



Government of South Australia

GPO Box 2343
Adelaide SA 5001
Tel (08) 8204 8773
Fax (08) 8204 8777 DX:467
srsaRecordsManagement@sa.gov.au
www.archives.sa.gov.au

State Records
of South Australia



Contracting and Official Records

Guideline

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Table of Contents

Introduction	4
Scope	4
Services on behalf of the agency	5
Services to the agency	5
Services sponsored by the agency	6
Policy Statement	6
The Regulatory Environment	6
The State Records Act 1997	6
Records Management Standards and Guidelines	7
The Freedom of Information Act 1991	7
Information Privacy Principles Instruction	7
Related Documents	8
Definitions	8
Variation to this Guideline	10
Further contact	11
The Principles	12
Principle 1: Planning	13
Explanation	13
Meeting its Obligations	13
Principle 2: Ownership and Custody	16
Explanation	16
Ownership	16
Custody	17
Meeting its Obligations	17
Principle 3: Creation and Control	20
Explanation	20
Meeting its Obligations	20
Principle 4: Disposal	23
Explanation	23
Meeting its Obligations	23

Principle 5: Access	26
Explanation	26
Meeting its Obligations.....	26
Principle 6: Storage	29
Explanation	29
Meeting its Obligations.....	29
Principle 7: Security	33
Explanation	33
Meeting its Obligations.....	34
Principle 8: Monitoring and Audit	37
Explanation	37
Meeting its Obligations.....	37
Principle 9: Contract Completion	40
Explanation	40
Meeting its Obligations.....	40
Glossary	42
Standard Details	42
Linked Documents	42
Attachment 1	43
Managing the Disposal of Official Records in accordance with the State Records Act 1997	43
Attachment 2	45
Principles & Obligations Matrix	45

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Introduction

Records management is one of a number of important ‘administrative’ activities that support agency core business. It 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) requires that every agency must ensure Official Records in its custody are maintained in good order and condition. Official Records are defined as those records made or received by an agency in the conduct of its business.

Business activities carried out by a contracted service provider do not diminish an agency’s responsibility to ensure that records are managed adequately. 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 be included.

Where an agency’s business activity is conducted by a contracted service provider 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 the records management responsibilities of contracted service providers.

The Auditor General has noted that in some cases the agency may take the view that including records management obligations in a contract would cause unnecessary administrative burden, be difficult or inconvenient to comply with a statutory requirement. Where the object or purpose of an Act of Parliament is clear there is no room for non-compliance. Claims of administrative difficulty are no excuse for non-compliance. ¹

Scope

The intention of this Guideline is to provide additional assistance to agencies bound by the State Records Act to apply the records management requirements into the contracting process as outlined in the *Contracting and Official Records Standard 2007* (the Standard).

Application of the Standard when contracting will ensure agencies consider their records management obligations under the *Freedom of Information Act 1991* (FOI Act) and 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

¹ Report of the Auditor-General for the year ended 30 June 2005. Supplementary Report – Government Management and the Security Associated with Personal and Sensitive Information, page 6, 2005.

general public. Agencies should not seek to apply this Guideline without first reading the Standard.

Both the Standard and this Guideline are 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 for either document however they may find the policy documents of use.

There is no requirement that the Standard or Guideline 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 or in instances where information related to the personal affairs of any person is involved.

It should be noted that neither the Standard nor the Guideline are 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 business activity. Agencies should seek separate advice from State Records on the application of the State Records Act, the FOI Act and the IPPs in these instances.

This Guideline and the associated Standard are intended as general guidance and aims to set the minimum requirements. It is not intended to constitute legal advice. Agencies are advised to seek Crown Solicitor's Office advice or from other appropriate Legal Counsel when entering into contractual arrangements.

The Standard is issued in accordance with sections 7(h) and 14 of the State Records Act and this Guideline supports its practical application.

While the Standard and Guideline aim to assist agencies when planning for any contractual arrangement, there may be instances where their application is limited or unnecessary.

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 the 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.

The Regulatory Environment

The regulatory environment that governs information and records management in South Australia establishes the boundaries for agency records management obligations and will have some impact on contracts made with contracted service providers.

The State Records Act 1997

The *State Records Act 1997* (State Records Act) entrusts State Records of South Australia with a pivotal role in guiding state and local government agencies and South Australian Universities in their records management and record keeping processes. It is acknowledged by the State Government of South Australia that records management practices have a significant impact on accountability and the effectiveness of any organisation.

Agencies also have responsibilities under the State Records Act to ensure that Official Records in their custody are well maintained, and that disposal of records occurs in an approved manner. Issued in accordance with sections 7(h) and 14 of the State Records Act, *Adequate Records Management Standard* requires agencies to ensure their records management practices meet minimum standards of adequacy and progressively improve performance to meet the benchmarks outlined in *Adequate Records Management Standard*.

This applies whether an agency is performing government business or if it is involved in contracting with a contracted service provider for the performance of a business activity on

behalf of government. It may also be applicable when an administrative or support service is performed for the government.

Records Management Standards and Guidelines

There are currently a number of Standards and Guidelines in relation to records management in South Australia issued under the State Records Act that may impact records associated with contractual arrangements. Those Standards and Guidelines include:

- Adequate Records Management Standard – State Records of South Australia
- Managing Records during Administrative Change – State Records of South Australia
- Appraisal of Official Records: Policy and Objectives – State Records of South Australia
- Records of Temporary Value: Management and Storage Standard and Guideline – State Records of South Australia

Other relevant Australian and International Standards include:

- AS ISO 15489 Records Management
- AS ISO 23081.1 – 2006 Information and documentation – Records management processes – Metadata for records

The Freedom of Information Act 1991

The *Freedom of Information Act 1991* (FOI Act) applies to the records created by state and local government business and South Australian Universities where the agency has an immediate right of access. Documents created by an agency and then provided to a contracted service provider to enable it to perform a service, would be documents to which the agency has an immediate right of access. The agency generally retains legal possession of such documents and the contracted service provider simply has physical possession or custody of the records whilst performing the service. Contracted service providers should be made aware via the contract that the agency will require access to Official Records in their custody in order to meet their legislative obligations under the FOI Act.

Further information in relation to the FOI Act can be sought from the agency's FOI Officer in the first instance or the State Records website at www.archives.sa.gov.au or by email to foi@sa.gov.au.

Information Privacy Principles Instruction

The Information Privacy Principles Instruction (IPPs) require the Principal Officer of an agency to ensure that the principles in the IPPs are observed in respect of all personal information for which the agency is responsible. The IPPs relating to storage and correction of information and access to information (clauses 4 (4) and (5) and (6)) all refer to information that the agency has “in its possession or under its control” and would therefore apply to documents created by an agency and provided to a contracted service provider for the purpose of performing the service. The IPPs relating to the use and disclosure of information relate to the conduct of the agency and therefore cannot apply to a contracted service provider.

Further information in relation to the IPPs can be sought from your agency's Privacy Officer or at the State Records website www.archives.sa.gov.au or via email to privacy@sa.gov.au.

Related Documents

This Guideline supports the *Contracting and Official Records Standard 2008*.

