activity records are legally owned by the contractor holding them in trust for the agency whilst they are in use, but legal and beneficial ownership is with the agency. | The agency becomes both legal and beneficial owner of the records. |
| The contract must define the legal and beneficial ownership of the records. | The outsourced activity records are legally owned by the agency and beneficially owned by the contractor. | The agency should request the return of all records and retain ownership of the records. |

A compliant agency can demonstrate that:

- the outsourcing contract specifies any particular requirements for records description and control, as well as the measures agencies will use to ensure compliance;
- the contractor is made aware of the requirements of the *Territory Records Act 2002* and the Standards, Codes and Guidelines produced under it; and
- specific instructions or standards are included in the contract 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

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