



22 January 2021

Ref: 20/0424

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

By Email: public.accountability@parliament.nsw.gov.au

Dear Chair

Final report of recordkeeping assessment of the Office of the Premier and records relating to the Stronger Communities Fund grants.

I refer to previous correspondence dated 5 November 2020 regarding the Public Accountability Committee's inquiry into the integrity, efficacy and value for money of NSW Government grant programs. In that correspondence, I outlined the NSW State Archives and Records Authority's (the Authority) handling of a complaint alleging, among other things, the non-compliant destruction of state records relating to the Stronger Communities Fund grants within the Office of the Premier.

Please find attached the final report outlining the Authority's recordkeeping assessment and findings for your review. In the spirit of transparency and accountability, the Authority will proactively release the report under Section 7 of the *Government Information (Public Access) Act 2009* (GIPA) and the *State Records Act 1998*. Accordingly, the Authority believes it appropriate for the full report to be made available along with other submitted evidence on the webpage of the inquiry.

This report was provided to the Office of the Premier on 22 January 2021.

Should you require any clarification on the content of the report, please contact me at
or on _____.

Yours sincerely

Adam Lindsay
Executive Director
State Archives and Records Authority of NSW

Encl. Recordkeeping Assessment – Alleged non-compliant disposal of records relating to the Stronger Communities Fund

Recordkeeping Assessment

Matter raised by Mr Greg Warren MP

Alleged non-compliant disposal of records relating to
the Stronger Communities Fund

Final Report
21 January 2021

Contents

1. EXECUTIVE SUMMARY3

2. INTRODUCTION.....5

3. COMPLAINT SUMMARY6

4. CONTACT AND CORRESPONDENCE WITH THE OFFICE OF THE PREMIER FOR THE PURPOSES OF THIS ASSESSMENT7

5. FINDINGS.....14

6. OTHER CONSIDERATIONS20

7. RECOMMENDATIONS21

8. END NOTE21

1. Executive Summary

The NSW State Archives and Records Authority (the Authority) is the statutory body established by the *State Records Act 1998* (the State Records Act). The Authority is responsible for establishing standards for the creation, protection and disposal of State records for NSW public offices, along with the management of the State Archives Collection. The Authority has functions that allow it to monitor compliance with the obligations under the State Records Act.

In October 2020 the Authority received a complaint regarding the alleged unauthorised disposal of records by a member of staff within the Office of the Premier. The records pertained to the Premier's role in the allocation of funding from the Stronger Communities Fund.

A review of the complaint identified that the substance of the allegations was sufficient to commence a recordkeeping assessment. This assessment was subsequently conducted, based on the scope of the complaint, in the context of the records management practices of the Office of the Premier at the times the alleged actions took place. The Authority recognises the cooperation of the Office of the Premier in assisting it to establish this context and providing information about the practices of the Office at the times in question.

The Authority requested material from, and met with representatives of, the Office of the Premier in order to test the veracity of the allegation as it pertains to the fulfilment of the Office's obligations under the State Records Act. This approach is consistent with the Authority's regular practices when conducting a recordkeeping assessment of a public office.

This assessment considers only 'working advice notes' and actions specifically referred to in the complaint, although the recordkeeping support available to staff within the Office of the Premier and the wider recordkeeping practices are considered for context.

The Authority acknowledges the high level of risk associated with the profile and functions of the Office of the Premier and makes the following findings as a result of the assessment.

Finding 1: The Authority finds that the Office of the Premier breached section 21(1) of the State Records Act with the unauthorised disposal of the working advice notes.

Finding 2: The Authority finds that the records management information in the *Ministers' Office Handbook* does not adequately support ministerial staff in their creation, capture, management and disposal of State records (and, consequently, their retention of State archives).

Finding 3: The Authority finds that the monitoring of records management in the Office of the Premier was insufficient and could not appropriately provide management assurance of compliance with records management obligations.

Finding 4: The Authority did not establish that disposal actions taken in regard to working advice notes were the result of explicit instruction by any staff member within the Office of the Premier.

As a result of the findings, the Authority has made the following recommendations, consistent with its regulatory objectives.

Recommendation 1: Develop and formalise a records management program which would include:

- a) a records management policy, which provides the framework for records management and recordkeeping in ministerial offices, articulates the obligations of and requirements for ministerial staff, and better supports ministerial staff in understanding their recordkeeping requirements;
- b) detailed advice and support for ministerial staff on the creation, capture, management and disposal of records with a focus on reducing any ambiguity or misunderstanding (e.g. treatment of 'working advice notes', 'briefing notes', 'working papers' and 'drafts');
- c) training opportunities for ministerial staff to support compliant recordkeeping within their office's practices, procedures and policies;
- d) regular monitoring of recordkeeping within ministerial offices and the conformity of staff with their recordkeeping requirements;
- e) appropriate technology or systems to support the above recommended actions.

Recommendation 2: Update the *Ministers' Office Handbook* to provide more detailed information to ministerial staff on their recordkeeping responsibilities and practices.

Recommendation 3: Work with the Authority and its Board to update the *General retention and disposal authority GDA13: Ministers' Office records*.

The Authority is available to advise and assist the Office of the Premier on the implementation of the above recommendations.

2. Introduction

The Authority is a statutory body established by the State Records Act. The Authority is responsible for establishing standards for the creation, protection and disposal of State records for NSW public offices, along with the management of the State Archives Collection.

The scope of the State Records Act governs State records. Records and State records are defined in section 3:

record means 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.

State record means 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.

Further, State archives are those State records which have been identified by the Board of the Authority as having enduring value and, as such, will be kept indefinitely.

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

The Authority's regulatory stance places emphasis on providing clear information, guidance and education to assist NSW public offices to comply with the obligations of the State Records Act.