Definitions

“Agency”² 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]. The objectives of the task will be achieved by the consultant free from direction by the [agency]

² Section 3, *State Records Act 1997*

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.³

Contracted service provider – means a third party that enters into an agreement 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.au⁴.

Custody – responsibility for the care and physical possession of official records is assigned to 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;⁵

Legal possession – ultimate 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 Record⁶ – means a record made or received by an agency in the conduct of its business, but does not include-

- (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 (however the copy retained by the agency would be an Official Record); or

³ Accounting Policy Framework, VI Definitions, Department of Treasury and Finance. See www.treasury.sa.gov.au

⁴ Accounting Policy Framework, APSII General Purpose Financial Reporting Framework, Department of Treasury and Finance. See www.treasury.sa.gov.au

⁵ Section 3, *State Records Act 1997*

⁶ Section 3, *State Records Act 1997*

- (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 – ⁷

- (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)⁸.

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

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

Variation to this Guideline

State Records may update or alter this Guideline from time to time as authorised by the Director of State Records, in consultation with the State Records Council. Agencies subject to the State Records Act shall be informed of any such alterations or updates.

⁷ Section 3, *State Records Act 1997*

⁸ Section 3, *State Records Act 1997*

Further contact

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

Manager, Government Recordkeeping

State Records of South Australia

GPO Box 2343

ADELAIDE SA 5001

Phone: (08) 8204 8773

Fax: (08) 8204 8777

Email: srsaRecordsManagement@sa.gov.au

The Principles

The objective of the Contracting and Official Records Standard is to ensure that the records of agencies are adequately managed throughout the contracting process.

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

It will assist agencies and contracted service providers where the tender documentation includes details of the records management requirements that the successful contracted service provider will be expected to operate under. In making decisions, in relation to a tender, agencies need to be confident that the successful bidder can meet current legislative and policy requirements.

Contract documents must clearly specify agency records management requirements (as appropriate) that the contracted service provider will be expected to comply with. The principles outlined in the Standard and further explained in this document will assist agencies in determining what these requirements should be.

The objective of this supporting guideline is to provide support and additional practical advice in relation to records management requirements when contracting.

The 9 Principles include:

- Planning
- Ownership and Custody
- Creation and Control
- Disposal
- Access
- Storage
- Security
- Monitoring and Audit
- Contract Completion

Please refer to Attachment 2, which is a matrix that outlines the principles and corresponding obligations.

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

Agencies must ensure that adequate records management planning has been undertaken and well documented prior to finalising any contractual arrangements. This planning should include consideration of records management terms and conditions for inclusion in the contract in addition to the services to be provided. 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.

Meeting its Obligations

Obligation 1 - The agency should undertake a risk assessment with specific consideration given to the complexity of the contract and the sensitivity of the information

There is likely to be an increased necessity for records management provisions in a contract associated with either increased contractual complexity or if the contract involves sensitive information.

The agency should consider undertaking a risk assessment using the following risk factors listed in *Adequate Records Management Standard* in relation to poor records management:

- a lack of available information
- poor decision making as a result of bad or incomplete information
- wasted time
- wasted financial resources
- severe legal liability
- increased corporate risk
- substandard client service provision
- a lack of quality systems.

Agencies should consider the risk of these things occurring and measure them against the necessity of records management provisions in their contract.

Obligation 2 - The agency should consult with all relevant bodies or parties

Other organisational staff may have experience or knowledge that will assist in the drafting of tender and contract documentation. Staff within an agency that may have the experience necessary to ensure the documentation contains the appropriate inclusions include:

- the agency's **Records Manager** – who can provide advice on the records that are created by the agency in relation to the function or activities to be undertaken by the contracted service provider. They may be able to offer advice in relation to the application of the principles of the Standard and in ensuring the agency can continue to meet the requirements of *Adequate Records Management Standard*
- the agency's **Privacy Officer** – who can offer advice in relation to the privacy implications of contracted service providers having access to information of a personal nature and the kinds of protection that the contracted service provider must have in place to ensure those kinds of records in the custody of the contracted service provider are not exposed to unacceptable levels of risk
- the agency's **Accredited FOI Officer** – can offer advice in relation to the effect of contracting on the efficient operation of the FOI process within the agency. In the case of Official Records being transferred to the custody of the contracted service provider the agency must ensure that the agency is able to meet its legislative obligations in relation to the FOI Act
- the **Crown Solicitors Office (CSO)** or other appropriate Legal Counsel – will be able to offer advice in relation to the tender and contract documents in their entirety. State Records recommends that the advice of the CSO (or other appropriate Legal Counsel) is sought in instances of contracting. The CSO can also offer specific advice in relation to records management terms and conditions.
- the agency's **accredited purchasing unit and contract management staff** – it is likely that these staff will already be involved in the contracting process, however, they may be able to offer advice in relation to the manner in which the tender and contracting process is handled and the kinds of documents that will be created as a result of the contract.

Obligation 3 - The agency should undertake research to discover any documents and/or agency experience that would assist in drafting the tender and contract documentation

In addition to the staff members and other agencies listed above there may be other staff within an agency who have experience in the contracting process and could therefore offer assistance when undertaking risk assessments or other planning activities related to the contract. It would be useful to locate any recent contracts drafted by the agency to determine if the issue of records management was contemplated and if so the decisions that were made.

Obligation 4 - The agency should ensure that procedures are in place to handle issues relating to contracts where information may traverse jurisdictional borders (trans-border data flow)

Trans-border data flow is defined as the flow of data from an entity in one jurisdiction to an entity in another jurisdiction.

In some instances contracts may be won by contracted service providers, which results in information being passed from one State to another or indeed from one country to another. With the increase in the use of communication technologies the passage of data from one jurisdiction to another is becoming increasingly fast and simple. Complicating the issue is the likelihood there will be different privacy regimes operating in these jurisdictions.

The community has a right to expect that the information they have given or may be required to give will not be exposed to an increased level of risk as a result of contracting decisions that have been made which are out of their control. Therefore, it is important that the agency ensure that in cases where personal information is transmitted or made available to other entities in other jurisdictions as a result of contracting that procedures are in place to ensure the information is protected.

In the event that any information, in particular personal information, will be passed to another jurisdiction the agency should seek specific advice from the Crown Solicitors Office or other appropriate Legal Counsel to ensure the protection of that information through contractual terms and conditions.

Further advice in relation to privacy in general can be sought from State Records via email at privacy@sa.gov.au.

Principle 2: Ownership and Custody

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

Explanation

Ownership

Determining whether the Official Records arising out of or in connection with a contract should be owned by the agency or the contracted service provider is an important issue that must be determined by the agency prior to the finalisation of the contract documentation and clearly specified within the contract. It may be useful for the agency to identify ownership in the tender documentation.

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 Records transferred to the physical possession of a contracted service provider to be returned to the agency at the completion or termination of the contract (refer to Principle 9: Contract Completion).

In order to determine ownership of specific Official Records it may be useful for the agency to consider the following series of questions for all types of groups of records created by the agency and the contracted service provider.

