



13 November 2020

Ref: F2020/698

Mr David Shoebridge, MLC
Chair of the Public Accountability Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Chair,

Thank you for the Committee's consideration and resolution to my letter of 6 November 2020. Below you will find the NSW State Archives and Records Authority's advice on the matters you raised in your letter of 9 November 2020.

A) What sort of record is considered a 'state record' under the *State Records Act 1998*, and more specifically are working advice notes State records and are they required to be retained?

What is a State record?

The *State Records Act 1998* defines a record as

“any document or other source of information compiled, recorded or stored in written form or on film, or by electronic process, or in any other manner or by any other means.”
(section 3)

A State record is defined as

“any record made and kept, or received and kept, by any person in the course of the exercise of official functions in a public office, or for any purpose of a public office, or for the use of a public office, whether before or after the commencement of this section.”
(section 3)

These two definitions should be read together. The definition of State record is built upon the foundational definition of a record (i.e. that the information has been compiled, recorded or stored). However, to be identified as a State record, the record must be created or received within the context of the official functions of a public office, or for the purpose or use of the public office. Therefore, it is the official nature and the context in which the record has been created or received that identifies whether or not the record is a State record.

Public offices are defined in section 3 of the *State Records Act 1998*. The Office of the Premier and Minister's offices are included within this definition (s3(k1)).

The definitions of record and State record are format neutral; a State record should be determined by its content and purpose and not its format or the technologies used. State records can therefore include paper files and paper documents, letters, minutes, maps, plans, photographs, film, audio recordings; digital records such as Word documents, emails, Excel spreadsheets, metadata, audit and access logs, data in business systems or online applications, data sets, CCTV footage, SMS messages, messages on social media platforms (e.g. WhatsApp, Twitter etc.), photographs, moving images, and audio-visual recordings. I note that this is not a prescriptive list, but examples of the types of formats and records that are covered by the *State Records Act 1998*.

Working Advice Notes as State records

The description of 'working advice notes' given at the Public Accountability Hearing of the *Inquiry into integrity, efficacy and value for money of NSW Government grant programs* on 23 October fits the definitions above of record and State record.

The NSW State Archives and Records Authority is currently conducting its own Assessment of the disposal of working advice notes. Until the conclusion of this process, I am not able to provide an answer.

Retention and disposal of State records

Part 3 of the *State Records Act 1998* creates a statutory framework for authorising the retention and disposal of State records. This also includes processes to determine those State records which have permanent value to the people of NSW and should be retained as State archives.

Section 21(1) of the State Records Act provides protection measures for State records. Section 21(2) defines the compliant pathways for the destruction of State records.

Retention and disposal authorities, approved by the Board and issued by the Authority, are the formal legal instruments which define the minimum retention time periods of State records, after which they can be destroyed and identify those State records that are required as State archives, and therefore need to be kept in perpetuity.

Section 22 of the State Records Act also permits public offices to use 'Normal Administrative Practice' to allow for the disposal of certain types of facilitative and duplicate records that may not be covered in the retention and disposal authorities. Schedule 2 of the *State Records Regulation 2015* prescribes guidelines on what constitutes normal administrative practice.

Practical scenarios

The relevant retention and disposal authorities are:

- *General Retention and Disposal Authority: Ministers' Office records (GDA13)* (see <https://www.records.nsw.gov.au/recordkeeping/rules/gdas/gda13>); and
- *General Retention and Disposal Authority: Administrative records (GA28)* (see <https://www.records.nsw.gov.au/recordkeeping/rules/gdas/ga28>).

Below are examples of how retention and disposal authorities may be applied:

1. Jane Smith, CEO of *Public Office A* provides advice to the Minister's office. The decision on retention would be based on the content of the advice (as opposed to its name or format). If the advice pertained to "substantive aspects of the organisation's... functions..." it would be covered by GA28: Disposal class 10.2.1 and would be required to be retained as a State archive. If it was "advice not concerning substantive aspects of the organisation's...functions" it would be covered by GA28: disposal class 10.2.2 and only need to be retained for 5 years, after the expiry of which the record can be compliantly destroyed.
2. John Doe, project staff member in a Minister's office organises a function. The decision on retention of records created would be based on the significance of that function. If the function was "attended by the Minister" and "of State significance" it would be covered by GDA13: disposal class 1.12 and would be required to be retained as a State archive. If the function was not attended by the Minister or of State significance, GDA13: Disposal class 1.13 would apply and the State records are to be retained until no longer required for administrative purposes, then destroyed.

B) What are the consequences or penalties for a breach of the State Records Act 1998 by disposing of a state record?

Section 21(1) of the *State Records Act 1998* includes a financial penalty for failing to protect records (50 penalty units or \$5,500, per document or offence). Section 78 provides for NSW State Archives and Records to undertake proceedings for an offence against the Act or the *State*

Records Regulation 2015 in the Local Court, and creates a limitation period of 2 years for commencing proceedings for an offence against section 21.

It is noted that NSW State Archives and Records has never sought to prosecute an individual or government authority, and instead has chosen other regulatory practices to pursue enforcement of the requirements of the Act and improve public sector recorded keeping.

Subject to section 14 of the *Criminal Procedure Act 1986*, “any person” may commence a prosecution in respect to an offence under the *State Records Act 1998*, including the NSW Police Force. To our knowledge, no person has ever brought proceedings.

We will be in a position to provide further advice about the retention and disposal of working advice notes specific to the Stronger Communities Fund at the conclusion of our Assessment.

Yours sincerely

Adam Lindsay
Executive Director
State Archives and Records Authority of NSW