

**MINISTERIAL BRIEFING NOTE**

**Subject:** State Archivist’s update on the progress of recommendations resulting from the independent investigation into alleged unauthorised disposal of public records by a Minister

**Decision/Action by:** N/A

**Reasons for Urgency:** N/A

**Briefing type:** Requested briefing note for noting

**Responsible Area:** Queensland State Archives

**Electorate:** Statewide

**Contact Officer:** Mike Summerell, Executive Director & State Archivist – (07) 3037 6601

**PURPOSE**

To provide the Minister with an update on the progress of recommendations resulting from the independent investigation into alleged unauthorised disposal of public records by a Minister

**RECOMMENDATION**

It is recommended that the Minister:

1. Note the State Archivist’s recommendations following an independent investigation into allegations of unauthorised disposal of public records by Minister Mark Bailey.
2. Note the progress to date in implementing these recommendations.

Noted	Approved	Not approved

Yes	No
	x

Media Release Required

**Routine** (Straight to MC)     **Non-routine** (DG to endorse)

<p><b>DIVISIONAL HEAD ENDORSEMENT</b></p> <hr/> <p>Andrew Spina Assistant Director-General Digital Capability, Information and Transaction Based Services</p> <p>Date: / /</p>	<p><b>COMMENTS</b></p>
<p><b>DIRECTOR-GENERAL ENDORSEMENT</b></p> <hr/> <p>Liza Carroll Director-General Department of Housing and Public Works</p> <p>Date: / /</p>	<p><b>COMMENTS</b></p>
<p><b>MINISTERIAL APPROVAL</b></p> <hr/> <p>Mick de Brenni MP Minister for Housing and Public Works Minister for Digital Technology Minister for Sport</p> <p>Date: / /</p>	<p><b>COMMENTS</b></p>

**CONTEXT**

- In March 2017, allegations were made that The Honourable Mark Bailey, Minister for Main Roads, Road Safety and Ports and Minister for Energy, Bio Fuels and Water Supply had disposed of public records without appropriate authorisation. Under the *Public Records Act 2002*, the State Archivist had a statutory obligation to independently investigate this matter. Subsequent to the commencement of the State Archivist's investigation commencing, the matter was referred to the Crime and Corruption Commission (CCC).
- The CCC were informed of the statutory obligation of the State Archivist to investigate the matter.
- The CCC requested that the State Archivist delay his independent investigation until its investigation into the matter had been completed. The CCC then requested the State Archivist to investigate the matter on its behalf.
- The CCC investigation included matters relevant to the statutory obligations of the State Archivist plus specific matters that the CCC wished to be investigated.
- In September 2017, the State Archivist presented the report of his investigation of the matter to the CCC.
- The State Archivist was then given approval to complete his independent investigation.
- The State Archivist's independent report was completed in October 2017 and a report was provided to the Director General of the former Department of Science, Information Technology and Innovation.
- The State Archivist made a number of common recommendations in both reports which related to the creation, maintenance and disposal of public records by Ministers. This Briefing Note provides an update on progress being made in relation to the implementation of these recommendations.

## KEY ISSUES

- The investigation into allegations of unauthorised disposal of public records highlighted the potential for the widespread creation and receipt of public records in the private email accounts by Ministers and their staff.
- While the use of private email accounts is not a breach of the Act, without implementation of appropriate processes to manage public records created or received in private accounts, there is a risk that future breaches of the Act will occur.
- Following the completion of the CCC investigation the CCC reported that the use of private email accounts, and particularly the deletion of records in those accounts, could give rise to a significant perception that the use of such accounts is done for a corrupt purpose.
- The use of private email accounts for official purposes is also symptomatic of a much wider issue related to the standard of recordkeeping practices across government and a lack of awareness of responsibilities and requirements relating to the management of public records.
- A number of recommendations specific to the actions of Minister Bailey were made to the CCC, along with several key recommendations relating to improving the standard of government recordkeeping and the management of ministerial records. Recommendations related to recordkeeping practices made by the State Archivist were accepted by the CCC. These recommendations were repeated in the independent report provided to the former Director-General of DSITI.
- The common recommendations made relating to improving the standard of government recordkeeping and the management of ministerial records are as follows:
  - That the State Archivist undertakes an urgent review of the processes in place for all current Ministers and Ministerial staff in managing public records created or received within their private email accounts.
  - That the State Archivist contact former Ministers of the last two Governments to request that they review their private email accounts for public records that may be in their possession.
  - That the State Archivist urgently reviews the guidance provided by Queensland State Archives on the management of public records within email, private email and social media accounts.
  - That the Department of the Premier and Cabinet (DPC) urgently reviews the training and support it provides to Ministers and their staff in managing public records. DPC should work closely with the State Archivist in developing and delivering this training and support.

- That DPC urgently reviews the guidance it provides via the *Ministerial Handbook* and *Ministerial Information Security Policy* around the management of public records within the private email and social media accounts of Ministers and their staff. This needs to comply fully with Queensland State Archives guidance.
- That an urgent amendment be made to the *Public Records Act 2002* to include a requirement that all public authorities must comply with mandatory guidelines issued by the State Archivist.
- The urgent amendment of the *Public Records Act 2002* is to include a requirement that all public authorities must ensure public records created or received in private email and social media accounts are forwarded to official systems within 20 days of creation or transmission or the inclusion of this requirement as a mandatory guideline.
- That the State Archivist develop a priority set of mandatory guidelines for implementation.
- That the State Archivist develops a team to undertake monitoring of compliance with mandatory guidelines. (Additional resources and budget will be required for Queensland State Archives to undertake this recommendation).
- The State Archivist reviews all guidance and disposal schedules relevant to Ministers.
- That the State Archivist reviews recordkeeping systems and processes in key departments supporting Ministers.
- An alliance of integrity agencies is established including the State Archivist, Information Commissioner, Integrity Commissioner, Auditor-General, Ombudsman, Crime and Corruption Commissioner and Public Service Commissioner to raise awareness and promote the importance of recordkeeping for good governance and government accountability.
- Progress has been made in relation to a number of these recommendations including:
  - A review of guidance provided on the management of public records within email, private email and social media accounts
  - The publication of the *Ministerial Records Policy* for Ministers, Assistant Ministers and their staff
  - Ministers and Assistant Ministers were advised of their recordkeeping responsibilities in a letter from the State Archivist sent on 19 December 2017
  - The development of training on the management of ministerial records will be delivered at a time agreed with the Department of the Premier and Cabinet to Ministers, Assistant Ministers and their staff
  - Input into the *Ministerial Handbook* and the *Ministerial Information Security Policy* provided to the Department of the Premier and Cabinet
  - Initiation of priority amendments to the *Public Records Act 2002*
  - Review of the *Office of a Minister of the Crown and Parliamentary Secretaries Retention and Disposal Schedule*
  - Ongoing contact with integrity agencies such as the Information Commissioner and the Ombudsman.

#### **ELECTION AND GOVERNMENT COMMITMENTS**

- The issue is not the subject of an election or Government commitment.

#### **FINANCIAL IMPLICATIONS**

- The implementation of some recommendations will require extra resources and budget including the development of a monitoring framework for compliance with mandatory guidelines.
- Some resources were provided by the former Department of Science, Information Technology and Innovation while the investigation was underway and for the commencement of implementing the recommendations.

#### **CONSULTATION**

- Not applicable.

#### **FUTURE STEPS**

- Work will continue on implementing the recommendations from the State Archivist's investigation.

- Further ministerial briefing notes will be prepared relating to specific recommendations including priority amendments to the Act.

**COMMUNICATIONS/MEDIA OPPORTUNITIES**

- Not applicable.

Released under RTI - DCHDE



## Karen Newton

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**From:** Office of the State Archivist  
**Sent:** Monday, 29 January 2018 5:34 PM  
**To:** Cathy Cross  
**Subject:** FW: HPE CM: Re: DMView\_1516864194810\_00105-2018\_64815\_Ministerial briefing note on recommendations arising from investigation into alleged disposal of public records by Minister Bailey - mS edit

Hi Cathy

We attached Mike's approval email to you

Regards Heather

---

**From:** Mike Summerell  
**Sent:** Friday, 26 January 2018 5:36 AM  
**To:** Cathy Cross <Cathy.Cross@dsiti.qld.gov.au>  
**Cc:** Office of the State Archivist <Officeofthe.StateArchivist@archives.qld.gov.au>  
**Subject:** HPE CM: Re: DMView\_1516864194810\_00105-2018\_64815\_Ministerial briefing note on recommendations arising from investigation into alleged disposal of public records by Minister Bailey - mS edit

Hi Cathy

Yes it is fine

Guideline is correct...the inability to enforce is one of the issues  
Mike

---

**From:** Cathy Cross  
**Sent:** Thursday, 25 January 2018 5:16:34 PM  
**To:** Mike Summerell  
**Cc:** Office of the State Archivist  
**Subject:** DMView\_1516864194810\_00105-2018\_64815\_Ministerial briefing note on recommendations arising from investigation into alleged disposal of public records by Minister Bailey - mS edit

Hi Mike

I've made some changes to the brief that was sent up today – mostly I've moved wording around and deleted some which was repeated but due to the changes I thought it prudent for you to review it again to make sure you are happy with it. I did google define guideline and the result made me wonder if guideline is the right word (although it may be your technical term) – the definition I found was: A **guideline** is a statement by which to determine a course of action. A **guideline** aims to streamline particular processes according to a set routine or sound practice. By **definition**, following a **guideline** is never mandatory. **Guidelines** are not binding and are not enforced.

Anyway some food for thought, and it's coming back to you in MECS for another review.(sorry)

Have a great weekend.

Cathy

**Cathy Cross**

Executive Officer  
Office of the Assistant Director-General  
Digital Capability, Information and Transaction Based Services  
Department of Housing and Public Works

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GPO Box 2457, BRISBANE QLD 4001

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Released under RTI - DCHDE

## Karen Newton

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**From:** OADGDPS  
**Sent:** Thursday, 1 February 2018 11:56 AM  
**To:** 'Department of Housing and Public Works'  
**Subject:** your item 298-18 MBN - State Archivist's update on progress of recommendations resulting from the independent investigation into alleged unauthorised disposal of public records by a Minister

Good morning

As discussed with Cynthia, could you please not progress 298-18 at this point in time, it has been decided that rather than sending in dot point form it will have a table inserted showing recommendations and status.

Many thanks

### Cathy Cross

Executive Officer  
Office of the Assistant Director-General  
Digital Capability, Information and Transaction Based Services  
Department of Housing and Public Works

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Cathy

**Cathy Cross**

Executive Officer  
Office of the Assistant Director-General  
Digital Capability, Information and Transaction Based Services  
Department of Housing and Public Works

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Released under RTI - DCHDE

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Many thanks

### Cathy Cross

Executive Officer  
Office of the Assistant Director-General  
Digital Capability, Information and Transaction Based Services  
Department of Housing and Public Works

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**MINISTERIAL BRIEFING NOTE**

**Subject:** Recommendations resulting from the independent investigation by the State Archivist into alleged unauthorised disposal of public records by a Minister and progress to date.

**Decision/Action by:** N/A

**Reasons for Urgency:** N/A

**Briefing type:** Requested briefing note for noting

**Responsible Area:** Queensland State Archives

**Electorate:** Statewide

**Contact Officer:** Mike Summerell, Executive Director & State Archivist – (07) 3037 6601

**PURPOSE**

To provide the Minister with an update on the progress of recommendations resulting from an independent investigation by the State Archivist into the alleged unauthorised disposal of public records by a Minister.

