

TAHO

Tasmanian Archive + Heritage Office

State Records Guideline No 10

Outsourcing of Government Business - Recordkeeping Issues

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Information Security Classification

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I Introduction

I.1 Purpose

This guideline provides advice concerning recordkeeping issues in the outsourcing of government functions. The purpose of this guideline is to assist Tasmanian Government agencies to make adequate provision in outsourcing contracts so that contractors make, keep and manage properly records of the Government business that is being outsourced. An Outsourcing Agreement template (Appendix 2) has been provided as a guide to use when drawing up an outsourcing agreement with a service provider.

I.2 Authority

This guideline is issued under the provisions of Section 10A of the *Archives Act 1983*. Guidelines issued by the State Archivist under this Section set standards, policy, and procedures relating to the making and keeping of State records. This section also requires all relevant authorities to take all reasonable steps to comply with these guidelines, and put them into effect.

Keyword	Interpretation
MUST	The item is mandatory.
MUST NOT	Non-use of the item is mandatory.
SHOULD	Valid reasons to deviate from the item may exist in particular circumstances, but the full implications need to be considered before choosing this course.
SHOULD NOT	Valid reasons to implement the item may exist in particular circumstances, but the full implications need to be considered before choosing this course.
RECOMMENDS RECOMMENDED	The item is encouraged or suggested.

'**MUST**' and '**MUST NOT**' statements are highlighted in capitals throughout the Guideline. Agencies deviating from these **MUST** advise TAHO of the decision to waive particular requirements.

Agencies deviating from a '**SHOULD**' or '**SHOULD NOT**' statement **MUST** record:

- the reasons for the deviation,
- an assessment of the residual risk resulting from the deviation,
- the date at which the decision will be reviewed, and
- whether the deviation has management approval.

Agencies deviating from a '**RECOMMENDS**' or '**RECOMMENDED**' requirement are encouraged to document the reasons for doing so.

I.3 Audience

The advice in this guideline is relevant for all Tasmanian government agencies including local government, state owned corporations and government business enterprises. The information in this Guideline will be useful for records and information managers, legal practitioners, senior managers and other stakeholders involved in outsourcing projects.

2 Key Points

The key points to bear in mind when addressing the recordkeeping aspects of outsourcing government business are as follows:

- Tasmanian Government agencies engage in a range of outsourcing, all of which have recordkeeping implications.
- Tasmanian Government agencies are accountable for the outsourcing arrangements they put in place. Outsourcing a business activity does not diminish an agency's responsibility to ensure that it is carried out properly and that all requirements for records are met.
- Government agencies have key responsibilities in outsourcing arrangements including:
 - proper records are made and kept that are full and accurate of the outsourced business (Section 10 of the *Archives Act 1983*)
 - records of the outsourced business are kept in safe custody and properly preserved both during and after the period of the outsourcing contract (Section 10 of the *Archives Act 1983*), and
 - records of the outsourced business are disposed of lawfully (Section 20 of the *Archives Act 1983*)
- The agency's Secretary/General Manager/CEO and executive are responsible for making appropriate provision for recordkeeping when outsourcing government business.
- Outsourcing arrangements **MUST** be monitored. Agencies have a responsibility to follow up with monitoring of contractors as detailed in this Guideline to ensure that contractual arrangements are being met. This **MUST** be done on at least a six monthly basis.

3 Agency Responsibilities

The regulatory framework that governs information and records management in Tasmania will establish the boundaries for your recordkeeping obligations as a Tasmanian government agency, and impact on any outsourcing arrangements your agency enters into.

3.1 Archives Act 1983

Agencies **MUST** ensure that the Government business they outsource is supported by sound recordkeeping. This can be achieved through the communication of the following sections of the *Archives Act 1983* in arrangements with contractors:

- obligation to keep proper records: full and accurate records **MUST** be kept of all agency activities, including those that are outsourced (Section 10 of the *Archives Act 1983*)
- protection of records held by other persons or organisations/ agencies. All agencies **MUST** ensure the safe custody and proper preservation and return of all the records under their control, including those that are in the custody of a contractor (Section 10 of the *Archives Act 1983*)
- Secretary/General Manager/CEO and agency executive responsibilities: the Secretary/General Manager/CEO of the agency that outsources its business is ultimately responsible for ensuring that

the records of the contracted out business are created, maintained and disposed of in accordance with the Archives Act (Section 20 of the *Archives Act 1983*).

3.2 Personal Information Protection (PIP) Act 2004

Agencies MUST communicate to contractors their obligation to abide by the personal information protection principles in the *Personal Information Protection (PIP) Act 2004*. The PIP Act regulates the collection, maintenance, use and disclosure of personal information held by the agency. The type of personal information may include a person's name and contact details, together with any specific information about a person that may be required to enable the agency to provide a service or administer legislation. The agency MUST take reasonable steps to ensure that the personal information it holds is accurate, complete and up to date. Where practicable, the agency MUST check on the accuracy of personal information before it is used.

The obligations and principles of the PIP Act need to be conveyed to any contractors engaged by an agency, via contractual arrangements. Records generated in the course of government business may be confidential because they relate to individuals, or have significant commercial value, particularly if it is used, linked or analysed in conjunction with other information or databases. Contracts struck with service providers MUST therefore include provisions to protect private or sensitive information and MUST make reference to the relevant policy statements of the agency.

3.3 Tasmanian Government Information Security Policy Manual

Agencies need to consider Information Security policies when making arrangements with contractors, with particular reference to:

- AS/NZS ISO/IEC 17799: 2001, '*Information Technology: Code of practice for information security management, security requirements in third party contracts*' includes examples of terms to be included in an outsourcing contract relating to information security
- Department of Premier and Cabinet, Office of eGovernment, *Information Security Policy Manual*.¹

3.4 Multiple parties to outsourcing

With the increasing complexity of government business, it is likely that circumstances will arise where there are more than two parties to an outsourcing exercise.

This situation might arise when the administration of a database is shared between two government departments and a privatised organisation. In this case each government agency would need to ensure that the privatised organisation was aware of the recordkeeping issues that needed to be addressed.