It is important to note that the Authority is not a NSW integrity agency and has limited powers to monitor compliance; for example, the Authority has no power to commence formal investigations. However, public offices do have obligations to report to the Authority on their records management if requested. As such, the Authority conducts assessments of recordkeeping practices against established legislation, standards and codes of practice in order to improve compliance with the State Records Act. Ultimately, compliance with the State Records Act ensures that the memory of the State is maintained, and is therefore in the best interests of the NSW public.

3. Complaint Summary

On 30 October 2020 Mr Greg Warren MP, Shadow Minister for Local Government, wrote to the Authority. The correspondence from Mr Warren referred for investigation ‘concerns about a number of potential offences under section 21 of the State Records Act ...’ (the complaint).

Mr Warren noted:

At a public hearing on 23 October 2020, the inquiry heard evidence from Ms Sarah Lau, Senior Policy Advisor in the Office of the Premier. In her evidence at the hearing, Ms Lau indicated that in the course of her duty she generated ‘working advice notes’ making recommendations to the Premier on the allocation of grant funding. As they were described, the working advice notes were conveyed to the Premier as the primary record for which the Premier would indicate her approval, or otherwise, by signing or marking and returning the working advice notes to Ms Lau. Ms Lau’s evidence is that she destroyed the original paper records by shredding them and subsequently deleted all digital versions of the working advice notes.

...

Furthermore, evidence provided by Mr Tim Hurst (former Chief Executive of the Office of Local Government, the agency responsible for dispersing the [Stronger Communities Grant] funds) at an earlier public hearing on 21 September supported the proposition that the working advice notes, which have since been destroyed, are the sole records of the recommendation that was put to the Premier.

Mr Warren cited the retention requirement of disposal class 1.7 under the *General retention and disposal authority GDA13: Ministers’ Offices records*; the protection of records from unauthorised disposal in section 21 of the State Records Act; and the retention of records according to Normal Administrative Practice requirements at sections 7 and 8 in Schedule 2 of the *State Records Regulation 2015*.

Additionally, Mr Warren noted section 21(4) of the State Records Act and requested that the Authority ‘examine whether the documents were destroyed on the instructions of the Premier, the Premier’s Chief of Staff, the Policy Director or any other staff member in the Premier’s Office to whom Ms Lau reported’.

Mr Warren advised that he had been in contact with the NSW Information Commissioner, who advised that ‘the matter should also be referred to the State Archives and Records Authority (SARA) in relation to the Act’.

3.1 The Authority’s acceptance of the complaint

The Authority reviewed the complaint and identified that the substance of the allegations was sufficient to commence a recordkeeping assessment of the issues as per the Authority’s *Procedures for assessing possible non-compliance with the State Records Act*. A Recordkeeping Assessment Plan was developed and approved by the Executive Director on 6 November 2020.

The Authority’s assessment covers the following broad areas:

1. The existence (or not) of ‘working advice notes’ (hardcopy documents and digital documents) and emails referred to in Ms Lau’s evidence. These documents and emails pertain to the Stronger Communities Fund and are from the period 1 June 2018 to September 2019.
2. Identification of dates when the ‘working advice notes’ (hardcopy documents and digital documents) and emails were disposed of, if applicable.
3. The existence (and adequacy) of policy, procedures, business rules or business instructions, and training provided to ministerial staff in the Office of the Premier to inform their records management practices. This will include assessing conformity of these materials with the

requirements of the State Records Act, *State Records Regulation 2015*, and the *Standard on records management* (issued under section 13(1) of the State Records Act).

4. Any instructions from the Premier, Chief of Staff, or Policy Director, or any other ministerial staff, on the management and disposal of State records referred to in the complaint.
5. Monitoring of records management practices within the Office of the Premier.

3.2 Evidence relied on from the Public Accountability Committee hearing

The complaint refers to evidence given by Ms Sarah Lau, Senior Policy Advisor, Office of the Premier, at the inquiry hearing conducted by the Public Accountability Committee of the NSW Legislative Council into the *Integrity, efficacy and value for money of NSW Government grant programs* on 23 October 2020.

The Authority's assessment does not rely on evidence given to the Public Accountability Committee. Instead the Authority has sought its own information from the Office of the Premier in order to assess the allegations made in the complaint. The only instances where the Authority relies on the evidence put before the Committee are where the complainant or the Office of the Premier has directed the Authority to such evidence.

Where directed to the transcript by the complainant or the Office of the Premier, the *Corrected transcript 23 October 2020* was used (available at www.parliament.nsw.gov.au/lcdocs/transcripts/2479/Transcript%20-%2023%20October%202020%20-%20CORRECTED.pdf).

4. Contact and correspondence with the Office of the Premier for the purposes of this assessment

The Authority contacted and met with the Office of the Premier during the course of its assessment. A summary with response dates are below.

| Date | Type of interaction |
|------------------|--|
| 6 November 2020 | <u>Letter from Authority to Office of the Premier</u> informing the Office of the commencement of a recordkeeping assessment and requesting information related to the complaint to assist with determining whether or not a breach of the State Records Act, or the standards issued under the Act, had occurred. |
| 20 November 2020 | <u>Response from the Office of the Premier to the Authority</u> in relation to the information requested in the Authority's letter of 6 November 2020 (see section 4.1). |
| 25 November 2020 | <u>Information provided by the Office of the Premier to the Authority</u> relating to additional material recovered from electronic back-ups (see section 4.2). |
| 2 December 2020 | <u>Meeting between the Authority and the Office of the Premier</u> (see section 4.3). |
| 4 December 2020 | <u>A request from the Authority to the Office of the Premier</u> for additional information (see section 4.3). |
| 10 December 2020 | <u>Response from the Office of the Premier to the Authority</u> in relation to the information requested on 4 December 2020 (see section 4.3). |