**RECOMMENDATION**

It is recommended that the Minister:

1. Note the State Archivist's recommendations following an independent investigation into allegations of unauthorised disposal of public records by the Honourable Mark Bailey MP, Minister for Transport and Main Roads.
2. Note the progress to date in implementing these recommendations.

Noted	Approved	Not approved
✓		
✓		

Yes	No

Media Release Required

Routine (Straight to MO)       Non-routine (DG to endorse)

<p><b>DIVISIONAL HEAD ENDORSEMENT</b></p> <hr/> <p>Andrew Spina Assistant Director-General Digital Capability, Information and Transaction Based Services</p> <p>Date: 05 / 03 /2018</p>	<p><b>COMMENTS</b></p>
<p><b>DIRECTOR-GENERAL ENDORSEMENT</b></p> <hr/> <p><i>Liza Carroll</i></p> <p>Liza Carroll Director-General Department of Housing and Public Works</p> <p>Date: 7/3/18</p>	<p><b>COMMENTS</b></p>
<p><b>MINISTERIAL APPROVAL</b></p> <hr/> <p><i>Mick de Brenni</i></p> <p>Mick de Brenni MP Minister for Housing and Public Works Minister for Digital Technology Minister for Sport</p> <p>Date: 7/4/18</p>	<p><b>COMMENTS</b></p>

## CONTEXT

- In March 2017, allegations were made that the Honourable Mark Bailey MP, Minister for Transport and Main Roads disposed of public records without appropriate authorisation under the *Public Records Act 2002* (the Act).
- The matter was referred to the Crime and Corruption Commission (CCC) and as the matter related to potential breaches of the Act, the CCC requested the State Archivist investigate the allegations.
- In September 2017, the State Archivist presented his final report of the investigation to the CCC who accepted all recommendations made.
- The State Archivist has a statutory obligation to independently investigate breaches of the Act and as such, completed an independent investigation into the matter and provided his report of the investigation to the Director-General of the former Department of Science, Information Technology and Innovation (DSITI) in October 2017.

## KEY ISSUES

- A number of recommendations specific to the actions of Minister Bailey were made to the CCC, along with several recommendations relating to improving the standard of government recordkeeping and the management of ministerial records.
- Recommendations relating to recordkeeping were also included in the report to the Director-General of the former DSITI.
- The investigation highlighted the potential for the widespread creation and receipt of ministerial records in the private email accounts of Ministers, Assistant Ministers and their staff, and wider issues relating to the standard of recordkeeping practices across government and a lack of awareness of responsibilities and requirements relating to the management of public records.
- Following the completion of the CCC investigation, CCC reported that the use of private email accounts, and particularly the deletion of records in those accounts, could give rise to a significant public perception that the use of such accounts is done for a corrupt purpose.
- The recommendations from the independent investigation relating to improving the standard of government recordkeeping and the management of ministerial records along with progress to date are included at **Attachment 1**.
- Queensland State Archives (QSA) is working to improve the standard of government recordkeeping through the Recordkeeping Transformation Program which includes a number of key deliverables:
  - review of the Act
  - development of new minimum recordkeeping standards
  - an improved records disposal authorisation framework
  - a digital maturity framework and a digital transition strategy.
- Briefing notes relating to the Recordkeeping Transformation Program, the review of the Act and priority amendments to the Act are being prepared by QSA.

## ELECTION AND GOVERNMENT COMMITMENTS

- The issue is not the subject of an election or Government commitment.

## FINANCIAL IMPLICATIONS

- A monitoring framework for compliance with mandatory guidelines is not able to be undertaken within existing resourcing.
- Resourcing implications for these recommendations and other improvements in record keeping standards are considered in a separate ministerial briefing note relating to a proposed Record Keeping Transformation Program.
- Funding for additional resources was provided to QSA by the former DSITI to enable QSA to undertake the investigation.

## CONSULTATION

- Not applicable.



**FUTURE STEPS**

- Work will continue on implementing the recommendations from the State Archivist's independent investigation within the capacity of available resourcing.
- Further ministerial briefing notes will be prepared relating to specific recommendations including proposed amendments to the Act.

**COMMUNICATIONS/MEDIA OPPORTUNITIES**

- Not applicable.

Released under RTI - DCHDE

**Attachment 1 – Recommendations and progress to date as at 16 February, 2018.**

No.	Recommendations	Progress to date
1.	The State Archivist to seek assurance from current Ministers that Ministerial records are managed appropriately including procedures for the management of Ministerial records created or received within private email accounts and social media accounts.	Not commenced
2.	The State Archivist to explore appropriate ways of seeking permanent value Ministerial records that may be in the possession of former Ministers including those contained within private email accounts.	Not commenced
3.	The State Archivist to issue new guidance for Ministers and their staff on the management of Ministerial records.	<p><i>Ministerial Records Policy</i> for Ministers, Assistant Ministers and their staff published</p> <p>Ministers and Assistant Ministers advised of their recordkeeping responsibilities in letter from the State Archivist sent 19 December 2017</p>
4.	The State Archivist to issue a revised retention and disposal schedule to cover Ministerial records. This revision will be focused on making the process far more practical for Ministers and their offices.	Review of the <i>Office of a Minister of the Crown and Parliamentary Secretaries Retention and Disposal Schedule</i> commenced.
5.	The Department of the Premier and Cabinet (DPC) to review training, IT systems and advice provided to Ministers and their staff on the management of Ministerial records to ensure compliance with State Archivist guidance.	<p>Following consultation with DPC, QSA provided training on the management of ministerial records which was delivered to ministerial staff on 30 January and 7 February 2018 by QSA.</p> <p>Ongoing recordkeeping advice is being provided to Ministerial Services in DPC by QSA.</p>
6.	DPC to review and update the Ministerial Handbook and the Information Security Policy regarding the management of Ministerial records created or received within private email accounts or social media accounts to ensure compliance with State Archivist guidance.	Input into the review of the <i>Ministerial Handbook</i> and the <i>Ministerial Information Security Policy</i> has been provided to DPC by QSA.
7.	<p>Government to consider urgent amendments to the <i>Public Records Act 2002</i> including:</p> <ul style="list-style-type: none"> <li>• Clear and contemporary definition of the disposal of public records.</li> <li>• Appropriate penalties for breaches of key sections of the <i>Public Records Act 2002</i> in particular non-compliance and unauthorised disposal.</li> </ul>	<p>Priority amendments to the <i>Public Records Act 2002</i> have been scoped.</p> <p>Ministerial Briefing Note to follow with specific recommendations.</p>

	<ul style="list-style-type: none"> <li>• Compliance with mandatory recordkeeping guidelines.</li> <li>• Public records contained in private email or social email accounts to be forwarded/transferred to official systems within 20 days of receipt or creation.</li> <li>• Establishment of a relevant and responsible public authority for Ministerial records.</li> </ul>	
8.	The State Archivist to review and update guidance for all public authorities on the management of public records within email, private email and social media accounts.	Under development.
9.	The State Archivist to issue new minimum standards for recordkeeping for all public authorities that replace <i>Information Standard 40: Recordkeeping</i> and <i>Information Standard 31: Retention and disposal of public records</i> . With the aim of these becoming mandatory requirements once the <i>Public Records Act 2002</i> is amended.	Consultation on new minimum standards for recordkeeping underway with agencies.
10.	The State Archivist to develop an auditing regime to monitor compliance with the <i>Public Records Act 2002</i> .	Not commenced.

Released under RTI - SCHIDE

**DIRECTOR-GENERAL BRIEFING NOTE**

**Subject:** Findings from Queensland State Archives' (QSA) investigation into potential breaches of the *Public Records Act 2002* (the Act) by Logan City Council councillors and employees

**Decision/Action by:** N/A

**Reasons for Urgency:** N/A

**Briefing type:** Unrequested briefing note for noting

**Responsible Area:** Queensland State Archives

**Electorate:** Statewide

**Contact Officer:** Mike Summerell – (07) 3037 6601

**PURPOSE**



To provide a summary of the findings from QSA's investigation into potential breaches of the Act by Logan City Council councillors and employees.

**RECOMMENDATION**

It is recommended that the Director-General:

1. Note the key findings of QSA investigation as outlined in **Attachment 1.**
2. Note the recommendations arising from QSA's investigation.

Noted	Approved	Not approved
✓		
✓		

<p><b>DIVISIONAL HEAD ENDORSEMENT</b></p>  <p>Andrew Spina Deputy Director-General Digital Technology and Services</p> <p>Date: 8/19/19</p>	<p><b>COMMENTS</b></p>
<p><b>DIRECTOR-GENERAL ENDORSEMENT</b></p>  <p>Liza Carroll Director-General Department of Housing and Public Works</p> <p>Date: 28/11/19</p>	<p><b>COMMENTS</b></p> <p>Andrew I note the comment in the brief that the State Archivist will progress recommendations</p> <p><input type="checkbox"/> MIN/DG agenda item from the investigation.</p> <p><input type="checkbox"/> Copy to Minister's Office As you are aware - any decision to progress proposals for legislative changes are matters for the Minister to consider and the Government to determine.</p> <p style="text-align: right;">Thanks, Liza</p>

Released under RTI - DO NOT REMOVE



## CONTEXT

- In December 2018, the Crime and Corruption Commission (CCC) requested that the State Archivist review correspondence that took place between a number of Logan City Council councillors and employees in private messaging accounts.
- The State Archivist identified that a number of the messages were considered public records, and that the actions of the councillors to delete these messages prior to capture in official Logan City Council systems may have resulted in a number of potential breaches to the Act.

## KEY ISSUES

- Given the potential breaches identified during the CCC review, the State Archivist undertook his own independent investigation to establish whether the actions of the Logan City Council councillors and employees breached the Act, specifically the following sections:
  - Section 7: Making and keeping of public records
  - Section 8: Custody and preservation of public records
  - Section 13: Disposal of public records
  - Section 14: Public authority must ensure particular records remain accessible.
- The State Archivist presented his findings in a report at **Attachment 1**. The State Archivist identified that Logan City Council had a range of policies and procedures in place for the creation and management of public records.
- Further, the State Archivist identified that the relevant messages identified as public records during the earlier CCC review, had not been captured in Logan City Council systems at the time of their creation or receipt.
- Relevant messages were only captured in Logan City Council systems after they were subsequently provided to the Council by the CCC.
- The State Archivist concluded that the actions of the Logan City Council councillors and employees did result in multiple technical breaches, specifically sections 7, 8, 13 and 14 of the Act; and consequently, resulted in a failure to meet statutory obligations under the Act.
- While the State Archivist identified minor improvements that could be made to Logan City Council policies and procedures, the governance framework in place should have been sufficient to avoid breaches of the Act if followed.
- The State Archivist's investigation found that it is likely that deliberate decisions were made by several Logan City Council councillors to avoid council policies and procedures, which resulted in the failure to manage the public records appropriately.
- However, given all the relevant public records identified from the private messaging accounts were ultimately recovered and captured in Logan City Council systems after they were provided to the Council by the CCC, the State Archivist considered that it would not be appropriate to pursue further action in relation to these breaches of the Act.
- The State Archivist made the following recommendations in response to the findings of this investigation:
  - Legislative amendments to the Act, including:
    - appropriate penalties for breaches of key sections of the Act
    - definition of a public authority to include Councillors and Mayors
    - compliance with mandatory recordkeeping guidelines.
  - Logan City Council to continue to update internal governance frameworks
  - Queensland State Archives (QSA) to continue to liaise with relevant stakeholders to assist with improved governance within the local government sector
  - QSA to continue to review existing advice in relation to messaging and communications accounts
  - Continued liaison between QSA, CCC and the Office of the Independent Assessor.

