

TAHO

Tasmanian Archive + Heritage Office

State Records Guideline No 14

Privatisation of Government Business - Recordkeeping Issues

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Information Security Classification

This document has been security classified using the Tasmanian Government Information Security classification standard as PUBLIC and will be managed according to the requirements of the Tasmanian Government Information Security Policy.

Document Development History

Build Status

Version	Date	Author	Reason	Sections
2.0	04-06-2015	Christine Woods	Template	All
1.0	13-07-2005	AOT	Initial Release	All

Amendments in this Release

Section Title	Section Number	Amendment Summary
All	All	Document imported into new template

Issued: July 2005

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I Purpose

This guideline provides a series of principles concerning recordkeeping issues inherent in exercises involving the privatisation of government functions and activities.

The purpose of this guideline is to ensure that:

- State records are adequately controlled during the privatisation processes
- State records are disposed of legally during the privatisation of government agencies, functions and activities
- access to State records is regulated and controlled following the privatisation of government agencies, functions and activities;
- questions surrounding the storage of State records are clarified during privatisation exercises
- questions surrounding the ownership of records are clarified during the privatisation of government agencies, functions and activities.

I.1 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.

2 More than two parties to a privatisation exercise

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

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

3 Controls over privatising

The privatisation of a government agency, function or activity may be authorised by one of two means, through the use of a legislative instrument or through a contract of sale with a third party entity.

The use of legislation - agencies participating in a privatisation exercise should establish if the exercise is taking place as a result of legislation. If so, the participating agency should check the legislation as it may contain some provisions relating to records. Such a set of provisions may specifically exempt or include certain categories of records as part of the privatisation. These provisions must be considered when managing the impact of the privatisation upon the records.

The use of a contract - agencies participating in a privatisation exercise should examine the terms and definitions of a contract closely. Records may not be mentioned directly in the contract, but be intended by those drafting the contract to be included within the scope of the term assets or Crown material. Without precise clarification of what constitutes assets or Crown material, the opportunity could arise for ambiguities over the treatment of records.

If those drafting the contract do not consider that records are assets or Crown material then agencies must ensure that the contract clarifies the rights and responsibilities of parties to the contract with regard to records.

3.1 Principle 1 -Planning

Records are included in the planning for a privatisation exercise

The process of privatising an agency, function or activity, or part thereof, is both complex and legally focused and can be achieved through a number of mechanisms. These mechanisms generally cover issues such as, service levels, performance benchmarks, costs and penalties. It is far less common to find that records are included in the privatising process and yet these records will have a central role in the ability of the agency and the third party entity to manage the privatising process successfully.

Agencies that do not ensure that records are included in the planning process, and in the mechanism authorising the privatisation, may find it difficult or impossible to access records when needed for administrative purposes or when required during litigation.

Accordingly, agencies must ensure that records are included in the privatisation planning process and in mechanisms authorising the privatisation.

3.2 Principle 2 - Ownership

Ownership of records is addressed and resolved during the planning process

Failure to adequately manage the question of the legal ownership of records, and the information they contain, in privatisation exercises can severely restrict the business capabilities of the third party entity and expose the agency to considerable risks.

The issue of ownership of records in relation to privatisation covers three main elements:

- records of the agency that will remain with the agency
- records of the agency that will become the property of the third party entity
- records of the agency that will be held temporarily by the third party entity but that will be returned to the agency

The transfer of agency records to a third party entity must be authorised by the State Archivist. Records that have been transferred into the custody of TAHO cannot become the property of the third party entity.

3.3 Principle 3 - Disposal

Arrangements for the disposal of records are made during the planning process

Disposal includes the transfer of ownership or custody of records and is not limited to the physical destruction of records. Transfer of ownership will occur where an agency, function or activity is being privatised, and the relevant records may move outside their originating agency

Section 20 (1) of the *Archives Act 1983*, states that a person may not destroy, or transfer custody or ownership of, any State records without the written approval of the State Archivist. Therefore, agencies must exercise equal control over such disposal activities as those that involve the physical destruction of records. This disposal can take the form of:

- destruction by the agency of temporary value records no longer required by the agency or third party prior to the privatisation
- transfer of ownership of temporary value records to the third party entity
- transfer of permanent value records to TAHO prior to privatisation

3.4 Principle 4 - Access

Agreement is reached between the agency and the third party entity concerning the provision of access to records during the planning process.

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 and other instruments.

