

TAHO

Tasmanian Archive + Heritage Office

State Records Guideline No 20

Records required for legal proceedings

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Information Security Classification

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I Purpose

This Guideline provides advice to government agencies about the management of records required for legal proceeding including Royal Commissions, Commissions of Inquiry and other independent reviews established by a Minister.

Legal proceedings means any actual, threatened or reasonably apprehended civil or criminal proceeding in and court, tribunal or other body and includes inquiries and investigations conducted by -

- A Commission of Inquiry
- A Royal Commission
- A law enforcement body with inquiry and investigation powers – for example Anti-Discrimination Tribunal, workers compensation tribunal and other statutory bodies
- Professional regulatory body established by statute
- Coroner
- A Police Service
- The Integrity Commission of Tasmania or other integrity body
- The Ombudsman
- Auditor-General
- Judicial or other statutory Review proceedings
- Agency internal investigations for example investigations under the state service code of conduct or internal grievance mechanisms

I.1 Scope

It does not cover inquiries undertaken by a government agency that form part of their core business, e.g. the Tasmanian Audit Office.

I.2 Audience

The advice in this guideline is relevant for all Tasmanian Government agencies, including local government, state owned corporations and business.

The information in the guideline may be useful for records and information managers, legal practitioners, senior managers and other stakeholders involved in managing information.

I.3 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 Records required for legal proceedings - Implications for Tasmanian Government Agencies.

Tasmanian Government agencies MUST not destroy information, including records, where the agency knows that it is reasonably likely that that information may be used as evidence in current or future legal proceedings.

Example : British American Tobacco Cases

The McCabe v British American Tobacco Australia Services Ltd (BAT) case signalled a significant change in the management of records required for evidence. In this landmark case, the Supreme Court of Victoria ruled that BAT had destroyed the records that would have helped Rolah McCabe's case. It found that although legal proceedings were not current, BAT's policy of destroying records that they could foresee being used as evidence in a lawsuit – even if it had not yet started – was an illegal action directed specifically at preventing the litigant from having a fair trial.

While this finding was overturned on appeal (British American Tobacco Australia Services Ltd v Cowell), it signalled a potential shift in the court's view on records management requirements, and may be taken up in other jurisdictions, including the Commonwealth. Specifically, the court ruled that records documenting actions where it would be reasonable to assume that there may be litigation, should be kept whether or not a legal action has commenced. This replaces the previous requirement that destruction of records cease only after the announcement of litigation.

The issue in the original McCabe ruling was correspondence between BAT and Clayton Utz, BAT's lawyers in Australia, advising BAT to destroy certain records. The Supreme Court of Victoria ruled that ad hoc destruction of records for the purpose of hampering a case against a company, even though the action had not yet been commenced, was a criminal action.

When BAT appealed the decision, they established that the destruction of records was neither in contempt of the court nor a deliberate attempt to pervert the course of justice by convincing the court that the purpose of advice from Clayton Utz was to use records storage space more economically.

R v Ensbey

In *R v Ensbey* (2004); ex parte A-G (Qld), the Supreme Court of Queensland Court of Appeal considered the provisions of section 129 of the Queensland Criminal Code which provides for an offence when a person knowing that a document may be required in evidence in a judicial proceeding wilfully renders it illegible or indecipherable with intent to prevent it from being used in evidence. In that case, the court found that it was sufficient to prove the offence if a person believed that the document may be required in evidence in a possible future proceeding, that they rendered them illegible or indecipherable with the intent to prevent them being used for that purpose.

There is a similar offence provision set out in section 39 of the Crimes Act 1914 (Cth). This provision provides that:

Any person who, knowing that any book, document, or other thing of any kind, is or may be required in evidence in a judicial proceeding, intentionally destroys it or renders it illegible or undecipherable or incapable of identification, with intent to prevent it from being used in evidence, shall be guilty of an offence.

However, the effect of certain provisions of the Criminal Code 1995 (Cth) is to make the state of knowledge under a Commonwealth offence stricter. The meaning of 'knowledge' is defined in s5.3 of the Criminal Code 1995 (Cth) as:

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

R v Selim

These provisions have been considered by the Supreme Court of NSW in *R v Selim* (2007). In that case, the court distinguished the decision in *Ensbey* on the basis of the differing legislative provisions and found that it must be established, at the time when the document was destroyed that the person was aware, in the sense that they had a reasonable contemplation, that there was a possibility of judicial proceedings being initiated in the future.

These cases signal a change in judicial consideration of records disposal. In the past, destruction has been permitted if there were no current legal proceedings, but it has become important for agencies to consider the potential legal cases associated with the records that they generate, and whether their destruction might pervert the course of justice.

The *Archives Act 1983* provides that state records MUST not to be destroyed without the permission of the State Archivist, in the form of an approved Retention and Disposal Schedule or a Destruction Authority issued by TAHO.

Retention and Disposal Schedules and Destruction Authorities are based on a thorough analysis of the legal delegates, business activities and stakeholder requirements at the time of issue. Destruction of records in accordance with a retention and Disposal Schedule is systematic, rather than ad hoc, and takes into consideration all foreseeable uses of the records.

As long as there is no change in context, it is unlikely that records destroyed pursuant to a valid records authority would be considered to be destroyed with the intention of spoiling a litigant's case.