Questions:

1. Does the function or business activity to be undertaken by the contracted service provider represent services performed on behalf of the agency? For example are they evidence of a core function of your agency, is the service provided as a result of a legislative or regulatory responsibility of your agency, or is the service provided by the contracted service provider provided directly to your clients?
 - If yes, ownership of the records should be vested with the agency.
 - If no, ask the following question.
2. Would any record of the group of records being considered be required by the agency (or another contracted service provider) at the termination of the contract, to enable the service delivery to continue or for another other reason?
 - If yes, ownership of the records should be vested with the agency.
 - If no, ask the following question.
3. Would the records need to be referred to by the agency for any reason, be used to establish the rights, entitlements or obligations of the agency or an individual, or be used for ongoing research?
 - If yes, ownership of the records should be vested in the agency.
 - If no, then ask the following question.

4. Would the agency need access to these records for any purpose either during or after the contract? For example for access under FOI?
- If yes, ownership of the records should be vested in the agency.
 - If no, then ownership of the records could be vested with the contracted service provider.⁹

Custody

In order for the contracted service provider to undertake the function or business activity being contracted out it may be necessary for some Official Records to be transferred to the custody of the provider. It is important, however, before asking which Official Records should be in the custody of the contracted service provider to determine which Official Records will remain in the legal possession of the agency (see above).

Legal possession and custody are two separate issues. Whilst it may be necessary for legal possession to be with the agency, custody can still be vested with the contracted service provider. In many cases it will be impossible for the contracted service provider to undertake the function or business activity without a transferral of custody. This transferral can be undertaken without the need to use a Transfer of Ownership and Custody Schedule (TOCS).

For Official Records which contain sensitive or security classified information, or if disclosure should result in a breach of confidence or prejudice any continuing action then the agency should consider retaining custody of the Official Records. If it is necessary to transfer selected records, then it is essential to ensure that the information is suitably protected. In some other cases it may be necessary for the agency to retain custody and to allow for access to the Official Records by the contracted service provider as required and under whatever conditions the agency deems appropriate.

Agencies should not charge the contracted service provider for having custody of the agency's Official Records, where those records are needed in order for the contracted service provider to use the Official Records for a purpose in relation to the contract.

Meeting its Obligations

Obligation 1 - The agency must ensure the contract specifically identifies ownership and custody arrangements

The agency should ensure the contract specifically identifies ownership and custody arrangements in the following instances:

- *Official Records relating to the contracted service that remain the property of the agency, including records created during the contract.*

The agency should continue to own and legally possess all Official Records made or received in order to maintain transparency and accountability. Agencies can identify the records to be designated Official Records by inserting a list of these records in the

⁹ *Records Issues for Outsourcing – including General Disposal Authority 25*, National Archives of Australia, June 1998, page16.

contract. This list should only include Official Records that remain in the legal possession of the agency.

- *Official Records related to the contract where ownership will be transferred to the contracted service provider and when this will occur.*

Official Records that are to be transferred into the legal possession of the contracted service provider should be disposed of in accordance with a current Transfer of Ownership and Custody Schedule (TOCS) that has been prepared by the agency and approved by the State Records Council.

Obligation 2 - The agency must ensure transfer of ownership of records is done via the use of a current TOCS approved by the State Records Council

Once ownership of groups of Official Records has been determined for those records related to the business activity being contracted out and/or the identification of the stages at which ownership may change has occurred, agencies must ensure there is a Transfer of Ownership and Custody Schedule (TOCS) in place.

Transferral of ownership of Official Records constitutes a ‘disposal’ as defined by the State Records Act. Therefore the action of transferring records will require a determination by the Director of State Records and the approval of the State Records Council. The TOCS represents this approval. In the event a TOCS is not in place the agency must contact State Records for further assistance before transferral of ownership of any records can occur. Transfer of custody can occur without the use of a TOCS. Therefore, in the event that transfer of ownership of records cannot occur immediately the transfer of custody can still occur to ensure continuity of service.

Note: transferral of ownership can include transferral from agency to a contracted service provider and from a contracted service provider to an agency.

Obligation 3 - 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

Intellectual property is defined as an idea that can be protected by law once it has taken a tangible form, for example the idea has been documented or recorded in some way. Intellectual property of any kind must be written down in order to be properly protected by copyright legislation.

Ownership of the intellectual property contained within the records created during the contract should be a clearly defined as ownership of existing records. Therefore, agencies should ensure that they own the intellectual property rights in all Official Records related to the conduct of the agreement between the parties to the contract, including intellectual property in existing Official Records as well as the intellectual property in Official Records created during the term of the contract.

Obligation 4 - Agencies should endeavour to consider the risks associated with transferring physical possession of permanent value records to a contracted service provider

Transferral of custody of records of permanent value in a contract does not include transferral of legal possession of records of permanent value to a contracted service provider. Records of permanent value cannot be legally transferred to a contracted service provider. However, in some cases the physical transferral of custody of records of permanent value to a contracted service provider may need to occur.

The most common ways in which records can be determined as having a permanent value are via legislation or by application of an approved disposal schedule (including General Disposal Schedules (GDS), Records Disposal Schedules (RDS), and TOCS).

Serious consideration should be given to the transferral of custody of records that are either very old, very fragile or both. Agencies should carefully consider the risk of loss of the record to the agency against the benefit of custody of the records being transferred to the contracted service provider. In these situations an agency might consider providing copies of the Official Records to the contracted service provider rather than the original records to meet the needs of the contracted service provider in service provision and ensuring the preservation of the original record. Alternatively in some cases the agency may decide to retain these types of records in their own custody and provide access of the records to the contracted service providers as required.

In all cases where Official Records are transferred to the contracted service provider the agency should stipulate the kinds of conditions they expect to the records to be kept in to ensure the records are protected and are returned safely to the agency at the completion, termination or other stage of the contract (refer to Principle 6: Storage and Principle 7: Security for further information).

Agencies should also be aware that contracted service providers may be creating records of permanent value associated with or as a result of the contract. In these cases agencies should stipulate the kinds of conditions they expect the contracted service provider to keep those records in to ensure they are protected prior to their transferral to the agency at the termination or completion of the contract or any other time as determined in the contract.

Principle 3: Creation and Control

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

Explanation

Official Records contain the evidence of actions taken, decisions made, procedures enacted and policies developed by agencies. They are essential for proving what was said, done or approved. Therefore agencies are required to create Official Records to ensure outcomes of business transactions are captured and retained.

Official Records are also created when the agency receives documents and they are incorporated into agency records. As records are often the primary source of information for an agency tracking its business, Official Records are created whenever evidence of business activity is required.

Given this importance it is essential that they be captured into recordkeeping systems upon creation or receipt in a controlled and systematic manner. A recordkeeping system may include, but not be limited to, electronic document and records management systems (EDRMS), records management software, a finance management system or even a manual card based system providing its use ensures control of the records recorded within it and meets the requirements of *Adequate Records Management Standard*.

Meeting its Obligations

Obligation 1 - The agency must identify in the contract any legal requirements to create documents

Many Acts of Parliament administered by agencies require those agencies to create documents in specific circumstances or for specific purposes. While the contract may require the contracted service provider to create those documents instead of the agency it remains the agency's responsibility to ensure those records continue to be created appropriately. Therefore, it is the agency's responsibility to ensure that the contracted service provider is aware of what those responsibilities are. The only way this can be ensured is to identify in the contract any legal requirements for specific record creation.

