Records Issues for Outsourcing

including General Disposal Authority 25

A GUIDELINE FOR AGENCIES ABOUT THEIR RESPONSIBILITIES FOR RECORDKEEPING IN OUTSOURCING ARRANGEMENTS
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INTRODUCTION

Purpose

This guideline has three purposes:

• to assist officers involved in the decision making process identify and address records issues when outsourcing service delivery or support services;

• to authorise the transfer of custody or ownership of records to a contractor, as required by the Archives Act 1983; and

• to provide details of other sources of information which are relevant to records issues.

The guideline consolidates information about records currently available from a number of sources.

It addresses three categories of records:

• those held by the agency prior to the commencement of the contract;

• those created and maintained by the contractor; and

• those created by the agency during the course of the contract.

It is equally applicable for the outsourcing of Information Technology activities as it is for other types of services.

The delivery of services to the public by the Commonwealth Government has always been required to be performed in an accountable, equitable and efficient manner. Commonwealth agencies are ultimately accountable to the Parliament for their actions.

Proper recordkeeping is a crucial part of all government administration and accountability. It is the basis for establishing and maintaining documentary evidence of government activities and decisions supporting good business practice. The need for proper recordkeeping is equally applicable if the activities are outsourced.

To ensure that the accountability and efficiency of government administration is not diminished as a result of outsourcing, agencies contracting out the provision of services to other parties must ensure that these arrangements include recordkeeping practices which meet Commonwealth standards and requirements.

One of the major problems when investigating complaints by members of the public or auditing the practices of an agency is the lack of sufficient records to fully investigate the circumstances. Acknowledging that this is a problem within the Commonwealth regime, failure by contractors to maintain sufficient records is also of concern.
Sufficient records must also be maintained to ensure that the contract is being performed to expectations.

It should also be remembered that, in many instances, records created by an agency or a contractor have a value for some time after the completion of the contract. These values include financial, evidential and administrative uses of the records. Records may also have a long-term value for public and official research.

The arrangements for contracting out services are very complex. Contracts must cover such things as: careful specification of subsets of services with appropriate objectives; service level requirements tied to payment schedules; liquidated damages clauses; incentive schemes; subdivision of services with a right to transition parts of the service to other service providers on failure to perform the services (or important aspects of them); providing enforceable complaint mechanisms; security clauses and transitioning provisions.

Because of this complexity, it is easy to overlook issues relating to records, such as: ownership of documents/Intellectual Property clauses; disclosure/confidentiality clauses. You must also ensure that the contract specifies what recordkeeping requirements are needed. This will enable contractors to be held accountable for their actions and will enable agencies to meet their obligations to the Government and the public. It will also facilitate the ‘transition out’ phase at the end of the contract if the existing contract is not renewed.

**Disclaimer**

The advice contained in this document should only be used for general guidance. It cannot cover all possible scenarios encountered when outsourcing. You will need to investigate the issues surrounding each outsourcing exercise and take appropriate action depending on the outcomes sought. You should seek specific legal advice about contractual arrangements applicable to your circumstances and the advice of your Records Management specialists.

This advice is not intended for use in cases of sale or privatisation of Government enterprises. You should seek the advice of the National Archives of Australia in these cases.
Definitions

**Agency** covers all Commonwealth institutions as defined by section 3 of the Archives Act 1983. It includes Commonwealth Government departments, statutory authorities and Commonwealth controlled companies;

**Commonwealth**, where used in the context of ownership, also includes those Commonwealth authorities which can own property in their own right;

**Contractor** covers all service providers whether it is a state, territory, private company or an individual;

**Custody** refers to the ‘physical’ possession of property, such as records (apart from any rights of ownership);

**General Disposal Authorities (GDA)** are similar to Records Disposal Authorities but apply to records which found in a number of agencies;

**In-house service providers** are also covered by the term contractor, but they will usually be subject to the same recordkeeping regime as the Commonwealth agency;

**Records Disposal Authorities (RDA)** are the permission given by the National Archives of Australia for a Commonwealth agency to legally dispose of records (by destruction, transfer of custody or the transfer of ownership). They identify the value of the records to the future administration of the Commonwealth, the evidence of the rights and obligations of the Commonwealth or the people and their possible long term research use;

**Transfer of ownership** refers to the transfer of physical (and possibly intellectual) property rights in records to another party;

**Transfer of custody** refers to the transfer of physical custody of property, such as records, to another party, with the Commonwealth retaining the ownership of that property (for example, a loan of an item).
COMMONWEALTH RECORDS AND THE LAW

Records relating to the responsibilities of your agency must be created, managed and disposed of in an accountable manner, even if your agency does not directly create them, store them or ultimately dispose of them.

