

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

### **Frequently Asked Questions arising from the Implementation Surgeries September 2012**

**1. Why has the Keeper of the Records of Scotland (the Keeper) not yet published a complete timetable showing when invitations will be sent to each public authority asking them to submit their plan?**

The Public Records (Scotland) Act 2011 comes in to force in January 2013, but the Keeper has no intention of inviting all 200+ named public authorities to submit their plans at once.

The first public authority to be invited to submit their records management plan (RMP) will be *the Registrar General and Keeper of the Records of Scotland*.

After that, the order of submissions and the timetable remains fluid. There have been intimations that some public authorities will be ready to submit in the first half of 2013. The Keeper would, in the spirit of the Act, accept these as they become available. As the implementation team cannot know how many 'volunteers' they are going to get, or how long it will take to assess and agree these plans, it is not currently possible to commit to a planned programme of assessments.

It is important to remember that when the Keeper invites a public authority to submit its RMP, there will be several months run-in time. This will allow the Keeper and the authority to consider the draft RMP and agree a suitable submission date.

**2. Will the Keeper take account of individual circumstances when inviting authorities to submit their RMPs for agreement?**

The Keeper is not trying to catch out public authorities. Nor is the Act deliberately designed to shine a spotlight on poor records management practice. The Keeper will, therefore, be sympathetic to particular situations in public authorities that might temporarily delay submission of plans.

For example, the current restructuring of the Police and Fire and Rescue services in Scotland may indicate that formal invitations to these authorities might be left to later in the process.

Improvement over time is central to achieving the aims of the Act. Colleagues should therefore remember that the Keeper is free under the Act to agree a reasonable improvement programme submitted as part of an RMP. The honest acknowledgement of gaps in provision and a determination to close these gaps will be good for the business of the authority and as such will be considered 'good records management practice' by the Keeper.

**3. Will the Keeper contact only the Chief Executive Officers (CEO) of named public authorities when he/she seeks to remind authorities of the implementation date of 1 January 2013?**

The Keeper must contact the CEO (or equivalent) of each scheduled authority to remind them of the date of full implementation of the Act and also when the invitation to submit the authority's RMP is issued.

However, the Keeper is open to suggestions as to who else in an authority it might be valuable alerting to the impending implementation date. For example, it has been suggested that the elected council leader should be copied into correspondence between the Keeper and the CEO of a local authority. This will require clearance from Scottish Ministers first.

The Keeper therefore urges colleagues to inform the implementation team as soon as possible who else they might consider should be contacted in their authority to ensure the message is properly received and disseminated across the authority.

#### **4. 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.

#### **5. Will the assessment of plans involve the implementation team visiting public authorities and giving 'scores'?**

No. The Keeper is not proposing to implement a formal assessment programme, involving on-site scrutiny of RMPs, as part of the initial agreement process.

Plans must be submitted by invitation to the Keeper to be assessed by the National Records of Scotland (NRS) implementation team. The Keeper recognises that public authorities are varied in their structure and complexity and each plan submitted at this early stage of the process will be assessed in its own right and in relation to the accompanying evidence. This initial evidence-based scrutiny process will not rely on a scoring system.

The Keeper has the right, under the Act, to re-visit public authority RMPs five years after agreement. On-site visits may be appropriate at this time. In the intervening period therefore the Keeper in collaboration with stakeholders will consider how best to conduct pre-arranged site visits and what the most appropriate assessment methodology might be.

#### **6. What other guidance might the Keeper publish and do public authorities have to follow it?**

##### **6.1 Electronic Records:**

The Act says that a record is anything in which information is recorded in any form. It is therefore not media specific and is unambiguous in its reference to public records in all and any format.

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>)

### **6.2 Contracting Out of Public Functions:**

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. The Keeper will not therefore develop and publish guidance for 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.

Responsibility for adequate guidance on how this will work in practice therefore lies with the public authority. The Keeper did however facilitate a Stakeholder 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.

### **6.3 Statutory Guidance:**

As part of his obligations under the Act, the Keeper published the statutory guidance to the form and content of the Model Plan. This will be regularly updated. It is intended that selections from formally agreed plans will gradually be used to replace the samples that currently appear in the Guidance Document. <http://www.nas.gov.uk/recordKeeping/PRSA/modelPlanGuidance.asp>

These resources are for consideration only. The Keeper, while acknowledging their potential usefulness, does not require that they are utilised by a public authority (although authorities must *have regard to the model records management plan* (PRSA 8.3) when developing their own).