In doing so the agency can continue to meet Outcome 1 of *Adequate Records Management Standard* which requires that the agency identify and document any specific legislative or administrative requirements to create particular Official Records.

Agencies should note that their responsibilities in *Adequate Records Management Standard* are not negated because a contracted service provider is now undertaking the creation of Official Records on behalf of the agency.

Obligation 2 - The agency must identify in the contract those documents that need to be created to ensure continuity of business and ensure it's accountability and statutory obligations are met

Official Records are often the primary source of information for an agency, providing evidence of business activity as required. Agencies that fail to capture Official Records as evidence of business activities may be exposed to increased liability.

This liability will not cease because the agency now uses a contracted service provider to provide a specific service under contract. Therefore, it is equally important that agencies identify administrative requirements to create particular Official Records to ensure continuity of business as described in Outcome 1 of *Adequate Records Management Standard*.

This includes ensuring that the contracted service provider is aware that they will be involved in the creation of documents of permanent value. Whilst these kinds of documents may not be identified as such at the time they are created, contracted service providers should be made aware that at some point those documents may be identified as having a permanent value and will need to be treated accordingly.

Agencies, or contracted service providers, that fail to capture Official Records are subject to the following risks:

- inability of the agency to meet other statutory obligations resulting from illegal destruction of a record
- financial risk to the agency from the loss of the record
- loss of the States history
- inability to meet community expectations that records will be created
- loss of personal information/personal history of members of the community
- poor decision making as a result of incomplete information
- increased corporate risk
- substandard service provision

Obligation 3 - 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

It is important to ensure that the control systems for both paper and electronic agency owned records are established by the contracted service provider prior to the provider being made responsible for the custody of those records.

If such control systems are not established the agency runs the risk of losing a precious asset. Agencies should bear in mind that they are required to meet other statutory obligations. For example, the FOI Act will require the agency to locate any documents required to process an application made under that Act. Whilst physical possession may have passed to the contracted service provider legal possession for agency owned documents has not. Therefore, if the contracted service provider does not have the appropriate control mechanisms in place prior to the transferral of custody of Official Records, the agency may find itself in a position where it is unable to meet its legislative obligations. In addition the agency will not be able to meet the requirements of *Adequate Records Management Standard*.

Obligation 4 - The agency must ensure that irrespective of format (electronic or paper-based), records created, generated or received by the contracted service provider are managed appropriately

It is important that the contracted service provider is made aware that the control systems they have in place to manage Official Records that are transferred into their custody should be utilised for any records created, generated or received by the contracted service provider regardless of its format.

Official Records regardless of format must be managed adequately. It is essential that they are captured into recordkeeping systems upon creation or receipt in a controlled and systematic manner. Agencies should ensure that Official Records are assessed as groups of records related to certain functions or business activities rather than subject based records. In doing so agencies will meet the classification requirements of *Adequate Records Management Standard*. Official Records should also be classified according to a general or agency specific thesaurus that matches a general or agency specific disposal schedule.

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 and whilst agencies are for the most part aware that electronic communication is considered to be an Official Record of a transaction, contracted service providers in some cases may not handle their electronic records with the same care. In order to protect electronic records and ensure they are handled appropriately the agency must consider including specific clauses.

The contracted service provider should also recognise that the Official Records in their custody, whether existing or created during the life of the contract, should be managed in a discrete system separate from the records owned by the contracted service provider.

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 the Contracting and Official Records Standard or this Guideline, all agencies need to have appropriate disposal coverage in place irrespective of whether the agency's Official Records are administrative or operational.

There are several General Disposal Schedules specifically designed to cover state and local government agencies. General Disposal Schedule 15 (GDS 15) prescribes the disposal of administrative records for all state government agencies, and General Disposal Schedule 20 (GDS 20) prescribes the disposal of administrative records for local government authorities. However, in order for operational records of those agencies to be disposed of, that is Official Records created that are unique to that agency, the agency requires a current Records Disposal Schedule (RDS) which has been approved by the State Records Council. Agencies should consult their Records Manager to determine which disposal authorities are applicable to the classes of records affected by the contract. (For further information in relation to the application of GDS 15, GDS 20 or an agency specific RDS, agencies should seek specific advice from State Records.)

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.

Meeting its Obligations

Obligation 1 - Any disposal of Official Records owned by the agency must be done in accordance with the State Records Act

Official Records may have short or long term value depending on the information they contain. Agencies are required to ensure that they are retained for as long as they are required regardless of custody arrangements with the contracted service provider. However, once their required retention period has been reached Official Records cannot simply be destroyed and it is vital that the contracted service provider be made aware of this.

Agencies or the contracted service provider must not destroy the records listed on the notification until State Records approves the list of records to be destroyed. This requirement must be met regardless of the custody arrangements in place for Official Records and regardless of to whom the responsibility for managing the physical destruction has been assigned.

Unauthorised destruction of Official Records is an offence under section 17 of the State Records Act. The result of which may leave an agency open to longer-term litigation, financial loss and political embarrassment.

In order to ensure Official Records are disposed of systematically and in accordance with the State Records Act, Outcome 3 of *Adequate Records Management Standard* should apply. A complete list of benchmarks is available in that document and agencies must ensure those benchmarks are met regardless of the custody arrangements.

However, the agency does need to determine whether the contracted service provider will be responsible for destroying Official Records or whether the contracted service provider will return Official Records to the agency and in what condition, to enable the agency to manage the physical destruction process. The Council of Australasian Archives and Records Authorities (CAARA) Policy Statement 13 recommends that the agency should have final sign off for disposal of Official Records including the transfer of Permanent records to the archives.¹⁰

The retention period outlined in approved disposal schedules are the minimum period that records need to be retained for. Agencies may decide to keep specific records for longer than the minimum retention periods outlined in the schedule. Agencies can make these determinations if they manage the destruction of their own records.

Obligation 2 - The agency must ensure the contract contains arrangements for the management of the physical destruction of Official Records either by the agency or contracted service provider

Briefly mentioned above, it is vital that the contract contain arrangements for the physical destruction of Official Records. Agencies are required to meet Outcome 3 of *Adequate Records Management Standard* in relation to all Official Records. This applies regardless of custody arrangements. It is up to the agency to determine whether to allow the contracted service provider to manage the physical destruction process. Responsibility for managing the physical destruction of Official Records should be clearly documented in the contract.

It is also important to note that the disposal of Official Records by a contracted service provider can only occur in accordance with an approved disposal schedule and with the approval of the responsible agency and State Records. A breach of section 17 of the State Records Act, which refers to the intentional damage, alteration or disposal of records without authority, carries a maximum penalty of \$10,000 or two years in prison.

Current legal advice suggests that section 17 of the State Records Act applies to “a person” and therefore includes contracted service providers as well as employees of an agency. A complaint made in relation to section 17 may be made by any person, however it is most likely that it would be made by either the Manager [Director] of State Records or a police officer.