While the language used in this document reflects one to one dealings, the principles can be scaled up to include more than two parties.

4 Steps to outsourcing

¹ http://www.egovernment.tas.gov.au/standards_and_guidelines/tasmanian_government_information_security_framework

4.1 Overview

It is the agency's responsibility, and not the contractor, to ensure there is clarity over the rights and responsibilities of all parties with regard to records management.

An outsourcing exercise may be authorised by the use of legislation or through an agreement.

If as a result of legislation, agencies **MUST** check if the legislation contains some provisions relating to records. Provisions may specifically exempt or include certain categories of records as part of the outsourcing exercise. These provisions **MUST** be considered when developing the contract or agreement.

Agencies **SHOULD** seek legal advice on the implication of legislation impacting on outsourced arrangements prior to finalising agreements. Legal advice **SHOULD** particularly be sought in situations when provisions for the custody and transfer of records have not been documented in legislation.

Agencies **MUST** consider carefully the terms and definitions necessary when drafting an outsourcing agreement. Records **MUST** be mentioned directly in the terms of the agreement. However, if this was overlooked at the time, those drafting the contract may have included records within the terms 'assets', 'contract material' or 'Crown material'. Without clarification there could be ambiguity over what is to be done with the records.

4.2 Planning

Responsibility for making, maintaining and disposing of records MUST be included in the planning process

The process of outsourcing an agency's functions or activities requires a contract or binding service agreement. These agreements generally cover issues such as service levels, performance benchmarks, costs and penalties.

Selection of a contractor

In making a decision for a tender, the responsible agency **MUST** be confident that the successful bidder can meet all requirements (see Treasurer's *Instruction No. 1101 'Procurement Principles: goods and services'* including requirements for the proper management of records.²

The Contract

The contract is the keystone of the relationship between the agency and the contractor. It is the main means for communicating the Agencies requirements, including its requirements for records. The contract **MUST** include clauses relating to:

² <http://www.treasury.tas.gov.au/domino/DTF/DTF.nsf/allS-v/BC96C5BFBFF74429CA257797001AC904>

- the recordkeeping requirements of the business being outsourced
- compliance with the *Archives Act 1983* and Guidelines on records management
- records disposal
- return of records at the termination/expiration of the contract
- records security and storage
- rights of and arrangements for access to records
- monitoring and inspection arrangements
- privacy and protection of personal information, and
- processes and penalties for failing to comply with records provisions in the contract.

Agencies that do not ensure that records are spelt out in the agreements and contracts may find it difficult or even impossible to access those records when needed, for example when required during litigation.

Agencies **MUST** contact the Tasmanian Archive & Heritage Office prior to the drafting of any outsourcing agreement or contract for advice on recordkeeping issues.

A **RECOMMENDED** outsourcing agreement template has been included in this Guideline (see Appendix 2).

4.3 Ownership and Risk Management

Ownership of outsourced records MUST be resolved

Failure to clarify who owns outsourced records, and the information they contain will expose the agency to considerable risks.

The issue of ownership extends not only to records of the agency, but also to records created by the contractor during the life of the agreement or contract.

Conducting a risk assessment will help agencies to identify and assess risks relating to the management of public records during outsourcing arrangements. It will also enable the development of risk mitigation strategies to assist public authorities to meet their recordkeeping obligations.

To minimise your agency's exposure to risk the recordkeeping requirements **MUST** be clearly communicated to contractors and formalised in the agreement. The agreement **MUST** detail specific requirements relating to the management of State records during the period of the agreement.

For an example of how to manage ownership of records in an outsourcing agreement, (refer to clauses 2 and 3 in the Appendix 2 template)

REMEMBER, AGENCIES CANNOT TRANSFER THEIR RECORDS TO A CONTRACTOR WITHOUT THE AUTHORISATION OF THE STATE ARCHIVIST - Note: to do so you will need a Transfer of Custody authority from the State Archivist. Contact Government Information Strategy Unit on 03 6165 5581 or gisu@education.tas.gov.au for advice on how to obtain this authority.

4.4 Control

Contractors MUST comply with the controls determined by the agency.

It is necessary that the agency retain some degree of responsibility for oversight and control over the function(s) performed by the contractor.

To make this possible the agency **MUST** require the contractor to create or manage records in a well-designed, functional recordkeeping system. This recordkeeping system may include (but is not limited to):

- an electronic document and records management system;
- records management software;
- collaborative tools; and
- business systems.

The agency **MUST** also require that the contractor follow any government policies and standards that were binding upon the agency prior to, or after, the outsourcing of the particular function.

For an example of how to lay down agency control in an outsourcing agreement, (refer to clauses 2, 5 and 6 in the Appendix 2 template).

4.5 Storage

Storage of outsourced records MUST be resolved during outsourcing

The safe custody and proper preservation of State records is required under Section 10 of the *Archives Act 1983*. Section 10 of the Act also requires that State records that go out of an agency's custody remain 'preserved and accessible'. Storage arrangements are therefore vital ingredients of any records management program, and **MUST** be addressed in outsourcing arrangements.

Agencies **SHOULD** ensure that contractors:

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

The agency **MUST** ensure that all parties to the outsourcing arrangement conform to best practice in record storage and handling, especially the storage principles specified in:

- State Records *Guideline no 11 'Physical storage of State records'*
- State Records *Guideline No 13 'Storage of State records in non-agency facilities'* and

The relevant authority **MUST** take all reasonable steps to ensure that these Guidelines are complied with. They are issued by the State Archivist according to Section 10A the *Archives Act 1983*.

Agencies are also RECOMMENDED to refer to the State Records *Advice No 26 'Disaster Preparedness and Recovery'*

Agencies MUST ensure that storage arrangements are included in outsourcing agreements and contracts. Poor or no decisions over the storage of records may result in their loss, leading to agency staff and members of the public losing confidence in the integrity of government agencies.

It is also vital that the agreements and contracts include arrangements for the storage of records at the expiry or termination of the agreement or contract. Failure to do so may result in records being misplaced or destroyed as they are no longer the concern of the contractor.

