

Public Records Act and Electronic Issues

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This paper updates the paper on our website, "[Record and Information Management: Legal Issues](#)", delivered to the Records Management Association of Australasia.

Proactive record-keeping duties

"Record" under the PRA is widely defined, and of course includes electronic material. The starting point is Section 17:

17 Requirement to create and maintain records

(1) Every public office and local authority must create and maintain full and accurate records of its affairs, in accordance with normal, prudent business practice, including the records of any matter that is contracted out to an independent contractor.

(2) Every public office must maintain in an accessible form, so as to be able to be used for subsequent reference, all public records that are in its control, until their disposal is authorised by or under this Act or required by or under another Act.

(3) Every local authority must maintain in an accessible form, so as to be able to be used for subsequent reference, all protected records that are in its control, until their disposal is authorised by or under this Act.

Although the standards and the audit process have a glide path through to 2010, this is the law now. As under the old legislation, however, there are "blind eyes" as to enforcement. Should organisations take the risk?

The Chief Executive (or equivalent officer) carries responsibility for compliance (which of course he or she must ensure is delegated and handled).

"Public Office" is wide (Government Departments through to SOEs, Crown Entities, etc). "Local Authorities" (which includes most council controlled organisations, etc), as Section 17 indicates, also have broad duties beyond the narrow range of "protected records".

Standards

Key are the Archive NZ Standards, with their glide path through to 2010, such as:

- "Create and Maintain Recordkeeping Standard" (June 2008);
- "Electronic Recordkeeping Metadata Standard" (June 2008).

These are mandatory for public offices and local authorities except for schools. The Metadata technical specification (associated with the Metadata standard) is optional (although it is mandatory as to critical records: Requirement 5).

The mandatory standards follow international standards, including the leading risk standard. There is a pragmatic risk and business focus.

The records to be created and maintained will vary according to context and the particular "business" of the agency so it is too simplistic to draw generic conclusions about what is encompassed in "normal, prudent business practice".

Litigation and privilege issues

Excellent recordkeeping of course has many side benefits and that includes tracking down documents for legal purposes (eg; discovery in litigation and responding to OIA requests). The Create Standard claims that keeping good records reduces litigation risk. In fact many private organisations conclude that litigation risk is lower if records are not created and kept ("the smoking gun" problem). Overall, having documents is more risky than not having them. It is legitimate for them to take an approach that minimises documents

(but that does not extend to destroying documents when the prospect of litigation is present).

However, that is not an option for organisations covered by the PRA.

Locating documents for discovery and OIA requests can be very expensive, in terms of time and cost: hence, systems should be designed with this in mind. Multiple copies on the network present challenges.

Particular care is needed to ensure legal privilege is maintained. Most (but not all) solicitor (internal or external solicitor)/client communications are privileged. Communications for the primary purpose of litigation are usually privileged, although, by the point this has become an issue, careful decisions, with legal advice, are required before documents are created.

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.

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