The Archives Act 1983

The Archives Act 1983 provides a framework for consistent and accountable recordkeeping practices. This regime applies to all records owned by the Commonwealth. Commonwealth records are defined in section 3 of the Archives Act as being ‘records which are the property of the Commonwealth or a Commonwealth institution’. Records are created and kept as evidence of agencies’ functions, activities and transactions. Records can be stored and managed in any format (e.g. paper, video, microfilm, electronically on computer).

The Archives Act places restrictions on the destruction and the transfer of the ownership or the custody of Commonwealth records. This is to ensure that the evidence contained in records is not lost or compromised because they have been destroyed, sold or given away, or removed from Commonwealth control. The restrictions on destruction apply to all Commonwealth records no matter where they are located or how old they are.

The Archives authorises the destruction or transfer of records by issuing ‘Records Disposal Authorities’. These consider the legal, evidential, administrative and other uses of the records as well as the long-term research value of the records. Records Disposal Authorities also identify records which should be retained permanently.

The Archives Act also grants a right of free public access to records which survive for more than 30 years. Some records may be withheld if they contain material that is still sensitive.

Other legislation affecting Commonwealth records

As well as the Archives Act, other general legislation such as the Privacy Act 1988 and the Freedom of Information Act 1982 also apply to Commonwealth records. In addition, specific legislation administered by your agency might also include requirements relating to the creation, access to or disposal of records. For example, section 488 of the Migration Act 1958 places restrictions on ‘reading’ and ‘examining’ certain records. Section 16 of the Income Tax Assessment Act 1936 places restrictions on the ‘disclosure’ of information. This section also defines a person ‘employed by the Commonwealth’ to include ‘a person who, although not appointed or employed by the Commonwealth, performs services for the Commonwealth’. This clearly covers outsourcing arrangements. You should check if there are legislative restrictions applicable to your agency.
These laws provide the framework for Commonwealth agencies to be accountable to the Government and the public. The principles on which these laws are based should apply to Commonwealth records whether they are in your agency’s possession or not. It is your responsibility to ensure that Commonwealth records relating to the functional responsibilities of your agency are created, managed, made accessible and disposed of in an accountable manner, even if you do not directly create them, store them or ultimately dispose of them.

**Freedom of Information Act 1982**

The Freedom of Information Act 1982 provides a right of public access to, and correction of, Commonwealth records. This is generally only applicable when these records are in the possession of the Commonwealth agency.

The Government is currently investigating how best to provide access under FOI to information held by third parties supplying services to the Government. In the meantime, to ensure that the public right of access is not diminished, you should develop a transparent mechanism to deal with these requests (eg if the agency receives a request from a member of the public, the agency should retrieve the record from the contractor and determine any exemptions before making the record available to the requestor – an individual should not have to discover who the contractor is, and then approach that contractor for access). This is particularly important for records relating to individuals or where there is a known public interest in the records.

**Crimes Act 1914**

Section 70 of the Crimes Act 1914 prohibits a Commonwealth, or a former Commonwealth, officer from disclosing information obtained as a consequence of their employment. Section 3 of the Crimes Act extends the definition of Commonwealth officer to someone who performs services for or on behalf of the Commonwealth, a Territory or a public authority under the Commonwealth. A contractor or the contractor’s staff may therefore be prosecuted for disclosing information.

**Privacy Act 1988**

The Privacy Act 1988 protects the rights of individuals as they relate to the collection, storage, use and disclosure of personal information. It also provides rights of access and alteration for individuals in relation to their own information. The Privacy Act does not apply generally to the private sector, although it has some application in respect of tax file numbers and credit reporting information.
The Privacy Act contains a detailed set of standards known as the Information Privacy Principles (IPP). IPP 4(b) states ‘that if it is necessary for the record to be given to a person in connection with the provision of a service to the recordkeeper, everything reasonably within the power of the record keeper is done to prevent unauthorised use or disclosure of information contained in the record’. This clearly places an onus on an agency to ensure the same level of protection for any records containing personal information that are transferred to contractors as if they were in their own possession.

The Government is currently investigating how best to protect personal information held by third parties supplying services to the Government. In the meantime to ensure the protection of personal information in the hands of a third party, outsourcing contracts should include suitable clauses to protect that information.

**Implicit requirements for recordkeeping**

Many laws require, either specifically or by implication, that records should be created and maintained. Many decisions made by Commonwealth agencies may be subject to rights, merits or judicial reviews, either internally or through an external body such as the Administrative Appeals Tribunal or the courts. The Ombudsman is empowered to investigate complaints about the ‘administration’ of agencies. Internal and external auditors are also empowered to investigate the conduct of agency activities.

There is a need to keep accurate and sufficient records to enable these bodies to review decisions and to investigate activities. These requirements are in addition to the general administrative need to keep an accurate record of business activities to support good business practice within your organisation.