For an example of how to manage with storage of records in an outsourcing agreement, (refer to clauses 2 and 3 in the Appendix 2 template).

4.6 Access

Agreement MUST be reached between the agency and the contractor on access to outsourced records

Within government, records are not only retained for their administrative use, they are also retained to meet legal requirements and community expectations. This access is established in archival legislation.

Access to records is easier to establish and maintain while the records remain in the custody of the creating agency. However, this is harder when a function is outsourced and so it is vital that agencies are particularly diligent in assuring access to records held by a service provider.

Failure to do so will make it extremely difficult for the agency (or other parties with a legitimate interest) to inspect and validate the service delivery being performed by the contractor. It may also raise or heighten community concerns regarding the control of personal information outside government hands.

Public access MUST be no more or less than was previously available when the records were in the custody of the agency.

Where contractors have custody of records over long periods of time, the agency MUST ensure that once permanent records are 25 years of age they are transferred to the Tasmanian Archive and Heritage Office.

For an example of how to manage access to records in an outsourcing agreement, (refer to clauses 4, 5 and 6 in the Appendix 2 template).

4.7 Disposal

Outsourced records MUST be transferred or destroyed in accordance with the Archives Act 1983

Agencies have a responsibility to ensure that State records are disposed of in accordance with the Archives Act. The best way for an Agency to achieve this in outsourcing arrangements is to specify to contractors in contracts those records disposal processes that are permitted, and those that are not. For long term outsourcing arrangements, Agencies may wish to make contractual arrangements for the periodic destruction or transfer of certain classes of records.

Agencies **MUST** ensure the transfer of all permanent records to the Tasmanian Archive & Heritage Office that have been in the custody of a contractor, as well as the physical destruction of all temporary records in the custody of a contractor.

Authorised disposal of State records

Agencies **MUST** prevent the unlawful disposal of any State records that are in the possession of contractors in outsourcing arrangements. This could include:

- unauthorised destruction
- transfer to a third party
- transfer out of the State
- neglect
- damage, or
- alteration.

Agencies can do this by:

- being aware of the main methods for authorised disposal in the Tasmanian Government, by referring to guidance on disposing of State records, available on TAHO's website, and
- communicating to contractors via the contract the authorised disposal processes that the contractors are allowed to perform, and also those disposal processes that are prohibited.

Forms of disposal that could be authorised in an outsourcing contract

Some outsourcing arrangements last over long periods of time. In these cases, it may be practical to require the contractor to carry out destruction of records periodically. Similarly, the contractor might be required to periodically transfer records to semi-current storage or back to the agency.

For example, a Council may outsource the security operations for parks and reserves to a contractor on an ongoing basis, with built in reviews of service. In this case, it would be sensible for the Council to specify in the contract that while the property security incident register is required to be retained for *7 years (Records Retention and Disposal Schedule for Local Government in Tasmania DA2200 23.15.01)*, records relating to routine security arrangements including issue of security pass, security key, building admittance and visitor's logs are permitted to be destroyed 2 years after action completed (DA2200 23.15.03).

Forms of disposal that should be prohibited in an outsourcing contract

An agency **MUST** prohibit the following forms of disposal of records in an outsourcing contract:

- disposal contrary to the records disposal provisions in the outsourcing contract
- corrupt or fraudulent disposal
- disposal for the purpose of concealing evidence of wrongdoing, or

- disposal for any other improper purpose

Penalties for unlawful disposal of State records

It may be necessary in some cases to advise contractors that penalties exist for the unlawful disposal (including destruction or transfer to an unauthorised party) of State records. Under section 20 of the *Archives Act 1983* this penalty is up to a maximum of 50 penalty units.

For more information about disposal of records please refer to State Records *Guideline No. 2 'Retention and Disposal of State Records'*

For an example of how to manage disposal of records in an outsourcing agreement, (refer to clause 3 in the Appendix 2 template).

4.8 Reviewing and monitoring performance

Agencies are responsible for ensuring that all requirements specified in the outsourcing contract are met, including requirements relating to recordkeeping

Monitoring contractor performance can be established as part of your records management program. An effective records management program SHOULD be regularly measured. This includes that part of the program that is effectively implemented by a contractor on the agency's behalf. Mechanisms SHOULD be established to ensure that this measurement occurs, and that corrective action is taken as required.

How to monitor record requirements in contracting arrangements

The contract serves as the benchmark for monitoring the contractor's compliance with the records requirements of the outsourced business.

The most efficient method of measuring a contractor's compliance is to periodically inspect the records of the outsourced business, either through a reporting regime established in the contract or by requesting that certain records be made available. It is important, therefore, that agencies ensure that contractual arrangements make clear their right to access records of the outsourced business for the purpose of monitoring.

For example the agency includes the following reporting regime in the contract: a requirement that the contractor sends to the agency copies of all records of serious complaints received by the contractor regarding the delivery of the service. In this way, the agency can monitor the delivery of the service and check that adequate records are being kept of the complaints received at the same time.

Keeping records of the outsourcing process

In addition to addressing the management of the records of the business that is being contracted out, it is important that your agency's own records of the contracting arrangements are created and managed appropriately. This means these records MUST be captured into and kept in corporate recordkeeping systems and disposed of in accordance with approved disposal authorities.

An agency who is contracting out MUST keep full and accurate records of the contracting out process, including:

- the tender specifications produced and records of their distribution to potential bidders
- the tender and evaluation process, including reasons for the selection of the successful bidder
- contracts, including any variations on contracts
- financial records associated with the outsourced business
- any correspondence with contractors, and
- the results of any monitoring or evaluation of the contractors' work.

There are going to be variations and additional recordkeeping requirements according to your particular agency. A full analysis of the legal and business requirements and the community expectations for records of contracts SHOULD be carried out as part of establishing administrative arrangements for the contracting out project.

Disposal of records of the outsourcing process

Agencies MUST ensure that records of the outsourcing process are retained and disposed of in accordance with Section 10 of the *Archives Act 1983*. The principal way that this will occur will be by reference to authorised general or functional Disposal Schedules. For more information on authorised disposal of State records, go to TAHO's State Records *Guideline No 2 'Retention and disposal of State records'*.