## ELECTION AND GOVERNMENT COMMITMENTS

- Not applicable.

### **FINANCIAL IMPLICATIONS**

- Not applicable.

### **CONSULTATION**

- QSA liaised with the Logan City Council throughout the investigation.

### **FUTURE STEPS**

- The State Archivist to progress recommendations arising from this investigation, including legislative amendments that will provide clarity to the Act.
- Logan City Council to progress a range of initiatives recommended by the State Archivist to strengthen the Council's governance framework.

### **COMMUNICATIONS/MEDIA OPPORTUNITIES**

- Not applicable.

### **BACKGROUND**

- Overall responsibility for ensuring a public authority meets their obligations to make and keep full and accurate public records rests with the executive officer (section 7 of the Act).
- Councillors are not currently defined as a public authority under the Act.
- Council Chief Executive Officer's are not able to direct councillors.
- While sections 7 and 14 of the Act provide statutory directions (i.e. a public authority must make and keep full and accurate records of its activities (section 7(1)(a); a public authority must ensure particular records remain accessible [section 14 of the Act]), these sections of the Act do not contain any penalty provisions for breaches to their respective statutory requirements.

Released under RMA/FOI



Queensland  
Government

**SUMMARY OF INDEPENDENT REPORT BY THE QUEENSLAND STATE  
ARCHIVIST INTO POTENTIAL BREACHES OF THE PUBLIC RECORDS  
ACT 2002 BY LOGAN CITY COUNCIL DURING THE PERIOD 1 JULY 2016  
TO 30 NOVEMBER 2018 RELATING TO THE USE OF PRIVATE  
MESSAGING ACCOUNTS.**

**JULY 2019**

Released under the Information Access Act 2009 - DCH/DE

## 1. EXECUTIVE SUMMARY

This summary report provides an overview of the key findings of an independent investigation by the State Archivist into potential breaches of the *Public Records Act 2002* (the Act) by Logan City Council (LCC) councillors and/or employees. This investigation has been carried out in response to information provided to the State Archivist by the Crime and Corruption Commission (CCC) during December 2018 as part of an investigation into the use of private messaging accounts by a number of LCC councillors and employees during the period 1 July 2016 to 30 November 2018 (the relevant period).

The investigation sought to determine specifically whether the actions of the LCC councillors and employees resulted in a breach of the Act with particular reference to:

- Section 7 – Making and keeping of public records
- Section 8 – Custody and preservation of public records
- Section 13 – Disposal of public records
- Section 14 – Public authority must ensure particular records remain accessible.

In order to make this determination the State Archivist investigation assessed:

- Policies and procedures in place to manage public records created or received in the private messaging accounts of LCC councillors and/or employees
- Whether public records had been created in private messaging accounts by LCC councillors and/or employees during the relevant period.

It is significant to note that the State Archivist considers the policies and procedures in place at LCC as reasonable and it is clear key staff are diligent and are focused on ensuring good record keeping practices. Whilst there are minor improvements that could be made, it is important to acknowledge that LCC policies and procedures should have been sufficient to avoid breaches of the Act. However, what the investigation found was it is likely that deliberate decisions were made by several LCC councillors to avoid these policies and procedures. Rather than a failure of policies and procedures, the State Archivist's view is that events that have occurred are as a result of primarily, seemingly conscious, decisions to avoid responsibilities under the Act and potentially the *Local Government Act 2009*.

The State Archivist has concluded that the actions of the LCC councillors and/or employees resulted in multiple technical breaches of the Act, specifically Sections 7, 8, 13 and 14, and failed to meet their statutory obligations under the Act.

In addition, whilst not the responsibility of the State Archivist, the State Archivist's view is that the actions also call into question whether responsibilities under the *Local Government Act 2009* in relation to transparency in decision-making processes have been met. The State Archivist is aware that the Independent Assessor is reviewing this matter.

In regard to penalties for the breach of the Act, the State Archivist has limited ability to take further action. The Act provides no specific penalties for breaches of sections 7, 8 and 14, therefore prosecution by the State Archivist is not possible under the Act.

Section 7 of the Act is written as a statutory direction and failure to follow it may result in a breach of section 204 of the *Criminal Code Act 1899*. However, it is the State Archivist's view that the eventual restoration of emails by the CCC and subsequent capture in LCC systems complicates any external actions for potential breaches of section 7 of the Act under the Criminal Code.



Of further relevance is that under section 7 of the Act, overall responsibility for ensuring a public authority meets their obligation to make and keep full and accurate public records rests with the executive officer, in this case the LCC CEO. This obligation is further complicated in the local government context by the fact that council CEOs are not able to direct councillors, and that councillors are not defined specifically as a public authority under the Act. Given the content of the public records in this instance and the deliberate attempts to bypass legitimate and reasonable procedures put in place by the council and CEO, action against the council CEO would be greatly inappropriate in these circumstances and highlights a responsibility matter in the Act that needs to be addressed going forward.

In regard to section 13 (Disposal of public records), schedule 2 of the Act provides a number of definitions of disposal. These include the destruction or damage of a record and abandoning, transferring, donating, giving away or selling a record. The actions of the LCC councillors to delete messages considered public records from private messaging accounts prior to their capture into LCC systems is potentially consistent with the definition of disposal due to abandonment and therefore a breach of section 13. However, based on the conclusion by CCC in an earlier investigation, that as permanent destruction of the public records had not occurred due to the recovery of the messages previously deleted, it would be difficult to prove beyond a reasonable doubt that a breach of section 13 occurred. In addition, the State Archivist would, as noted previously, have been only able to take action under the Act against the council CEO. The State Archivist's view again is that would be greatly inappropriate in these circumstances.

The State Archivist would like to formally acknowledge the cooperation and assistance provided by LCC and CCC during this investigation. The level of help and support provided by the Acting CEO of LCC and other council employees during this investigation was exemplary and greatly appreciated. The response of LCC in improving policies and procedures in this area since the CCC conclusions were published has been very strong and to be commended.

The State Archivist recommends a number of actions to be taken in response to the findings of this investigation:

1. Legislative amendments should be considered to introduce penalties for breaches of key statutory requirements of the Act, specifically for sections 7, 8 and 14.
2. Legislative amendments should be considered related to the inclusion of a provision to make compliance with key recordkeeping standards, policies and guidelines issued by the State Archivist mandatory for public authorities.
3. A regulation to declare councillors to be a public authority (as provided for under the current definition of a public authority in the Act); or direct legislative amendment to include councillors as public authorities.
4. The State Archivist should continue to explore opportunities to partner with relevant agencies to ensure the importance of recordkeeping in good governance is understood and incorporated by local government.
5. The State Archivist to issue additional guidance in how messages considered a public record in non-traditional communication applications should be captured and managed. Specifically, Queensland State Archives (QSA) should consider the following factors when reviewing existing advice:
  - How to identify, capture and manage public records in non-traditional communication applications

- Clarification in relation to timeframes for the capture of records (given the Act does not provide a specified timeframe).
6. LCC to consider improvements to their internal government framework in this area, specifically:
- defining an approved whitelist of systems, devices and communications accounts for councillor and LCC employee use
  - development of procedures that provide clarity in terms of responsibilities for capture of public records (e.g. when sending/receiving emails, messages in social media accounts, distinguishing between personal/divisional/ward correspondence and council related records etc.)
  - general updating of relevant LCC policies and directives to reflect new advice published by relevant stakeholders such as the DLGRMA, OIA, CCC etc.
  - refining the process related to the recording of training offered to councillors (e.g. recording who training was offered to, who accepted or declined etc.)
  - implementation of a governance framework prior to the March 2020 council elections and processes to ensure this framework cannot be reversed without acceptable reason
  - provision of training to councillors as part of their induction which includes recordkeeping.

## **2. KEY RECOMMENDATIONS**

The following recommendations are made in response to the findings of this investigation.

### **2.1 LEGISLATIVE AMENDMENTS TO THE PUBLIC RECORDS ACT**

To ensure the Act achieves its stated purposes and is consistent with the expectations of government and the community in general, the State Archivist is proposing consideration of the following legislative amendments:

#### **2.1.1 APPROPRIATE PENALTIES FOR BREACHES OF KEY SECTIONS OF THE ACT**

A number of sections of the Act establish statutory requirements and place a responsibility on public authorities to take mandatory action, including:

- Section 7: Making and keeping of public records
- Section 8: Custody and preservation of public records
- Section 14: Public authority must ensure particular records remain accessible.

Despite the statutory requirements established in sections 7, 8 and 14 of the Act, there are no penalties if a public authority fails to take appropriate action.

Legislative amendments should be considered to introduce penalties for breaches of key statutory requirements of the Act, specifically for sections 7, 8 and 14.

#### **2.1.2 DEFINITION OF A PUBLIC AUTHORITY**

The Act applies to public authorities (which includes councils) and employees of public authorities. As elected representatives, councillors are not employees of a council. The Act does not currently define a councillor as a public authority, even though they may create or

receive public records. While the executive officer of a public authority (e.g. a council's CEO) has responsibility for ensuring their public authority complies with the requirements of the Act, in the case of local government, a council's CEO is not able to direct their mayor or councillor. Council specific directions and responsibilities of councillors are typically specified in policies, procedures and resolutions of Council. While recordkeeping obligations for councillors are currently indirectly provided for within the LG Act and the Code of Conduct, legislative clarification is required to remove beyond any reasonable doubt that councillors are subject to the statutory obligations of the Act (independent of the local government), including the requirement to make and keep full and accurate records.

Legislative options that should be considered are:

- making of a regulation to declare councillors to be a public authority (as provided for under the current definition of a public authority) – legal advice would be required to determine whether this option would be a viable approach
- direct legislative amendment to include councillors as a public authority
- partnering with relevant stakeholders to make appropriate legislative changes.

### **2.1.3 COMPLIANCE WITH MANDATORY RECORDKEEPING GUIDELINES**

Despite the mandatory requirement for public authorities to make and keep full and accurate records (section 7(1)(a) of the Act) noted above, section 7(1)(b) only requires public authorities to 'have regard to any relevant policy, standards and guidelines made by the State Archivist about the making and keeping of public records.' Yet it is extremely likely that in order to "make and keep full and accurate records of its activities" the key guidance of the State Archivist would be required to be followed. There is currently no provision that allows the State Archivist to issue mandatory recordkeeping requirements to ensure a minimum standard of recordkeeping practice is maintained. Legislative amendments should be considered related to the inclusion of a provision to make compliance with key recordkeeping standards, policies and guidelines issued by the State Archivist mandatory for public authorities.

## **2.2 LOGAN CITY COUNCIL TO CONTINUE TO UPDATE INTERNAL GOVERNANCE FRAMEWORKS**

LCC recordkeeping staff have already identified a number of initiatives to improve the governance framework at LCC which the State Archivist supports.

In addition, the State Archivist recommends consideration of the following:

- defining an approved whitelist of systems, devices and communications accounts for councillor and LCC employee use
- development of procedures that provide clarity in terms of responsibilities for capture of public records (e.g. when sending/receiving emails, messages in social media accounts, distinguishing between personal/divisional/ward correspondence and council related records etc.)
- general updating of relevant LCC policies and directives to reflect new advice published by relevant stakeholders such as the DLGRMA, OIA, CCC etc.
- refining the process related to the recording of training offered to councillors (e.g. recording who training was offered to, who accepted or declined etc.)