**Examples of outsourcing in legislation**

The Employment Services Act 1994 and the Employment Services (Consequential Amendments) Act 1994 are examples of legislation which aim to protect the rights of individuals in an outsourcing type arrangement, preserving the rights which would apply if the service was conducted by the public sector. They include provisions to enable the Commonwealth to specify recordkeeping standards as well as extending the provisions of the FOI Act, the Privacy Act and the Ombudsman Act to the private sector service providers.

While it is unusual for outsourcing arrangements to be included in legislation, these Acts provide a model which can be followed and give an indication of the basis for the ongoing Commonwealth ownership of records and protection of the rights and entitlements of the public.
TRANSFERRING EXISTING RECORDS TO THE CONTRACTOR

Only transfer the custody of those records needed to ensure continuity of service.

Ownership of the records generally should remain with the Commonwealth.

When developing a contract, you will have to determine what existing Commonwealth records, if any, will need to be transferred to the contractor to enable the contract to be performed. The contractor will then be able to take over the management of those records, in accordance with recordkeeping standards prescribed by the agency.

Records not required by the contractor should be retained by your agency. In most cases, the Commonwealth should retain ownership of all existing Commonwealth records needed by the contractor to deliver services. For example, if you were outsourcing the provision of personnel services, the contractor would need ready access to the records of all current personnel to provide that service efficiently. Because there would be no need for the contractor to have access to the records of former personnel, their records should be excluded from transfer.

Section 24 of the Archives Act 1983 places a general prohibition on the transfer of ownership or custody of records to non-Commonwealth bodies. This prohibition does not apply if the permission of the Archives is given.

To facilitate the ‘transition’ of service delivery to a contractor, this guideline also includes a General Disposal Authority which authorises the transfer of custody of certain ‘existing’ records to non-Commonwealth bodies. The General Disposal Authority starts at page 29.

This authorisation is subject to the following terms and conditions being imposed on the contractor (usually by contractual means):

- prohibition on the destruction of records by the contractor without the express permission of the agency (in accordance with Records Disposal Authorities issued by the National Archives of Australia);
- arrangements to recover records at the completion or termination of the contract, or at any other reasonable time;
- requirements that the records are appropriately managed and maintained;
- protection of the security of the records;
- compliance (as appropriate) with the provisions of the Privacy Act 1988;
- prevention of unauthorised disclosure of information, in accordance with the provisions of the Crimes Act 1914 and any legislation relevant to your agency;
• provision of reasonable access to the records by the Commonwealth and its authorised agents;
• limitations on the use of the records to legitimate purposes under the terms of the outsourcing arrangement.

These conditions would be similar to those placed on any Commonwealth records created by the contractor as a result of the contract. They are discussed in more detail later in this guideline.

You may also have to make special provisions for some records over and above the conditions listed. If records contain sensitive or security classified information, or if disclosure would result in a breach of confidence or prejudice any continuing Commonwealth action then it may be preferable not to transfer those records to the contractor. If faced with the previous example of outsourcing personnel services, you may decide not to transfer all records relating to any staff counselling or disciplinary action. If it is necessary to transfer selected records, then it is essential to ensure that the information is suitably protected.

In some cases, it may be appropriate to retain the records in agency custody and provide access to the contractor as required. Making copies of relevant records (or parts of records) to transfer to the contractor is also an option.

You should keep details of those records which transfer to the contractor. This is to ensure that the records can be located if required and to ensure that all records are returned at the end of the contract.

The attached General Disposal Authority also authorises the transfer of ownership of copies of operating manuals, procedural guidelines, publications, handbooks, etc that will be needed by the contractor to perform the tasks required of them. However, you generally should not make copies just to be able to transfer ownership. If you feel that ownership of other records should be passed to the contractor, please contact your local office of the National Archives of Australia for advice.

Ideally, all agency records should be covered by a Records Disposal Authority issued by the National Archives of Australia. A Records Disposal Authority specifies which records should be retained permanently and when other records can be legally destroyed. They are issued as a result of an assessment of the values (including the administrative, financial, legal, evidential and research uses) of classes of records. You should consult your Records Management specialists for advice about applicable RDAs and the likely value of the records to the Commonwealth.

Records which do not transfer to the contractor should be sentenced and managed in accordance with applicable Records Disposal Authorities. Suitable arrangements for the ongoing management of the records whose custody is transferred to the contractor will also have to be considered. Your Records Management specialists should be able to provide advice on this.
OWNERSHIP OF RECORDS CREATED BY THE CONTRACTOR

The Commonwealth should own all records that it needs to maintain accountability to the Parliament and to the people.

This must be done by contractual means.

The Archives Act does not apply to records created and controlled by contractors which are not specifically ‘owned’ by the Commonwealth.