Relevant disposal classes

In addition to any disposal classes covering outsourcing/contracting-out in your agency's functional Retention and Disposal Schedule, disposal classes relevant to this area have been included in the *Disposal Schedule for Common Administrative Functions (DA No 2157)* and the *Disposal Schedule for Local Government in Tasmania (DA No 2200)*

Audit and probity requirements

The Tasmanian Audit Office and other investigative agencies such as the Integrity Commission and the Tasmanian Ombudsman use records to determine organisational performance, financial accountability, legislative compliance and to identify and investigate wrong doing. Ensuring contractors create and manage records that adequately document Tasmanian government business is necessary to ensure that agencies can represent themselves and their activities for auditing or other forms of investigations.

The role of the contract in outsourcing arrangements

The basis of the relationship between an agency and a contractor is the official documentation of the agreement between the parties. Both the initial tender and the contract are important means for the communication of recordkeeping and other requirements.

Tendering

The Department of Treasury and Finance RECOMMENDS that tenders clearly specify all performance requirements for the service to be provided. This SHOULD include both requirements relating to the service/s to be provided and requirements relating to the recordkeeping responsibilities of the service provider. For

further information refer to the Tasmanian Government website and follow the link to 'Winning Government Business'.

Probity

A probity advisor is an individual who is engaged to observe, review and report on the bidding and selection process in government procurement projects and to provide advice on probity issues which may arise, to ensure that the process is equitable and that it is conducted with integrity. The Department of Treasury and Finance has established guidance on when a probity advisor is required and have developed a Probity Adviser Directory to assist agencies in selecting a probity advisor, if it has been determined that one is required. See the website (<http://www.purchasing.tas.gov.au/>).

4.9 Contract completion

Recordkeeping issues MUST be addressed at the completion of contracts or agreements

Certain records that are created, received or generated in course of outsourced business are essential to the ongoing conduct of that business. Failure to ensure that these records are transferred back to the agency at the completion of an outsourcing contract can have serious consequences later in terms of business continuity and accountability. It is therefore very important that the outsourcing contract makes clear which records SHOULD be returned to the agency at the end of the contract.

Just as agencies MUST ensure that the initial stages of a contract are well regulated, they MUST also ensure that the completion and post completion stages of a contract are well regulated and monitored. Failure to do so will result in lost information, increased risk of exposure to legal liabilities and wasted time and money.

A contractor will not devote time and effort to records for which it is no longer required to manage for the government, unless there is a contractual requirement for it to do so.

Agencies MUST ensure that there is planning for the management of records after completion of an outsourcing contract or agreement. When records are managed in a hurry, the risk of material of continuing value being lost or accidentally destroyed increases exponentially. An orderly end to the contractual process will result in good records management and fewer wasted resources, both by the contractor and the agency. It will also substantially reduce both the agency and the contractor's exposure to risk.

Records return provisions in the outsourcing contract

It is crucial that records return arrangements are included in the contract with the service provider, including:

- restrictions on the contractor using the information contained in the records for commercial profit, unless otherwise allowed in the contract
- arrangements regarding the manner in which the records are returned (for example, using secure transport), and
- agreed timeframes for the return of the records.

Which records are required to be returned?

Ongoing needs for records at the end of a contract could include:

- referral by the agency (or another contractor) for any reason
- protection of sensitive or confidential information
- use of the records to establish or protect the rights, entitlements or obligations of the State or an individual
- records required to properly manage facilities or capital works owned by Government
- records that document the expenditure of Government funds, such as the purchase of equipment or other assets, or
- use for future research by the State or an individual.

For example, records may be required for ongoing maintenance of capital works. An engineering firm that was hired to build a bridge for a Council would be required to provide the Council with records relating to the bridge's design and construction, to facilitate the ongoing maintenance and safety monitoring of the bridge.

Return of equipment/technology dependent records

Arrangements **MUST** be made for the safe return of all equipment / technology dependent records held by the contractor, including electronic copies on networks and hard-drives. Receiving electronic records from a service provider on the completion of a contract that cannot be read by the agency's systems is not acceptable. Contractual arrangements **SHOULD** specify formats for electronic records that will be compatible with your agency's systems.

Return of control records

It is vital that your agency receives control system information along with any returned records to enable the records to be accessed. Where records have been kept using records or document management software, information from the database of files / documents **SHOULD** be transferred. It may be, however, that more simple systems such as Excel spreadsheets or manual listings of records have been used.

Regardless of their form, control records such as these **SHOULD** be specified to be returned along with the records themselves.

Returned records subject to normal disposal processes

Once they have been returned, the records of the outsourced business will become part of your agency's recordkeeping systems and therefore subject to normal disposal processes, Guidance on disposing of State records is available from TAHO's website.

For an example of how to manage with the completion of a contract, (refer to clause 3 in the Appendix 2 template).

5 Tips and Hints for defining recordkeeping requirements in your outsourcing contract

5.1 Overview

Recordkeeping requirements for business that is to be outsourced MUST be identified so that records are included in, and monitored over time in the outsourcing contract. This will ensure that your agency is meeting its legislative obligations.

Recordkeeping requirements are identified by:

- analysing documentary sources including legislation
- researching the business requirements of your agency
- conducting interviews with relevant staff

5.2 5.2 Types of recordkeeping requirements

Recordkeeping requirements can define any aspect of a record's management over time, including:

- in what format a record is created
- who has access to it
- how it is stored, or
- its retention period and ultimate disposal action.
- Tasmanian Government policy encourages government agencies to use standard descriptors to label records and other forms of information that contain sensitive or confidential information, and to manage those records appropriately. This is an example of a recordkeeping requirement affecting both how a record SHOULD be accessed and stored. (See *Information Security Policy Manual, Office of eGovernment, Department of Premier and Cabinet*)

5.3 Legal requirements relating to records

The need to create and keep records is often based on statements in legal instruments such as Acts or regulations.