As it is unlikely that the contracted service provider would make a complaint under section 17 of the State Records Act if they are responsible for causing the breach, the contract should state that it is the agency’s responsibility for bringing a breach of section 17 to the attention of the Manager [Director] of State Records as soon as the agency becomes aware that an offence may have occurred.

¹⁰ *Policy Statement 13: Recordkeeping issues associated with outsourcing and privatisation of government functions*, Council of Australasian Archives and Records Authorities, March 2007.

Contracted service providers are however free to destroy or dispose of their own records that are not Official Records.

See Attachment 1: Managing the Destruction Process of Official Records in accordance with the *State Records Act 1997* in this Guideline.

Obligation 3 - The agency must ensure the contracted service provider maintains documentation for records that have been destroyed by the contracted service provider on behalf of the agency

One of the specific benchmarks of Outcome 3 in *Adequate Records Management Standard* requires an agency to keep a record of Official Records that it has destroyed with the approval of State Records. This requires records to be sentenced using an approved disposal schedule and listed on a Notification of Intention to Destroy Records Report Form forwarded to State Records for approval.

State Records recommends agencies consider the risks associated with having a contracted service provider manage the physical destruction of records owned by the agency but in their custody. 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 the agency manages the destruction process. In addition, the agency should also sign off on documentation for the transfer of permanent records to State Records as part of their disposal program.

For a list of risks associated with having the contracted service provider manage the physical destruction of Official Records owned by the agency, refer to Principle 3 – Creation and Control, obligation 2.

However, if after considering these risks the agency chooses to allow the contracted service provider to manage the physical destruction process it must be managed in accordance with the requirements of the State Records Act.

Information about the destruction process, including the paperwork that is required to be completed, can be sought from State Records. Further information is also available in this guideline at Attachment 1: Managing the Disposal of Official Records, in accordance with the *State Records Act 1997*.

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 may need access to records held by the agency to ensure continuity of service.

Access to Official Records and the disclosure of information within them needs to be systematic, considered and consistent. The indiscriminate release of, or refusal to release, information may infringe on the rights of individuals or the state and cause severe liabilities for the agency.

Information contained within the Official Record may require disclosure control for reasons of security, personal privacy, state-to-state, and state to foreign nation security, commercial confidentiality or legal liability.

However, despite these reasons for disclosure control, access to the public must remain the same regardless of who is delivering the service where ownership of the records remains vested with the agency. If ownership of the records has been transferred the agency must recognise they may have limited or no control over disclosure of the information.

Meeting its Obligations

Obligation 1 - The agency must ensure arrangements are made between the agency and the contracted service provider concerning access to records

The agency must ensure arrangements are made between the agency and the contracted service provider concerning access to records related to the business activities undertaken by the contracted service provider on behalf of the agency regardless of ownership.

The agency must ensure the following arrangements are made:

- *Access conditions relating to records owned by the agency but in the custody of the contracted service provider*

Outcome 4 of *Adequate Records Management Standard* in relation to Access to Records will still apply to Official Records owned by the agency but in the custody of the contracted service provider as the records are considered to be in the legal possession of the agency. Therefore, agencies have the same access rights to their records as they would if the records were physically within the agency. The contracted service provider

should be made aware that they cannot impede agency access to those records in any way. This includes having inappropriate or inadequate control systems resulting in records not being able to be located.

Therefore in meeting its access obligations, the agency will need to:

- assign responsibility for providing access to records and disclosing the information they contain. Where the Official Records are in the custody of a contracted service provider the responsible person for the provision of access should still be employed by the agency;
 - develop criteria for assessing requests for access to, and disclosure of information within Official Records, where other legislative processes do not apply, for example the FOI Act;
 - identify and document security issues governing the release of information within its records;
 - ensure that it has processes in place to ensure access to Official Records does not compromise the reliability of the records;
 - identify and document any commercial confidentiality agreements to which it is a party governing the release of information within its records, and
 - have processes in place to seek legal advice where the provision of access to and the release of information from its records is likely to expose the agency to legal liabilities.
- *Access conditions relating to records owned by, and in the custody of, the agency, but to which the contracted service provider requires access*

In some cases the contracted service provider may require access to records owned by and in the physical possession of the agency to ensure continuity of service by the contracted service provider. In these cases arrangements for the temporary transferral of those records will need to be made or arrangements for the contracted service provider to be able to view the records at the agency.

If the records are to be transferred, the agency should determine an appropriate time for the records to be returned to the agency. In determining these arrangements the agency should consider the reasons why the records were not transferred to the custody of the contracted service provider at the time the contract was made and determine if those reasons have any bearing on the decision being made now.

- *Access conditions relating to records owned by the contracted service provider, but to which the agency may require access*

In limited cases the agency may require access to records owned by the contracted service provider. It would be highly unlikely that the agency would require access to records of the contracted service provider that do not relate to the business activities that have been contracted out. In these cases it would be up to the discretion of the contracted service provider as to whether the agency could be granted access. It would be highly unlikely that the agency would require access to records that existed prior to the existence of the contract and were not necessary to be provided during the tender process.

Agencies should consider that if it is likely they will require access to records previously owned by the agency but now owned by the contracted service provider those records should be determined as records that should be owned by the agency.

Obligation 2 - 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

Compliance with legislative requirements for access does not change because the custody arrangements for some agency Official Records has changed as a result of the contractual arrangement. Therefore, agencies that enter into contracts which involve the transfer of custody of Official Records to the contracted service provider must ensure they are able to continue to comply with the legislative requirements for access, including FOI and any other legislative obligations.

The only time that the legislative responsibilities of an agency will change in relation to access provisions in relation to records arising out of or in connection to a contract is when legal possession is changed via the use of a current TOCS approved by the State Records Council.

Obligation 3 - Access conditions and rights established under the contract are applied consistently and equitably

The rights that are established under the contract must always be applied consistently to ensure the contract is honoured.

Access conditions and rights to agency owned records in the custody of the contracted service provider established under the contract must also be protected and ensured if a dispute exists or arises between the agency and the contracted service provider.

The contracted service provider must acknowledge that it has no right to withhold Official Records from the agency.

Principle 6: Storage

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

Explanation

Records must be protected, secure and accessible for as long as they are required to meet business and accountability needs and community expectations. If records do not survive for the period that they are required for business and accountability purposes, agencies and the wider government may be exposed to unacceptable levels of risk and potentially costly consequences. If records sustain damage during their period of active use due to poor storage conditions, the government may incur significant expense to repair items that are subsequently transferred into archival custody. Storing records appropriately for their retention periods is therefore a good investment for agencies and the State Government as a whole.

To lessen the likelihood of loss or damage to records whilst Official Records are in the custody of a contracted service provider, agencies should 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. It is important, however, that along with arrangements for ongoing storage of Official Records, the contract establish date or timeframe for records to be returned by. The reason for this is two-fold. It ensures that the records aren't subject to extended periods of risk but also ensures contracted service providers aren't left with the burden of storing records that are no longer their responsibility. Refer to Principle 9 – Contract Completion for more information.

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

In relation to the storage of Official Records of permanent value by contracted service providers, the contracted service providers must be made aware that records of permanent value are to be transferred to State Records after they are 15 years old or sooner if no longer required for administrative purposes in consultation with State Records. Where records are to be transferred prior to 15 years then the agency and the contracted service provider should discuss the proposed transfer with State Records.