Other legislation, such as the Freedom of Information and Privacy Acts, generally does not apply to records not in the ‘possession’ of a Commonwealth agency (although this situation may change - see page 9 for more information).

Unless specified in a contract, agencies may not be able to obtain access to records owned by a contractor for its own needs.

For these reasons, the Commonwealth should own all records that it needs for its ongoing business purposes and to maintain accountability to the Parliament and to the people. In an outsourced environment, this would mean all records created by the agency which have been provided to the contractor, and any records created by the contractor in the performance of the contract which would provide essential evidence of service delivery, should belong to the Commonwealth.

Depending on the nature of the services provided, it is not always necessary to have ownership of all records created by a contractor vested in the Commonwealth. This is discussed in more detail below.

It is therefore important to clearly define who will own which records. If ownership is not properly vested in the Commonwealth, records of significant value to the Commonwealth and the community for administrative, financial, legal, evidential and research purposes might be unavailable through loss by destruction or disputed ownership. This situation may compromise operational efficiency and government and public accountability.

Ownership of records which will be created or maintained by contractors should be determined during the preparation of outsourcing documentation such as tender documents and contracts.

All legal agreements entered into by the Commonwealth for the purchase of services should clearly state the ownership (including intellectual property rights such as copyright) of any records resulting from the performance of the contract.
Services provided on behalf of the Government

This involves another party acting as an agent of a government agency to provide a service which is that agency’s responsibility. These are also called ‘core’ activities. Examples of this include contracting to private sector employment agencies the provision of employment placement services or the provision of a wide variety of services to veterans previously performed by the Department of Veterans’ Affairs.

Where the Commonwealth or a Commonwealth agency enters into an agreement or arrangement with another party which requires that party to provide services on behalf of the Commonwealth, then ownership (including intellectual property rights such as copyright) of existing or new records created by the contractor must be vested in the Commonwealth. These records will also be subject to the requirements of the Archives Act and other legislation as explained in the ‘Attorney-General’s Legal Services Guidelines’ issued 1 July 1995.

Services provided to Government

These are usually ‘non core’ functions of an agency. They include support functions which may have been previously undertaken in-house such as information technology, personnel, recruitment and property management as well as support functions previously delivered by the former Department of Administrative Services such as car hire, property services, transport and storage. Even though these services have traditionally been undertaken by the Government they are not ‘core’ functions of Government as they service the Government itself, not its clients. These functions should be identified as services being provided to government.

It is not always appropriate that contracts for the supply of services to the Commonwealth should vest ownership of all or any records in the Commonwealth. This issue must be considered carefully and be directly addressed in legal agreements so there is no doubt of ownership of any material resulting from the agreement.

To determine if a class of records should be owned by the Commonwealth, you should ask ‘will I (or another contractor) need these records to continue operations at the end of this contract?’ If the answer is ‘yes’ then you should ensure that the ownership of those records is vested in the Commonwealth.
You will also need to consider the likely uses of the records once the current action is completed. These uses would include:

- referral by the agency (or another contractor) for any reason;
- use of the records to establish the rights, entitlements or obligations of the Commonwealth or an individual;
- use for ongoing research by the Commonwealth or an individual.

Records Disposal Authorities issued by the National Archives of Australia, applicable to the records, will give an indication of how long records should be kept after action is completed. This information may be useful to help decide the likely use of the records after action is completed.

If the records would have these uses, then their ownership should be vested in the Commonwealth.

Individual classes of records may be owned by the contractor, if it has been determined that they would not be reasonably required by the Commonwealth for any further purpose. If the answer to any of the previous questions is ‘no’ then ownership probably can be vested in the contractor. It is likely that these records would include records of a short term, facilitative nature. You may then need to consider if the agency would need access to these categories of records for any purpose. If so, you will need to specify in the contract what that access should be.

There are also categories of records to which the Commonwealth would have no claim to ownership. It is likely that these will include ‘housekeeping’ records, used by the contractor to support their activities under the contract (eg personnel records, financial records, intellectual property developed by the contractor prior to the current contract).
Checklist – who should own records created by the contractor?

Determining the ownership of records created by the contractor is one of the key records issues for an outsourcing arrangement. The Commonwealth should own all records that it needs to maintain accountability to the Parliament and to the people and to protect their interests.

You should identify all types of records which will be required to be created by the contractor. In many cases, they will be similar to the types of records already created by your agency to support the activity.

For each group of records, you should ask the following questions:

1. Does the outsourced activity represent services performed on behalf of Government?

   For example, are they:
   - a core function of your agency?
   - a provision of service directly to your clients?
   - a regulatory responsibility of your agency?

   If yes, ownership of the records should be vested in the Commonwealth. If no, go to next question.

1. Would any individual records in the group be required by the agency (or another contractor) at the termination of this contract, to enable the service delivery to continue or for any other reason?