4.1 Information received from the Office of the Premier on 20 November 2020

In response to the Authority's questions, outlined in its letter of 6 November 2020, the Office of the Premier advised the following:

1. *The allegations received by the Authority cite evidence given by Ms Sarah Lau from the Office of the Premier at the Public Accountability Committee's inquiry into the Integrity, efficacy and value for money of NSW Government grant programs on 23 October 2020. The citation in the allegations received by the Authority states that hardcopy and digital documents referred to as 'working advice notes' and emails pertaining to the Stronger Communities Fund from the period 1 June 2018 to September 2019 had been disposed of. Can you please advise if the hardcopy and digital copies of the 'working advice notes' and emails are extant or have they been destroyed?*

As Ms Lau indicated in her evidence before the Public Accountability Committee (the **Committee**) on 23 October 2020, the relevant 'working advice notes' were essentially the written equivalent of a conversation, intended to ascertain the Premier's comfort or otherwise with a proposed approach in relation to Stronger Communities Fund matters. Ms Lau subsequently drafted emails recording the approach of the Premier's Office in this regard and sent them to the Chief Executive Officer of the Office of Local Government (**OLG**), Mr Tim Hurst.

Mr Hurst was responsible for the administration of the Stronger Communities Fund pursuant to a valid financial delegation issued under the *Public Finance and Audit Act 1983* (NSW). Consistent with the Stronger Communities Fund – Tied Grants Program Guidelines, advice was provided by Ministers (including the Premier) on the proposed allocation of funds to eligible local councils. Each item of expenditure from the Stronger Communities Fund was documented in a formal agency brief prepared by OLG and signed by Mr Hurst as delegate. Ms Lau's emails recording the views of the Premier's Office on the proposed approach were included as attachments to the formal agency brief. Hardcopies of the relevant working advice notes documenting the Premier's endorsement of the proposed approach were therefore not retained by Ms Lau.

Copies of Mr Hurst's approved agency briefs, which incorporate Ms Lau's emails, have been produced to the Legislative Council pursuant to an Order of the House and are enclosed at **Annexure A**.

Following a recent resolution of the Legislative Council under Standing Order 52, and in light of Ms Lau's commentary before the Committee, the Premier's Office has requested that the Department of Premier and Cabinet (**DPC**) commence searches of electronic backup systems with a view to receiving the digital Word versions of the relevant working advice notes (and any related material). These searches are ongoing. It is anticipated that they will be finalised by Wednesday, 25 November.

2. *If they have been destroyed, when (that is, what date) and how were the 'working advice notes' and emails disposed of?*

With respect to hardcopy working advice notes, please refer to page 5 of the transcript of the hearing of the Committee dated 23 October 2020, a copy of which is enclosed at **Annexure B** for ease of reference.

It is important to note that 'working advice notes' have no formal status. As Ms Lau noted in her evidence before the Committee, and as noted above in relation to Question 1, these notes are essentially the written equivalent of an oral conversation and do not record formal decisions of the Premier.

In any event, the Premier's Office asked DPC, as part of the document recovery process referred to above in response to Question 1, to clarify when the digital Word version of the relevant working advice notes were likely to have been deleted from the Office's document management system. Noting the document recovery constraints referenced in the response to Question 3 below, it is only possible to observe that the relevant documents were disposed of after September 2018.

3. *Can digital copies of any or all of these 'working advice notes' and emails be recovered from the Department of Premier and Cabinet systems (for example, backup copies of file/mail servers)?*

The Digital and Information Branch of DPC maintains 'back-ups' of email accounts and network drives held on the Ministers' IT network for disaster recovery purposes. In order to search a back-up, mail accounts and network drives must be restored. The time to restore to a back-up is highly variable, and depends on the number of technical aspects, such as the volume of data.

It is not always possible to restore a document that has been kept on a backup. The back-up may have been corrupted or may otherwise be deficient as a result of technical issues encountered during recording.

Similarly, material is not always easily searchable, and the restoration of documents from the material can require significant and costly specialist IT resources.

As per the commentary above in response to Question 1, the Legislative Council passed a resolution requiring the Premier's Office to commence searches of electronic backup systems with a view to recovering the digital Word versions of the relevant working advice notes and associated emails. The Premier's Office has written to the House advising that it expects to comply with the resolution by Wednesday, 25 November. Copies of any relevant documents will be provided to the Authority at the same time as they are provided to the House.

4. *A copy of the Guidelines for the Stronger Communities Fund at 20 June 2018, including any State records that contain the procedural or governance arrangements for any aspect of this Fund, with particular reference to the allocation, approval and disbursement of funding.*

Please find [typo in original] enclosed at **Annexure C**.

5. *A list of the relevant policy, procedures, business rules or business instructions in place in the Office of the Premier to instruct and guide ministerial staff in the creation, capture, management, and disposal of records, with particular reference to 'working advice notes'.*

The *Ministers' Office Handbook* (the **Handbook**) provides policy and practice material for Ministers and their staff about employment and office management arrangements. The Handbook, which is provided to all staff upon commencement of their employment, affords guidance for Ministers' offices on making and keeping records appropriately and complying with their obligations under the *State Records Act 1998* (NSW). The Handbook is publicly available at <https://publications.dpc.nsw.gov.au/ministers-office-handbook/managing-records-and-publishing-diaries/>.

The *Ministers' Staff Acceptable Use of Network Services Policy* (Attachment N to the Handbook) specifically provides that records stored on or conveyed through network services including email and computers are subject to statutory record keeping requirements.

The *NSW Office Holder's Staff Code of Conduct* (Attachment B to the Handbook) provides that all staff of political office holders are required to comply with all applicable laws, applicable codes of conduct and Premier's Memoranda (including, without limitation, record keeping requirements under the *State Records Act 1998*).

