

Policy on co-regulation and referral of matters

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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 (1)(a) 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*¹ and enables the use of coordinated, responsive and risk-informed practices to improve compliance with the requirements of the State Records Act and the standards issued under the Act.

A variety of approaches will be undertaken with public offices to improve compliance, however, when a public office fails to comply or non-compliance is significant and complex, we will refer the public office to the appropriate oversight agency for investigation or to the relevant Minister.

2. Objects of the Policy

The objective of the *Policy on Co-regulation and Referral of Matters* (the Policy) is to establish principles and a framework for decision-making regarding the management of instances of non-compliance under the Act that require referral.

State Records NSW commits to:

- using co-regulatory approaches to escalate recordkeeping and records management non-compliance matters and those matters that are significant and complex matters (see Section 5)

¹ Available at <https://staterecords.nsw.gov.au/recordkeeping/guidance-and-resources/regulatory-framework-the-state-records-act-1998>

- referring only those matters of significant concern to the relevant Minister or a coordinating entity (e.g. Secretary of a cluster or the Office of Local Government) (see Section 6).

3. Application of the policy

This policy applies to State Records NSW and its staff, and its oversight of public office recordkeeping.

4. Co-regulation

Co-regulation typically refers to where one organisation develops and administers standards or requirements, but is supported by other organisations to enforce those standards and requirements.

The *Regulatory Framework for the State Records Act 1998* incorporates co-regulation and identifies the following:

- the *State Records Act 1998* sets out the mandatory requirements and standards for public offices
- State Records NSW administers the requirements and standards
- State Records NSW monitors compliance with the requirements and standards using sections 12(4) – 12(6) and section 15 of the *State Records Act*
- oversight agencies² in NSW Government assist State Records NSW to enforce the requirements and standards.

State Records NSW has identified that oversight agencies are better placed to conduct investigations into some non-compliance matters. The Information and Privacy Commission (IPC) and the NSW Ombudsman have been identified as having complementary legislative scope and investigative powers which would assist State Records NSW to enforce the requirements of the *State Records Act*.

5. Referring matters to an oversight agency

Issues of non-compliance with requirements of the *State Records Act* and the standards issued under the Act are generally identified through the following monitoring activities:

- formal reporting by public offices on their compliance to the *State Records Act* and standards in the annual Recordkeeping Monitoring Exercise
- Recordkeeping Assessments (undertaken in response to a complaint or an emerging recordkeeping/records management issue in a public office)
- inspections of records storage, records, systems, or records management practices
- a public office's report on findings of an assessment conducted in response to a notice issued by State Records NSW
- an assessment of a recordkeeping issue which has been referred to us by another organisation, and
- follow-up with a public office when serious incidents of non-compliant records management or recordkeeping are identified in oversight agency reports or in media reports.

5.1 Criteria for referral

The Executive Director will determine if a public office is to be referred to an oversight agency based on an assessment against the criteria listed below. See **Appendix A** for further information on the criteria.

Criteria for referring a public office to an oversight agency (or escalating to a Minister) may include:

² Oversight agencies are those agencies which have special powers that enable them to safeguard the public interest and conduct investigations. They include the NSW Ombudsman, Independent Commission Against Corruption, Audit Office of NSW, and Information and Privacy Commission of NSW. (see <https://sef.psc.nsw.gov.au/understanding-the-sector/central-and-oversight-agencies>)

- Issues raised concern possible maladministration or corrupt conduct
- Issues raised concerning destruction of information contained in a record to deliberately prevent disclosure via the *Government Information (Public Access) Act 2009* as authorised or permitted under the GIPA Act
- Issues are more significant, widespread, or complex than first identified in the preliminary assessment
- Issues raised are more than just a breach of the *State Records Act 1998* and concern other legislation, policy or procedure
- The public office is demonstrating limited interest in cooperating with State Records NSW
- The public office has not demonstrated willingness to comply with the State Records Act, or acts contrary to the State Records Act
- The public office failed to respond to a notice issued under section 12(5) of the State Records Act
- The public office's report, or findings in the report, in response to a notice are deemed to be unsatisfactory
- The public office has refused to implement recommendations in a Recordkeeping Assessment Report to rectify recordkeeping failures.

5.2 Referral of matters

Matters concerning:

- possible corrupt conduct will be referred to the Independent Commission Against Corruption (ICAC).
- possible maladministration will be referred to the NSW Ombudsman.
- possible destruction of information held in a record to deliberately prevent access via the *Government Information (Public Access) Act 2009* as authorised or permitted under the GIPA Act will be referred to the Information and Privacy Commission (IPC).

In addition, matters concerning the below are to be referred to the NSW Ombudsman's Office as a complaint under section 12 of the *Ombudsman Act 1974*.

- significant or complex complaints about recordkeeping or records management issues
- significant, widespread or complex issues of recordkeeping or records management which require investigation, or
- significant or complex issues of recordkeeping or records management where there is limited interest in cooperating with State Records NSW, complying with the State Records Act, or implementing recommendations to address recordkeeping failures.

While State Records NSW may refer matters to oversight agencies, it will be up to the receiving agency to determine, in accordance with their processes, whether or not to take action. A referral of a matter is not of itself a direction that in any way binds the receiving agency.

6. Escalating matters to the relevant Minister or coordinating entity

Escalating matters to the relevant Minister is considered the last resort.

