



NATIONAL ARCHIVES OF AUSTRALIA

Obligations of Contractors in Australian Government outsourcing arrangements

Purpose

This fact sheet provides advice on information management requirements, including the ownership of records, for contractors providing services on behalf of, or to, the Australian Government (ie Federal or Commonwealth government).

- **Services provided on behalf of the Australian Government** – where a contractor acts as an agent of a government agency and provides a service that is that agency's responsibility (eg private sector contractors providing employment placement services on behalf of the Department of Employment; or provision of services to veterans on behalf of the Department of Veterans' Affairs).
- **Services to the Australian Government** – where a contractor provides administrative functions to a Government agency (eg personnel, ICT, facilities or records management services).

Commonwealth records and the law

Commonwealth records are records created and kept as evidence of business activity.

There are a number of laws which apply to Commonwealth records. These include generally applicable legislation such as the *Archives Act 1983*, the *Privacy Act 1988* and the *Freedom of Information Act 1982*. The Archives Act, for example, prohibits the transfer of custody or ownership of a Commonwealth record to another party unless certain requirements have been met. Furthermore, under the Archives Act, the destruction of Commonwealth records requires the Archives' permission, unless destruction is required by another law. In addition, specific legislation administered by agencies may also include requirements relating to the creation, access or disposal of records.

These laws provide the framework for Australian Government agencies to be accountable to the Government and to the public. The principles on which these laws are based continue to apply to Commonwealth records in the custody of contractors.

Who owns records in outsourcing arrangements?

Where a contractor provides services on behalf of or to the Australian Government, ownership (including intellectual property rights such as copyright) of existing or new records created by the contractor is generally vested in the Australian Government. However, in some instances, ownership may rest with the contractor.

Records created as part of a service provided to clients **on behalf of the Australian Government** will be Commonwealth records, including client complaints, as the function being delivered is a core function of the Australian Government. However, some records



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which are facilitative or housekeeping in nature and that have no direct link to the contracted service will probably not be Commonwealth records. This may for example include the contractors' own operational records such as its payroll and financial records.

Where a contractor provides services **to the Australian Government** itself rather than to its external clients, ownership of records may not be vested in the Commonwealth. For example, records of a contractor which provides a cleaning service to an Australian Government agency, where cleaning is not the core function of the government agency, will not generally be considered to be Commonwealth records. In another example, where the Australian Government contracts a company to write a report for Government, the report is a Commonwealth record but the contractor's business records are not considered Commonwealth records and remain property of the contractor.

Records documenting Commonwealth business are Commonwealth records under the *Archives Act 1983*. Provisions under the Act to which all parties, including commercial providers, are bound require the return of Commonwealth records to the Commonwealth. The ownership of the records should be set out in the service contract to assist contractors in understanding their responsibilities under the Act.

Information Management Requirements

Any Commonwealth records resulting from outsourcing contracts must be managed in accordance with requirements of the Archives Act, including adherence to records authorities issued under the Act as well as information management policies and practices applicable to Australian Government agencies.

[General Records Authority \(GRA 40\) Transfer of custody of records under Australian Government outsourcing arrangements](#) provides agencies with permission to transfer records to contractors for the period of the contract. It covers both existing records and new records created by the service provider during the contract.

The Archives Act is applicable to contractors or any other person. To satisfy the information management requirements of the Australian Government with respect to Commonwealth records, contractors must:

- Ensure that the records are not inappropriately used, disclosed, or held in the custody of a party other than the controlling government agency without formal approval.
- Meet minimum information and records management standards for Commonwealth records, including the [Digital Continuity 2020 Policy](#) which requires Australian Government agencies to create and manage records digitally.
- Comply with legislative requirements such as the *Archives Act 1983*, *Privacy Act 1988*, *Freedom of Information Act 1982*, agency-specific legislation and requirements relating to confidentiality or disclosure.
- Maintain the records during the period of the contract in a format that is accessible by the Australian Government, its authorised agents and the public, as appropriate.
- Undertake required migration to avoid obsolescence and ensure continued access to the records.
- Return Commonwealth records to the Australian Government at the end of the contract.

- Not destroy Commonwealth records without express permission of the agency, in accordance with records authorities issued by the National Archives.

Transfer of Commonwealth records at the completion of the contract

As indicated above, contractors are obliged to return Commonwealth records at the conclusion of the contract. To support this outcome contractors must:

- Return records to the contracting Australian Government agency within a reasonable timeframe.
- Return records in a digital format that is accessible to both the Commonwealth and the contractor if required.
- Return or destroy all duplicates of Commonwealth records (including digital copies) at the completion of the contract.
- Facilitate the transfer of Commonwealth records to a new service provider if the outsourcing contract with the old service provider is not continuing.

Requirements for contractors to access records at the conclusion of the contract may be included in outsourcing arrangements where there is a business need.

Further information

For further advice on information management responsibilities and obligations of contractors and Australian Government agencies under outsourcing arrangements, see the following resources:

[General Records Authority 40: Transfer of custody of records under Australian Government outsourcing arrangements.](#)

[Australian Government Solicitor Fact Sheet: Commonwealth legislation that may apply to Australian Government contractors](#)

[Department of Finance: Commonwealth Contract Terms \(C.C 22\)](#)