6. *A list of training provided to ministerial staff in the Office of the Premier to guide their records management practices.*

Copies of training materials and related information provided to Ministerial staff regarding records management practices is enclosed at **Annexure D**.

7. *What (general and/or specific) instructions, directions or guidance was provided to Ms Lau by the Chief of Staff, the Policy Director, or any other ministerial staff in relation to disposal of State records (particularly 'working advice notes') concerning the Stronger Communities Fund?*

Ms Lau does not recollect any directions or guidance being provided to her by other members of staff within the Premier's Office regarding the disposal of records concerning the Stronger Communities Fund. As stated by Ms Lau in her evidence to the Committee on 23 October 2020, it is likely that the working advice notes were disposed of by her in accordance with her normal record keeping practices.

8. *What monitoring was undertaken by supervisors in the Office of the Premier to ensure that ministerial staff conformed with records management requirements?*

Ms Lau's supervisors of 2018 no longer work in the Office of the Premier. However, senior staff of the Office of the Premier would be pleased to receive advice from the State Archives and Records Authority as to best practice records management in a ministerial office.

9. A copy of the organisational chart for the Office of the Premier as at 20 June 2018 identifying roles and the staff holding those roles.

Please see enclosed at **Annexure E**.

10. Any further information, record or advice that would assist our Assessment.

[No response provided to item 10]

In its response, the Office of the Premier provided the Authority with a range of materials, including:

- Annexure A: copies of Mr Hurst's approved agency briefs incorporating Ms Lau's emails
- Annexure B: *Uncorrected transcript* of 23 October 2020 hearing
- Annexure C: *Stronger Communities Fund Guidelines – tied grant round; New Council Implementation Fund Guidelines*
- Annexure D: Recordkeeping Advice to Ministerial Offices (compiled by DPC) (includes Attachments 1–26)
- Annexure E: Organisational chart of Office of the Premier, 30 June 2018
- Attachment 1: Presentation slides – Ministers' Office Records, 27 November 2018
- Attachment 2: Handout – Copy of GDA13 (2003), 27 November 2018
- Attachment 3: Handout – Recordkeeping Fundamentals for Ministers' Offices, 27 November 2018
- Attachment 4: Handout – Ministers' Office Records Management Summary, 27 November 2018
- Attachment 5: Handout – DPC Contact Details, 27 November 2018
- Attachment 6: Email – Ministers' Office Records Handouts from 27 November 2018, provided on 4 December 2018
- Attachment 7: Presentation slides – Ministers' Office Records, 31 January 2019
- Attachment 8: Email – Ministerial Records Post Presentation Handouts, 4 February 2019
- Attachment 9: Handout – Ministerial Records Post Presentation Handouts, 4 February 2019
- Attachment 10: State Archives Recordkeeping For Ministers Offices Brochure, 4 February 2019
- Attachment 11: Email – Obligations of Ministers' staff under the *State Records Act 1998*, 14 March 2019
- Attachment 12: Handout – Obligations of Ministers' staff under the *State Records Act 1998*, 14 March 2019
- Attachment 13: Email – How to download Minister's social media records, 20 March 2019
- Attachment 14: Handout – Procedure for downloading Ministerial social media content, 20 March 2019
- Attachment 15: Email – Ministers' Office Records, 21 March 2019
- Attachment 16: Handout – Ministers' Office Records Declaration for Chief of Staff, 21 March 2019
- Attachment 17: Handout – Public Access Direction for Ministers, 21 March 2019
- Attachment 18: Agenda – Ministers' Office Admin Staff Induction First Session, 30 April 2019
- Attachment 19: Presentation Slides – Ministerial EA Staff induction, 30 April 2019
- Attachment 20: Presentation Notes – Record Keeping EA Induction, 30 April 2019
- Attachment 21: Agenda – Ministers' Office Admin Staff Second Session, 9 May 2019
- Attachment 22: Presentation slides – Managing Records in Ministers' Offices, 9 May 2019
- Attachment 23: Ministers' Office Handbook, published 24 June 2020
- Attachment 24: Ministers' Office Handbook 2020, recordkeeping pp. 31–33

- Attachment 25: Ministers' Office Handbook 2016, recordkeeping pp. 35–36
- Attachment 26: Ministers' Staff Employment Welcome Message

4.2 Information received from the Office of the Premier on 25 November 2020

On 25 November 2020 the Authority received further information from the Office of the Premier which included copies of recovered documents and emails as a result of searches of back-up tapes in response to a Legislative Council Order for Papers. The Authority was advised that the labelling of the documents and redactions of contact details were for the purposes of compliance with the Legislative Council Order. Included were:

- three draft working advice notes [labelled (7)(a)2, (7)(a)6, and (7)(a)8]
- email from Matthew Crocker to Sarah Lau on 10 April 2018, subject: Advice – Hornsby log of claims [labelled (7)(a)1]
- email from Tim Hurst to Sarah Lau on 12 June 2018, subject: SCF Tied Grants Round [labelled (7)(a)3]
- Office of Local Government Briefing Note to Minister on Stronger Communities and New Council Implementation Fund guidelines [labelled (7)(a)4]
- emails between Sarah Lau and various Office of Local Government staff between 15 and 21 June 2018, subject: Leftover merger funding [labelled (7)(a)5]
- emails between Sarah Lau and Matthew Crocker on 26 June 2018, subject: Note re final merger funds [labelled (7)(a)7]

4.3 Further information received from the Office of the Premier on 10 December 2020

On 2 December 2020 the Executive Director and senior staff from the Authority met with Mr Neil Harley (Chief of Staff) and Mr Bran Black (Director Cabinet and Legal) of the Office of the Premier. At the meeting the Authority advised that it had further questions and any additional information from the Office of the Premier would be welcomed.