A broad recordkeeping requirement that applies to all Tasmanian Government agencies can be found in the *Archives Act 1983*, section 10, which states the relevant authority 'is to keep proper records in respect of the business of the Government department, State authority or local authority for which the relevant authority is responsible.' This requirement applies to any government business that is outsourced.

Sometimes, a legal requirement can relate to the way in which a record is destroyed. For example, the *Archives Act 1983* specifies that no State record SHOULD be destroyed unless it is done so in accordance with the Section 20 of the Act.

5.4 Business needs for records

Some recordkeeping requirements are based on business needs, rather than a legislative requirement. For example, it makes good business sense to keep records of past dealings with a customer, for ready reference if

required. In an outsourcing contract, you may wish to specify to a contractor that records **MUST** be maintained of all contact with clients.

5.5 Community expectations for records to be kept

Another type of recordkeeping requirement is based on community expectations that government organisations will keep records of their operations, policies and interactions with the community over time. A contractor to the Government would not be aware of this broad responsibility to keep evidence of government business, so it is up to the agency to communicate these requirements to contractors.

5.6 Recordkeeping requirements and electronic business systems

Much of the business that is conducted on the agency's behalf under outsourcing arrangements is done using electronic business systems, such as electronic messaging, databases or web technology. Regardless of the means by which the business is transacted, requirements for evidence apply.

Agencies **SHOULD** ensure that contractors are aware that records of the outsourced business that are created, generated or received using these technologies are subject to all the usual requirements of the Archives Act and the State Records Guidelines. See State Records *Guideline No 18 'Managing records of Social Media'*.

5.7 All recordkeeping requirements **MUST** be communicated to the contractor

All recordkeeping requirements **MUST** be communicated by the agency to the contractor as part of the contractor's recordkeeping responsibilities. They need to be described in such a way as to be format independent. Here are correct and incorrect examples of how to do this:

Records **MUST** be kept of all customer complaints received, including the complaint itself, the date the complaint was received and any follow up action taken.

Keep all customer complaint letters.

The main way in which recordkeeping requirements are communicated to contractors is through the outsourcing contract. The requirements listed in the contract can then be used as a benchmark for monitoring the contractor's performance.

As previously mentioned, A **RECOMMENDED** outsourcing agreement template has been included in this Guideline (see Appendix 2).

6 Definitions

agency - is used in this guideline to refer to all agencies, authorities, statutory offices, departments, councils and other organisations that are subject to, and defined in, the *Archives Act 1983*.

contractor - an organisation or individual with whom a responsible agency has contracted to perform a function or activity, or part thereof, or an organisation or individual to whom the agency, or part thereof, has been sold. The organisation may be a private or public entity.

disposal (records) - involves either the destruction of records; their transfer to the Tasmanian Archive & Heritage Office for retention as part of the State archives; their transfer to another custodian; or some other process approved by the State Archivist which removes them from the custody of their creator or current keeper.

disposal schedule - a detailed inventory of records created and stored by an agency, listed by record classes and identifying the appropriate disposal action. These comprehensive documents are formally authorised by the State Archivist and the destruction periods identified in the schedule can be acted upon without further reference to TAHO.

outsourcing / contracting-out - the process by which a contractor performs a function or activity on behalf of an agency as regulated by a contract or agreement. Government outsourcing arrangements include joint ventures and alliances, publicly funded research, public-private partnerships and the engagement of non-government organisations for specific services. Types of outsourcing include the provision of goods or services such as cleaning services, storage of semi-current records. Outsourcing may also include core agency business. This type of outsourcing is most commonly done by agencies with private sector organisations. Finally, outsourcing includes shared service arrangements for government services. This type of outsourcing is always done within government.

permanent value records - Records that **MUST** be transferred to the Tasmanian Archive & Heritage Office 25 years after the date of creation for retention as State archives.

record - a document or an object that is, or has been, made or kept by reason of any information or matter that it contains or can be obtained from it or by reason of its connection with any event person, circumstance, or thing. A document includes any printed or written material and an object includes a sound recording, coded storage device, magnetic tape or disc, microfilm, photograph, film, map, plan, or model or painting or other pictorial or graphic work.

service provider - an organisation (or individual) engaged by an agency to provide a service where the facility and staff are not controlled or managed by that agency. These organisations could be private sector operations or other Federal, State or local government bodies.

State record - records of State government agencies/departments, State authorities, or local authorities. These public bodies are defined in Section 3 of the *Archives Act 1983*.

storage – the function of storing records for future retrieval and use.

temporary value records - records that can be destroyed under the authority of an authorised Disposal Schedule after a minimum retention period or once certain requirements have been met.

transfer of custody - involves transferring the duty of care for the ongoing physical management of records from one custodian to another.

transfer of ownership - involves one party relinquishing physical, legal and, in certain instances, intellectual property rights over the record to another party.

Further Advice

For more detailed advice, please contact:

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Tasmanian Archive and Heritage Office
91 Murray Street
HOBART TASMANIA 7000
Telephone: 03 6165 5581
Email: gisu@education.tas.gov.au

Acknowledgements

This Guideline SHOULD be read in conjunction with the following State Records Guidelines and Advices:

- *Guideline No. 1 Records Management Principles*
- *Guideline No. 2 'Retention and Disposal of State Records'*
- *Guideline No 11 'Physical storage of State records'*
- *Guideline No 13 'Storage of State records in non-agency facilities'*
- *Guideline No. 17 'Managing the recordkeeping risks associated with cloud computing'*
- *Guideline No 18: 'Managing records of Social Media'*
- *Advice No 26 'Disaster Preparedness and Recovery'*

Council of Australasian Archives and Records Authorities (CAARA), *CAARA Policy 13 – Recordkeeping Issues associated with Outsourcing and Privatisation of Government Functions (adopted: August 2002 revised: March 2007)*

Queensland State Archives, *Custody and Ownership Guideline: Managing Public Records during Outsourcing or Privatisation (January 2010)*

Public Records Office of Victoria, *PROS 10/10 Guideline 2 Managing Records of Outsourced Activity (2010)*

