



## Regulatory statement

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## Contact for enquiries

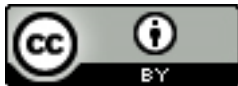
Government Recordkeeping Directorate

Archives New Zealand

Phone: +64 4 499 5595

Email: [rkadvice@dia.govt.nz](mailto:rkadvice@dia.govt.nz)

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## **1 OUR ROLE**

The Chief Archivist has a primary statutory role through the Public Records Act 2005 (the Act) to lead public sector information and records management. A necessary part of this legislative responsibility is the provision of an integrated regulatory framework for the systematic creation, management, disposal and preservation of public sector information (including data) and records.

The Act provides regulatory tools and powers to assist and support public sector organisations to achieve voluntary, full and sustained compliance. Through Archives New Zealand's use of these tools and our regulatory activities, we enable government to be held accountable and enhance public trust in the integrity and reliability of central and local government. Good information and records management practices are a cornerstone to building this trust.

### **1.1 Purpose**

This Statement describes Archives New Zealand's approach to regulatory compliance. It acknowledges the stewardship role that we have and how we will work with our regulated sector to achieve the requirements of the Act. The statement also outlines how we intend to use the tools and powers available to support our regulatory activities. Sections 5 to 16 describe what the tool or power is, the approach we intend to follow to use it and any principles or factors we might use or consider. However, the sections do not detail "how" we will implement a particular regulatory tool or power as this will evolve and change with time and different circumstances.

### **1.2 Audience**

This Statement is written for:

- Archives New Zealand staff tasked with advising the Chief Archivist on the development and implementation of our regulatory tools and powers
- public sector organisations with responsibility for meeting their legislative obligations under the Act, and
- members of the public and external stakeholders with an interest in Archives New Zealand's regulatory role.

## **2 OUR APPROACH**

Archives New Zealand is building an integrated regulatory framework focused on raising information and records management capability and performance across the public sector and ensuring that our regulatory approach is fit for purpose in an increasingly digital environment.

### 3 GUIDING PRINCIPLES

Archives New Zealand will use the following principles to focus our regulatory efforts and guide how we work with our regulated sector to achieve the requirements of the Act.

#### 3.1 Outcome focused

Our regulatory activities seek maximum impact on delivering what government and the community expect. This includes:

- effective and responsible stewardship of information assets
- creation and maintenance of information and records that can be used to hold government to account
- preservation of information and records with long-term historical or cultural value, or which contribute to New Zealanders' sense of their national identity.

We want organisations and individuals to comply with the law in a way that best delivers these outcomes. We systematically review and learn from experience to help inform our future work and to promote good business practice.

#### 3.2 Fair and reasonable

Our staff act with integrity and in accordance with the codes of conduct of the Department of Internal Affairs and the public sector. We expect the same from organisations in the public sector.

Being fair means giving organisations and individuals affected by our regulatory activities opportunities to contribute to our thinking and decision-making processes, or to request exemption from or variation of certain compliance requirements.

It also means our responses to instances of non-compliance are reasonable, considerate and unbiased and follow the principles of good administrative practice and natural justice.

#### 3.3 Consistent, transparent and open

We take similar approaches in similar circumstances. This does not mean uniformity. Each set of circumstances is unique and must be considered in regard of the outcomes sought, risks, resources, and other relevant factors.

Our response to non-compliance, while consistent and fair, is informed by a public expectation for action. Our regulatory activities can help to repair or bolster public confidence and trust in government information and records, even when this involves revealing failings.

We are clear about our regulatory approach and how we make our decisions. We explain our decisions to those affected by them. This includes explaining our decisions to the public.

#### 3.4 Targeted and trusted

Our primary goal is long-term sustainable compliance to support the purposes of the Act, but this does not prevent us acting against non-compliance that we consider is negligent and that damages the integrity of the public record. We take a risk-based approach to proactively intervening in circumstances we consider appropriate and where our impact is timely, strong and useful.

The public and our stakeholders have trust and confidence in our work because we are recognised as an effective, competent and principled regulator. We use our knowledge and expertise to prioritise and target our regulatory efforts and put our tools to best use.

### 3.5 Supportive and collaborative

Most organisations and individuals willingly comply with legal requirements if they are well-informed and supported to comply, because it is in their own interests.

We play an active role in pursuing solutions and interventions aimed at minimising harm and maximising benefit. We collaborate with a range of organisations, often actively working with them to improve compliance or to develop solutions.