   For example
   - if a particular type of current case record would be needed to be transferred to a new contractor, then all case records (current and non-current) should be owned by the Commonwealth.

   If yes, ownership of the records should be vested in the Commonwealth. If no, go to next question.

1. Would the records:
   - be referred to by the agency (or another contractor) for any reason after the action is completed?
   - be used to establish the rights, entitlements or obligations of the Commonwealth or an individual?
   - be used for ongoing research by the Commonwealth or an individual?

   Records Disposal Authorities issued by the National Archives of Australia, applicable to the records, will give an indication of how long records should be kept after action is completed. This information may be useful to help determine the ongoing use of the records.

   If yes, ownership of the records should be vested in the Commonwealth. If no, go to next question.
1. Would the Commonwealth need access to these records for any purpose, either during or after the contract?

   If yes, the contractor could own records and you should ensure that the contract provides for access.
   If no, contractor should own records (and you do not have to worry about provision of access).

**For each group of records to be owned by the Commonwealth, you should ensure that the contract includes:**

- appropriate recordkeeping standards;
- appropriate measures to protect privacy and security standards;
- appropriate access to the records by the Commonwealth is permitted; and
- arrangements for the return or the proper disposal of the records.
Examples of categories of records and who should own them

The types of records listed here are only included as examples. This list may serve as the basis of a schedule to the contract specifying records ownership and recordkeeping standards. You will have to modify this list to suit each individual circumstance.

Existing Commonwealth records which remain owned by the Commonwealth where custody passes to the contractor

Case records relating to [type of service]

Existing Commonwealth records where ownership passes to the contractor

Copies of operating manuals, procedural guidelines, publications, handbooks, etc that may be required by the contractor to perform the tasks required of them

Note: Any other records which the agency wishes the ownership to pass to the contractor require specific authorisation from National Archives of Australia.

Commonwealth records created by the contractor

Case records relating to [type of service] (including new cases and ongoing management of existing cases)

Note: You will need to specify the standards for recordkeeping for these records.

Contractor records which are subject to access by the Commonwealth

Records of processor usage

Batch Job reports

Finance and Accounting records relating to the contract

Note: You will need to specify how long the contractor should maintain these records.

Contractor records which are not subject to access by the Commonwealth

Personnel records relating to contractor’s staff

Finance and Accounting records of the contractor not relating to the contract


DESTRUCTION OF RECORDS BY THE CONTRACTOR

Records owned by the Commonwealth should only be destroyed by a contractor with the permission of the agency, in accordance with the requirements of the Archives Act.

Records owned by the Commonwealth generally cannot be destroyed without the approval of the National Archives of Australia. This is to ensure that records are retained for as long as they are of value to the Commonwealth and the public; and to protect the public’s right of access to records. The prohibition on destruction applies no matter where the records are kept; in the Commonwealth’s custody or in a contractor’s custody.

Some records may have value for a considerable time after an outsourcing contract has expired. It is likely, however, that some records may become due for destruction while they are in the custody of a contractor.

You should ensure that mechanisms are in place to enable the contractor to destroy Commonwealth records only in accordance with Records Disposal Authorities issued by the National Archives of Australia. You should seek the advice of your Records Management specialists to determine what disposal authorities are applicable to particular classes of records. Records subject to ‘disposal freezes’ or relating to pending legal action must not be destroyed, no matter where they are held.

It is recommended that you require the contractor to seek specific approval to destroy records in their custody. This way, the risk of inadvertent destruction is minimised.

It is your agency’s responsibility to advise the National Archives of Australia of any records destroyed. Your Records Management specialists will be able to advise you of the correct procedures.

In general, the contractor would be free to destroy records which they own at any time (subject to any legislative and recordkeeping requirements placed on their business). However, it may be desirable to require the contractor to retain some records for a specific period, for example, if they would be required by the agency to audit the conduct of the contract. These types of records are likely to be those identified as requiring access by the Commonwealth.
**TRANSFER OF COMMONWEALTH RECORDS AT THE COMPLETION OF THE CONTRACT**

A smooth termination or completion of the contract is desirable.

When you are planning a contract, it is easy to overlook arrangements for the termination or completion of the contract.

You should identify which records would be required by a new contractor (or the agency, if outsourcing is not to continue) to ensure continuity of service. These are the records which should have ownership vested in the Commonwealth.

You will have to consider a strategy for the transfer of all Commonwealth records either back to the Commonwealth or to a new service provider. For example, do you want the records to be stored by the contractor and returned at the end of the contract, or would it be better to have records returned to your agency on a regular basis during the course of the contract? You should consider requiring the contractor to physically arrange the records to facilitate their eventual destruction or transfer to National Archives of Australia or another storage contractor, as appropriate. You should note, however, that the Archives prefers only to deal with agencies rather than contractors when transferring records to its custody. Consult your Records Management specialists for advice on suitable arrangements.

