

# Policy on the Notices Power in the *State Records Act* 1998

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## 1. Introduction

The *State Records Act 1998* (the Act) establishes the State Records Authority NSW ('State Records NSW') as the regulator of records management and recordkeeping within NSW public offices. Section 66 of the Act identifies that the key function of State Records NSW is the oversight of public office recordkeeping.

State Records NSW uses a *responsive regulatory approach* in the pursuit of our objectives for the regulation of records management and recordkeeping. This approach is articulated in the *Regulatory Framework for the State Records Act 1998*<sup>1</sup> and enables the use of coordinated, responsive and risk-informed practices to improve compliance with the requirements of the *State Records Act 1998* and the standards issued under the Act.

In the first instance, State Records NSW will seek a cooperative resolution of a recordkeeping or records management issue including using the regulatory mechanisms available at sections 12(4) and 15 of the Act. If these mechanisms are unsuccessful, or a cooperative relationship with the public office has not been established, and the issue has not been able to be resolved, State Records NSW will escalate the approach and consider use of the notices power at section 12(5) of the Act. State Records NSW may also use this power where, for example there is a need to respond urgently to an egregious issue of recordkeeping failure or breach of the Act.

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## 2. Objects of the Policy

The objective of the *Policy on the Notices Power in the State Records Act 1998* ('The Policy') is to establish principles and a framework for decision-making in using sections 12(5) and 12(6) of the Act.

The policy provides decision-makers with a framework for

- identifying if a notice should be issued to a public office
- issuing a notice to a public office
- responding to a public office's assessment findings, and
- reporting on notices in the Authority's Annual Report.

State Records NSW commits to using the notices power

- in a fair, consistent, and accountable way
- efficiently and effectively

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## 3. Application of the policy

This policy applies to State Records NSW and its staff, and its use of sections 12(5) and 12(6) of the Act.

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## 4. Definitions

For the purposes of this policy, the following definitions apply:

### **Monitoring activity**

An activity undertaken by State Records NSW to measure the maturity and conformity of records management and recordkeeping in a public office. The monitoring activity may use the Records Management Assessment Tool (RMAT), or the minimum compliance requirements in a records management standard issued by State Records NSW, or other specified requirements. Monitoring

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<sup>1</sup> Available at [www.staterecords.nsw.gov.au](http://www.staterecords.nsw.gov.au)

activities may also include inspections of State records, records storage, and systems used to store and manage records. Sections 12(4) and 15 of the Act provide the authority for such monitoring activities.

Monitoring activities can be undertaken with the entire jurisdiction of the Act, or with a sector of the jurisdiction (e.g. councils, universities, government agencies, or local health districts), or an individual public office.

## **Recordkeeping**

The process of making accurate and reliable records and capturing them into the official recordkeeping systems of the organisation.

## **Recordkeeping Assessment**

An impartial and evidence-based assessment of a public office's recordkeeping conducted by State Records NSW. Section 15 of the Act provides the authority for this work.

The outcome of an assessment is a Recordkeeping Assessment Report which may include recommendations to the public office to remediate and improve recordkeeping.

## **Records management**

Field of management responsible for the efficient and systematic control of the creation, receipt, maintenance, use and disposition [disposal] of records, including processes for capturing and maintaining evidence of and information about business activities and transactions in the form of records (*AS ISO 15489.1:2017 – clause 3.15*)

## **Records Management Assessment Tool**

A self-assessment tool developed by State Records NSW and used to assess the maturity and conformity of recordkeeping and records management in a public office. Also known as the RMAAT.

## **Responsive Regulatory Approach**

State Records NSW takes a responsive regulatory approach in regulating the Act. This enables cooperative and collaborative engagement with public offices to promote voluntary compliance and self-regulation with the Act. This regulatory approach enables State Records NSW to escalate its monitoring activities and actions according to the level of risk posed by non-compliance, for example escalating to formal notices, referral of matters to a co-regulator, to reporting to the Minister, and legal proceedings.