Appendix I - Checklist of minimum requirements

I	Planning <i>Responsibility for making, maintaining and disposing of records MUST be included in the planning process</i>		
I.1	Recordkeeping requirements MUST be analysed and documented by analysing documentary sources including legislation, researching the business requirements of your agency and conducting interviews with relevant staff.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
I.2	Outsourcing risk assessment MUST be undertaken and completed	<input type="checkbox"/> Yes	<input type="checkbox"/> No
I.3	Draft the contract or agreement using the RECOMMENDED TAHO template found in this Guideline (Appendix 2)	<input type="checkbox"/> Yes	<input type="checkbox"/> No
I.4	The Tasmanian Archive and Heritage Office MUST be notified that an outsourcing arrangement is pending and for any further advice on recordkeeping issues for inclusion in the contract	<input type="checkbox"/> Yes	<input type="checkbox"/> No
I.5	Authorisation to transfer custody of records to a contractor MUST be sought and received from the State Archivist	<input type="checkbox"/> Yes	<input type="checkbox"/> No
I.6	Existing agency records MUST NOT be transferred to the ownership of a contractor	<input type="checkbox"/> Yes	<input type="checkbox"/> No
I.7	Agreement MUST be reached and documented between the agency and the contractor regarding ownership of the records created by the contractor during the life of the contract	<input type="checkbox"/> Yes	<input type="checkbox"/> No
I.8	Any interoperability requirements SHOULD be determined between the electronic document, information and/or records management systems used by the contractor and any other systems used by the agency.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
I.9	Record storage arrangements MUST be made between the agency and the contractor for records in the custody of the contractor.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
I.10	Access rules are established between the agency and contractor concerning access to records. These rules MUST address: <ul style="list-style-type: none"> • agency and public access • access by other compliance authorities • restrictions 	<input type="checkbox"/> Yes	<input type="checkbox"/> No

<p>2</p>	<p>Contract or Agreement</p> <p><i>Responsibilities for the making, maintaining and disposing of records of outsourced functions and activities MUST be included in contracts or agreements</i></p>		
<p>2.1</p>	<p>Existing agency records that will be transferred to the custody of the contractor SHOULD be listed and specified in the contract or agreement.</p>	<p><input type="checkbox"/> Yes</p>	<p><input type="checkbox"/> No</p>
<p>2.2</p>	<p>The contract MUST specify that existing agency records transferred to the custody of the contractor are State records covered by the Archives Act 1983 and MUST bind the contractor to comply with the Act.</p>	<p><input type="checkbox"/> Yes</p>	<p><input type="checkbox"/> No</p>
<p>2.3</p>	<p>The contract MUST specify that the records created by the contractor during the life of the contract belong to the Crown.</p>	<p><input type="checkbox"/> Yes</p>	<p><input type="checkbox"/> No</p>
<p>2.4</p>	<p>The contract or agreement MUST specify that the Crown owns the intellectual property to all records.</p>	<p><input type="checkbox"/> Yes</p>	<p><input type="checkbox"/> No</p>
<p>2.5</p>	<p>Record storage arrangements for records in the custody of the contractor MUST be specified in the contract or agreement and conform to the storage principles specified in the <i>State Records Guideline No. 11 'Physical Storage of State Records'</i>.</p>	<p><input type="checkbox"/> Yes</p>	<p><input type="checkbox"/> No</p>
<p>2.6</p>	<p>Any recordkeeping requirements that MUST be followed to enable the agency and the contractor to fulfil their statutory and service obligations relating to the management of the records are specified in the contract.</p>	<p><input type="checkbox"/> Yes</p>	<p><input type="checkbox"/> No</p>
<p>2.7</p>	<p>The contract or agreement MUST specify that State records held by the contractor are only destroyed in accordance with a disposal authorisation issued by the State Archivist. The agency MUST also stipulate:</p> <ul style="list-style-type: none"> • that the contractor uses a method of disposal appropriate to the format of the records • which specific classes of records can be destroyed. 	<p><input type="checkbox"/> Yes</p>	<p><input type="checkbox"/> No</p>
<p>2.8</p>	<p>Any technical standards needed to ensure interoperability between the electronic document, information and/or records management systems used by the contractor and any other systems specified by the agency MUST be specified in the contract or agreement. This includes the appropriate management of all metadata that is kept to facilitate access to the records.</p>	<p><input type="checkbox"/> Yes</p>	<p><input type="checkbox"/> No</p>

2.9	Access rules established between the agency and contractor MUST be specified in the agreement or contract.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
2.10	Any restrictions on the contractor using information from records for commercial profit and other purposes, during or upon completion of the project MUST be stipulated in the contract.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
2.11	The orderly transfer of records between entities when one contractor is replaced by another MUST be stipulated in the contract.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
2.12	Recordkeeping issues to be addressed upon contract completion MUST be stipulated in the contract. These include: <ul style="list-style-type: none"> • destruction of any records as per 2.7 • listing and transfer of all remaining records back to the agency • appropriate transit arrangements of records from the contractor to the agency according to their format requirements 	<input type="checkbox"/> Yes	<input type="checkbox"/> No
2.13	The agreement or contract MUST stipulate sufficient lead time for recordkeeping issues to be addressed during the final stages of a contract or agreement.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
2.14	Penalties MUST be stipulated in the contract for breach of contract, such as the failure to return records to the agency at the completion of the contract	<input type="checkbox"/> Yes	<input type="checkbox"/> No

3	Compliance <i>Contractor MUST comply with the records management controls determined by the controlling agency.</i>		
3.1	Contract MUST stipulate that the contractor is regularly audited and reviewed, including 6-12 monthly inspections by the agency.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
3.2	The contractor's compliance MUST be monitored against all relevant State Records Guidelines issued by the State Archivist.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
3.3	The contractor's recordkeeping system MUST comply with all functionality requirements of the agency.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
3.4	The agency MUST ensure the contractor complies with all relevant sections of the <i>Archives Act 1983</i> and the <i>Personal Information Protection Act 2004</i> .	<input type="checkbox"/> Yes	<input type="checkbox"/> No
3.5	Access rules established under the agreement or contract SHOULD be equitably and consistently enforced.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
3.6	The agency MUST ensure that the contractor conforms to best practice in record storage and handling especially the storage principles specified in the <i>State Records Guideline No. 11 'Physical Storage of State Records'</i> .	<input type="checkbox"/> Yes	<input type="checkbox"/> No