We seek to align our work with other related functions, such as the Government Chief Digital Officer, the Government Chief Data Steward, the Privacy Commissioner, the Government Chief Privacy Officer, the Auditor-General, and the Ombudsman.

We also incorporate and or refer to relevant standards and ethics developed by archival and information management professions and sector groups in New Zealand and internationally. We exercise our role in a way that supports relevant government domestic and international commitments, for example implementing Treaty settlement commitments and participating in the Open Government Partnership.

## 4 OUR ACTIVITIES

We expect everyone to comply with the law so that the purposes of the Act are achieved.

The Act provides Archives New Zealand with a range of tools and activities that enable us to provide an integrated framework to build and drive improvements to information and records management capability and performance across the public sector.

We do this by promoting best practice, providing advice and guidance, simplifying compliance and enabling self-management, monitoring compliance, capability and performance, and responding to risks and challenges.

### 4.1 We promote best practice

We recognise excellence and responsibility, particularly where it contributes effectively to better levels of compliance and helps to achieve the desired outcomes. We spread information about good information and records management practice that we believe the public sector could adopt more widely. We support organisations that take on greater responsibility for positive outcomes and that are striving for excellence.

[Section 5](#) outlines how the Chief Archivist defines and communicates accepted best-practice information and records management by issuing or adopting standards. Standards describe practical and reliable methods for achieving designated outcomes at a specific point in time.

[Section 7](#) outlines how the Chief Archivist may choose to issue specific requirements to individual organisations or sectors in certain circumstances. An example of this is the instruction issued to local authorities on the storage and preservation of protected local authority records and archives.<sup>1</sup>

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<sup>1</sup> *Protection and preservation of protected records: Instruction to local authorities (16/Sp3).*

We want to increase public trust in the quality and care of government information, records and archives. This may mean that we promote examples of excellence, or highlight areas where non-compliance is threatening that trust. The Chief Archivist's annual report to the Minister on the state of public sector recordkeeping is one of the key tools that we can use to provide visibility of these as well as identifying emerging trends (see [section 9](#)).

## **4.2 We provide advice, guidance and support**

We acknowledge that barriers such as a lack of awareness, understanding or capability may prevent some organisations achieving full and sustained compliance. Public sector organisations need clear information about the requirements of the law and how they can comply.

[Section 16](#) outlines the approach we will take and some of the considerations and factors we will take into account when assessing and determining whether an organisation is a public office or local authority and therefore subject to the Act.

Archives New Zealand produces and promotes many forms of advice and guidance, including website information, FAQs, presentations, forums, newsletters, standards and instructions.

In addition to any other requirements that may exist in law, the Chief Archivist may consider that certain local authority information and records are, in his/her opinion, worthy of preservation for administrative, accountability, heritage or research reasons, and declare these to be protected for the purposes of the Act (see [section 15](#)).

## **4.3 We simplify compliance and enable self-management**

Public sector organisations must take responsibility for ensuring their own compliance. We make compliance as simple as possible in the circumstances. We seek to make our systems and processes straightforward and effective to support this. We are clear about our expectations.

Under the Act, exemptions from compliance with a standard or an instruction may be granted by the Chief Archivist (see [section 6](#)). Public offices may also ask the Chief Archivist to agree to defer the mandatory transfer of information and records that are 25 years or older to Archives New Zealand, as outlined in [section 14](#).

Some non-compliance is inevitable in a complex environment. Usually, an open discussion of problems provides greater benefit than punitive use of regulatory powers. We can help rectify problems when they are brought to our attention openly and early. We are committed to continuously improving our systems and working with the sector to minimise the cost and burden of that compliance.

Public offices can request to have the status of information and records as public records cancelled or discharged. [Section 13](#) outlines criteria that the information and records must meet to be considered suitable by the Chief Archivist for discharge.

## **4.4 We monitor compliance, capability and performance**

Archives New Zealand seeks to enhance public confidence and trust in the integrity and management of public and local authority information and records. We also focus and adapt our efforts dynamically and effectively. This approach is outlined in [section 9](#).

We use a range of tools to monitor, audit, inspect and/or direct the sector to improve information and records management practice, capability and performance.



We commission independent audits of information and records and the recordkeeping practices of public offices under the Act. We report on these audits to the Minister and the House of Representatives. The Act provides flexibility about the criteria and aspects of information and records management to be covered by the audits. We will use that flexibility in a way that maximises benefits both to organisations and the system.