The Authority contacted the Office of the Premier on 4 December 2020 and requested additional information by 11 December 2020. On 10 December 2020 the Authority received responses to the specific questions included in the Authority's email of 4 December 2020 (see below).

1. *Is it usual practice within the Office of the Premier for records management practices to be monitored? We note that Chiefs of Staff are required to certify standards of recordkeeping (point 4 of Attachment 16 provided in content delivered on 20 November). In order to provide certifications such as these, what monitoring is typically conducted? Examples may include management oversight/action, reports from systems about usage patterns, disposal processes?*

It is usual practice within the Office of the Premier (**Office**) for records management requirements to be communicated by senior staff, discussed at team meetings and the subject of training (including by the Department of Premier and Cabinet).

There is an opportunity to ensure greater consistency for the Office's records management monitoring practices. This matter is presently being addressed and the Office would welcome input from the Authority in this regard.

2. *With the recovered documents as indicative, would you say they are typical of 'working advice notes' in the Premier's Office? Do they usually cover matters of more/less significance/detail?*

There is no typical working advice note within the Office; however, most Office staff have experience preparing written advice for the Premier. Written advice notes might cover matters such as driver

arrangements for collecting the Premier ahead of a media engagement to more substantive matters. In the latter case, working advice notes are ordinarily attached to departmental briefs.

3. *How are 'working advice notes' usually handled after the Premier has seen/actioned/annotated them? Scanned and captured in the recordkeeping system, saved onto a network drive, or disposed of?*

Working advice notes are generally required to be retained by the staff who draft them. As per the response to Question 1, there is an opportunity to ensure greater consistency for the Office's records management monitoring practices.

4. *Does the Office of the Premier have a records management policy or a policy which provides the overarching framework and governance of records management in the Office (other than the Ministerial Office Handbook)?*

The Office presently relies upon the framework and requirements set out in Ministerial Office Handbook. The Office considers that a more tailored approach would be beneficial and would welcome input from the Authority in this regard.

5. *Copy of the templates for briefing notes and templates of working advice notes used in the Office of the Premier.*

As per the response to Question 2, there is no typical working advice note within the Office; however, please see **attached** a template that is commonly used. It is important to note that use of the language 'Approve / Note / Not approve' in the template does not mean the Premier has in fact approved, noted or not approved a course of action. It simply means she has approved, noted or not approved the advice provided by an advisor.

6. *Metadata for the recovered items to demonstrate that they are reliable and authentic. In the Office of the Premier's response to [the Authority] (received on 20 November), it was noted in Question 2, that "the Premier's Office asked DPC, as part of the document recovery process referred to above in response to Question 1, to clarify when the digital Word version of the relevant working advice notes were likely to have been deleted from the Office's document management system." The Authority would like the following information from the recovery process in relation to the three draft working advice notes [labelled (7)(a)2, (7)(a)6, and (7)(a)8]:*

- a. *What date was each document created?*
- b. *Who is identified as the author/creator of each document?*
- c. *Where were the documents stored? In the document management system or on a shared network drive?*
- d. *What date was each document deleted?*
- e. *Who deleted the documents?*

Please see the below email from Mr Andrew Pollard [Manager IT Infrastructure & Operations, Ministers' ICT] of 9 December.

| | | Item (7)(a)2 | Item (7)(a)6 | Item (7)(a)8 | Comment |
|----|--|--------------------------|--------------------------|--------------------------|---|
| a. | What date was each document created? | 10/04/2018 | 20/06/2018 | 26/06/2018 | Using the "Content created" field in the Word file metadata. |
| b. | Who is identified as the author/creator of each document? | Sarah Lau | Sarah Lau | Sarah Lau | Using the "Last saved by" field in Word file metadata. We believe the Author field is the template creator. |
| c. | Where were the documents stored? In the document management system or on a shared network drive? | Office Group Drive (G:) | Office Group Drive (G:) | Office Group Drive (G:) | This is a shared network drive |
| d. | What date was each document deleted? | 14/09/2018 to 22/03/2019 | 14/09/2018 to 22/03/2019 | 14/09/2018 to 22/03/2019 | Date range has been determined from timing of tape backups |

| | | | | | |
|----|----------------------------|---------|---------|---------|---|
| e. | Who deleted the documents? | Unknown | Unknown | Unknown | System is not designed to retain this information |
|----|----------------------------|---------|---------|---------|---|

“ ... we don’t believe it is feasible for DPC to answer the questions in paragraphs D and E more precisely.

“The shared network drive is not designed to retain the information that would help to answer paragraphs D and E. DPC would need to engage suitable external expertise to apply digital forensics tools and techniques to the network drive and its underlying storage, to try and find this additional information. The shared network drive is stored on a shared Storage Array Network (SAN) that is an expensive (>\$250k) and heavily utilised piece of infrastructure. It cannot be turned off and removed for offline examination without shutting down the servers and networks that depend on it. Given where this document was stored, how the network drive is configured and the large time period that has passed since the deletion took place, we believe that trying to find this additional information would be an expensive and disruptive exercise with a very low probability of success.”

5. Findings

Finding 1: The Authority finds that the Office of the Premier breached section 21(1) of the State Records Act with the unauthorised disposal of the working advice notes.

The statutory context

Working advice notes are State records and are subject to the retention and disposal obligations of the State Records Act.

Section 21(2) of the State Records Act prescribes the compliant pathways for the disposal/destruction of State records. The most common pathway to gain approval for the disposal of a State record is prescribed in section 21(2)(c), being with permission from the Authority. Documents known as retention and disposal authorities, which are approved by the State Records Board and issued by the Authority, are the formal legal instruments which give permission to destroy certain State records. Retention and disposal authorities define the minimum retention time periods for State records, after the expiration of which they can be destroyed. They also identify those State records that are of enduring value, which are required as State archives and therefore need to be kept in perpetuity.