4.	Contract completion <i>Recordkeeping issues MUST be addressed upon completion of contracts or agreements</i>		
4.1	Recordkeeping issues MUST be well monitored during the final stages of an outsourcing contract or agreement.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
4.2	There SHOULD be appropriate sign off on reports of records management activities at the expiry or termination of an outsourcing contract or agreement.	<input type="checkbox"/> Yes	<input type="checkbox"/> No

Appendix 2 - Outsourcing Agreement template

This template outlines the key elements of an agreement as a guide for your agency to use when drawing up an outsourcing agreement with a service provider. Some of the clauses may not be relevant to your circumstances and SHOULD be reviewed by your legal representative. The Tasmanian Archive & Heritage Office would like to acknowledge Retirement Benefits Fund's assistance in developing this template.

I INTERPRETATION

I.1 Definitions

Relevant Law means any requirement of the following:

- (a) Archives Act 1983
- (b) Right to Information Act 2009
- (c) Personal information Protection Act 2004
- (d) Electronic Transactions Act 2001
- (e) Evidence Act 2001
- (f) Limitations Act 1974
- (g) Financial Management & Audit Act 1990
- (h) (any other legislation relevant to your agency or this agreement)

State Archivist means the person holding the position of Tasmanian State Archivist under section 7 of the Archives Act

State Authority has the meaning given to that term in the Archives Act

State Record has the meaning given to that term in the Archives Act

2 CONFIDENTIALITY, PRIVACY and SECURITY

2.1 Non-disclosure by both parties

Except as required by law or as is necessary for the performance of its obligations under this Agreement by its respective officers, employees, subcontractors or agents, neither party will directly or indirectly disclose to any other person, or use or permit to be disclosed or used for any other purpose than as specifically contemplated by this Agreement, the terms of this Agreement or any information that may be acquired by it under or for the purposes of this Agreement including any (name of agency) records, and will keep all such information confidential. In the event disclosure is required by law, the disclosing party will provide notice within a sufficient time to the other party to allow the other party to challenge such disclosure. This clause does not apply to any information which:

- a) is in or becomes part of the public domain other than directly or indirectly as a result of a breach of this Agreement;

- b) was known to the recipient at the time of disclosure of the information except as a result of a prior confidential disclosure to the recipient; or
- c) is disclosed to the recipient by a third party who is not known by the recipient to be acting in breach of a confidentiality obligation owed to the other party.

2.2 Privacy

The parties **MUST** comply with all applicable privacy laws or data protection laws in force from time to time and agree to cooperate in the resolution of any complaint under or relating to any of those laws, codes or guidelines.

2.3 Security

- a) (Name of service provider) **MUST** have appropriate security policy and standards to protect information within its control from unauthorised access and will ensure that its officers and agents comply with those policies and standards.
- b) (Name of service provider) will at all times ensure that appropriate security measures are utilised such that, except as required by law or agreed in writing by the (name of agency) access to (name of agency) records shall be limited to (name of service provider)'s employees, officers, agents, sub-contractors and such other persons as are necessary to enable (name of service provider) to properly comply with its obligations under this Agreement.
- c) (Name of service provider) **MUST NOT** allow any (name of agency) records transmitted to (name of service provider) by the (name of agency) to be retransmitted to another computer, terminal or device other than a computer, terminal or device used by the (name of service provider) Parties for the purpose of providing the Services without the (name of agency)'s prior written consent.

2.4 (Name of agency) records

(Name of service provider) acknowledges that:

- a) (Name of service provider) does not under this Agreement obtain any rights to use any information provided by the (name of agency), or by any other person for the purposes of a (name of agency), other than for the purposes of this Agreement and **MUST NOT** use the information for (name of service provider)'s monetary benefit.
- b) All physical and electronic documents:
 - i. provided to (name of service provider) by the (name of agency), or by any other person for the purposes of the (name of agency), remain the property of the (name of agency); and
 - ii. created by (name of service provider) in carrying out its functions under this Agreement, are, subject to (state any exceptions), the property of the (name of agency).

3 DOCUMENTS, RECORD KEEPING AND PROVISION OF INFORMATION

3.1 Application of Archives Act

(Name of service provider) acknowledges and agrees that the (name of agency) is a State Authority for the purposes of the Archives Act and that the (name of agency)'s records are State Records covered by the Archives Act.

3.2 Compliance with Archives Act

- a) (Name of service provider) MUST take such actions as are necessary to ensure that the (name of agency)'s obligations as a State Authority under the Archives Act are complied with.
- b) (Name of service provider) MUST take all reasonable steps to comply with any guidelines issued by the State Archivist in relation to the making and keeping of State Records.

3.3 Preservation and accessibility of documents

(Name of service provider) MUST keep the (name of agency)'s records for such period as required under the Archives Act and cause them to be preserved and accessible.

3.4 Record storage arrangements

- a) (Name of service provider) MUST conform to best practice in record storage arrangements and handling the (name of agency)'s records in the possession of (name of service provider) and comply with the storage principles specified in the Tasmanian Archive & Heritage Office State Records Guideline No.11 Physical storage of State records issued by the State Archivist.
- b) Records are to be kept in a stable environment, within the range of 15 to 27C temperature and 30% to 60% relative humidity.
- c) Storage areas for magnetic media are protected from magnetic fields.
- d) Records that are in electronic format are backed up regularly, and copies of backup tapes are kept off-site.

3.5 Destruction of documents

Any documents forming part of the Contract Material that are State Records MUST NOT be destroyed other than in accordance with a disposal authorisation issued by the State Archivist.

3.6 Transfer of custody of documents

(Name of service provider) MUST NOT transfer the custody of any documents forming part of the Contract Material that are State Records to another party unless it is a requirement at law or it is otherwise done by or with the written permission of the State Archivist or in accordance with a practice or procedure approved in writing by the State Archivist.

