

Australian Capital Territory

Territory Records (Standard for Records Management Number 4: Access) Approval 2009 (No 1)

Notifiable instrument NI2009—14

made under the

Territory Records Act 2002, s 18 (Approved standards and codes for records management)

1. Name of Instrument

This instrument is the Territory Records (Standard for Records Management Number 4: Access) Approval 2009 (No 1)

2. Approval

I approve the Standard for Records Management Number 4: Access

3. Commencement

This instrument commences on the day after notification.

4. Revocation

I revoke Notifiable Instrument NI2003-230 notified 1 July 2003.

David Wardle
Director of Territory Records
5 January 2009



Australian Capital Territory
Territory Records Office
STANDARD



Standard for Records Management Number 4 - Access

PURPOSE

To set principles for public access to Territory records, to set out the procedures for agency use in applying the public access provisions of the *Territory Records Act 2002* and to set out the minimum standards for providing public access to records.

AUTHORITY

This Standard is produced in accordance with section 18 of the *Territory Records Act 2002*, which allows the Director of Territory Records to approve Standards or Codes for agency records management.

Section 26 of the *Territory Records Act 2002*, which commenced on 1 July 2008, gives the public the right to access Territory records that are more than 20 years old. Section 27 of the *Territory Records Act 2002* requires agencies to assist members of the public to make applications for access to records. Section 16 of the *Territory Records Act 2002* requires agencies to manage their records in such a way as to ensure that the information in them remains accessible.

Under section 17 of the *Territory Records Act 2002* an agency's Principal Officer may only approve a Records Management Program that complies with the Standards and Codes set by the Director of Territory Records.

Section 17(2) of the *Territory Records Act 2002* allows a Principal Officer to approve a Records Management Program that does not comply with an approved Standard or Code only if the Director of Territory Records agrees in writing that non-compliance is necessary for the operational needs of the agency.

This Standard must be reviewed as soon as practicable 5 years after its commencement.

INTRODUCTION

The *Territory Records Act 2002* gives the public a general right of access to Territory records that are more than 20 years old. Governments provide access to the records they make in order to support accountability and democratic government and to enrich the community through a source of cultural and collective memory.

Management of the access regime is a responsibility shared between the Director of Territory Records and the agencies that made, or are responsible for, Territory records. The Director of Territory Records produces Standards, Codes and Guidelines, which agencies must adhere to when managing public access, and makes decisions on exemptions from public access at the request of agencies. Agencies must assist members of the public to have access to records not exempted from the access provisions. This Standard sets out the principles that guide access decisions in the Territory and outlines the procedures agencies must use in managing the access regime.

Access to records under the *Territory Records Act 2002* is different from decisions made under the *Freedom of Information Act 1989*. Decisions to give access to records under FOI take into account the identity or motive of the person applying for access, so that one person might be given access to information that is denied to another. The primary principles of access under the *Territory Records Act 2002* are openness and equity.

BACKGROUND

The principles established in this Standard ensure that the rights of present and future generations of citizens to access the records of the Territory are protected and acknowledged. These principles are established in the main purposes of the *Territory Records Act 2002*:

- to encourage open and accountable government by ensuring that Territory records are made, managed and, if appropriate, preserved in accessible form;
- to preserve Territory records for the benefit of present and future generations; and
- to ensure that public access to records is consistent with the principles of the *Freedom of Information Act 1989*.

PRINCIPLE 1: OPENNESS

Territory Records that are more than 20 years old are generally presumed to be available for public access. The *Territory Records Act 2002* provides for some classes of records to be exempted from access by the general public, but these records should be in the minority. In the Territory, the *Executive Documents Release Act 2001* allows Cabinet records to be released for public access after ten years. In this environment there should be very few government records that cannot be released under the *Territory Records Act 2002* after 20 years.

PRINCIPLE 2: EQUITY

Access to records under the *Territory Records Act 2002* must be equitable. The identity of applicants for access or the uses to which they intend to put the records must not be a criterion in making access decisions. A record that is open for access to one person under the *Territory Records Act 2002*, is open to all people. This is significantly different from FOI decisions, where a person is entitled to see information about themselves which would not be made available to others.