Acting in accordance with retention and disposal authorities is the most common way that public offices ensure compliance with section 21 of the State Records Act.

Working advice notes are briefing notes

From the three examples of draft 'working advice notes' seen by the Authority (the recovered documents provided on 25 November 2020 and the template provided on 10 December 2020), working advice notes are seen to be used functionally as briefing notes. This determination is based on the examples shown to the Authority and the general observation that both working advice notes and briefing notes used in the Office of the Premier share characteristics and purpose, including that they:

- a) have a defined template (each document has the same documentary form and field characteristics);
- b) record recommendations, evidence and justification for decisions or actions of the Office of the Premier;
- c) include sections for the purpose of recording responses from the Chief of Staff and the Premier; comments from the Chief of Staff and the Premier; and whether the recommendations are 'approved', 'noted', or 'not approved'.

Working advice notes related to the Stronger Communities Fund are briefing notes

In relation to the Stronger Communities Fund, the relevant working advice notes were used for the function of an internal 'briefing note'. In addition to the general shared characteristics outlined above, their content summarises facts, contains comments and recommends actions which were used to direct subsequent action. In addition, these briefing notes were created and used by the Office of the Premier.

An assessment of working advice notes against the relevant retention and disposal authority

The relevant retention and disposal authority is the *General retention and disposal authority GDA13: Ministers' Office records* (see www.records.nsw.gov.au/recordkeeping/rules/gdas/gda13). This document outlines the retention and disposal requirements for records created by Ministers' offices in NSW.

There are three record classes in GDA13 which are relevant to this finding. These are classes 1.7, 1.8 and 1.9. Each class pertains to briefing notes; the previous section of this report outlines the Authority's determination that the working advice notes in question share features, purpose and functionality with briefing notes and, following this, are treated as briefing notes for the purposes of disposal.

Disposal class 1.7 in GDA13 requires that 'Briefing notes or papers maintained in the Premier's Office' are to be retained permanently as State archives. The working advice notes in question were created within the Office of the Premier, used functionally as briefing notes, and were then maintained in the Office of the Premier, directing further and subsequent related action. It follows that these working advice notes should not have been destroyed and that they should have been retained as State archives, as per disposal class 1.7 in GDA13.

Class 1.8 in GDA13 also requires permanent retention as State archives. Class 1.8 pertains to briefing notes or papers 'of other Ministers' and for that reason is not the appropriate class for the working advice notes created within the Office of the Premier.

Class 1.9 in GDA13 provides the disposal period for 'other briefing notes or papers'. If the working advice notes had not been found to have met the definition of 1.7, they may have fallen within this disposal class, which allows destruction once administrative use ceases; however, given the evidence presented to the Authority, it is the Authority's position that 1.7 is the correct class for the records in question.

Assessment of position using Normal Administrative Practice provisions

Section 22 of the State Records Act permits public offices to use Normal Administrative Practice (NAP) to allow for the disposal of certain types of facilitative, draft and duplicate records, including working papers and records. Schedule 2 of the *State Records Regulation 2015* sets out guidelines on what constitutes NAP.

NAP is another compliant pathway for destruction of State records and, as with following a retention and disposal authority, acting in accordance with NAP constitutes compliance with section 21 of the State Records Act.

To ensure completeness, in the course of this assessment the Authority has assessed the situation according to the NAP provisions to ensure that this finding is sound.

In this specific case, an email was sent to the Office of Local Government, which recorded the final outcome of the Premier's review of the working advice note. Despite the understanding of the Office of the Premier that this constituted the final version of the record, the email was not sufficient as the final version of the record. The email did not contain all relevant aspects of the working advice note, such as any comments or annotations made by the Chief of Staff and/or the Premier or reasons for the decision being made (sometimes against the recommendations made).

This means that a copy of the final working advice note, whether the original physical or a scanned version, could not be permissibly destroyed using NAP.

Likewise, section 7 of Schedule 2 of the *State Records Regulation 2015* provides exclusions from NAP for working papers that have continuing value:

Working papers and records that must not be disposed of are those that document significant decisions, discussions, reasons and actions or contain significant information that is not contained in the final version of the record.

It is therefore the Authority's position that disposal of the working advice notes regarding the Stronger Community Fund is a breach of section 21(1) of the State Records Act as the working advice notes should have been retained in accordance with disposal class 1.7 in *General retention and disposal authority GDA13: Ministers' Office records*.

Finding 2: The Authority finds that the records management information in the *Ministers' Office Handbook* does not adequately support ministerial staff in their creation, capture, management, and disposal of State records.

The Handbook

The Authority was advised that ministerial staff are provided with a copy of the *Ministers' Office Handbook*. Copies of the 2016 and 2020 Handbook have been provided to the Authority. Each Handbook includes a section on managing records which includes the following:

- Retaining and Disposing of Records in Accordance with the *State Records Act 1998*
- Creating and Classifying Records
- Possession or Control of Ministers' Records Stored on the Ministers' IT Network
- Storing Records (includes information on the disposal of records based on GDA13).

The Office of the Premier also advised that Attachment N of the Handbook (*Ministers' Staff Acceptable Use of Network Services Policy*) identifies that records stored or conveyed through network services are subject to recordkeeping requirements. Attachment B of the Handbook (*NSW Office Holder's Staff Code of Conduct*) also identifies that ministerial staff are required to comply with statutory recordkeeping obligations. Additionally, new ministerial staff are sent an employment welcome message which references the *Ministers' Office Handbook* and the Code of Conduct eLearning module.

