

Public Records Act – What to Put in Contracts with Suppliers to the Public Sector

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Most New Zealand public sector agencies (central and local government, Crown entities, SOEs, etc) have PRA obligations in relation to services provided to them by contractors. Contractors range from individual contractors through to large suppliers providing outsourced services.

What do those agencies need to put in contracts with their suppliers? Recent guidance from Archives emphasise that the PRA needs to be covered, and there is no “one size fits all” solution.

As public sector agencies know, they must create and maintain full and accurate records of their affairs, in accordance with normal prudent business practice.¹ That is at the heart of the PRA² and it is driving considerable recordkeeping change in the sector.

That obligation extends to “records of any matter that is contracted out to an independent contractor”.

For example, if an agency gets outsourced services from a supplier, the agency still has the responsibility to ensure the supplier creates and maintains “full and accurate records of their affairs, in accordance with normal prudent business practice”.

Archives have recently produced a useful guide on this to help clarify what to do: *Record Keeping for Business Activities Carried out by Contractors*.³

Some key points emerge, in addition to confirmation that the public sector agency is responsible for ensuring the supplier maintains full and accurate records in accordance with the PRA. They include, according to Archives:

- Just like the agency’s own recordkeeping, the level of records to be created and

¹ *Public Records Act and Electronic Issues*
<http://wigleylaw.com/Articles/LatestArticles/public-records-act-and-electronic-issues/>

² Section 17, Public Records Act

³ http://continuum.archives.govt.nz/files/file/guides/sinness_Activities_Carried_out_by_Contractors_0.pdf

maintained by suppliers varies according to the circumstances. The agency and the contractor should use guidance such as Archives’ *Create and Maintain Record Keeping Standard*. Not everything has to be documented: the decision is made based on accountability requirements and mitigating risk. For example, generally it is not necessary, for PRA compliance, for records to be maintained as to the way contractors manage their business, according to Archives. That won’t always be the case though.

- Similarly, requirements for provision of information to the agency (ranging from regular status reports to more detailed information) should be resolved.
- The agency is responsible for working with the contractor to agree and clearly define expectations for the records to be created and maintained. The contractor’s responsibility should be clearly understood and documented, ideally in the contract. Where there is already a contract, it may be necessary to enter updated arrangements. The responsibilities can be set out in policies, guidance material, lists of categories of information, and so on. This can include requirements as to how the records are stored, their format, etc, to meet requirements such as ongoing accessibility.
- There should also be agreement on the processes for sharing and handing over

agreed electronic and physical records during and at the end of the engagement.

the situation, in a schedule and/or other material such as policy documents.

The Guide points out particular considerations where services are provided offshore: this will be an increasingly significant issue with developments such as cloud computing.⁴

The Guide also contains a useful link to draft PRA clauses to include in contracts. However, each situation is different and calls for a customised approach.

Keeping contracts as simple as possible, given these needs, is a challenge. One way to achieve this is to have a general PRA clause in the supply contract, which refers to greater detail, specific to

⁴ See our article, *The Case Against Cloud Computing*
<http://wigleylaw.com/Articles/LatestArticles/the-case-against-cloud-computing-revisited/>

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