This dual access role of records is easy to establish and maintain while the records remain in the custody of the creating agency. It is vital therefore, that agencies ensure that issues of access to records, held by the third party entity are addressed during privatisation exercises.

Failure to do so may raise, or heighten, community concerns regarding the control of personal information outside government hands.

Access conditions and agreements between the agency and third party entity should be reached in consultation with TAHO.

Issues to be considered include:

- previous access regimes established under the *Archives Act 1983*
- the degree to which the third party entity will continue to apply any personal information protection requirements
- commercial-in-confidence limitations brought about by the performance of government functions and activities by third party entities

3.5 Principle 5 - Storage of records

Storage of records is addressed and resolved during the planning process

Section 10 of the *Archives Act 1983*, requires agencies to preserve State records until they are dealt with by the Act. Agencies should ensure that the parties to the privatisation arrangement conform to best practice in record storage and handling especially the storage principles specified in the *State Records Guideline No. 11, Physical Storage of State Records*.

Poor, or no decisions over the storage arrangement for records will result in the loss of records of evidential value as well as diminished confidence in the integrity of these records. It may also lead to unnecessary duplication of effort.

Record storage arrangements must be authorised through the use of an instrument (such as a contract) to ensure that the parties to the privatisation arrangement comply with the standard for the physical storage of records.

4 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*.

disposal - involves either the destruction of records; their transfer to the TAHO 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.

permanent value records - Records that must be transferred to TAHO 25 years after the date of creation for retention as State archives.

privatisation - The process by which the entire functions and activities of an agency, or a part thereof, is sold to a third party entity.

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.

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.

third party entity - 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.

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:

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

Acknowledgements

- This guideline is based on a policy statement of the Council of Australasian Archives and Records Authorities (CAARA) which was developed with the assistance of member organisations including the Tasmanian Archives and Heritage Office.

Appendix I - Checklist of minimum requirements

1	Planning Records are included in the planning for a privatisation exercise		
1.1	The Tasmanian Heritage and Archives office is contacted for advice on recordkeeping issues	<input type="checkbox"/> Yes	<input type="checkbox"/> No
1.2	Recordkeeping requirements are analysed and documented. These may include consideration of any specific records management requirements in the enabling legislation relating to an agency or the Archives Act 1983.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
1.3	The ownership of records is considered including: <ul style="list-style-type: none"> records of the agency that will remain with the agency records of the agency that will become the property of the third party entity records of the agency that will be held temporarily by the third party entity but will be returned to the agency 	<input type="checkbox"/> Yes	<input type="checkbox"/> No
1.4	Authority to transfer ownership or custody of temporary value records to a third party entity is sought from the State Archivist	<input type="checkbox"/> Yes	<input type="checkbox"/> No
1.5	No permanent value records are transferred to the ownership of a third party entity at the point of privatisation.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
1.6	Arrangements for the disposal of remaining agency records are made during the planning process including: <ul style="list-style-type: none"> destruction of temporary value records no longer required by the agency or third party prior to the privatisation transfer of permanent value records to TAHO prior to privatisation 	<input type="checkbox"/> Yes	<input type="checkbox"/> No
1.7	Record storage agreements are reached with the third party entity where temporary value agency records are in the temporary custody of the third party entity	<input type="checkbox"/> Yes	<input type="checkbox"/> No
1.8	Issues relating to access to records held by the third party entity are addressed.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
2	Contract or Agreement Recordkeeping requirements are included in the mechanism controlling the privatisation		
2.1	Existing temporary value records that will be transferred to the ownership of the third party entity are specified in the contract or agreement.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
2.2	The contract or agreement refers to the transfer of ownership authorisation issued by the State Archivist.	<input type="checkbox"/> Yes	<input type="checkbox"/> No

2.3	Existing agency records that will be transferred to the temporary custody of the third party entity are specified in the contract or agreement.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
2.4	The contract or agreement refers to the transfer of custody authorisation issued by the State Archivist.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
2.5	The contract or agreement specifies that existing agency records transferred to the custody of the third party entity are State records covered by the Archives Act 1983 and binds the third party entity to comply with the Act.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
2.6	Record storage arrangements for records in the custody of the third party entity are specified in the contract or agreement and conform to the storage principles specified in the State Records Guideline No. 11, Physical Storage of State Records.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
2.7	Records access conditions established between the agency and the third party are specified in the contract or agreement.	<input type="checkbox"/> Yes	<input type="checkbox"/> No