The Office of the Premier also noted that 'It is usual practice within the Office of the Premier for records management requirements to be communicated by senior staff, discussed at team meetings and the subject of training (including by the Department of Premier and Cabinet)'.

The advice provided in the *Ministers' Office Handbook* is a useful overview and includes links to supplementary information available from the Authority's website (www.records.nsw.gov.au) and to documentation available from the Department of Premier and Cabinet.

The *Creating and Classifying Records* section of the Handbook advises ministerial staff to:

- Create and maintain full and accurate records of any official government business transacted by the office.
- Retain those records for as long as they are required.
- Dispose of those records legally and appropriately when they are no longer required. This may entail the transfer of permanently valuable records to State Records NSW (where they will be retained as part of the State's official archives).

The Handbook, however, contains no explicit advice to guide practices for the creation, capture, management or disposal of working advice notes or briefing notes.

As noted above, the *Storing Records* section of the Handbook includes a simplistic triage guide to the disposal of records based on the *General retention and disposal authority GDA13: Ministers' Office records*. The general nature of the advice in the Handbook, and the absence of any other system in place to provide more specific guidance, may have resulted in staff misunderstanding obligations and led to unauthorised disposal – in this case, the disposal of working advice notes. The section referred to is reproduced below and is contained in the 2016 and 2020 versions of the Handbook:

| | |
|---|---|
| <i>All remaining paper and electronic records</i> | <i>Make a judgement call about retention (e.g. based on office needs and guidelines issued by the State Records Authority). For paper records which are to be retained, consider the option of scanning</i> |
|---|---|

From the information that has been provided, it is clear that the *Ministers' Office Handbook* provides a basic and high-level framework for records management within the Office of the Premier and Ministers' offices. The training provided to ministerial staff in 2018 and 2019 (discussed below) is indicative of the need to supplement the advice provided in the *Ministers' Office Handbook*, and to provide more detailed and explicit advice to support staff in the compliant creation, capture, management and disposal of State records and State archives.

In order to bring together all of the recordkeeping requirements and obligations that are contained in the *Ministers' Office Handbook* and across the training materials, the Office of the Premier should develop a records management policy document which would provide the framework for records management and recordkeeping across all ministerial offices, articulate the obligations and requirements for ministerial staff, and better support ministerial staff in understanding their recordkeeping requirements. Such a policy would also assist in standardising recordkeeping practices, enable greater compliance with recordkeeping objectives and enable the monitoring of recordkeeping in ministerial offices.

It is the view of the Authority that the guidance provided by the Handbook is too broad and without additional specific instructions is likely to have resulted in unauthorised disposal driven by misunderstanding.

Training materials

The Authority was provided with copies of training materials and related information provided to ministerial staff in 2018 and 2019. The training materials supplement the information provided in the *Ministers' Office Handbook* and provide more granular detail on practices and requirements. It is noted that the Authority's staff assisted the Department of Premier and Cabinet in the development and delivery of some of the training.

The training modules from November 2018 (Attachment 1) and January 2019 (Attachment 7) include specific references to briefing notes and that these are required as State archives. The November 2018 module also includes a flowchart to assist staff to triage and identify appropriate disposal outcomes for records. Handouts provided to ministerial staff as part of the training also include references to briefing notes and that these are required as State archives (*Recordkeeping Fundamentals for Ministers' offices*, Attachments 3 and 10, were developed by the Authority's staff). While the training was specifically designed to assist staff in managing records in preparation for the 2019 State Government Election, much of the content is still relevant and should continue to be made available to ministerial staff.

Other training materials provided to the Authority included:

- a handout sent to Chiefs of Staff on 14 March 2019 (Attachments 11 and 12) which includes specific references to briefing notes and that these are required as State archives;
- induction sessions for new administrative staff on 30 April 2019 and 9 May 2019 which provided basic information on the State Records Act and recordkeeping obligations and the electronic document and records management system EDRMS (Attachments 18, 20, 21 and 22).

The training undertaken in 2018 and 2019 by the Department of Premier and Cabinet to support ministerial staff in understanding their recordkeeping requirements is very sound. This training assists

the Office of the Premier to comply with the *Standard on records management* (Minimum Compliance Requirement 1.6: *Staff and contractors understand the records management responsibilities of their role, the need to make and keep records, and are familiar with the relevant policies and procedures*).

The training provided to ministerial staff supplements the advice provided in the *Ministers' Office Handbook*; there is a need to provide more detailed and explicit advice to ministerial staff that they can refer to during the regular course of their official functions. The development and deployment of technology to aid compliance should also be strongly considered as a solution that can be of great benefit.

Materials developed for the training program in 2018 and 2019 should be included in a revised *Ministers' Office Handbook*. The Authority also encourages further training opportunities to provide staff with more detail and clarity on the use and application of Normal Administrative Practice within their work practices and how this fits with the retention and disposal authority GDA13.

GDA13: Ministers' Office records

The *General retention and disposal authority GDA13: Ministers' Office records* was issued under section 21(2)(c) of the State Records Act on 23 December 2002. The retention and disposal authority provides disposal coverage for the records of offices of Ministers of the NSW Government, including the Office of the Premier, in respect of their responsibilities for the administration of government.

While the core functions of Ministers' offices remain stable, the age of this disposal authority warrants review, update and reissue. This work should be carried out in collaboration with the Authority, Ministers' offices and the Department of Premier and Cabinet.

Finding 3: The Authority finds that the monitoring of records management in the Office of the Premier was insufficient and could not appropriately provide management assurance of compliance with records management obligations.