The *Regulatory Framework for the State Records Act 1998* discusses the coordinated, responsive and risk-informed practices undertaken by State Records NSW to improve compliance with the requirements of the Act.

Unless otherwise defined in this policy, words and phrases used in this policy have the same meaning as in the Act.

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# **5. Monitoring mechanisms in the *State Records Act 1998***

The Act establishes State Records NSW as the regulator of recordkeeping and records management within the NSW Public Sector. Section 66 of the Act identifies that the key function of State Records NSW is the oversight of public office recordkeeping.

State Records NSW uses the regulatory mechanisms including those provided by sections 12(4) and 15 of the Act to monitor records management and recordkeeping, and to achieve a cooperative resolution of a records management or recordkeeping issue. Regulatory mechanisms provided by Sections 12(5) and 12(6) of the Act allow State Records NSW to escalate the actions that can be taken in response to an issue.

Section 20 provides reporting powers which may be used when State Records NSW considers there is increased risk and/or the need to escalate issues; Section 20 may also be used to report on monitoring activities and specific issues of concern.

The table below sets out the monitoring and reporting powers and how they may be used:

| Monitoring power  | How is it used by State Records NSW?  |
|---|---|
| <p><b>Section 12(4)</b> requires public offices to make arrangements with and provide reports to State Records NSW in order for State Records NSW to monitor the public office's records management program.</p>  | <p>This obligation is generally discharged by public offices submitting an assessment as part of the annual Recordkeeping Monitoring Exercise.</p>  |
| <p><b>Section 15</b> requires a public office to give State Records NSW access to the public office's State records in order to enable State Records NSW to monitor compliance with the requirements of the Act.</p>  | <p>This obligation may be used by State Records NSW to undertake a Recordkeeping Assessment. It is used to request access to records and information from public offices in order to determine for example, if:</p> <ul style="list-style-type: none"> <li>• records storage is adequate</li> <li>• a record is extant,</li> <li>• a public office has the appropriate governance arrangements and/or practices for records management in place.</li> </ul> |
| <p><b>Section 12(5)</b> allows State Records NSW to issue a notice to a public office requiring the public office to</p> <p>(a) conduct an assessment of its record-keeping processes and records management program, and</p> <p>(b) provide State Records NSW with a report on the findings arising from the assessment.</p>   | <p>State Records NSW may use this section to escalate the actions that can be taken in response to a records management or recordkeeping issue.</p> <p>Sections 6 and 7 of this policy discuss the issue of notices and evaluation of responses received from public offices.</p>   |
| <p><b>Section 12(6)</b> allows State Records NSW, if it is not satisfied with a report, or the findings of a report, made under section 12(5) of the Act, to include information about this in the State Records NSW's annual report.</p>   | <p>State Records NSW may use this section to escalate an issue by reporting dissatisfaction with the public office's report or the public office's findings of a report, in the State Records Authority NSW' annual report.</p> <p>Section 8 of this policy discusses reporting.</p>  |
| <p><b>Section 20(1)</b> enables State Records NSW to report to the Minister responsible for a public office regarding the failure of the public office to comply with the Act, the regulations, or "any other matter of concern" in regard to the public office's obligations.</p> <p><b>Section 20(2)</b> enables State Records NSW to report on incidences of public office failure to comply with the Act and its requirements in the Authority's Annual Report.</p> | <p>State Records NSW uses section 20(2) to report on:</p> <ul style="list-style-type: none"> <li>• annual monitoring activities</li> <li>• case studies of recordkeeping failures in public offices and learnings from these issues, and</li> <li>• identifying specific concerns with recordkeeping in a public office.</li> </ul>   |

## 6. Issuing a section 12(5) notice to a public office

### 6.1 Purpose of a notice

The section 12(5) notice enables State Records NSW to gather sufficient information from a public office to understand the current maturity and conformity of recordkeeping and the records management program, any recordkeeping issues being experienced by the public office, and the corrective actions being taken by the public office to address the issue.