- implementation of a governance framework prior to the March 2020 council elections and processes to ensure this framework cannot be reversed without acceptable reason
- provision of training to councillors as part of their induction which includes recordkeeping.

### **2.3 QSA TO CONTINUE TO LIAISE WITH RELEVANT STAKEHOLDERS TO ASSIST WITH IMPROVED GOVERNANCE WITHIN THE LOCAL GOVERNMENT SECTOR**

QSA should continue to explore opportunities to partner with relevant agencies to ensure the importance of recordkeeping in the good governance of local government is understood and incorporated.

### **2.4 QSA TO REVIEW EXISTING ADVICE IN RELATION TO MESSAGING AND COMMUNICATIONS ACCOUNTS**

The challenges associated with the use of new and emerging communication platforms are not unique to LCC. Further advice is required in relation to how messages considered a public record in non-traditional communication applications should be captured and managed. Specifically, QSA should consider the following factors when reviewing existing advice:

- how to identify public records in non-traditional communication applications
- how to capture and manage records contained within non-traditional communication applications
- clarification in relation to timeframes for the capture of records (given the Act does not provide a specified timeframe).

### **2.5 CONTINUED LIAISON BETWEEN QSA, CCC AND OIA**

Public records, and the failure to keep public records, can provide evidence of conduct, misconduct and corruption. QSA has an important role to play in helping identify public records and determine whether recordkeeping requirements have been met. The CCC plays a significant role in investigating corruption, while the OIA investigates councillor conduct, including allegations of misconduct. Consequently, continued liaison between the CCC, OIA and QSA is vital. The State Archivist recommends that a copy of this report should be provided to the OIA and the Department of Local Government, Racing and Multicultural Affairs.

**Subject** State Archivist's independent investigation of Minister Mark Bailey's private email account

Approval required by N/A

**RECOMMENDATION**

- It is recommended that the Minister:
  - **Note** the independent actions to be carried out by the State Archivist regarding the deleted and restored email account of the Honourable Mark Bailey MP, Minister for Main Roads, Road Safety and Ports, and Minister for Biofuels and Water Supply.

**BACKGROUND**

- In February 2017 it became publicly known that Minister Mark Bailey, Minister for Main Roads, Road Safety and Ports, and Minister for Biofuels and Water Supply, held and utilised a private 'yahoo' email account under the account name [mangocube6@yahoo.co.uk](mailto:mangocube6@yahoo.co.uk).
- It also became known that this private email account had been closed, and due to this deactivation, records sought under a Right to Information request could not be retrieved.
- The Premier directed her department to conduct a review of this matter on 28 February 2017 and simultaneously the matter was also referred to the Crime and Conduct Commission (CCC) for investigation.
- There may be emails and documents within this private email account that may be considered 'public records' under the *Public Records Act 2002*, if the emails pertain to Minister Bailey's role as a government Minister and the business of government.
- It is an offence under the Public Records Act to unlawfully dispose of public records.
- The State Archivist has an obligation under the Public Records Act to investigate any unlawful disposal of public records and report the investigation to the Minister for Science, Technology and Innovation as the Minister responsible for the Public Records Act.
- The CCC have acknowledged the State Archivist's statutory obligations to investigate this matter.
- The CCC have requested that the State Archivist support the Department of Premier and Cabinet (DPC) in their review of this matter and expressed a preference that the State Archivist's investigation commences once the CCC have had time to consider the DPC review findings.

**KEY ISSUES**

- It is the role of the State Archivist under the *Public Records Act 2002* to independently investigate any unlawful disposal of public records.
- The State Archivist is currently assisting DPC in their investigation.
- The State Archivist will formally commence his review following completion of the DPC review and CCC consideration of its findings.

**ELECTION/CABINET/PUBLIC COMMITMENTS/LEGISLATION**

- Unlawful disposal of public records is an offence under the *Public Records Act 2002*.

**CONSULTATION**

- The State Archivist has consulted with the CCC, Crown Law and DPC as part of a separate investigation into this matter for which an interim report is due to the CCC by 15 June 2017.
- The State Archivist has sourced independent legal advice from Clayton Utz partner, Jamie Doran, to obtain clarity on elements of law and the obligations of the State Archivist to investigate this matter.

Subject **State Archivist's independent investigation of Minister Mark Bailey's private email account**

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**COMMUNICATIONS/MEDIA OPPORTUNITIES**

- QSA have been in consultation with the Media team and anticipate further media interest and consultation in this matter.

**FUTURE STEPS**

- The State Archivist will prepare a brief and report for the Minister with the independent findings and recommendations from this investigation.

**Endorsed**

**Noted / Approved / Not Approved**

Jamie Merrick (or Director on behalf of)  
**Director-General**  
/ /

Leeanne Enoch (or Chief of Staff on behalf of)  
**Minister for Innovation, Science  
and the Digital Economy and  
Minister for Small Business**  
/ /

<i>Minister or Director-General comments</i>

Media release required: Yes  No

**Electorates:** Statewide

Released under RTI - Schedule 1



**From:** [Mike Summerell](#)  
**To:** [Chris Fechner](#)  
**Subject:** RE: My contract  
**Date:** Thursday, 18 February 2021 1:13:00 PM  
**Attachments:** [Confidential DG Briefing Note - Update on summary of investigations into potential breaches of the Public Records Act 2002 and deficiencies in the Act.docx](#)

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No one else has seen this it was a confidential briefing update that Trish asked for to be given solely to her whilst she was Acting DG following our discussion on the 2019/20 Annual report.

Clearly the deficiencies that are related to the Act are our view and others may disagree...hence why I think it is important to have full public consultation on the Act so that it can be drafted with all views represented. Our views are our views – we don't claim to be infallible or that alternate views don't have equally validity. But they do represent fully the view of QSA in terms of our experiences in trying to administer it in recent times.

If you are looking to start with a clean slate...then this update is essentially the "slate"  
Mike

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**From:** Chris Fechner <Chris.FECHNER@hpw.qld.gov.au>  
**Sent:** Thursday, 18 February 2021 12:58 PM  
**To:** Mike Summerell <Mike.SUMMERELL@archives.qld.gov.au>  
**Subject:** Re: My contract

Thanks Mike,

I'm happy with the messaging around you moving on after a long and valuable contribution.

I'd like the report given to Trish. Did anyone else know about it? I know I didn't.

I will leave you alone until Monday and then I think Andrew and I will discuss transition arrangements.

Thanks,

Chris

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**From:** Mike Summerell <Mike.SUMMERELL@archives.qld.gov.au>  
**Sent:** Thursday, February 18, 2021 1:53:29 PM  
**To:** Chris Fechner <Chris.FECHNER@hpw.qld.gov.au>  
**Subject:** RE: My contract

I think the easiest option on wording is that after 5 years at QSA I am moving back to NZ to look at new opportunities

The LT across QSA are very well aware of all the issues it been our world for 3 years. HPW never sought to address the issues, it largely caused them. I think it is impossible to resolve them in 2 weeks. Josephine in particular is very up to speed on all details as they are primarily issues in her world.

For me the way forward is very much to recommence the process to review the Public Records Act that was stopped in 2018 by Minister de Brenni. The next stage in that process (it had been running for 3 years by 2018 and started before I was appointed) was to go out for public consultation on potential improvements etc on the Act. I think that is the only path to address many of the issues definitively. Many of the issues (for me) all ultimately relate to the Act and its interpretation, hence why I say they are not things that will be resolved in 2 weeks.

Trish Woolley as Acting DG following Liza's resignation requested a full confidential brief on the investigations that occurred over the last few years and our view on deficiencies and the impacts of the deficiencies in the Act. I am happy to provide you a copy of that. It covers things in a lot of detail (21 pages)

Mike

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**From:** Chris Fechner <[Chris.FECHNER@hpw.qld.gov.au](mailto:Chris.FECHNER@hpw.qld.gov.au)>

**Sent:** Thursday, 18 February 2021 9:59 AM

**To:** Mike Summerell <[Mike.SUMMERELL@archives.qld.gov.au](mailto:Mike.SUMMERELL@archives.qld.gov.au)>; Andrew Spina <[Andrew.SPINA@hpw.qld.gov.au](mailto:Andrew.SPINA@hpw.qld.gov.au)>

**Cc:** Sandi Bardsley <[Sandi.BARDSLEY@hpw.qld.gov.au](mailto:Sandi.BARDSLEY@hpw.qld.gov.au)>

**Subject:** Re: My contract

Hi Mike,

Firstly, let me say I understand and respect that you are taking active control of your career and I appreciate the information you have provided.

I would like to point out that I have been able to guarantee the conditions of the non-renewal of your contract at the extension if that makes any difference in the timing of your decision.

I would like to give you a call to just talk a little more on messaging to the team and next steps. I have identified [redacted] as suitable to act in the interim with HR.

I would still be very keen to provide a clean slate platform for the new archivist.

Kind Regards,

Chris

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**From:** Mike Summerell <[Mike.SUMMERELL@archives.qld.gov.au](mailto:Mike.SUMMERELL@archives.qld.gov.au)>

**Sent:** Wednesday, February 17, 2021 6:55:39 PM

**To:** Andrew Spina <[Andrew.SPINA@hpw.qld.gov.au](mailto:Andrew.SPINA@hpw.qld.gov.au)>; Chris Fechner <[Chris.FECHNER@hpw.qld.gov.au](mailto:Chris.FECHNER@hpw.qld.gov.au)>

**Cc:** Sandi Bardsley <[Sandi.BARDSLEY@hpw.qld.gov.au](mailto:Sandi.BARDSLEY@hpw.qld.gov.au)>

**Subject:** My contract

Hi Both

49 Sch 4

Clearly with no prospect of renewal of my contract post June I need to move on with certainty and I think it's better for QSA if I move on quickly to allow transition to a new direction and leadership. I think a "lame duck" period would not be productive for all concerned.

I do appreciate your consideration of a temporary arrangement, however it's clear that it is not something that will work given my need to find a permanent role quickly.

I therefore will plan to work until the simple expiry of my contract on 8 March 2021.

Regards

Mike

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## DIRECTOR-GENERAL CONFIDENTIAL BRIEFING NOTE

**Subject:** Summary of investigations into alleged breaches of the *Public Records Act 2002* and deficiencies in the *Public Records Act 2002*.

**Decision/Action by:** N/A

**Reasons for Urgency:** N/A

**Briefing type:** Requested Confidential briefing note for noting

**Responsible Area:** Queensland State Archives

**Electorate:** Statewide

**Contact Officer:** Mike Summerell – (07) 3037 6601

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### PURPOSE

To provide the A/Director-General with a summary of investigations that are currently in progress or have been completed by the State Archivist into alleged breaches of the *Public Records Act 2002* (the Act) and known or perceived deficiencies and inconsistencies in the Act.

### CONTEXT

- The main purposes of the Act are to ensure that public records of Queensland are made, managed, kept and, if appropriate, preserved in a useable form for the benefit of present and future generations; and to support the *Right to Information Act 2009* (s.3). Amongst the key statutory obligations in the Act are that public authorities must follow is the requirement to make and keep full and accurate records of its activities (s.7(1)(a) and not to dispose of a public record unlawfully (s.13).
- Since 2017, Queensland State Archives (QSA) has opened 16 separate investigations (six completed, ten still open) into alleged breaches of the Act by public authorities. Prior to 2017, records indicate no investigations into potential breaches had been undertaken by the State Archivist.
- Four of these investigations were referred to QSA by the Crime and Corruption Commission (CCC); four were referred to QSA from members of the public; two were referred to QSA in the form of a Public Interest Disclosure (PID); two potential breaches of the Act were identified in media articles; one was a consequence of an earlier State Archivist investigation; and two were referred to QSA by <sup>Complainant</sup> [redacted]
- A major factor throughout these investigations have been apparent deficiencies in the Act itself.
- A process to review the Act commenced in 2014 and continued until 2018, when it was put on hold by Minister de Bréni.