Agencies are not required to keep every record just in case they may one day be needed in a future judicial proceeding. However, agencies are advised to retain and maintain records in an accessible form if the agency knows it is reasonably likely that the record may be needed as evidence:

- in current judicial proceeding (this includes a legal proceeding or inquiry); or
- in future judicial proceeding that will be commenced or will likely be commenced.

A valid Retention and Disposal Schedule or Destruction Authority does not exempt Tasmanian Government agencies from this obligation.

It is likely that other jurisdictions may have differing provisions. If it is likely that Tasmanian Government agency records will be required as evidence for offences under Commonwealth legislation or if there are any additional issues, agencies should seek legal advice.

Court orders or subpoenas

Information Managers should be aware that Courts and Tribunals may require production of information which may include, or be limited to specific records.

The *Right to Information Act 2009* uses the term information rather than record. Information within an agency that has not been placed on official files or in recordkeeping systems may fall within the scope of 'information'.

When an agency is involved in litigation, RTI and court processes such as court orders, orders for discovery or subpoenas may be made to the agency directly or through Crown Law.

The request will have instructions which will set out the type and range of information sought. Once the Information Manager has identified the relevant information, the appropriate clearances need to be received from within the agency before the requested material is made available. Legal advice should also be sought where appropriate.

When a record has been legally disposed of, the Register of Records Destroyed should be provided in response to the court order or subpoena.

For RTI requests it is important that agencies only respond to a request for access to records if they have functional responsibility for the record. Recipients of a court order or subpoena must forward the request for the record to the owner of the record if they only have custody of the record, for example in Shared Service

arrangements. However for other proceedings if the agency is asked for the record then it must be provided regardless of whether the agency is the originator.

Possible legal proceedings

A Retention and Disposal Schedule specifies retention periods. That is, how long records are to be retained by the agency before being destroyed or retained as state archives by TAHO.

Retention periods set down in a schedule are minimum periods only and an agency may keep records for a longer period if considered necessary for business requirements. Reasons for longer retention could include legal requirements, administrative need or agency directives.

An agency must not dispose of any records where it is aware of possible legal action for which the records may be required as evidence.

TAHO RECOMMENDS that agency establish internal business process to:

- Identify hot topics or issues (e.g. this may be an announcement of a review by a Minister or current areas of interest by media or public)
- Engage relevant Business Unit managers throughout the agency
- Inform their senior executive
- Implement consistent collection, review and release procedures

Generally if a record that is subject to later proceedings has been lawfully destroyed under an approved Retention and Disposal Schedule before its need for legal proceedings were apparent, then agencies will be able to argue that such destruction was legally undertaken.

Retaining records for legal proceedings

TAHO recommends that agencies:

- develop processes for monitoring and identifying legal proceedings, both current and potential, that may relate to records controlled by the agency. This process SHOULD include a risk analysis of your agency's information holdings considering possible legal proceedings.
- take action to prevent the destruction of any records that may relate to the proceedings identified.
- develop agency wide records management policy and procedures for the management of records.
- manage records in functionally approved files or folders to facilitate the identification of the required material.
- maintain an information asset register so that information managers know the location of all agency records at all times.
- maintain an active records management program - agency records managers can mitigate the liability of government if agency records are regularly and routinely appraised, sentenced and, where appropriate, disposed of according to approved retention and disposal schedules.

These processes SHOULD ensure that records are not destroyed if your agency knows it is reasonably likely that those records may be required in legal proceedings. This applies whether the proceedings are in progress,

pending or reasonably likely to commence in the future. The suspension of destruction must be implemented regardless of any existing disposal schedules or authorities issued by TAHO and remain in place until the proceedings (including appeals) are completed, or it is confirmed that the records are not required.

Agencies required to produce records in legal proceedings

All Tasmanian government agencies **MUST** ensure that any records that may be relevant to legal proceedings are protected from destruction. This may require agencies to suspend the application of their Document Disposal Schedules under their relevant State Records Disposal Schedule or Disposal Authorisation in respect of certain matters, those relevant to the topic of the legal proceeding. Another example is the Royal Commission of Inquiry into Child Sexual Abuse; Agencies need to review records holdings and suspend destruction of case records of allegations or investigations of child sexual abuse matters, including historical records. Once a Royal Commission has been established, it is an offence under section 6k of the *Royal Commissions Act 1902* (Cth) to wilfully destroy any document or writing that is or may be required in evidence before a Royal Commission of Inquiry.

Further Advice

More information about managing records as evidence in legal proceedings is available on the TAHO website.

For information about your specific legal responsibilities, consult with legal staff within your agency.

If you receive a court order or subpoena, or become aware that agency records may be relevant to legal proceedings (whether current or pending), consult with legal staff within your agency.

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 the following documents:

- *Records Advice No 57 Records and documents required for legal proceedings*, Territory Records Office¹
- *Records Destruction and Possible legal proceedings*, National Archives of Australia²
- *State Records Guideline No. 1 Making Proper Records*³
- *State Records Guideline No. 2 Retention and Disposal of State Records*⁴
- *State Records Advice No 16 Legal Acceptance of State records*⁵

¹ http://www.territoryrecords.act.gov.au/_data/assets/pdf_file/0008/435914/Records-Advice-No-57-Records-and-Documents-Required-for-Legal-Proceedings-January-2011.pdf

² <http://www.naa.gov.au/records-management/strategic-information/standards/records-in-evidence/possible-legal-proceedings.aspx>