State Records NSW may use section 12(5) of the Act including if:

- regulatory mechanisms at sections 12(4) and 15 of the Act have been unsuccessful
- State Records NSW has been unable to establish a cooperative relationship with the public office to resolve an issue
- a recordkeeping issue in the public interest is brought to State Records NSW's attention, or
- State Records NSW has to urgently respond to an egregious issue of recordkeeping failure or breach of the Act in a public office.

The notice may require a broad or specific assessment of recordkeeping and records management, depending on the issue/s of concern. The assessment of the issue/s and the report of the public office's findings arising from the assessment should furnish State Records NSW with sufficient information and detail.

## 6.2 Criteria for issuing a notice

Prior to issuing a section 12(5) notice, State Records NSW will assess and triage the recordkeeping and records management issues to determine if the issue meets the criteria for issuing a notice. In determining if a notice is warranted, State Records NSW may consider:

- level of recordkeeping risk or failure
- seriousness of the breach of the Act and the standards and codes of best practice issued under the Act
- public office's records management risk profile, and/ or
- level of cooperation received from the public office in relation to responding to requests made under sections 12(4) and 15.

The triage process will identify the appropriate timeframe for responding to the notice.

## 6.3 Section 12(5) notice

A section 12(5) notice is issued by the Executive Director to the Chief Executive of the public office.

The notice should include the *purpose and why the information is being sought*. This should be outlined in enough detail and be specific enough for the public office to know why this information is being sought.

The notice should set out *what information is being sought*. The notice should outline in sufficient detail the type and scope of assessment that the public office should conduct, the criteria to be used for the assessment, the report to be provided to State Records NSW of the findings of the assessment and the approach to corrective actions, and a timeframe for responding to State Records NSW.

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# 7. Responding to a public office's assessment findings

State Records NSW will acknowledge the receipt of information provided by the public office, in a timely fashion.

## 7.1 Evaluating and assessing the public office's report

State Records NSW will evaluate and assess the information received from the public office.

In order to meet the requirements of section 12(6) of the Act, the assessment process will also determine if State Records NSW is satisfied/not satisfied with the report and the findings provided by the public office. Additionally, the assessment will identify if State Records NSW should include detailed information about the report and/or findings of the report in the Annual Report.

State Records NSW will ensure that documentation of the assessment process is maintained.

## 7.2 Responding to a public office

State Records NSW will respond to the public office's report and findings based on the evaluation undertaken in 7.1.

State Records NSW may:

- indicate satisfaction with the approach described in the public office's report to rectifying recordkeeping and records management issues
- seek further information from the public office
- require further reporting to State Records NSW
- require the public office to implement other steps.

If State Records NSW intends to require the public office to undertake further reporting (using the monitoring power of section 12(4) of the Act), or to implement other steps (i.e. additional remediation or other actions), State Records NSW will provide the public office with a Recordkeeping Assessment Report. The Report will identify why State Records NSW were not satisfied with the public office's report and findings. State Records NSW will seek a response from the public office on the Recordkeeping Assessment Report and incorporate the public office's comments into the final version of the Report.

Any enforcement action, as a result of recordkeeping issues raised in the Recordkeeping Assessment Report, will be in proportion State Records NSW considers necessary to the level of recordkeeping risk or failure and the seriousness of the breach of the Act.

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## 8. Reporting on notices in State Records NSW's Annual Report

State Records NSW will include a report on the use of section 12(5) in its Annual Report. The report will identify in summary the number of notices issued each year and the issues/topics of concern.

Under section 12(6) of the Act, if State Records NSW is not "satisfied" with a public office's report, or the findings in the public office's report, State Records NSW may include information about this in the Annual Report, including identifying the public office.

If a public office is identified using section 12(6), State Records NSW will need to consider if the matter should also be escalated to the relevant Minister using the reporting power at section 20(1) of the Act.