## **KEY INVESTIGATIONS UNDERTAKING SINCE 2017**

Prior to 2017 State Archivist had never been required to undertake any investigations into alleged breaches of the Act. Since 2017 the amount of complaints or incidents related to potential breaches of the Act have increased significantly, with the rate of increase rising during 2020. The following are key investigations undertaken since 2017, we have sought to protect the identity of complainants in most cases.

### **Investigation into the alleged unlawful disposal of public records from a private email account by Minister Bailey**

- In March 2017, reports from *The Australian* newspaper, alleged that the Honorable Mark Bailey, Minister for Main Roads, Road Safety and Ports and Minister for Energy, Bio Fuels and Water Supply had unlawfully disposed of public records within a private email account in response to a Right to Information (RTI) request from *The Australian*.
- The State Archivist commenced an independent investigation into these allegations in March 2017 in the context of potential breach of the Act. The State Archivist obtained legal advice Exempt Sch 3(7) [REDACTED] The State Archivist's independent investigation was placed on hold at the request of the CCC whilst their investigation was open.
- In March 2017, the Department of the Premier and Cabinet (DPC) were also requested to investigate the matter by the Premier.
- In March 2017, the CCC commenced a potential corrupt conduct investigation into the actions of Minister Bailey.
- Given multiple investigations and the central allegation that related to potential unauthorised disposal of public records, the CCC requested the State Archivist work with DPC to initially identify whether Minister Bailey had potentially disposed of public records without authorisation.
- In June 2017, following a report by the State Archivist and DPC which concluded that Minister Bailey had potential disposed of several hundred public records without authorisation, the CCC requested the State Archivist conduct a further investigation to confirm whether Minister Bailey had breached the Public Records Act and to identify records which could be of interest to the CCC in regard to potential corruption.
- In September 2017, the State Archivist presented his final report to the CCC.
- In October 2017, following approval from the CCC to recommence his independent investigation, the State Archivist presented his independent report to the Director-General of the Department of Science, Information Technology and Innovation (DSITI). The State Archivist's independent report related only to potential breaches of the Public Records Act.
- In both reports, the State Archivist concluded that the actions of Minister Bailey resulted in multiple breaches to the Act, specifically s.7, s.8, s.13 and s.14. The State Archivist ultimately concluded it would be not possible to take successful action against Minister Bailey for these breaches due to deficiencies in the Act and the CCC's decision not to take action against Minister Bailey.
- In his report, the State Archivist made a number of recommendations specific to the actions of Minister Bailey along with several key recommendations related to improving the standard of government record-keeping and the management of ministerial emails.
- Key among the recommendations of this investigation was that the Government consider urgent amendments to the Act.
- The CCC publicly accepted all of the State Archivist's recommendations in a media statement in September 2017.





- The State Archivist made a number of recommendations in response to the findings of his investigation, including the need for legislative amendments to the Act to amend who were deemed responsible authorities. A number of these amendments were consistent with those previously identified following the investigation into the actions of Minister Bailey.
- While the recommendation relating to legislative amendments have not progressed, all other recommendations have been completed.

#### **Investigation into potential unlawful disposal of records by the Queensland Police Service (QPS)**

- In February 2019, the *Brisbane Times* published an article about the Queensland Police conducting an investigation into how filing cabinets containing police documents came to be found at a waste facility in Cairns.
- QSA contacted QPS to seek further information regarding the potential unlawful disposal of records by Cairns Police.
- The QPS advised that all material had been recovered, however a formal complaint had been lodged with the Ethical Standards Command and the CCC and that the matter was subject to an internal investigation.
- To date QPS has not advised QSA about the outcome of their internal investigation.
- The State Archivist's view is that given that all records were recovered that action for breach of the Act was not appropriate.

#### **Investigation into the unlawful disposal of records by a former employee of the Public Service Commission (PSC)**

- On the advice of the CCC, the Chief Executive of the PSC wrote to the State Archivist in February 2019 regarding the alleged unlawful disposal of public records by a PSC employee.
- The PSC Chief Executive advised that an investigation into the actions of the former PSC employee identified a small number of public records were allegedly permanently deleted. These records were however able to be recovered.
- Given the concerns around a potential repeat of the issue in the future, the State Archivist sought confirmation from the PSC Chief Executive about any preventative measures that the PSC had put in place to minimise the risk of unlawful disposal of public records re-occurring.
- The PSC Chief Executive was able to outline a range of initiatives that had been put in place to ensure their future compliance with the Act.
- The State Archivist view was that given actions taken by PSC and the fact that all records were recovered, action for breach of the Act was not appropriate. The State Archivist was satisfied that the PSC had put processes in place to minimise the future risk of unlawful disposal of public records.

#### **Investigation into the Queensland Building and Construction Commission's (QBCC) failure to create records of decisions**

- In March 2019, QSA received a complaint from a member of the public requesting an investigation into alleged breaches of the Act by the QBCC.
- The complainant alleged that the QBCC failed to make and keep full and accurate records of its activities (i.e. decisions that were made) and as a result, failed to comply with their requirements under s.7 of the Act.
- The State Archivist wrote to the QBCC to seek further information in relation to their recordkeeping practices and actions that the QBCC has taken to prevent a re-occurrence of a similar incident occurring.
- Based on the information provided by the complainant and the QBCC, the State Archivist considers that a technical breach of s.7 of the Act has occurred. However, under the Act, there are no penalties for this breach and therefore it was not clear what, if any, action the State Archivist would be able to take.



- The State Archivist requested Crown Law advice Exempt Sch 3(7)  
  
. The request for Crown Law advice has never been progressed by the Department.
- The need to review and amend s.7 of the Act had been identified during both the investigation into Minister Bailey and the investigation into Logan City Council. The current situation in effect means that if you create a public record that is required to be retained under the Act, and then dispose of it without authorisation you can potentially be prosecuted under s.13 of the Act. However, if you fail to create the records at all, this is a breach of s.7, but the Act provides no penalties for breach of s.7, thus the Act can be potentially avoided by simply making no records at all. This is clearly completely inconsistent with the purpose of the Act.
- Following a request for Crown Law advice from the Public Records Review Committee (PRRC) in Dec 2019, Exempt Sch 3(7)  
  
 The Department is currently considering a committee or procedure for the investigation of complaints under legislation and potential prosecutions to be referred to. As of November 2020, this committee or procedure has not been established. The role of the PRRC is to advise the Minister and the State Archivist on matters related to the administration of the Act.
- The State Archivist is awaiting the forming of this committee or procedure to refer this matter to in regard to actions to be taken response to breach of s.7 of the Act.
- In June 2019, the State Archivist referred the matter to the CCC for consideration. Following a review by the CCC, they referred the matter to the QBCC to manage and deal with.
- QSA has not received any further information from the QBCC regarding actions that they have taken in response to this complaint.

#### **Investigation into the unlawful disposal of public records from Metro North Hospital and Health Service**

- In June 2019, the State Archivist became aware of a potential breach of the Act by the Metro North Hospital and Health Service following media reporting of an incident where public records were provided to a contractor for destruction and accidentally spilled onto an inner-city Brisbane road.
- This action may have resulted in a breach of s.8 and s.13 of the Act.
- The State Archivist wrote to the CEO of Metro North Hospital and Health Service to seek further information in relation to the incident that had been reported in the media.
- Following a review of the incident, Metro North Hospital and Health Service made a number of recommendations for improving the management of waste and advised the State Archivist that all recommendations had been accepted and were being implemented.
- The State Archivist was satisfied with the steps being taken to minimise the risk of further similar breaches of the Act and the matter is closed. There was insufficient evidence to conclude that a breach of the Act had occurred.

#### **Investigation into the alleged unlawful disposal of public records of the Premier's Chief of Staff**

- In November 2019, the Deputy Leader of the Opposition wrote to the State Archivist to request an investigation into media reports regarding the potential unlawful disposal of the resignation letter of David Barbagallo, the Premier's Chief of Staff.
- As the matter was also part of an investigation by the CCC, QSA contacted the CCC to inquire whether an investigation by the State Archivist into the matter would conflict with the CCC's investigation. The CCC advised it had no objection to an investigation by the State Archivist proceeding.
- Following discussions with the DG of DHPW, the State archivist was initially advised to contact Mr. Barbagallo's lawyer about the missing letter through Filly Morgan, DPC.
- DPC then advised direct contact with Mr. Barbagallo's lawyer could be made.

- Mr. Barbagallo's lawyer advised a copy of his resignation letter was placed in Mr. Barbagallo's "out tray" for the attention of his Executive Assistant.
- The State Archivist followed up with the Premier's Chief of Staff who advised the Executive Assistant could not recall seeing the letter.
- This matter indicates technical breach of s.13 of the Act related to unauthorised disposal and potentially breach of s.7 which requires public authorities to make and keep full and accurate records. The responsible authority for this under the Act is the Premier.
- Exempt Sch 3(7)  
[REDACTED] This request has not been progressed by the Department.
- Exempt Sch 3(7)  
[REDACTED] The department is currently considering a committee or procedure for the investigation of complaints under legislation and potential prosecutions. As of November 2020, this committee or procedure has not been established.
- This matter is outstanding. The State Archivist is awaiting the forming of this committee or procedure to refer this matter to, in relation to actions to be taken response to breach of s.7 of the Act.

### **Investigation into the alleged unlawful disposal of public records by the Queensland Police Service (QPS)**

- In April 2020, QSA received notification from a member of the public requesting an investigation into alleged breaches of the Act by the QPS.
- The complainant alleged that the QPS breached s.13 of the Act and s.129 of the *Criminal Code 1899* and destroyed records that the complainant allegedly had been provided to the Southport Police Station.
- Given the potential for the unlawful disposal of public records, the State Archivist undertook a review to establish whether any breaches of the Act had occurred.
- The State Archivist wrote to the Police Commissioner to seek further information in relation to their recordkeeping practices and actions that were alleged in the complaint.
- Based on information provided by both the complainant and the QPS, the State Archivist was unable to establish beyond a reasonable doubt, the unlawful disposal of public records by the QPS.
- The State Archivist informed the complainant of his findings. However, the complainant has sent further correspondence on a number of occasions requesting a review of the matter. If any new evidence is received, the State Archivist will review the matter further. The complainant has referred this matter to multiple Queensland integrity agencies and continues to pursue the matter.

### **Investigation into the alleged unlawful disposal of public records by the Queensland Police Service (QPS)**

- In May 2020, QSA received notification from a member of the public requesting an investigation into the potential unlawful disposal of public records by the QPS.
- The complainant alleges that the QPS unlawfully destroyed public records relating to them.
- Following further correspondence with the complainant, the State Archivist was provided with a list of documents that are subject to the complaint.
- Given the allegation also involves a number of other Queensland Government agencies, the State Archivist sought advice from the DHPW Integrity Services Unit regarding appropriate actions to take in response to the complainant's allegation.
- Given the nature of the allegation and the potential for corrupt conduct (as defined by the *Crime and Corruption Act 2001 (CC Act)*), the complaint was referred to the Corrupt Conduct Intake & Assessment Committee for review.
- Following review, the matter was referred to the Crime and Corruption Commission for assessment for corrupt conduct.