Meeting its Obligations

Obligation 1 - Agencies should determine the degree and detail of documentation required in relation to Official Records in the custody of the contracted service provider

The degree and detail of documentation required in relation to Official Records in the custody of the contracted service provider will depend on a number of variables, including:

- the size of the business activity being conducted by the contracted service provider
- the amount of records transferred to the custody of the contracted service provider that remain the property of the agency
- the sensitivity of the records being transferred.

In determining the degree of detail of storage documentation required of a contracted service provider, agencies should consider the degree of storage documentation they require of their own agency when the agency was responsible for the business activity. It would be unwise for the agency to require less of the contracted service provider than they would of themselves, bearing in mind that the agency no longer has physical control of the records.

Obligation 2 - Agencies should ensure the records are stored in such a manner that they can be easily retrieved

Agencies should also remember that the requirement to access Official Records in the custody of the contracted service provider but in the legal possession of the agency will be the same as the requirements for Official Records still in the possession of the agency.

Using FOI as an example it may be more difficult for an agency to seek records from a contracted service provider that are the subject of an FOI request if the degree and detail of documentation is inadequate. This could potentially expose the agency to unacceptable levels of risk and costly consequences. Therefore the agency must ensure that the records in the custody of the contracted service provider are properly indexed and ordered in a form that will enable the agency to carry out proper inspections of the records (where necessary).

Agencies could consider requiring the contracted service provider to provide the following kinds of information in an agreed format in relation to storage of Official Records:

- where records are stored
- the number and title of files created over a specified period, including the number of volumes opened for each file
- up-to-date location reports
- the number and title of files transferred to temporary or off-site storage facilities

In determining the kinds of information the agency requires it would be wise to consider the kinds of information the agency collects or uses that is derived from their own records management system.

Obligation 3 - Agencies should ensure contracted service providers have a Disaster Management Plan that includes the recovery of records

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

Records are always potentially at risk of disaster. Due to the importance of records, their loss in a disaster may be crippling for the responsible agency depending on the significance of the records damaged or lost.

Disaster management is part of wider risk management and mitigation strategies that agencies should pursue, regardless of whether the Official Records are in the custody of the agency or the contracted service provider.

Disasters affecting storage may include:

- Natural events such as earthquakes, cyclones, bushfires, floods, vermin
- Structural or building failure such as malfunctioning sprinklers, heating or air conditioning systems, roof leaks
- Industrial accidents such as nuclear or chemical spills, gas leaks, fire
- Technological disasters such as viruses and computer equipment failures
- Criminal behaviour such as theft, arson, espionage, vandalism, riots and terrorism, and war
- Accidental loss through human error

Agencies should consider requiring that the contracted service provider have disaster response plans that are relevant to the degree of risk in the event of damage or loss (refer to the list of risks of poor records management in Principle 1 Planning).

Disaster response plans can include the following:

- Procedures that ensure the safety of records to follow in the event of an accident, emergency or disaster
- Procedures that include prevention, preparedness, response and recovery, including how the provision of services will be maintained in the instance of a disaster
- Procedures that relate to the following:
 - Physical and technological disasters
 - Criminal behaviour, including but not limited to, such things as arson, theft and vandalism
- Fire alarms are installed in storage areas and linked to a readily available emergency service and tested on an annual basis
- Maintenance of Supply Bins and Disaster Recovery Supplies

In ensuring that a disaster management plan is in place an agency will be complying with Outcome 7 of *Adequate Records Management Standard* for those records associated with the contract.

Obligation 4 - Agencies should ensure that records are handled appropriately for their format and protected from physical harm

The tender and contract documents need to include a minimum standard for the physical security protective measures.

Records in all formats are likely to deteriorate if they are not handled appropriately. Personnel may be injured if appropriate occupational health and safety considerations are not taken when handling records. Agencies should take steps to promote the correct handling, use or transport of records to minimise the risk of personal injury and to ensure the preservation of Official Records for as long as they are required regardless of where those records are located.

Agencies should also consider including the following:

- Development of handling procedures for the general use of records as well as for records in transit. These can be used as the basis for the expectations they have for the handling of records in the custody of the contracted service provider
- Forbidding smoking, eating or drinking in or near records and records storage areas
- Ensuring containers are clean and in good condition, designed to fit the records, strong enough to withstand handling, pressure and the weight of the records, and of a quality and composition commensurate with the records format, media and use
- Identification and removal to a new location of records stored in dangerous formats. These records should be moved to a location away from records that could be affected by fumes, etc
- Raise shelving off the floor by 85-150mm as a disaster precaution
- Establish and maintain disaster management programs and an up-to-date disaster response plan – ensuring all storage areas have alarms, heat and smoke detection and fire extinguishing equipment
- Equipment complies with occupational health, safety and welfare codes of practice.

Principle 7: Security

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

Explanation

Information is a vital asset to the state government and as such needs to be suitably protected. Information security protects information from a wide range of threats in order to ensure business continuity, minimise business damage and the successful achievement of objectives.

Information can exist in many forms. It can be printed or written, stored electronically, transmitted by post or using electronic means. Whatever forms the information takes, or means by which it is shared or stored, it should always be appropriately protected.

Agencies and their information systems face a wide range of security threats including computer assisted fraud, sabotage, vandalism, fire and flood. More common threats include computer viruses and computer hacking. Agency dependence on these systems makes them more vulnerable to these threats.

Information security is achieved by implementing a suitable set of controls including policies, standards, practices, procedures, organisational structures or software functions.

In the event of inadequate security measures or contracted service provider negligence resulting in the loss or destruction of Official Records, the contracted service provider should be required to pay all costs incurred by the agency reinstating those records¹¹.

Agencies may consider the following in relation to information security:

- How the legal requirements are to be met (eg data protection and legislation)
- What arrangements will be in place to ensure that all parties involved are aware of their security responsibilities
- How the integrity and confidentiality of the agency's Official Records are to be maintained and tested
- What physical and logical controls will be used to restrict and limit the access to the agency's sensitive or information of a personal nature to authorised users
- What levels of physical security are to be provided for Official Records
- The right of audit (see Principle 8 for more information)¹²

¹¹ SA Government Information Security Management Framework, Government of South Australia.

¹² SA Government Information Security Management Framework, Government of South Australia.

Electronic and physical security of records is also 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 should also ensure that any personal information in the custody of the contracted service provider 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.

Further information on the management of information security can be found in the *SA Government Information Security Management Framework*, Government of South Australia.

Meeting its Obligations

Obligation 1 - Agencies must ensure that security measures implemented by the contracted service provider to protect areas or systems in which records are stored are appropriate to the security classification of the records in accordance with current government security standards

The current government security standard is the *SA Government Information Security Management Framework*, published by the Government of South Australia. Agencies can also refer to AS/NZS ISO/IEC 17799:2001, Information Technology: Code of Practice for Information Security Management – 4.2.2 Security requirements in third party contracts. This provides examples of terms to be included in an outsourcing contract relating to information security when seeking to implement best practice in information security measures.