For records stored in electronic format, you should consider the possibility that records may need to be migrated to another hardware or software platform.

The contract should provide a mechanism for the recovery of Commonwealth records at the completion (or earlier termination) of the contract. While the return of records to the Commonwealth is technically a ‘transfer of custody’, it does not require the explicit approval of the Archives as it is permitted under section 24(2)(d) of the Archives Act.
WHAT SHOULD BE SPECIFIED IN CONTRACTS ABOUT RECORDS?

The Commonwealth's interests in the records will have to be protected by contractual means.

To ensure the Commonwealth's interests are protected, contracts should:

- ascribe ownership, either to the Commonwealth or the contractor, as appropriate;
- prescribe minimum standards of recordkeeping by the contractor for Commonwealth records consistent with those of the contracting agency;
- prescribe requirements to ensure that the records are not inappropriately used or disclosed by the contractor;
- protect the security of the records;
- provide a mechanism for access (and amendment or correction) by the public to records, if appropriate;
- ensure that any subcontractors are subject to the same level of compliance with these requirements.

You should seek specific legal advice to ensure that relevant clauses are included in the contract.

Ownership

The advice given in the section ‘Ownership of records created by the contractor’ on page 13 provides assistance in determining who should have ownership of what records.

You should detail those records which will be owned by each party. Likely categories of records will include:

- existing records which remain owned by the Commonwealth;
- existing records where ownership is transferred to the contractor;
- records created by the contractor which are owned by the Commonwealth;
- records created by the contractor which are owned by the contractor and the Commonwealth requires access;
- records created by the contractor which are owned by the contractor and the Commonwealth does not require access.

The ownership of the records created by the contractor should also include the ownership of any intellectual property contained in the records.
Recordkeeping - Commonwealth records

The contractor should be required to comply with the standards prescribed by the contracting agency for the creation, care, access, storage, preservation and return or legal destruction of all Commonwealth records resulting from the contract arrangements. These standards should be based on the Australian Standard for Records Management (AS 4390) which is endorsed by the National Archives of Australia for use by Commonwealth agencies.

These requirements should also extend to any existing Commonwealth records whose custody is transferred to the contractor. Unless these provisions are made the agency could undermine the Commonwealth’s interests and remove individuals’ statutory rights of access to records.

Your Agency should prescribe minimum standards of recordkeeping for those Commonwealth records created by the contractor. These standards may contain requirements for such things as (but not limited to): level of documentation of actions, standards to ensure the physical protection of the medium used (ie paper, film or microform). The agency should notify the contractor of these standards before commencement of the contract.

All Commonwealth records should be maintained by the contractor in a discrete recordkeeping system. The contractor should impose a system of control for Commonwealth records created by the contractor consistent with the agency’s system. This is to allow for these records to be integrated into the agency’s recordkeeping system on completion or other termination of the contract. Specifications of the agency’s system should be provided to the contractor.

The contractor should store Commonwealth records in conditions prescribed by the contracting agency to ensure that records are not lost through damage, loss or destruction. The contractor should be required to notify the agency should any loss or damage occur.

You should also ensure that you include mechanisms in contracts to prevent unauthorised destruction of Commonwealth records and plan for the eventual return of the records to the Commonwealth.

Where records will be created, stored and controlled using computers, you should ensure that, on completion or other termination of the contract, the contractor will facilitate the transfer of those records to any software and hardware platform specified by the agency.

Recordkeeping - Contractor records

To enable an effective ‘audit’ of the contractor’s activities, it may be necessary to specify minimum standards of recordkeeping for records which will be ‘owned’ by the contractor. For example, in an ‘Information Technology’ contract, you may wish to specify that the contractor maintains ‘batch job’ records (for a specified time) to enable you to determine if service delivery standards are met; or details of ‘processor load’ to enable accounts to be reconciled.
In many cases, these types of records would be maintained in accordance with the business needs of the contractor, but it is safer to specify them in a contract.

If the contract covers services in more than one location, it is also important to ensure that standards are applied consistently across those locations.

Records owned by the contractor should be adequately controlled so the contractor is able to meet any requests for legitimate access by the Commonwealth. They must be controlled separately from any Commonwealth records.

**Inappropriate use**

Inappropriate use of the records would include breaches of privacy, unauthorised disclosure of information to other parties and use of information outside the terms of the contract. You should ensure that these issues are addressed.

It may also be necessary to specify what requirements should be in place to identify cases of inappropriate ‘browsing’ of records by agency or contractor staff.

You may require the contractor’s staff to sign a ‘safeguard of official information’ (see next page).
SAFEGUARD OF OFFICIAL INFORMATION - Crimes Act 1914

Section 70:

1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he is authorised to publish or communicate it, any fact or document which comes to his knowledge, or into his possession, by virtue of being a Commonwealth officer, and which it is his duty not to disclose, shall be guilty of an offence.