Section 17 of the *State Records Act 1998* enables State Records NSW to request a review of a matter by the Minister responsible for State Records NSW and the Minister responsible for the public office when State Records NSW is 'in dispute' with a public office concerning the operation of the Act. Additionally, State Records NSW may also escalate a matter to a coordinating authority (e.g. Office of Local Government, Secretary of the relevant Department).

Depending on the matter, State Records NSW may also suggest to the Minister responsible for the public office that the matter is referred to the Auditor-General for investigation.

The Executive Director will determine if a public office is to be referred to the relevant Minister or coordinating entity based on an assessment of the public office against the criteria listed below:

- ongoing high risk and very high risk issues of non-compliance
- public office undertakes functions of high public interest
- public office is unwilling to comply or cooperate or remediate practices, systems, or processes to address the issues of non-compliance, i.e. the public office is in 'dispute' with State Records NSW over the operations of the State Records Act
- public office has failed to respond to a notice issued under section 12(5) of the State Records Act
- public office's report, or findings in the report, in response to a notice are deemed to be unsatisfactory
- there are ongoing or repeated instances of non-compliance.

Document History

Version	Date issued	Notes
1.0	April 2021	Initial Draft; consultation with Recordkeeping Standards & Advice
2.0	May 2021	Draft for consultation with Director
3.0	June 2021	Final draft approved by the Board
4.0	April 2023	Revisions to incorporate legislative changes; consultation with Manager State Records NSW
4.1	June 2023	Incorporation of feedback and finalisation of draft
5.0	July 2023	Final draft approved by the Board

Review Date

This policy will be reviewed approx. July 2026 (review dates are dependent on the type of policy and impending regulatory changes. Review dates may change to accommodate).

Contact

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Appendix A: Criteria for referring a public office to an oversight agency

The following criteria are not definitive, but have been developed to guide decision-making and to ensure consistency in decisions to referral matters. In all cases, consideration will also be given to the public interest.

1. Have the issues raised concerns of possible maladministration or corrupt conduct?

During a recordkeeping assessment, there may be concerns of possible maladministration or corrupt conduct. It may become apparent that corrupt behaviour has taken place (e.g. records may have been altered or destroyed to hide corrupt conduct, or false records created etc.).

State Records NSW has an obligation under section 11 of the *Independent Commission Against Corruption Act 1988* to report possible corrupt conduct to the ICAC.

Maladministration is defined in section 26 of the *Ombudsman Act 1974* as conduct contrary to law, unjust, unreasonable, improperly discriminatory, based wholly or partly on improper motives, based wholly or partly on irrelevant grounds or consideration, or otherwise wrong. State Records NSW will report possible maladministration to the NSW Ombudsman.

2. Have the issues raised concerns that there has been a destruction of records to prevent disclosure of information under the *Government Information (Public Access) Act 2009*?

Assessment of a matter can reveal that the matter concerns the deliberate act of concealment, alteration or destruction of records to prevent disclosure of information under the *Government Information (Public Access) Act 2009* as authorised or permitted under the GIPA Act.

In this scenario, the matter should be referred to the Information and Privacy Commission for investigation.

3. Are the issues more significant, widespread, or complex than first identified in the preliminary assessment process?

A preliminary assessment of a non-compliance matter may identify recordkeeping issues, however it's often the case that the magnitude of the issues is not understood until a more in-depth assessment is undertaken. The more in-depth process may also identify that more than one business unit is involved and the issue is more likely to be widespread throughout the organisation and not limited to a single business process.

In some scenarios, the recordkeeping issue may also have been looked at or assessed previously by State Records NSW, and the new or current issue may identify that there is a systemic or ongoing problem which needs to be addressed.

4. Does the public office have a risk rating of High Risk or Very High Risk of a recordkeeping failure?

As part of the process of referral, a risk analysis of the public office should also be undertaken. If the public office has a risk rating of High Risk or Very High Risk of a recordkeeping failure, then this will also add weight to the decision to refer the public office.

5. Are the issues beyond the scope of the State Records Act?

A preliminary assessment of a non-compliance matter has identified recordkeeping issues. A more detailed assessment can reveal that the matter may have breached the State Records Act and is also a matter concerning other legislation, policy or procedure. In such cases, it's appropriate to refer the matter, so that the matter can be more thoroughly investigated and a more holistic outcome can be achieved.

6. Has the public office demonstrated limited interest in cooperating with State Records NSW, including responding to requests for information?

This criteria draws upon the risk analysis of the public office and the relationship between State Records NSW and the public office.

7. Has the public office demonstrated no interest or willingness to comply with the State Records Act, or acts contrary to the State Records Act?

This criteria draws upon the risk analysis of the public office and the relationship between State Records NSW and the public office.

8. Has the public office failed to respond to a notice issued by State Records NSW?

This criteria draws upon the notices power at section 12(5) of the State Records Act. If a public office should fail to respond to a notice, then this would be a serious failure and it is appropriate to refer the public office to the relevant Minister.

9. Is the public office's report, or findings in the report, in response to a notice deemed to be unsatisfactory?

If State Records NSW is not "satisfied" with a public office's report, or the findings in the public office's report, then State Records NSW may include information about this in the State Records NSW's Annual Report, including identifying the public office (as per section 12(6) of the State Records Act). State Records NSW may also escalate this matter to the relevant Minister.

10. Has the public office refused to implement recommendations to address recordkeeping failures?

This criteria draws upon the relationship between State Records NSW and the public office, and the public office's response to recommendations made by State Records NSW to address recordkeeping failure.