In the instances where Official Records are in the custody of the contracted service provider agencies should ensure the contracted service provider implements the same security measures as the agency would be required to implement as appropriate for the security classification of the records.

Obligation 2 - Agencies must ensure protection against unauthorised access to both the physical and digital records

Records, regardless of format, are an essential part of an agency's business. Recordkeeping systems and storage facilities need to be designed and implemented to protect records from unauthorised access, alteration, deletion or loss.

Agencies will need to ensure that the recordkeeping systems and facilities used by the contracted service provider are adequate for the records that are being managed throughout the course of the contract.

Protecting unauthorised access to physical records may include the use of storage rooms that are secured by a set of procedures such as security swipe cards, sign-in sheets or security keys that only authorised staff have access to. Protection of electronic records might require the placement of databases or terminals in secure rooms or include functionality that allows records staff with appropriate access to apply caveats to prevent unauthorised access to electronic records.

The agency may need to decide what level of security is required as appropriate to the security classification of the records that the contracted service provider will be required to meet.

Obligation 3 - Agencies must ensure tender and contract documents include reference to the current government security standard for the physical security protective measures

Agencies are required to comply with the current government security standard which is the *SA Government Information Security Management Framework* published by the Government of South Australia. Agencies can also refer to AS/NZS ISO/IEC 17799:2001, Information Technology: Code of Practice for Information Security Management – 4.2.2 Security requirements in third party contracts. This provides examples of terms to be included in an outsourcing contract relating to information security when seeking to implement best practice in information security measures.

As the contracted service provider would be required to adhere to the same security measures as the agency for the security classifications of Official Records in their custody it is necessary that potential contracted service providers and hence the successful contracted service provider be given enough information as necessary to ensure they are able to comply with the contract.

Obligation 4 - 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

One of the major threats to the safety of records is the risk of disaster. Counter disaster management strategies yield many benefits for records both physical and electronic. These are also essential for meeting Outcome 7 of *Adequate Records Management Standard* which specifies disaster recovery plans are established and vital records identified.

In order to develop processes and implement appropriate measures, the contracted service provider should be required to undertake a risk assessment relevant to records storage facilities and recordkeeping systems, and the development of subsequent plans to reduce the probability of disaster and loss; activities to identify and protect vital records; and the development of disaster response and recovery plans to follow after a disaster.

Technology and access procedures include access status and control, controlled access to storage areas and an unauthorised entry detection system in the security measures.

Further information in relation to the physical protection of Official Records can be found under Principle 6 – Storage.

Risk audits should also be applied to electronic records and their locations. Existing security procedures should be examined and documented. Additional risks common in electronic formats such as disc crashes, hardware failure and system crashes should also be examined.

The South Australian Information Security Management Framework should be consulted by agencies when specifying what procedures and technology measures are required of the contracted service provider.

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 contractual arrangements are being met and so that action can be taken by the agency to ensure the provider meets their records management obligations.

The most effective method to measure compliance is to periodically inspect the records held by the contracted service provider through an appropriate reporting regime established in the contract. It is important that the contract establishes the agency's right of access to records for the purpose of monitoring performance. Specific advice will need to be sought in relation to contracts with off-shore companies as monitoring and audit arrangements that include a physical inspection component may not be possible.

Meeting its Obligations

Obligation 1 - Consider the risks associated with limiting any monitoring requirements in the contract

Agencies are responsible for ensuring that contracted service providers are fulfilling their requirements outlined in the contract, including those practices relating to records management.

Monitoring can take a variety of forms including onsite auditing or the development of regular reports by the contracted service provider for the responsible agency. The nature of these reports and onsite audits should be specified in the contract with the contracted service provider.

Agencies that do not include monitoring and audit requirements in contract documentation are exposed to the same risks that the agency would face if they were not to adequately manage their own records. Without monitoring the contracted service providers' records management practices, as outlined in the contract, the agency cannot ensure that their records management responsibilities are being managed and maintained or that the services being provided by the contracted service provider on behalf of the agency is being delivered adequately.

The risks associated with not monitoring the contracted service providers' records management requirements include:

- The agency may not meet the outcomes detailed in *Adequate Records Management Standard* to achieve adequate records management practices if the contracted service provider does not fulfil the records management requirements established in the contract.

These inadequate records management practices may lead to a breach under section 16 of the State Records Act

- The agency cannot confirm that the function/business activity that the contracted service provider is delivering on behalf of the agency is being delivered appropriately due to the lack of information being provided.
- Severe legal liabilities if records cannot be located upon request (eg FOI, subpoenas)
- Increased corporate risks as the agency will not be able to provide evidence to support actions
- Substantial client service provision.

Obligation 2 - Frequency and method of auditing / monitoring of records associated with the contract

Monitoring or audit of the records management processes of the contracted service provider is not compulsory and can be included in the contract at the agency's discretion. However, in the event the agency does decide to audit the records management processes of the contracted service provider it should be handled fairly and consistently.

To achieve fairness and consistency the agency should provide the contracted service provider with details of what will be audited or monitored and provide sufficient warning that the audit or monitoring exercise will occur. Specific details of the content of the audit or monitoring exercise do not need to be included in the contract. However, the frequency of the exercise should be determined and included. Agencies should consider making it mandatory for the person to whom responsibility for the records has been assigned be in attendance during the process.

Other considerations for the agency to assist in the monitoring and audit process include:

- Ensuring records are kept of which Official Records are transferred to the custody of the contracted service provider
- Ensuring records are kept in relation to Official Records that have been returned to the agency or legally destroyed by the contracted service provider
- Provision of up-to-date location reports prior to an audit being undertaken to enable the agency to match the report against control records kept by the agency. This will ensure an audit can be undertaken on all records that exist
- The agency could consider the determination of a performance indicator that the contracted service provider must meet eg 80% of records were in the location specified on the location report provided by the contracted service provider.

The above list is not exhaustive. The agency should include any other requirement they feel is necessary to ensure an effective audit can be undertaken and which gives the agency enough data to be satisfied the contracted service provider is meeting their records management requirements.

Obligation 3 - Periodical reports on the control systems of the records in the recordkeeping system

Agencies need to ensure that the contracted service provider reports periodically on the control systems of the records in the recordkeeping system to ensure they are aware of the extent of recordkeeping practices being conducted by the contracted service provider.

The nature of these reports and frequency needs to be determined and outlined in the contract. Monitoring control systems of records in the recordkeeping system will ensure that records are being appropriately created and captured. It may be appropriate for agency staff to physically view a sample of files in these control systems to ensure the accuracy of the systems and that metadata is being applied adequately.

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 the records can continue to be used or sentenced appropriately.

Transfer of permanent value records to the custody of State Records must be done in accordance with State Records requirements and in consultation with the agency. Further information on transferral of Permanent value records into State Records custody can be sought from State Records Collection Management Services team.

Meeting its Obligations

Obligation 1 - When the records will be returned

It is most important to determine how the records of the business activities undertaken by the contracted service provider will be dealt with at the end of the contract. Failure to communicate agency requirements for the return of agency owned records could result in lost information and increased exposure to risk.