Compliance with Principle 1 and Principle 2

Applications for Access

Section 27 of the *Territory Records Act 2002* says that agencies must take “reasonable steps” to assist members of the public to apply for access under the Act. Agencies must also comply with the request in a “reasonable time”.

What constitutes “reasonable steps” and “reasonable time” will vary from agency to agency, and will depend on factors such as the complexity of the agency’s recordkeeping systems, the extent to which the applicant is able to identify the records sought, the storage location of the records and the resources the agency has available to service access requests. None of these, however, should be allowed to present insurmountable barriers to access by the public.

Failure to quickly locate the records requested by a researcher will often be a symptom of deficiencies in the agency’s recordkeeping system. If agencies are unable to fulfil the majority of requests within 30 days they must examine their systems and review their Records Management Programs to identify problem areas. Only extremely large or complex requests should take more than 90 days to fulfil. Applicants must be kept informed of the progress of their request.

A compliant agency can demonstrate that they:

- take steps to ensure that the majority of requests for access are satisfied within 30 days.

Exempting Records From Public Access

Agencies may apply to the Director of Territory Records to have records exempted from public access under a number of provisions set out in the *Territory Records Act 2002*. These are provisions from the *Freedom of Information Act 1989* and relate to records:

- affecting relations with the Commonwealth and the States;
- affecting enforcement of the law and protection of public safety;
- affecting personal privacy;
- subject to legal professional privilege; or
- disclosure of which would be in contempt of the Legislative Assembly or a court.

When considering exemption of records from public access, agencies must bear in mind the principles of access set out in this Standard. They must also consider that the sensitivity of information usually diminishes with time, and as a result the exemption categories in the *Freedom of Information Act 1989* can often be applied less stringently when being applied to records requested under the *Territory Records Act 2002*. Agencies generally should not apply for a section 28 declaration for records to which they would normally allow unrestricted access under the *Freedom of Information Act 1989*.

Agencies must consider section 28 declarations in a proactive fashion, rather than in reaction to a request from the public for access to sensitive records. Records likely to be sensitive for more than 20 years and therefore needing protection under section 28 can often be identified at the point of creation or during the appraisal process. Agencies are encouraged to seek section 28 declarations, where appropriate, early in the record's existence. Agencies must also note that records dating from before self-government are also subject to the access provisions of the Act, and section 28 declarations must be sought for these records where appropriate.

Only the Director of Territory Records can declare a record to be exempt from public access under the Act. When seeking to have a record or group of records exempted, agencies must provide sufficient information to the Director to enable him or her to make an informed decision about the records. This will include:

- sufficient descriptive information to identify the records or group of records, their content and the government activities to which they relate;
- an assessment of how the exemption category or categories relate to the records in question;
- an opportunity for the Director to inspect the records or a sample of the records as required; and
- any other available information which may help the Director to make a decision about access to the records.

Provided sufficient information accompanies the request for exemption, the Director of Territory Records will endeavour to respond to requests within 30 days. Agencies must also note that records exempted from access by the public under section 28 may still be made available under the *Freedom of Information Act 1989*.

A compliant agency can demonstrate that they:

- take a pro-active approach to requesting section 28 declarations; and
- provide adequate information to the Director of Territory Records when requesting a section 28 declaration.

Providing Access Facilities and Services

Agencies will need to provide appropriate facilities and services to enable the public to access records. The Director of Territory Records may make arrangements for access to Territory Records to be provided at a central location. In these circumstances agencies may be required to provide assistance to the Director in enabling public access to records.

Facilities to Inspect Records

Agencies must be able to provide researchers with a reasonable opportunity to inspect original records, and may therefore need to provide public access facilities. Such facilities must be secure, and researchers must be supervised when viewing original records to ensure that there is no possibility of theft or tampering. Members of the public should be provided with a secure place to leave personal items and not

be allowed to take bags or the like into the area provided for inspecting records. Facilities, as for any public office, must be easily accessible by people with disabilities. Where access to the records requires the use of some form of technology, such as audio, video or computer equipment, agencies must provide the necessary equipment and a suitable place for the researcher to use it.