**7. My authority compiles evidence in support of compliance with other information legislation and compliance regimes. Does the PRSA now require us to create different evidence?**

Ministers are clear that the Act must not generate unreasonable burdens on public authorities. It is important therefore that authorities do not set out to create new or additional evidence to support their RMP. It is hoped that most authorities already create the evidence needed to support the elements of their RMP and that no new systems or mechanisms are required to help an authority meet its obligations.

Ministers further remain very keen to ensure that Government is not seen to be prescribing change or dictating the systems to be used in working towards compliance. They are however determined that the Act should facilitate continuous improvement driven by Scottish public authorities developing solutions that are reflective of their individual needs.

***Remember the Keeper is free to agree a RMP where it includes a credible improvement plan for those areas of an authority's current provision that require improvement.***

It is certainly the case that where an authority compiles evidence of compliance to satisfy other legislative obligations that same evidence should, where appropriate, be re-used to satisfy PRSA obligations.

**8. If an authority is found by the Scottish Information Commissioner (SIC) to be in breach of its obligations under FOISA with regard to records management and acts to rectify the situation, is the authority obliged under the PRSA to make the Keeper aware of this?**

The Act permits the Keeper to review an authority's agreed RMP, but only after 5 years. However, the Keeper will encourage authorities to regularly review their own plans to ensure that they remain fit for purpose. This is in the spirit of continuous improvement that underpins the Act. If an authority chooses or is compelled to review its plan and to update it, and in doing so record the implementation of new procedures that lead to material changes to the plan, then the authority must re-submit its RMP for the agreement by the Keeper at that time and not wait until the Keeper revisits the plan under the 5 year rule.

Where the SIC considers that the practice of a Scottish public authority does not meet the requirements of the code of practice issued under section 61 of FOISA, she has the power, under section 44(3) of FOISA, to issue a Practice Recommendation to the authority in question. It is likely that a Practice Recommendation will be issued where there have been persistent or frequent breaches of the code of practice, or where there has been a particular breach which is so severe that it warrants firm action.

Where the SIC becomes aware that a Scottish public authority has failed to conform to the Code, and where she considers that the non-compliance may be such that a practice recommendation

may be issued, there is a requirement that consultation takes place between the SIC and the Keeper of the Records of Scotland prior to that Practice Recommendation being issued. A Memorandum of Understanding exists between the Keeper and the SIC to facilitate this relationship.

Although under no statutory obligation to do so, the SIC may consult the Keeper in other circumstances. For example, where she becomes aware of a Scottish public authority's failure to comply with the Code, but decides that a practice recommendation will not be issued. In such cases, she may seek advice and assistance from the Keeper on the best way to guide the Scottish public authority concerned to rectify the non-compliance.

### **9. Will the Keeper charge for conducting an assessment of an authority's RMP?**

No. The Keeper is statutorily obliged to assess authorities RMPs as part of his/her role in implementing and regulating the Act. The Act does not permit the Keeper to charge for assessments.

### **10. Will named authorities be compelled to revisit current contracts with non-public bodies to ensure they comply with the authority's new obligations under the Act?**

No. The Act is silent on this issue and does not therefore compel named authorities to revisit current contracts with a view to re-negotiating or renewing them in line with their new obligations.

It is the case however that subsequent to 1 January 2013 and when an authority seeks to contract out a statutory function the contract must, where appropriate, make provision for the proper management of records created by the contracting body under that contract. Guidance on a records management minimum standard for contractors and a legal statement of compliance with this standard are available from the Scottish Council on Archives website. Look under the 'guidance' tab at:

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

### **11. Can named authorities combine to submit a joint RMP?**

The Act requires named public authorities to produce a RMP for approval by the Keeper. The schedule defines the authorities to whom the duty applies. In an effort to be as flexible as possible and minimise any potential burden on public authorities the Act allows an authority to produce more than one plan. It is recognised that for some more complex authorities, one plan may not be a practical vehicle for demonstrating compliance. This option could for example be useful to Scottish Ministers, who administer a large number of diverse functions.

In order to accommodate groups of authorities that are in close working relationships and discharge similar functions, the Act allows for collaboration on a single common plan. Section 1(9) of the Act addresses this issue and says,

**(9) A group of two or more authorities—**

**(a) must, if the Keeper so requires, or**

**(b) may, with the Keeper's agreement,**

**(c) have a common records management plan for both or, as the case may be, all of the authorities in the group.**

An example of where this ability to collaborate on one RMP might prove useful could be in relation to Audit Scotland, the Auditor General for Scotland and the Accounts Commission for Scotland. These are individually named authorities for the purposes of the Act, but their close working relationship could serve to make a single common RMP a practical solution for their combined operations.