It is important that the Official Records of the agency in the custody of the contracted service provider, including those existing and those created during the life of the contract, are returned promptly and within a timeframe as specified by the contract. It is the responsibility of the agency to determine whether they would prefer them to be returned at the termination or completion of the contract or earlier. This should also include any relevant control systems used to manage records throughout the contract in relation to the delivery of that service. They may include records/document management software, databases, spreadsheets or manual listings. The contract should specify that control records, regardless of their form, should be returned along with the appropriate records at the completion of the contract.

It is not always necessary to leave the return of records until the termination or completion of the contract. In some cases it may be more efficient, or even safer, to have the contracted

service provider return records in its custody, but not in their legal possession, prior to the end of the contract or indeed periodically over the term of the contract.

One consideration in favour of returning records periodically may be that the records fall reasonably neatly into regular or periodic timeframes. There may also be other reasons more specific to the kinds of records or functions being performed. Returning records periodically may also prove more efficient for the agency as staff will not be required to deal with all of the records of the contract in one overwhelming project, rather, they can be dealt with in several more reasonable sized sentencing projects that span the life of the contract.

Obligation 2 - The process for returning the records

The agency should stipulate that the records need to be returned in a manner in which allows them to be easily reviewed and retrieved by the agency. This means they should be boxed and listed appropriately in order for the agency to know exactly which records are stored in which boxes.

The boxes that records are returned in should also be appropriate for their storage. They should be in containers that are clean and in good condition, designed to fit the records, strong enough to withstand handling during transportation and of good quality and composition commensurate with the records format, media and use. The use of appropriate couriers will also need to be considered, including companies that use vehicles that can protect records from rain and other elements during transportation.

Responsibility for payment of couriers or transportation should be considered for inclusion in the contract, remembering that a significant amount of records may have been created during the term of the contract.

Obligation 3 - The process for the safe return of all equipment/technology dependant records, including electronic copies of Official Records on networks, disks and tapes

The process of returning Official Records should include the return of all equipment and technology dependent records in such a manner that those records can still be reproduced by the agency. The kinds of records to be considered would include electronic copies of Official Records on networks, disks and tapes. All of which will require specific equipment or software to reproduce. Records that are unable to be reproduced due to changes or redundancy of technology are likely to become a liability for the agency that receives them.

It must be remembered that the records being returned remain the Official Records of the agency and it is therefore the responsibility of the agency to ensure they can be reproduced. Including this requirement in the contract is the best way of meeting this responsibility.

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/glossary.html>

Standard Details

This document supports and provides further practical advice on the principles outlined in the *Contracting and Official Records Standard*, State Records of South Australia, 2007.

The Standard issued in accordance with section 7(h) and 14 of the State Records Act is available via the State Records website at www.archives.sa.gov.au under adequate records management publications/standards for records management.

Linked Documents

Adequate Records Management Standard, State Records of South Australia.

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

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

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

Contracting and Official Records Standard, State Records of South Australia

Attachment 1

Managing the Disposal of Official Records in accordance with the State Records Act 1997

Adequate Records Management Standard - Outcome 3 – Records are disposed of systematically

All Official Records of the agency shall be disposed of in accordance with the provisions of the State Records Act.

In order to meet the requirements of Outcome 3 a number of benchmarks have been developed. The following benchmarks are a reproduction of those listed in *Adequate Records Management Standard*, however, they have been divided into those that are the agency's responsibility and those that could be divested to the contracted service provider. In some cases they have been modified for the purposes of this Guideline (refer to *Adequate Records Management Standard* for the generic benchmarks). It will be the agency's responsibility to manage disposal programs for Official Records related to the contract in the custody of the agency.

Agency responsibility:

- The agency assigns responsibility for the disposal of Official Records related to the contract either to itself or to the contracted service provider. This decision **must then be recorded in the contract**. It is recommended that the agency retain some control over disposal of Official Records (refer to Principle 4: Disposal)
- Approved and current disposal schedules cover all Official Records related to the contract of the agency regardless of the custody arrangements.
- The agency routinely reviews its records disposal schedules and revisions are approved by the State Records Council

The outcome of the first point above – will affect the following section.

The agency may determine to assign full or partial responsibility to the contracted service provider for the points in the following section. However, a decision must be made in relation to all of the benchmarks listed and those decisions must be recorded in the contract.

Agency and/or contracted service provider **as determined by the contract**

The agency or the contracted service provider responsibility:

- conducts regular Official Records disposal programs for Official Records related to the contract in the custody of the contracted service provider
- sentences records against an approved and current disposal schedule.
- disposes of Official Records only in accordance with determinations made by the Manager [Director] of State Records.
- keeps a record of the Official Records that it has destroyed and seeks approval to destroy such records from State Records prior to destruction.
- reviews business processes to ensure that all Official Records in the custody of the contracted service provider that ought to be disposed of, are disposed of.

The agency and the contracted service provider responsibility:

- inform their staff of the need to dispose of Official Records in accordance with the provisions of the State Records Act.
- keep a record of Official Records being held off site, for short and long-term retention.

It is recommended that the government agency signs off on the Notification of Intention to Destroy Records Reports prior to being forwarded to State Records for approval to ensure records that may be of future value to the agency (despite the minimum retention period being reached as per the disposal schedule) are retained.

Transfer documentation of permanent Official Records to the archives, also considered as disposal under the State Records Act, should be sighted and approved by the responsible agency particularly when records are being transferred prior to them reaching 15 years of age. Once records are transferred to the archives, the records are considered inactive (closed off) and the agency cannot add to these files.

Attachment 2 Principles & Obligations Matrix

Principle	Obligation 1	Obligation 2	Obligation 3	Obligation 4
Planning	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.	The agency should undertake research to discover any documents and/or agency experience that would assist 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 (trans-border data flow).
Ownership & Custody	The agency must ensure the contract specifically identifies ownership and custody arrangements.	The agency must ensure transfer of ownership or records 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 the risks associated with transferring physical possession of permanent value records to a contracted service provider.
Creation & Control	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 it's 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 appropriately.
Disposal	Any disposal of Official Records owned by the agency must be done in accordance with the State Records Act.	The agency must ensure the contract contains arrangements for the management of the physical destruction of Official Records either by the agency or contracted service provider.	The agency must ensure the contracted service provider maintains documentation for records that have been destroyed by the contracted service provider on behalf of the agency.	
Access	The agency must ensure arrangements are made between the agency and the contracted service provider concerning access to records.	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.	
Storage	Agencies should determine the degree and detail of documentation required in relation to Official Records in the custody of the contracted service provider.	Agencies should 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 the recovery of records.	Agencies should ensure that records are handled appropriately for their format and protected from physical harm.
Security	Agencies must ensure that security measures implemented by the contracted service provider to protect areas or systems in which records are stored are appropriate to the security classification of the records in accordance with current government security standards.	Agencies must ensure protection against unauthorised access to both the physical and digital records.	Agencies must ensure 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.
Monitoring & Audit	Consider the risks associated with limiting any monitoring requirements in the contract.	Frequency and method of auditing/monitoring of records associated with the contract.	Periodical reports on the control systems of the records in the recordkeeping system.	
Contract Completion	When the records will be returned.	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 and tapes.	