2) A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him), any fact or document which came to his knowledge, or into his possession, by virtue of having been a Commonwealth officer, and which, at the time he ceased to be a Commonwealth officer, it was his duty not to disclose, shall be guilty of an offence.

Penalty: Imprisonment for two years

NOTE: Section 3 (1) of the Crimes Act 1914 states that the term ‘Commonwealth officer’ includes a person who ‘performs services for or on behalf of the Commonwealth, a Territory or a public authority under the Commonwealth’.

I .......................................................... ..........................................................

(Full Name)

of ...........................................................................................................

(Address)

acknowledge that my attention has been directed to section 70 of the Crimes Act 1914.

I further undertake not to disclose any information, including personal information, commercial in confidence information, and security classified information, which comes to my knowledge or into my possession as a result of the performance of the Consultancy Services; as described in an agreement made between ...........................................................................................................(Name of Consultant or firm) and the Commonwealth of Australia, in respect of which I shall perform services.

.......................................................... ..........................................................

Signature Witness

..........................................................

Date
Security

You should ensure that any records which have a national security classification are appropriately protected. This may extend to communications facilities between the agency’s premises and the contractor’s premises.

You may also wish to ensure that the Commonwealth has a right of inspection of the contractor’s premises and facilities to ensure compliance with any security requirements.

The forthcoming Commonwealth Protective Security Manual provides advice on appropriate protection for these records. All volumes are potentially relevant, while volume F on the Security Framework for Competitive Tendering and Contracting is especially relevant.

Rights of access

The agency should ensure that it has reasonable access to all Commonwealth records that are in the custody of the contractor. This should extend to other Commonwealth agencies which may have an interest in the records (such as the National Archives of Australia, Australian National Audit Office, Ombudsman).

You should also ensure that it is possible to recover records which are needed by the agency for business. This would include the provision of access to records under Freedom of Information legislation [see page 9].

The Australian National Audit Office recommends that all contracts for outsourcing allow for reasonable access to the records relating to the contract owned by the contractor. This will enable the agency and the Auditor-General to fully ascertain the benefits gained by the outsourcing process and to monitor the conduct of the contract.

You may also need to make provision for the contractor to have access to records in your agency’s custody, especially if the contractor had created them and subsequently returned them to you.

If circumstances warrant, you may also include clauses which set out any conditions that may apply for the release of information to third parties. For example, if you were outsourcing the provision of legal advice, you could give assurances that any records which dealt with ‘professional legal privilege’ were exempt from public access under the Freedom of Information and Archives Acts.
MONITORING THE CONTRACT

What records should the agency create during the management of the contract?

You need to make sure you keep appropriate records in your agency about the process of outsourcing and managing the contract.

You should ensure that accurate records of the tender evaluation process are made. This will ensure that your agency can account for its decision to select a particular contractor, and will help protect against claims of impropriety.

Outsourcing contracts are usually applicable for a fairly long time. Because of this, it is highly unlikely that staff involved in the initial stages of the contract will have an ongoing responsibility over the duration of the contract. To ensure the success of the contract, adequate records of discussions with the contractor should be made.

These records should include:

- minutes of meetings between the agency and the contractor
- details of variations to the contract
- problems that arise during the course of the contract and their resolution
- ‘successes’ which occur during the contract.

As well as making a record of discussions for a ‘subject matter’ file, you may need to ensure that relevant material is available for overall ‘contract management’.

The Australian National Audit Office recommends that all contracts for outsourcing allow for the contractor to provide regular reports on the conduct of the contract. The nature of these reports should be identified and included in the contract.

These measures will assist in the general management of the outsourcing. They will also help to identify problems in the delivery of the service and ensure that the responsibilities of all parties are identified.

A record should also be kept of which records are transferred to the contractor, as well as which records are returned to the agency or destroyed by the contractor.

General Disposal Authority 15 provides information on the retention or destruction of records relating to tenders and contracts. Your Records Management specialists should be able to provide copies. They are also available from the National Archives of Australia.
FURTHER INFORMATION

Please contact your local office of the National Archives of Australia for further information about recordkeeping issues. Your agency’s Records Management specialists will also be able to provide advice on records issues.


Advice on the outsourcing of the sentencing of records is contained in the National Archives of Australia publication Using Contractors for Records Sentencing. There is also a Common Use Arrangement (BG 240) for the custody and storage of short term value records. Details of these are available from your nearest office of the Archives.

National Archives of Australia

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Tel: (03) 6244 0105
Fax: (03) 6244 6834

INTERNET
Email: archives@aa.gov.au
WWW: <http://www.naa.gov.au>
Other contacts

Guidance in relation to best practice recordkeeping and the rationale for maintaining full and accurate records is also provided by Records Management AS 4390 which the National Archives of Australia endorses. The application of the Standard to outsourced functions is explained in Part 3, page 16, paragraph 8.6.