- The Crime and Corruption Commission advised no finding of corrupt conduct was found and the matter can be investigated by QSA.
- Further assessment by DHPW Legal of this matter is underway before contact with QPS is made. The matters referred to by the complainant extend beyond the remit of the Act.
- The complainant continues to contact QSA frequently seeking updates on this matter.

### **Investigation into the alleged unlawful disposal of ministerial records**

- In May 2020, the Deputy Leader of the Opposition wrote to the State Archivist to request an investigation into media reports regarding the potential unlawful disposal of ministerial records by former Deputy Premier, Jackie Trad.
- Given the subject of this complaint potentially involved corrupt conduct as defined by the CC Act, the matter was referred to the CCC by the Assistant Director-General, Corporate Services. Advice was also sought from the CCC whether it would be appropriate for the State Archivist to investigate given the CCC had an ongoing investigation involving Jackie Trad MP.
- In their response, the CCC advised that they considered that there was insufficient evidence to raise a reasonable suspicion that corrupt conduct by the Minister occurred. The CCC report however, highlighted potential multiple breaches of the Act by the Department of Education. The report also referred the matter to the PSC for investigation in terms of the actions of Department employees.
- CCC provided approval for the State Archivist to proceed with his investigation. Following this approval, the DHPW Corrupt Conduct Intake & Assessment Committee via the DHPW Integrity Services Unit requested the State Archivist to submit a plan prior to commencing an investigation.
- Following approval of the State Archivist's investigation plan, the State Archivist wrote to the Director-General of the Department of Education to request copies of specified records to establish whether any unlawful disposal of public records occurred.
- The Director-General of the Department of Education advised that due to the ongoing investigative processes of the PSC, they were not in a position to assist the State Archivist with his investigation at this point in time.
- The State Archivist has requested that following the completion of the PSC, the Department of Education assist the State Archivist with his investigation.
- The State Archivist has not received any further correspondence from the Department of Education and cannot currently progress this investigation further until the PSC releases its report into the matter.
- There is potential that the actions of DHPW and the Department of Education could be perceived as technical obstruction of the investigations of the State Archivist and a breach of s.48 of the Act, however the State Archivist is comfortable that no such intent existed in terms of DHPW actions.

### **Public Interest Disclosure (PID): alleged unlawful disposal of Public Records**

Exempt Sch 3(12)





## **DEFICIENCIES IN THE PUBLIC RECORDS ACT 2002**

A feature of many of the investigations noted above are actual or perceived deficiencies or inconsistencies in the Public Records Act which have significantly impacted the investigations of the State Archivist, QSA and others. A number of these issues are potentially in the public domain through statements made by the CCC in 2017 following the conclusion of their investigation of the actions of Minister Bailey. Some issues have been raised by experts on archives and public recordkeeping, however many of the issues noted that follow are not in the public domain. The view of QSA is that the Act is potentially no longer fit for purpose and that its deficiencies and inconsistencies are causing considerable confusion and ultimately undermining its central purpose in maintaining the integrity of the public record for the benefit of the Queensland public. What follows are known or perceived deficiencies and inconsistencies. They provide an additional level of context to the investigations noted earlier.

### **Making and keeping records**

Issues relating to s.7 of the Act are potentially the most significant deficiency in the Act at present. S.7(1)(a) of the *Public Records Act 2002* requires that a public authority must 'make and keep full and accurate records of its activities'. Under s.7(2) of the Act the Chief Executive Officer of each public authority is responsible and accountable for ensuring their public authority complies with this requirement. However, despite the mandatory direction of section 7(1)(a), there are no penalties that can be applied for failing to make and keep public records under the Act. One of the main purposes of the Act is for public records to be made, managed, kept and preserved. However, the lack of penalty for not making records is inconsistent with the penalty that can be applied for the unlawful disposal of public records under s.13 (165 penalty points). It is frankly ridiculous that a public authority can be prosecuted for unlawfully disposing of public records under s.13 but will face no penalty if the same records are not created in the first place. This oversight seriously risks damaging the integrity of public records in Queensland.

There have been several examples noted in the investigations above where the failure to make and keep public records has been identified as a significant issue. Apart from the practical impact on the efficient operation of government, the failure to make and keep public records (whether deliberate or otherwise) has the real potential to impact people's lives. The Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA) recognised that inadequate records and recordkeeping practices contributed to delays or failures to identify and respond to risks and incidents of child sexual abuse. The problem was identified as continuing in present day institutions. A clear and practical mechanism is required to enforce this section of the Act otherwise public authorities can openly fail in terms of making and keeping public records without repercussion.

The lack of a penalty applied to this section has been a factor in several investigations conducted by QSA including an investigation into the QBCC which found:

*'Section 7 (1) (a) states that a public authority must make and keep full and accurate records of its activities and section 7 (2) states that the executive officer of a public authority must ensure the public authority complies with subsection (1).*

*QBCC should have made and kept full and accurate records of its interactions with [Complainant] in the course of its business activities i.e. managing complaints against builders and contractors. While it is not expected that a public authority keeps records of every single interaction, during the course of investigating a complaint, records of decisions and actions taken should be made and kept as it is a business activity.*

*Keeping full and accurate records is a principle of the Records Governance Policy issued by the State Archivist under section 25 of the Act and which agencies are required to have regard to. All of the advice we publish relate to agencies keeping full and accurate (or complete and reliable) records including the advice 'What records do I need to keep?'*

S. 7 of the Act also presents concerns when looked at in the local government context. S.7(2) places the responsibility for compliance with the Act upon the Chief Executive of the public authority, which in the case of local governments is the Chief Executive Officer. Local government councillors are required to make public records, but Chief Executive Officers cannot direct councillors and councillors are not defined specifically as a public authority under the Act. If a councillor deliberately attempts to bypass legitimate and reasonable procedures put in place by the council and Chief Executive Officer, as was found in QSA's investigation of Logan City Council, it would be inappropriate for action to be taken against the CEO for the actions of councillors. This anomaly needs to be resolved as part of a review of the Act.

### **Non mandatory nature of policies, standards and guidelines**

S.7(1)(a) of the Act requires that a public authority 'must make and keep full and accurate records of its activities'. However, section 7(1)(b) of the Act only requires public authorities to 'have regard to' policies, standards and guidelines issued by the State Archivist. The term 'have regard to' means that public authorities must consider policies, standards and guidelines issued by the State Archivist when managing their records, but do not have to comply with them.

Policies, standards and guidelines issued by the State Archivist are developed to assist public authorities in meeting their legislative obligations. However, the inability to issue mandatory guidance related to the making and keeping of public records is a limitation of this section of the Act. The non-mandatory nature of the guidance could be considered a contributing factor to the poor standard of government recordkeeping in Queensland. In earlier drafting of the Act, the *Public Records Bill 1999* required public authorities to 'take all reasonable steps to comply with' any relevant policy, standards and guidelines issued by the Archivist.

The lack of a penalty applied to this section has been a factor in several investigations conducted by QSA including Minister Bailey, Logan City Council and the QBCC. A core recommendation of the State Archivist following the Minister Bailey investigation was that certain key guidelines should be mandatory, whilst some remain non mandatory. This is consistent with practice in NSW, where mandatory guidelines are independently approved by their equivalent of the PRRC.

### **Enforcement of public authority compliance with the Act**

Several sections of the Act have penalty provisions applied but are silent on how breaches of legislative obligations should be enforced. As it currently stands, no entity is allocated any enforcement responsibility to prosecute breaches of the Act. The State Archivist currently has limited powers for monitoring compliance with the Act including the power to send authorised officers to enter an agency's premises and examine their recordkeeping procedures and records under sections 46-48 of the Act. QSA staff, however, cannot copy or remove records nor compel an agency's officers or staff to answer questions about recordkeeping. The Act is silent on which entity can bring about a prosecution in effect creating an offence under the Act but no mechanism or power to enact it.

Since 2020 investigations and complaints under the Act have been required by DHPW to be referred to the Integrity Services Unit for consideration by the Corrupt Conduct Intake and Assessment Committee prior to investigation by the State Archivist. The Committee assesses any complaints for potential corrupt conduct under the *Crime and Corruption Act 2001*. Current departmental processes require any liaison with the Crime and Corruption Commission to be through the Assistant Director-General, Corporate Services. Correspondence with the CCC indicates that they regard the State Archivist having independence under the Act to undertake investigations and make recommendations about potential actions.

Action for non-compliance with the Act at present can only be taken under the *Justices Act 1886*, which has its own set of limitations. For example, if it is suspected that a public record has been unlawfully disposed of under s.13, the offence is classified as a summary offence under the *Justices Act* which means any legal action must be taken within 12 months of the offence occurring. This



raises difficulties when determining an exact date of the unlawful disposal and becoming aware of the offence within the 12-month period.

While s.7 of the Act does not itself impose criminal sanctions or penalties for a breach of the requirement to make and keep full and accurate records, s.7(1)(a) of the Act establishes a statutory duty which, when read in conjunction with section 204 of the *Queensland Criminal Code*, could potentially be interpreted as leading to the establishment of a criminal offence.

S. 204 of the Code establishes the offence of 'disobedience to statute law' which provides as follows: '*Any person who without lawful excuse, the proof of which lies on the person, does any act which the person is, by the provisions of any public statute in force in Queensland, forbidden to do, or omits to do any act which the person is, by the provisions of any such statute, required to do, is guilty of a misdemeanor, unless some mode of proceeding against the person for such disobedience is expressly provided by statute, and is intended to be exclusive of all other punishment. The offender is liable to imprisonment for 1 year.*'

S.7 of the Act includes an express statutory requirement which if not complied with could enliven the application of s.204 of the *Queensland Criminal Code*.

The lack of clear enforcement provisions under the Act have meant that while technical breaches of the Act may have occurred in several cases that have been investigated by the State Archivist, e.g. Logan City Council, QBCC and Minister Bailey, no prosecutions for breaches of the Act have been instigated. The limitations of the *Public Records Act 2002* have played a significant role in the lack of prosecutions.

The current Act relies primarily on facilitation and persuasion techniques such as awareness raising and education, as well as monitoring (e.g. via self-assessment surveys) and independent dispute resolution (e.g. via the Public Records Review Committee). This model relies upon public authorities 'doing the right thing' due to the limited availability of enforcement mechanisms. QSA has previously reported on the state of recordkeeping in Queensland to Parliament on a bi-annual basis, the last survey completed in 2015. These surveys do not currently require the State Archivist to 'name and shame' public authorities that are not compliant with the requirements of the Act.

From 2009 to 2015, Queensland State Archives monitored agency compliance with the Act against *Information Standard 40: Record-keeping* and *Information Standard 31: Retention and Disposal of Public Records*. In June 2018, the information standards were repealed and replaced by the *Records Governance Policy*.

QSA's previous survey monitoring revealed that levels of recordkeeping compliance had been demonstrably poor, with the 2014-15 survey revealing that 85 per cent of public authorities did not meet the minimum standard of records management practice that QSA would deem appropriate.

In November 2017, QSA launched its 'Recordkeeping Transformation Program' to improve the standard of records and information management across government. A baseline survey was proposed to measure public authorities' recordkeeping maturity against the simplified requirements of the *Records Governance Policy* and support Queensland public authorities in lifting their digital recordkeeping maturity. The first Survey was designed to establish a baseline level of compliance against the Policy and be repeated annually to measure recordkeeping maturity over time.

