

## **Public Records (Scotland) Act 2011**

### **Frequently Asked Questions arising from the Implementation Surgeries April 2013**

## **1. Are there any sanctions for (a) not producing a Records Management Plan, or (b) not complying with the Records Management Plan agreed by the Keeper?**

The Keeper is empowered under Section 4.3 (b) of the Public Records (Scotland) Act 2011 to return a plan without agreement if he considers that it does not set out proper arrangements for the management of a named public authority's records. If he does this he must consult with the authority, explaining his reasons and suggesting what modifications would allow agreement, and have regard to any representations it may make in response.

Only if suggested modifications are not implemented or a revised plan is not forthcoming, would he seek to invoke the action notice powers under Section 7 of the Act. If the authority fails to comply with any of the requirements of the action notice, under Section 7(5) of the Act the Keeper can take such steps as he "considers appropriate to publicise the failure".

Authorities who fail to submit a records management plan when requested by the Keeper, or who fail to modify their plan for resubmission when it has been returned, may be deemed to have failed in their obligations under the Public Records (Scotland) Act 2011. The Keeper is under these circumstances obliged to report any such failure to Scottish Ministers.

If the Keeper has evidence indicating an authority is failing to implement or comply with the terms of their 'agreed' plan, then he can invoke the powers given to him under Section 7 of the Act. This section states that where the Keeper considers an authority to have failed or is failing to implement an agreed plan, the Keeper may issue an 'action notice' to that authority specifying the details of the failure and requiring the authority to take specified action by a certain date. Before he does this the Keeper must, however, inform the authority of his intention to issue a notice and his reasons for doing so. He must subsequently have regard to any representations made by the authority seeking to rectify or explain the identified failure. If the authority fails to comply with the requirements of the action notice the Keeper has authority to take such steps as he considers appropriate to publicise the failure. Effectively he has the power to name and shame the authority in question.

The Act is intended to be a 'light touch' piece of legislation and as such it is hoped that through engagement with the implementation team, scheduled authorities will be able identify areas of development within their organisations and put relevant action plans in place to remedy these.

## **2. Does my authority need to make provisions for archiving records?**

Element 7 of the Keeper's Model Records Management Plan <http://www.nas.gov.uk/recordKeeping/PRSA/modelPlan.asp> is a mandatory element under Section 1(2)(b)(iii) of the Public Records (Scotland) Act 2011, so an authority must show that it has a mechanism in place for dealing with records identified as being suitable for permanent preservation. This

mechanism will be informed by the authority's retention schedule which as well as identifying records with current or semi-current corporate and legal value will identify records of enduring historical value for permanent preservation.

An authority's Records Management Plan must detail its archiving and transfer arrangements and ensure that records of enduring value can be deposited in an appropriate archive repository. The Plan will detail how custody of the records will transfer from the operational side of the authority to either an in-house archive, if that facility exists, or another suitable repository, which must be named. The person responsible for the archive should also be cited.

If you have any queries about archiving records earmarked for permanent preservation you can contact the relevant client managers within the archive part of the National Records of Scotland. The PR(S)A implementation team can provide contact details.

### **3. My authority contracts out some of its functions to the private/voluntary sector. How does that affect the Records Management Plan of the scheduled authority?**

The Act does not apply to non-public bodies, so the Keeper has no authority to advise them directly on how to manage records created under contract to a named public authority when providing a function of that authority. The Keeper will not therefore develop and publish guidance for non-public bodies. Further, he has no authority under the Act to inspect the records management provisions of non-public bodies.

The Act makes clear however that the functions of a public authority, contracted out to non-public bodies, should be covered by the records management plans of the public authority. Named authorities are therefore now required to ensure they know what records are being created by contractors providing one or more of their functions, and be confident that the records are managed in accordance with the authority's RMP.

Responsibility for adequate guidance on how this will work in practice therefore lies with the public authority. The Keeper did however facilitate a Stakeholder Forum sub-group with voluntary and private body representation to consider the main issues around this new obligation. It was recognised for example that it may be difficult, particularly for a small organisation, to determine what a minimum standard of records management provision actually is.

The sub-group therefore developed tools to help contractors know what might be expected of them when public records form part of a contractual arrangement with a public authority named under the Act.

The Forum was able for example to develop a minimum standard that most non-public bodies should be able to comply with. This was underpinned with a legal statement, endorsed by the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR), for public authorities to use when contracting out a function to a non-public authority. Look under the 'guidance' tab at:

<http://www.scottisharchives.org.uk/projects/toolsstandards/arms/tour>

The minimum standard will be maintained over time by the Scottish Council on Archives (SCA). And, to further support the guidance for non-public bodies, the SCA have offered to run training sessions for them.

#### **4. How do we define what functions are part of a public authority?**

To properly address the concerns around this question the Keeper facilitated a Stakeholder Forum sub-group, with voluntary and private body representation, to consider the main issues around 'contracting out functions'. The sub-group concluded it would not be reasonable to expect the Keeper to remain fully acquainted with all the separate functions undertaken by the over 250 named public authorities.