3.7 Copying and duplicating information

(Name of service provider) MUST refrain from copying or duplicating any part of the (name of agency)'s records other than in the normal course of producing data or as permitted or required by this Agreement unless compelled to do so by law.

3.8 Compliance with Right to Information Act

- a) The (name of agency)'s preference is to limit the number of assessed disclosures of information under the Right to Information Act by ensuring all the relevant information is, to the extent it is appropriate, publicly available. Notwithstanding, (name of service provider) acknowledges requests for information may be made.
- b) (Name of service provider) will, in a timely manner, take such steps and provide such information to the (name of agency) as will enable the agency to discharge its obligations under the Right to Information

Act. (Name of service provider) reserves the right to be able to charge for complying with this clause. Any such charges **MUST NOT** exceed the fee payable by an applicant pursuant to section 16 of the Right to Information Act.

4 ACCESS AND ASSISTANCE

4.1 Access to records

The (name of agency) will promptly give (name of service provider) all records and any other assistance as the (name of service provider) reasonably requires to enable (name of service provider) to carry out the Services under this Agreement. (Name of service provider) is not liable for any failure to comply with Performance Standards caused by or due to any delay in the provision of records to (name of service provider). However, (name of service provider) **MUST**, as soon as reasonably practicable, advise the (name of agency) of any failure of which it is aware in respect of records provided or to be provided to it.

4.2 Records to be accurate

- a) The (name of agency) acknowledges that (name of service provider) is entitled to rely on any information including records provided to it by the (name of agency) or any agent of the (name of agency) as being accurate (in absence of knowledge to the contrary by (name of service provider)).
- b) Where (name of service provider) considers that the records supplied contain major or regular errors, and those errors are not caused by (name of service provider), (name of service provider) **MUST NOT**ify the (name of agency) in a timely manner and the (name of agency) will:
 - i. correct any errors in the records promptly; or
 - ii. promptly request (name of service provider) to correct the errors.

4.3 Correction of errors

(Name of service provider) **MUST** correct any errors in records under clause b)ii, subject to the (name of agency) promptly furnishing all data reasonably necessary to correct the error.

5 AUDITS AND REVIEW

5.1 (Name of service provider) to provide information and assistance to the (name of agency)

Subject to clause 5.5, (name of service provider) **MUST**, on the written request of the (name of agency) or the State Archivist and within a time period specified in the written request that is reasonable in the circumstances, allow or provide the (name of agency), the State Archivist or other representative of the (name of agency), or the State Archivist may reasonably specify in the written request the following:

- a) such information that (name of service provider) has in its possession or to the extent reasonably available within such reasonable time as is specified in the notice with respect to the (name of agency);
- b) such access to records of the (name of agency) or the Services as is reasonably required;
- c) access to (name of service provider)'s premises to conduct an on-site visit and to inspect any documents that are State Records;

- d) each such access referred to in paragraphs (b) and (c) of this clause to be known as an independent or prudential audit or review.

5.2 Appoint auditor to review performance

(Name of service provider) MUST, on the written request of the (name of agency), appoint a person to audit, or make all documents and information (excluding information covered by clause 4.3) available to a person appointed by the (name of agency) to audit the performance of (name of service provider)'s obligations under this Agreement. (Name of service provider) is not responsible for the costs of such audit.

5.3 Appoint auditor to review internal control policies and operational risks

(Name of service provider) MUST within (xx) months of the end of the financial year cause its internal control policies and operational risk and (name of service provider)'s compliance with them to be audited and a report prepared by the auditor and provided to the (name of agency) regarding the effectiveness of the internal control policies and general compliance with them. (Name of service provider) is responsible for the costs of such audit.

5.4 Confidentiality and disruption

Prior to the commencement of any independent or prudential audit or review, each person to whom access is to be given MUST execute a confidentiality undertaking as reasonably required by (name of service provider).

5.5 Co-operate in relation to any investigation

In addition to the obligations imposed on (name of service provider) by clauses 5.1 to 5.4, (name of service provider) MUST otherwise cooperate with the (name of agency) in relation to any investigation conducted in relation to the (name of agency).

5.6 Periodic review

Subject to prior reasonable notice, (name of service provider) will meet with the (name of agency) (quarterly, biannually, or other) to enable the (name of agency) to review (name of service provider)'s performance of its obligations under this Agreement. (Name of service provider) reserves the right to charge for any work arising from such meetings which is other than of a corrective nature and additional to the Services or not otherwise dealt with under this Agreement and may also charge for any reasonable expenses incurred in attending such meetings.

5.7 Compliance with (name of service provider)'s security practices

Notwithstanding any other provision in this Agreement, any access granted to the (name of agency), or any other third party under this Agreement to (name of service provider)'s premises, records, computers, operating environment, systems procedures and controls is subject to the inspecting party complying with (name of service provider)'s reasonable security practices and requirements.

6 BUSINESS CONTINUITY AND SECURITY OF RECORDS

6.1 Business continuity plan

(Name of service provider) MUST have in place at all times a Business Continuity Plan containing:

- a) procedures to be followed after a disruption to the normal performance of its business activities, whether such disruption arises by causes internal or external to (name of service provider);
- b) procedures for the backup and recovery of (name of agency) records and software; and
- c) provisions that normal Performance Standards be restored as soon as practicable, but in any event within (xx) Business Days after a disruption to the normal performance of its business activities and which in its application to the Services otherwise generally complies with the principles of protection from disaster provisions of the Tasmanian Archive & Heritage Office State Records Advice #26 Disaster Preparedness and Recovery and State Records Guideline No. 11 Physical Storage of State Records.

6.2 (Name of service provider) to provide details

(Name of service provider) MUST, prior to the Commencement Date, and otherwise promptly on request from the (name of agency) or on a material amendment to its Business Continuity Plan, provide details of its Business Continuity Plan together with an annual report stating that the Business Continuity Plan is in place, that it has been reviewed and tested and a summary of the testing activities as they relate to the Services.