The survey was initially planned for release in 2017 but to date it has not progressed for release. The survey progressed to the Minister's office in 2019, however it has not been approved for release and no reasons have been provided for this decision. It is currently still waiting to be released. Given the last record-keeping survey was undertaken in 2015, this is a significant issue. It is now 3 years overdue. The survey is a key part of the strategy to improve record-keeping, however QSA is unable to progress the survey. The other key part of the Recordkeeping Transformation Program was review of the Act itself, which as noted has also not progressed since 2018.

## Statutory requirements of the Act with no penalty for non-compliance

In addition to s.7 of the Act, a number of other sections of the Act create statutory obligations but contain no penalty and therefore no avenue for prosecution for non-compliance. S.8 of the Act requires public authorities to ensure the safe custody and preservation of records in their possession which is a statutory obligation. There have been examples of technical breaches of this section uncovered during QSA investigations including Minister Bailey and Logan City Council where individuals retained public records in private applications rather than transferring them to official government recordkeeping systems. As this section does not require a person to take a specific action rather a provision to generally ensure the safe custody and preservation of records, prosecution under other legislation such as the *Queensland Criminal Code* are unlikely to be successful.

S.14 of the Act requires public authorities to ensure their public records remain accessible, with a specific focus on digital records or records that require particular equipment or technology to be produced or made available. In the case of Minister Bailey and Logan City Council, it could be argued that the actions of the individuals in deleting records from private accounts before being captured in official council systems may have involved a failure to take reasonable action to ensure that the messages remained able to be produced or made available. Between the time the individuals deleted messages from their private accounts to when they were recovered by the CCC, the records were clearly not accessible.

Although s.14 of the Act provides a statutory direction that agencies '*must take all reasonable action to ensure information is able to be produced or made available*', for the purposes of other legislation such as the Criminal Code, '*reasonable action*' is not sufficiently clear to be able to establish that a breach of this section occurred.

## Independence of the State Archivist

S.24 of the Act details the statutory functions of the State Archivist:

- a) To develop and promote efficient and effective methods, procedures and systems for making, managing, keeping, storing, disposing of, preserving and using public records;
- b) To identify public records of enduring value and require that they be retained in a useable form, whether or not the records are in the custody of the archives;
- c) To make decisions about the disposal of public records;
- d) To manage, keep and preserve records for public authorities and other entities;
- e) To provide public access to public records
- f) To conduct research and give advice about the making, managing, keeping and preserving of public records;
- g) To perform another function given to the archivist under this or another Act;
- h) To do anything else – incidental, complementary or helpful to the archivist's other functions; or likely to enhance the effective and efficient performance of the archivist's other functions.

S.25 of the Act details the statutory powers of the State Archivist:

- a) To establish and manage repositories and other facilities to store, preserve, exhibit and make available for use public records and other materials;
- b) To copy public records and other materials;
- c) To publish public records and other materials;
- d) To acquire records by purchase, gift, bequest or loan;
- e) To authorise the disposal of particular public records or classes of public records;
- f) To make policy, standards and guidelines about the making, keeping, preserving, managing and disposing of public records.

S.27 of the Act details specific directions around the independence of the State Archivist in relation to disposal decisions, specifically:

- The archivist and the staff of the archives are not subject to the control or direction of a Minister or a department in relation to making decisions about the disposal of public records.

S.23 of the Act complicates this however by stating:

*'Subject to the Minister and the chief executive, the archivist is to control the archives.'*

Since 2002 all State Archivists have operated with an assumption of independence in regard to all the statutory functions and powers noted in the Act. This practice is consistent in principle with the operation of all government archives within Australia and New Zealand.

Crown Law advice

Exempt Sch 3(7)

The wording of the Act, s.23 in particular, relating to direction and control is problematic. As noted, it is inconsistent with practices across all archives in Australia and New Zealand, which provide independence protections for the Archivist. In Queensland, the independence of the State Archivist was apparently a major consideration during the development and passing of the Act.

Exempt Sch 3(7)

The inconsistency and confusion related to s.23 in regard to direction and control, led to the State Archivist seeking the advice of the Integrity Commissioner in October 2017 in regard to attempts to change the content of his independent report on the Minister Bailey investigation. The State Archivist sought advice relating to the potential conflict of following the direction of the Director-General versus his statutory obligations. Advice provided by the Integrity Commissioner included:

Act does not apply Schedule 1

During Estimates hearing in July 2017, during the active stage of the Minister Bailey investigation, the DG of DSITJ referred to the independence of the State Archivist in response to a question:

question.

**Mrs SMITH:** Can you advise how widespread the use of private email accounts for ministerial business is in the Palaszczuk government ministry?

**Mr Merrick:** I thank the member for the question. I think it is important to note in relation to the functions and powers of the State Archivist, conferred under the Public Records Act, that matters relating to the disposal of records or records management are covered under the independent statutory role of the State Archivist. I am not in a position personally to answer that question. That is a matter for the State Archivist. In relation to such matters, I would reinforce that the State Archivist is independent from any direction from either me or the minister in relation to those sorts of issues.



It should be stated that direction of the State Archivist is in itself not a concern, it is completely expected of an executive of a department and frequently such direction adds significant value. However, the State Archivist has concerns that [redacted] Exempt Sch 3(7)

A related matter in regard to the independence of the State Archivist is raised in the implementation of s.56 of the Act, which requires the State Archivist to give an annual report on the administration of the Act to the Minister responsible for Archives to provide to Parliament. The Act states that this report "may include details of the extent to which public authorities are complying with the Act including for example instances of non-compliance and any measures taken or the State Archivist recommends be taken to prevent or reduce noncompliance with the Act." During the 2<sup>nd</sup> reading of the Act prior to it's passing, the Minister responsible for the Act stated in response to questions around independence of the State Archivist:

*"Clause 27 guarantees the independence of the Archivist. That is a fundamental clause of the bill. Clause 56 provides for the Archivist to make an annual report. The bill also has a provision for a Public Records Review Committee."*

This response arguably creates a perception that the Annual report was very much intended to be a means to ensure the independence of the State Archivist.

Prior to 2018, there are no known attempts to interfere with the State Archivist's commentary within his or her annual report. Since 2018, DHPW have directed the State Archivist to remove certain content from his 2017-18 and 2018/19 Annual reports that related to the administration of Act and key activities undertaken during the year. The excluded content was essentially material that could be perceived negatively. The result was that the State Archivist was not provided a means to accurately inform the Minister and Parliament of compliance with the administration of the Act by public authorities and to make recommendations to improve compliance with the Act. As noted above, since 2017 the State Archivist has never met with the Minister to provide his view on compliance with the Act or potential measures to improve it. The Annual report provides currently the only means available to the State Archivist to do so.

The State Archivist had significant concerns that DHPW were potentially in breach of the Act by directing him on the content of the Annual report and in particular to remove content directly related to the administration of the Act.

Attempts by the State Archivist to obtain Crown Law legal advice [redacted] have been made regularly since 2018, however these requests for legal advice have not been progressed by the Department. In December 2019, the PRRC requested advice [redacted] Exempt Sch 3(7)

[redacted] In May 2020 Crown Law provided legal advice that stated:

There is no doubt the central cause of these issues is the wording of the Act itself. The Crown Law interpretation of s.23 may indeed be a valid literal interpretation, despite its inconsistency with prior practice. Addressing this matter should be a major factor in a review of the Act. It has the potential to cause considerable ethical dilemma and conflict for many individuals and should be addressed within the Act itself to provide absolute clarity.

### **Disposal of public records in a digital context**

Schedule 2 of the Act defines the definition of disposal of a record to include destroying or damaging a record, or part of it or abandoning, transferring, donating, giving away or selling a record, or part of it. S.13 of the Act sets out the conditions for the disposal of public records to include authorisation of the State Archivist or other legal authority, justification or excuse. In a digital context, this definition of disposal is inadequate as just about any digital record can be forensically recovered which means records are never really destroyed. In the digital world, there is rarely only one record as copies are held on backup servers and multiple copies of the same record held in different locations. This then is at odds with how disposal is described in the Act.

Another issue not considered by the Act is the 'intent' to destroy public records. In a digital environment, a person may intend to destroy digital public records, but they can often be recovered (potentially at great expense). Under the current Act, the intent to deliberately destroy records is not a consideration while records can be recovered.

The ability to recover digital records was an issue in QSA investigations relating to Minister Bailey and Logan City Council which both involved the deletion of public records in private email accounts or messaging apps. In both cases the records were recovered by the CCC as part of their investigations which negated the act of disposal of the records by the individuals involved. In the case of Minister Bailey, the CCC concluded that as the emails had not permanently been deleted due to their recovery, it would be difficult to prove beyond reasonable doubt that a breach of s.13 had occurred. The act of recovering the records for investigation essentially removed the possibility of prosecution of breach of s.13. Somewhat ironically if the CCC recovery had been delayed by a further 10 days the records could not have been recovered as they would be automatically permanently deleted by the email service provider.

### **Transfer of public records not mandatory**

The transfer of permanent value records to QSA helps to ensure that records of an historical or cultural nature are appropriately protected, securely stored and accessible to the public. The Act does not mandate the transfer of records by public authorities to QSA instead relying on public authorities to decide when records are transferred with QSA's agreement. The Act only provides for the transfer of public records more than 25 years old under section 10. This may be appropriate for records in stable formats such as paper or microfilm but can be problematic for records in less stable formats such as digital and audio-visual records. Technological obsolescence means these types of records can deteriorate or become unreadable after a few years due to the speed of technology advances. Waiting too long for digital records may mean that it is too late to ensure the ongoing usability and integrity of the records. The lack of mandatory transfers also means that public authorities can refuse to transfer records to QSA and keep them within their own agencies or communities. This lack of access to a wider audience limits the available of records to all Queenslanders and QSA has no visibility of records held by these public authorities, even though they may be permanent value public records of significant interest to Queenslanders.

## **Management of Ministerial records**

The Act is ambiguous about the management of public records of former Ministers. Under the Act, Ministers and Assistant Ministers are identified as public authorities for the purposes of the Act. However, this only applies while a Minister or Assistant Minister remains in office. Once a Minister or Assistant Minister leaves office they are no longer a public authority. In effect, this means there is no entity identified that can make decisions about access to or the disposal of Ministerial records in QSA's custody. The impact of this means access to Ministerial records held at QSA can only be applied for under Right to Information and Privacy legislation. This includes former Ministers accessing records they personally created while in office. It also means temporary value Ministerial records held at QSA cannot be destroyed and remain available for access under the above legislation even though former Ministers may have expected them to have been destroyed. In addition, if former Ministers continue to hold public records that relate to their time as a Minister they are also potentially in unlawful possession of these public records. However, if they destroy the records, they are potentially in breach of s.13 of the Act. The State Archivist has sought to address these deficiencies through urgent amendments on many occasions with no success.

### **WHY THE PUBLIC RECORDS ACT WAS DEVELOPED**

Many of these perceived deficiencies and inconsistencies should be read in the context of what led to the drafting of the Public Records Act in 2002. The Act was intended to address a number of high-profile issues and interpretation of sections of the Act arguably should not be made without considering the likely intent of those who drafted it. The current dominant interpretation of the Act being applied by DHPW relates to Crown Law advice provided in 2018. There is no doubt that the literal interpretation being applied by Crown Law has validity, however as noted it is not consistent with earlier interpretations or indeed other archival legislation and practice in Australia and New Zealand.

The Archives in Queensland commenced regulatory life under iterations of the Libraries Act from 1943 and then The Libraries and Archives Act 1988, but did not achieve standalone legislation until 2002 following key Queensland reviews that looked at corruption, the archival legislation and freedom of information.