From the information provided to the Authority, it appears that there was little or no oversight or monitoring of ministerial staff compliance with records management requirements. The Training Handout provided at the 14 March 2019 training session (Attachment 12) contains a detailed breakdown of the obligations of Ministers' staff under the State Records Act and requires the Chief of Staff to:

- Ensure staff comply with their record keeping obligations.
- Ensure staff create and maintain records of all office operations relating to the portfolio responsibilities of the Minister.
- Ensure all State records are stored in the official network – see below.
- Certify compliance at the end of Minister's tenure or four year term using the enclosed Chief of Staff Certificate, and provide an access direction relating to all State Records.

When directly asked about monitoring activity in the meeting of 2 December 2020 and in written questions, the Office of the Premier only outlined the responsibilities of senior staff and staff training with regard to records management. There was no evidence of any system of monitoring that would meet the *Standard on records management* (the Standard). The Standard requires that all public offices undertake monitoring of records management within the public office (see Minimum Compliance Requirement 1.8: *Records and information management is monitored and reviewed to ensure that it is performed, accountable and meets business needs*).

Monitoring may take the form of management oversight or action, reporting from systems about usage patterns, disposal processes and/or other systems and checks set up to provide assurance of

compliance with records management obligations. From the evidence provided, the Office of the Premier provides the training and sets expectations but there seems to be no system to check or observe that the training and expectations are being put into practice.

Finding 4: The Authority did not establish that disposal actions taken in regard to working advice notes were the result of explicit instruction by any staff member within the Office of the Premier.

As the Authority lacks investigative powers and cannot compel individuals to provide statements of evidence, the Authority must rely on the response from the Office of the Premier to this aspect of the complaint:

Ms Lau does not recollect any directions or guidance being provided to her by other members of staff within the Premier's Office regarding the disposal of records concerning the Stronger Communities Fund. As stated by Ms Lau in her evidence to the Committee on 23 October 2020, it is likely that the working advice notes were disposed of by her in accordance with her normal record keeping practices.

6. Other considerations

6.1 Section 12 – Full and accurate records

Section 12(1) of the State Records Act establishes obligations that ‘Each public office must make and keep full and accurate records of the activities of the office’. This obligation requires that records created by a public office are accurate and authentic and can be trusted. Additionally, it creates obligations for public offices to ensure that where records are not created in the normal course of business (e.g. during a conversation), they must be created; these records must also be kept in accordance with section 21.

In the course of our assessment we received evidence which indicated that working advice notes are used in place of ‘short conversations’. The use of working advice notes appears to be an effective practice of creating full and accurate records of the activities of the office. It is the opinion of the Authority that the fully and accurately annotated working advice notes relating to the Stronger Communities Fund would need to have been kept in order to fulfil the obligations of section 12(1).

Noting the partial recovery of the relevant working advice notes and the scope of the complaint, the Authority has not made a finding in relation to section 12 of the State Records Act. Consistent with our regulatory objectives and our focus on building the memory of the State, the Authority has made recommendations both in line with the findings outlined in this assessment and with a view to ensuring compliance with section 12 of the Act.

6.2 Section 21 and penalty provisions

Breaches of section 21(1) may be penalised through proceedings under section 78 through the local court and attract a maximum of 50 penalty units.

Pursuing legal penalties and action is not consistent with the Authority’s regulatory model, which emphasises education and information to assist voluntary compliance by public offices with obligations of the State Records Act. A prosecution of unauthorised disposal of State records is a labour-intensive activity that is almost certain to bring no improvement to recordkeeping or commitment to improving practices.

In addition to the above, the Authority will not be taking legal action on the unauthorised disposal of State records for the following reasons:

- The Authority cannot reasonably gather sufficient evidence to prove when precisely the disposal of State records took place. It is possible that the deletion of records from the system may have been outside the prescribed timeframes required by section 78(2) of the State Records Act (‘commencing proceedings not later than 2 years from when the offence was alleged to have been committed’).
- The Authority has considered the cost of such novel litigation and the potential benefit and has determined it to be inconsistent with our regulatory model and that such action does not pass a cost/benefit analysis.

To date, the Office of the Premier has been forthcoming and participated openly in our assessment process. The Office has demonstrated an eagerness to improve any practices which might be deficient and take the advice and guidance of the Authority. It is the belief of the Authority that a productive relationship between the Authority and the public office, as has been demonstrated through this assessment, is more likely to ensure compliance with the Act and continue to build the documentary history of the State than seeking penalties under the State Records Act.

7. Recommendations

The Authority recommends that the Office of the Premier undertake the following actions:

Recommendation 1: Develop and formalise a records management program which would include:

- a) development of a records management policy which would provide the framework for records management and recordkeeping in ministerial offices, articulate the obligations of and requirements for ministerial staff, and better support ministerial staff in understanding their recordkeeping requirements;
- b) detailed advice and support for ministerial staff on the creation, capture, management and disposal of records with a focus on reducing any ambiguity or misunderstanding (e.g. treatment of 'working advice notes', 'briefing notes', 'working papers' and 'drafts');
- c) training opportunities for ministerial staff to support compliant recordkeeping within their office's practices, procedures and policies;
- d) regular monitoring of recordkeeping within ministerial offices and the conformity of staff with their recordkeeping requirements;
- e) appropriate technology or systems to support the above recommended actions.

Recommendation 2: Update the *Ministers' Office Handbook* to provide more detailed information to ministerial staff on their recordkeeping responsibilities and practices.

Recommendation 3: Work with the Authority to update the *General retention and disposal authority GDA13: Ministers' Office records*.

8. End note

In line with the Authority's *Procedures for assessing possible non-compliance with the State Records Act* and general principles of fairness, a draft copy of this report was provided to the Office of the Premier for comment.

In response, the Office of the Premier has accepted the report without change, and welcomes the findings. The Office of the Premier also thanks to the Authority for its efforts.