The Office of the Privacy Commissioner provides advice about the implications of outsourcing functions where ‘personal’ information is transferred. This advice is also relevant in the transfer of other types of records.


The Office of Government Information Technology provides information on the outsourcing of Information Technology activities.
GENERAL DISPOSAL AUTHORITY NO 25

The Disposal Process

The disposal of Commonwealth records is the process of assessing the value of records for future use, identifying those which have enduring value and how soon the remainder can be destroyed or otherwise disposed of. The process can also involve the transfer of ownership or custody and the alteration of records. Further, it involves authorising the action arising from the assessment and putting the action into effect.

Section 24 of the Archives Act 1983 provides that records are not to be disposed of without the permission of the National Archives of Australia unless the action of disposal is positively required by law, or takes place in accordance with a normal administrative practice of which the Archives does not disapprove. Advice on the provisions of the Archives Act is available from any of National Archives of Australia offices.

Purpose of this Authority

This General Disposal Authority authorises the transfer of the custody of Commonwealth records to private contractors providing services, either on behalf the Commonwealth or to the Commonwealth. It also authorises the transfer of ownership of copies of certain records to a contractor.

This Authority also endeavours to protect the rights of the Commonwealth and its citizens by requiring that appropriate measures are in place before records are transferred out of Commonwealth custody.

Only those records which are reasonably required by the contractor to fulfil their obligations should be transferred. All other records should be retained by the agency. The remaining records should be sentenced in accordance with applicable Records Disposal Authorities, issued by the Archives, and disposed of accordingly (either by destruction or transfer to appropriate storage facilities).

Other than copies of records, this Authority does not authorise the transfer of ownership of any records. If you feel that it is necessary to transfer the ownership of any other records to the contractor, please contact your local office of the National Archives of Australia to obtain advice and authorisation.
Conditions attached to Authority

The transfer of custody of the records is only valid if the terms and conditions listed in the authority are met. These terms and conditions are to ensure that the agency’s obligations under the Privacy Act 1988, Archives Act 1983, Freedom of Information Act 1982, Crimes Act 1914 and any other legislation are met.

Other terms and conditions may be included in contractual arrangements entered into by the agency if required.

It is the agency’s responsibility to ensure that all conditions attached to the transfer are met.
# Authorisation

**GENERAL DISPOSAL AUTHORITY 25**

| Person to whom notice of authorisation is given: | Secretaries of Departments, Heads of Authorities and Commonwealth controlled companies (as listed in attachment A to the memorandum 1998/27 dated 5 March 1998 accompanying this Authority) |
| Purpose: | Authorises arrangements for the disposal of records in accordance with section 24(2)(b) of the Archives Act 1983 |
| Application: | Transfer of custody or ownership of records to contractors providing services on behalf of or to Government under outsourcing arrangements |

This authorisation applies to only the disposal of the records described on the authority in accordance with the disposal action specified on the authority. The authority will apply only if disposal takes place with the consent of the agency that is responsible at the time of disposal for the functions documented in the records concerned.

| M Piggott | 5 March 1998 |
| Authorising Officer, Australian Archives | Date of Issue |

| Michael Piggott | Date of Amendment |
| Director Disposal Policy and National Coordination Government Services | |

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Classes
GENERAL DISPOSAL AUTHORITY 25

<table>
<thead>
<tr>
<th>Entry</th>
<th>Description of Records</th>
<th>Disposal Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Commonwealth records in existence at contract start date reasonably required by the contractor to perform its contractual obligations</td>
<td>Transfer custody of records to contractor for the period of the contract provided that the terms and conditions listed below are met.</td>
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</tbody>
</table>

Terms and Conditions

The Agency must:

- ensure that the contractor does not destroy or otherwise dispose of records without the express permission of the Agency (in accordance with Records Disposal Authorities issued by the Australian Archives);
- recover all Commonwealth records at the completion or termination of the contract, or at any other reasonable time;
- ensure that the records are appropriately managed and maintained;
- ensure that the security of the records is protected;
- ensure that personal information is protected consistent with the provisions of the Privacy Act 1988;
- ensure that unauthorised disclosure of information is prevented, in accordance with the provisions of the Crimes Act 1914 and any legislation relevant to the Agency;
- the contractor provides reasonable access to the records by the Commonwealth and its authorised agents;
- ensure that the use of the records by the contractor is limited to legitimate purposes under the terms of the outsourcing arrangement.

2 Copies of: operating manuals, procedures, guidelines, publications, handbooks, etc that are required by the contractor to perform contractual obligations | Transfer ownership to contractor. |