As a result of the Fitzgerald Inquiry (the Inquiry into Possible Illegal Activities and Associated Police Misconduct) the proper protection and preservation of public records was determined as a matter that related to honesty, impartiality and efficiency in the public administration of the State.

The Electoral and Administrative Review Commission (EARC) were established as a result of the Fitzgerald Inquiry to provide reports to the Chairman of the Parliamentary Committee for Electoral and Administrative Review, the Speaker of the Legislative Assembly and the Premier, with a view to achieving and maintaining efficiency in the operation of the Parliament; and honesty, impartiality and efficiency in (i) elections; (ii) public administration of the State and (iii) Local Authority Administration.

The EARC reviews of the Freedom of Information Legislation and the Queensland Legislative Assembly Electoral System, determined that there needed to be a review of the archives legislation and the administrative practices and resources of QSA and deemed that the powers, practices and procedures of the Queensland State Archives were important matters.

EARC released their Review on Archives Legislation in June 1992. Their Review recommended that there should be specific archives legislation to provide for the establishment of an independent archives authority, with this authority to be constituted as a statutory corporation and independent agency within a ministerial portfolio. The archives legislation was to provide that the Archives Authority not be subject to external direction, whether ministerial or otherwise.

The EARC reviews were just an initial recommendation in this space. There followed a series of positions taken relating to the role of the State Archivist and its functions.



The following table details some of these:

<p>Background - Intent of the Act</p>	<ul style="list-style-type: none"> <li>The Legal, Constitutional and Administrative Review Committee on Freedom of Information in Queensland in 2000 recognised the link between effective freedom of information legislation and good recordkeeping.</li> </ul>
<p>The <i>Public Records Bill 1999</i></p>	<ul style="list-style-type: none"> <li>The <i>Public Records Bill 1999</i> provided that the State Archivist would not be appointed under the <i>Public Service Act 1996</i>. Clause 21 stated that the Archivist is to be appointed by the Governor in Council and that the <i>Public Service Act</i> does not apply to the appointment of the Archivist.</li> <li>The intent of this arrangement was to further the perception of the independence of the State Archivist in respect of making decisions in relation to the disposal and retention of public records.</li> </ul>
<p>Second reading speech, 12 December 2001 (Opposition response)</p>	<ul style="list-style-type: none"> <li>If the statutory body or person controlling Archives lacks independence, in the sense of being free of direction, there will always be the possibility that political pressure will be brought to bear to approve, inter alia, which records should be preserved and which should be destroyed. The effect of this would be that Archives would cease to be a mechanism for accountability and a haven for the heritage of the state.</li> <li>If the State Archivist is not independent of the Minister, then no believable public assurance can be given that decisions made by the State Archivist are not influenced by the responsible minister.</li> </ul>

Released under the Official Information Act 2009

<p>Queensland. Electoral and Administrative Review Commission report</p>	<ul style="list-style-type: none"> <li>• The Commission considers that an archives authority should be established in Queensland along the same lines as the NSW Archives Authority. It should be independent of a government department and constituted as a statutory corporation and independent agency within a ministerial portfolio. Clause 11 of the draft Archives Bill 1992 provides for this. The relevant Minister should be responsible for ensuring adequate resources for the Authority, but be unable to direct it as to its administration of the archives legislation.</li> </ul> <p><b>Recommendations</b></p> <ul style="list-style-type: none"> <li>• ...archives legislation provide for the establishment of an independent archives authority, such authority to be constituted as a statutory corporation and independent agency within a ministerial portfolio</li> <li>• ...archives legislation provides that the Archives Authority not be subject to external direction, whether ministerial or otherwise</li> </ul> <p><b>Conclusions</b></p> <ul style="list-style-type: none"> <li>• Such legislation will provide an independent mechanism to ensure that the essential records of Queensland's history are created and preserved for the benefit of the present and future generations.</li> <li>• The main features of the archives legislation recommended in this Report are:             <ul style="list-style-type: none"> <li>○ The present QSA be reconstituted as a new independent statutory corporation with functions and powers relating not only to the collection and preservation of public records of ongoing value, but also to the proper management of public records by government agencies, and the provision of public access to those records.</li> <li>○ The statutory authority ("the Archives Authority") proposed will be independent of Ministerial direction, have wide ranging functions of training, guidance and enforcement in relation to records management, to provide public access to records of a certain age held by the Archives Authority and to collect and preserve records having value as historical records or otherwise having value as part of Queensland's or Australia's heritage</li> <li>○ A central function of the Archives Authority will be to establish record management standards governing the making, management, preservation and destruction of public records. These standards will include an obligation on public authorities to make complete and accurate records of their operations</li> </ul> </li> </ul>
<p>Archives Society of Archivists (ASA) submission to the Scrutiny of Legislation Committee 2002</p>	<ul style="list-style-type: none"> <li>• A good and effective archival regime in a State has to start with recordkeeping practices within agencies. The quality of processes within an archives are largely irrelevant if records have not been created by an agency in the first place or properly cared for by the responsible public authority</li> <li>• Consistent approaches adopted to define the powers of parties and not for example by stating that the archivist has a power in one section then severely qualifying it in a subsequent section</li> </ul>

<p>(RIMPA) Records and Information Management Professionals of Australasia Submission on the draft Qld Archives Bill 1999</p>	<ul style="list-style-type: none"> <li>We support the intent of the Bill to give the Queensland State Archivist powers to make decisions without fear of interference from the Government. This is paramount requirement if the role is to provide an independent view on the management of public records especially those relating to disposal decisions.</li> </ul>
<p>Published articles on recordkeeping and accountability for a healthy democracy</p>	<p><i>Sue McKemmish (1993) - Recordkeeping, Accountability and Continuity: The Australian Reality</i></p> <ul style="list-style-type: none"> <li>...lack of recordkeeping is symptomatic of certain types of behaviour, of a disregard for the formal procedures and processes that provide the safeguards against systemic corruption</li> <li>The Act focuses more on the custodial and heritage role of QSA than the records management standard-setting, granting of inspection powers and the role of an accountability mechanism</li> <li>The test of whether we have succeeded in spiriting 'an understanding of the archives as arsenals of democratic accountability . . . into society' will be when we observe our governments upholding and defending this role - not seeking to dismiss or suppress it.</li> </ul> <hr/> <p><i>Bob Sharman (1993) – The Hollow Crown</i></p> <ul style="list-style-type: none"> <li>Referencing the report from the WA Inc Royal Commission...records provide the indispensable chronicle of a government's stewardship. They are the first defence against concealment and deception.</li> <li>Departmental officers and ministers hold responsibility for record creation, maintenance and retention, but overall responsibility for those matters cannot be left with those officials.</li> </ul>

Ultimately the exact intent of drafters of the Act cannot be known definitively, however it is clear that the Act is a major issue impacting the standard of government recordkeeping in Queensland and in the ability to take action to address non compliance with the Act. It is in effect at present, largely unenforceable and it is hard to believe that anyone would have drafted an Act intended to be unenforceable.

**Changes in legislation impacting on record-keeping**

A further reason for changes to the Act are simply consistency with a range of legislative obligations with record-keeping implications which have been introduced over the past 12 – 24 months. Most notably, these include the introduction of the *Human Rights Act 2019* and legislative amendments made in response to recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse. The new and amended legislative obligations emphasise the importance of good recordkeeping and keeping complete and reliable records that provide evidence that public authorities have taken all reasonable steps to ensure the proactive protection of vulnerable persons. This includes the introduction of a 'reverse-onus' on institutions to prove that they took all reasonable steps to prevent abuse; removal of limitation periods in relation to commencing action for civil damages in relation to child sexual abuse; records that demonstrate that acts or decisions are made in a way that is compatible with human rights; and providing a positive human right for access to government information. The changes in legislation highlight and strengthen the importance for the need for good recordkeeping in public authorities and the need for the Act to reflect this level of importance. In its current form, the Act is powerless to deliver on the expectations established by these legislative amendments.

## **WHY DOES THIS MATTER?**

Ultimate why do the apparent deficiencies and inconsistencies in the Act matter? - For Archivists, and many others, public records form the cornerstone of government accountability. Good records support effective business practice, improve government accountability and efficiency, and the records themselves provide unique evidence and context of the actions and decisions taken by governments over time. Records are central to a government's ability to efficiently and effectively provide goods and services, protect the community, and demonstrate delivery on its commitments.

Successful open government relies on sound recordkeeping practices to support public accountability and transparency. Through an examination of 202 reports tabled between 2013 and 2020 by the Queensland Audit Office, the Queensland Ombudsman, the Office of the Information Commissioner and the Crime and Corruption Commission, QSA has noted many cases of poor recordkeeping practices within government departments and public authorities within its jurisdiction.

Recordkeeping issues were identified in 82 of the 202 reports. Specific issues include:

- ineffective recordkeeping practices (e.g. procedures; policies; workplace culture)
- decentralised records management systems
- systems and technology limitations (e.g. maintenance; security, capability, automation)
- inadequate recordkeeping training / awareness
- falsified / fabricated records.

Forty-two Acts of Parliament were acknowledged as having been impacted in some ways due to recordkeeping issues in the 2019/20 period.

There have been high profile cases where the failure to make and keep public records has been identified as a significant issue. The Royal Commission into Institutional Responses to Child Sexual Abuse found that the impact of poor recordkeeping added to the trauma associated with childhood abuse. Bob Atkinson AO APM who was a Commissioner of the Royal Commission wrote in his forward to QSA's *Guideline on creating and keeping records for the proactive protection of vulnerable persons*:

*'Throughout the Royal Commission into Institutional Response to Child Sexual Abuse (the Royal Commission), I heard first hand from many people with lived experience of institutional child sexual abuse about the associated impact recordkeeping had on their lives.*

*The past recordkeeping practices of many organisations failed the children in their care. For many institutions, records did not exist, were incomplete or were inaccurate and insensitive. Some records were deliberately destroyed or otherwise withheld from authorities.*

*It was common for an institution to approach recordkeeping from its own perspective, often to protect its reputation, its finances and its personnel.*

*We found during the Royal Commission that the impact of poor recordkeeping can add to the trauma associated with childhood abuse. We heard of the distress and frustration experienced when people received files about them that contained limited, inaccurate and inappropriate information.*

*There is no doubt recordkeeping has greatly improved over the years. Contemporary organisations accept that recordkeeping is an important element of institutional leadership and culture as well as transparent and accountable governance.*

*Importantly, full, accurate and sensitive records have the potential to support people with lived experience and alleviate the lifelong impact of child sexual abuse.'*



In March 2020, a coronial inquest was conducted into the death of 22-month old Mason Jet Lee in 2016. The Coroner's report published in June 2020 details numerous incidents involving poor recordkeeping which contributed to the eventual death of the toddler.

The time for a review of the Public Records Act is arguably well overdue. It is arguably no longer fit for purpose and the consequences of this are becoming very clear. Whilst our own investigations highlight a group of issues, the number of reports from other integrity agencies highlighting poor recordkeeping as a major factor should be far more concerning. Poor recordkeeping is a major problem and the review of the Act should be a core element in actions taken to address the current deficiencies in government recordkeeping.

In 2015 85% of public agencies did not meet what QSA would deem to be a minimum standard of recordkeeping practice. QSA has no evidence to indicate that this has improved, in fact evidence from its investigations and the investigations of other agencies actually indicate the opposite is potentially happening. Poor recordkeeping has major consequences both for individuals and for the accountability of those elected or employed to serve the Queensland public. Concerted and coordinated action arguably is required, action which should include a review of the Public Records Act.

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