Under no circumstances should researchers be allowed to borrow or otherwise have custody of original Territory records. Records are significantly different from library materials in that they are unique and irreplaceable.

Copying

The *Territory Records Act 2002* also requires agencies to provide copies of records where required by the researcher. These may be photocopies of print documents, print-outs or disks of, or networked access to electronic records, audio or video tapes or other suitable copies. The extent to which agencies can charge for copies of records requested under the Act is discussed later in this Standard.

Standards of Service

As for all Territory services to the public, agencies must comply with the ACT Public Service Customer Service Standard and Customer Service Code of Practice when providing access to records.

A compliant agency can demonstrate that they:

- provide appropriate, secure, and supervised facilities and equipment for public access;
- never lend records; and
- provide a copying service, for which the Minister may allow fees to be charged.

Registration of Section 28 Declarations

Under the *Territory Records Act 2002* agencies are required to keep a Register of records to which a section 28 declaration has been applied. The Register is required in order to enable agencies to keep track of records which have been exempted from public access. The register must include:

- sufficient detail to identify the records that have been exempted;
- a copy of, or reference to, the Director of Territory Records' declaration exempting the records from public access; and
- the date of the decision.

A compliant agency can demonstrate that they:

- keep a register of section 28 declarations.

Review of Decisions

Decisions to exempt records from public access under the *Territory Records Act 2002* can be appealed in the same way as decisions made under the *Freedom of Information Act 1989*. Members of the public can apply to the agency for a review of a decision to withhold a record from public access. Where an applicant is not satisfied by the result of the review he or she can apply to the Administrative Appeals Tribunal for further review. Agencies and the Director of Territory Records have an obligation to inform applicants of their rights to appeal decisions made to exempt records from public access.

Because the sensitivity of information decreases with time, decisions to exempt records from the public access provisions must be reviewed regularly, and not less than every 5 years.

Agencies may reverse a section 28 declaration without reference to the Director of Territory Records. Agencies, must, however, inform the Director that the section 28 declaration no longer applies and update their register of declarations accordingly. Agency staff must remember that access to records under the *Territory Records Act 2002* must be equitable, and once a section 28 declaration has been reversed the records must be available to all members of the public.

A compliant agency can demonstrate that they:

- inform applicants of their rights to appeal against access decisions;
- regularly review the application of section 28 determinations; and
- inform the Director of Territory Records of any section 28 determinations that no longer apply.

Charges

Only the Minister responsible for the *Territory Records Act 2002* can set fees for services under the Act. The Act does not provide for fees to be set for the cost to agencies of assisting researchers to apply for access. Fees may be set for costs associated with providing access to records, including for providing copies.

A compliant agency can demonstrate that they:

- only levy fees for access under the *Territory Records Act 2002* that are authorised under the *Territory Records Act 2002*.

DEFINITIONS

Agency

The Executive, an ACT Court, the Legislative Assembly Secretariat, an administrative unit, a Board of Inquiry, a Judicial or Royal Commission, any other prescribed authority, or an entity declared under the regulations of the *Territory Records Act 2002* to be an agency.

Principal Officer

The Chief Executive of an administrative unit, or its equivalent in other types of agencies.

Records

Information created, received, and maintained as evidence and information by an organisation or person, in pursuance of legal obligations or in the transaction of business. This recorded information must be maintained or managed by the agency to provide evidence of their business activities. Records can be in written, electronic or any other form.

Records of an Agency

Records, in writing, electronic or any other form, under the control of an agency or to which it is entitled to control, kept as a record of its activities, whether it was created or received by the agency.

Records Management Program

A document which complies with section 16 of the *Territory Records Act 2002* by setting out the means by which an agency will manage its records, and is approved by the agency's Principal Officer.

Recordkeeping Systems

Information systems that capture, maintain and provide access to records over time. While the term is often associated with computer software, Recordkeeping Systems also encompass policies, procedures, practices and resources which are applied within an agency to ensure that full and accurate records of business activity are made and kept.

REFERENCES

Executive Documents Release Act 2001

Freedom of Information Act 1989

Territory Records Act 2002

Territory Records Office 2009, *Records Management Programs* (Standard for Records Management Number 1) Territory Records Office, Canberra.