Stakeholders further agreed that it must be for each authority to decide and define what its functions are. For smaller authorities this may be easier to determine, especially if they were statutorily established to fulfil a small number of functions. Larger, more complex authorities may find this more difficult, but it is essential that every authority is aware of the functions that it is obliged to provide and the records created in doing so.

The Keeper will therefore rely to a large extent on an authority's Records Management Plan and accompanying evidence to provide sufficient evidence of all their statutory functions.

#### **5. How should public authorities account for electronic records in their records management plans?**

Although the Act is media neutral, it is appreciated that the practicalities of keeping paper records and electronic records may be different.

The business classification of a public authority, required to be viewed as part of the agreement process, needs to show that the authority understands all its functions and the types of records produced by the business areas delivering these functions. It does not need to include details of the particular software used to create or manage these records.

Many public authorities operate a hybrid system of paper records, structured electronic records systems and unstructured solutions. The Keeper is willing to agree plans of this type when there is clear evidence that the difficulties of unstructured electronic information are understood by the authority and

particularly when improvement strategies are in place to address the difficulties.

Generally throughout the RMP, evidence of such strategies, that take account of where an authority is now and where it aims to be in the near future, will be welcomed and can be agreed by the Keeper even if the improvement project is incomplete. This agreement would be dependent on evidence of a senior officer's approval of the improvement plan and an indication that resources have been appropriately allocated.

The Keeper is keen to ensure that the Act is adequately supported and remains very aware of the issues around e-records. The Act permits the Keeper to issue guidance other than that which is required to publish by statute relating to the form and content of the Model Records Management Plan. To this end, the Keeper will publish and maintain guidance on best practice for the creation, management, storage and preservation of digital or electronic records. The Keeper is confident that this guidance will contribute significantly towards alleviating concerns of stakeholders on this issue.

Guidance on electronic records management is being created by the National Records of Scotland's e-records unit. The current version of the Guidance is available on the NRS website:

(<http://www.nas.gov.uk/recordKeeping/ERGuidance/default.asp>)

## **6. Are there any training courses available in Scotland which provide an understanding of the basic principles of records management?**

The Keeper cannot recommend any particular course or records management training organisation, but the universities of Glasgow and Dundee provide records management courses which are highly regarded nationally and internationally. You can also check the Information and Records Management Society website <http://www.irms.org.uk/>, as they occasionally run training courses on various topics. There are also a number of records management consultants based in Scotland who may be able to provide your authority with a bespoke solution to your records management needs.

## **7. Will the submission of Records Management Plans lead to an increase in subject access requests?**

It might be the case that once a scheduled authority submits a Records Management Plan it may see an increase in subject access requests. Having submitted a Records Management Plan however, this should mean that an authority's records are being better managed and will have the effect of making subject access and Freedom of Information requests easier to deal with.

## **8. Where can survivors of abuse and former residents of care go to find records?**

They can contact the In Care Survivor Scotland Service <http://www.incaresurvivors.org.uk/> which is supported by the Scottish Government to provide advice and guidance to former residents of care on access to records.

The Victims and Witnesses (Scotland) Bill is currently being scrutinised by the Scottish Parliament's Health and Sport Committee. If the Bill is successful it will establish a National Confidential Forum (NCF) that will provide a mechanism for former residents of care and survivors of abuse to record their account of their in-care experience.

A separate but linked strand of this work is the Scottish Government (SG) supported development of a web-based facility similar to the Find & Connect facility recently established in Australia, and which seeks to provide care leavers with guidance on how to find records and information on their in-care experience. Research on the proposed Scottish web-based solution is being led by the Centre for Excellence for Looked After Children in Scotland (CELCIS). A Scottish equivalent of Find & Connect will seek also to provide former residents of care with guidance on where and how to access records about their personal care experience and assist with more general information about historical aspects care provision In Scotland.

## **9. What about records that don't fit into a public authority's EDRMS?**

The authority should have policies, procedures and systems in place that ensure **all** corporate records are accounted for under its RMP.

Clearly, for many authorities it will not be possible for all records to fit properly into a single system. For example, some authorities will operate a hybrid system based both on paper and on electronic records. They may also have data sets that will necessarily sit outside any electronic document and records management system (EDRMs) or they may, for legitimate business reasons, decide to operate two or more incompatible software platforms in different parts of the organisation to manage different records. None of these issues impede the creation of a business classification scheme that covers all records created by the authority. In fact, it is likely that the 'typical' public authority business classification scheme will feature records kept in several different media types. The business classification (Element 4), Retention Schedule (Element 5) and Audit Trail (Element 11) should aim to reflect the different procedures in place for all these media types.

Part 2, section 13(1) of the Act states for the purposes of the Act "record" means anything in which information is recorded in any format". Scottish public authorities are therefore required to have proper provision for the management of all their public records regardless of format.

Authorities should be aware of the potential risks introduced to their business by records hidden from the business classification by poor operational procedures. Records created and stored on personal or unstructured drives or in e-mail folders need to be accounted for. Authorities may need to be aware of public records held on separate electronic devices, possibly belonging to staff members. Remote working is becoming more common, which means that an appreciation of the dangers of remote records storage, outside the core systems, must be addressed in relevant records management policies.