We may also choose to follow up audit findings or recommendations with an inspection. [Section 10](#) details the types of inspection notices the Chief Archivist can issue to ensure that public sector information, records and archives are appropriately maintained and preserved.

The Chief Archivist's direction power is a broad and flexible tool that may be used for example, to gather evidence of possible non-compliance, or to gather broader sector information to inform the annual report, or to focus future regulatory efforts. The different types of directions under the Act are outlined in [section 8](#).

We may choose to publicise regulatory action that we are taking or have taken. Publicising our action can promote greater understanding of the consequences of non-compliant public sector information and records management and deter individuals and organisations from engaging in non-compliant activity. We will use the most useful channel for publicity, including the Chief Archivist's State of Government Recordkeeping Report that is tabled in Parliament each year by the Minister.

#### **4.5 We respond to risks and challenges**

A well-informed public can be an effective source of information about non-compliance through any allegations or complaints they make. Although the Act does not include a formal complaints mechanism, we can use our regulatory tools in response to any such information received.

[Section 11](#) states the approach we may follow to evaluate, assess and review an alleged or suspected breach or offence under the Act. This section also outlines factors that may be taken into consideration when determining the appropriate level of our response.

Archives New Zealand may also use this approach if we discover irregularities or instances of suspected non-compliance through our monitoring framework. Failure to disclose information and records management problems by public sector organisations can indicate a poor understanding of their importance or a lack of capability but may also indicate systemic failure that requires our intervention.

We always seek to work with public sector organisations to improve compliance, but we are fully prepared to escalate our response if necessary. We are guided by factors such as a public sector organisation's history of compliance, and how open and prepared it is to cooperate with us. Our responses and interventions may include directions to report, directions to manage, copy, make publicly available or transfer information and records, as well as inspections of information and records and/or systems for maintaining these.

The Chief Archivist may recommend the Minister's use of the prescribed records powers in the Act to temporarily ensure the safekeeping of public or local authority information, records or archives that are no longer under the control of a public office or local authority (see [section 12](#)).

[Section 8](#) outlines directions the Chief Archivist may issue to the custodian of an estray record(s)<sup>2</sup> including a direction to manage these in accordance with any relevant standards or instructions. The Chief Archivist may also issue a direction requiring the transfer or copying of a prescribed record(s)<sup>3</sup> (see [section 12](#)).

## 5 STANDARDS

### 5.1 Purpose

Standards describe accepted best-practice approaches to achieving desired or mandated outcomes at specific points in time. Under sections 27 and 28 of the Act, the Chief Archivist can issue, adopt, review, amend or revoke mandatory or discretionary standards for public sector organisations' information and records management.

### 5.2 Approach

The Chief Archivist will typically use standards when it is necessary or important to:

- embed or influence particular information and records management practices
- communicate government and community expectations for public sector information and records management
- support and explain legislative requirements
- raise the profile of and address a pressing issue or problem, and/or
- define or provide a clear benchmark against which information and records management practices can be evaluated.

It is important therefore that standards issued under the Act are clear about:

- the information and records, and the management practices covered
- the Chief Archivist's expectations, and
- the minimum standards of practice allowed.

Standards are suited for use when:

- there is a clear best-practice approach to achieving desired management outcomes
- there are many competing approaches, but mandating or recommending a standardised approach will achieve system-level benefits
- the chosen approach is consistent with national and international best practice and is mature enough to be codified and communicated, and/or
- where doing so achieves system-level benefits that issuing advice and guidance or intervening in another way does not.

While standards are usually focused on outcomes, there are differences in approach depending on the intended audience or the subject matter. This determines their level of detail, structure, size, tone and language. Two common approaches are prescription-based and performance-based.

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<sup>2</sup> Means a public record, public archive, or protected record that has been disposed of otherwise than—  
 (i) in accordance with an authorisation of the Chief Archivist under this Act; or  
 (ii) as required by or under another enactment; but  
 (b) does not include a discharged public record (s.4).

<sup>3</sup> Prescribed record means a record declared under section 38 to be a prescribed record for the purposes of this Act (section 4).

### 5.2.1 *Prescription-based standards*

Prescription or rules-based standards provide precise specifications or methods for attaining an outcome. This can exist in either a positive or negative form. For example, a standard might compel public sector organisations to use certain methods, or it might prohibit the use of certain methods. Prescription-based standards may be appropriate in situations requiring a high level of certainty. AS/NZS ISO 13028 *Information and documentation - Implementation guidelines for digitization of records* is an example of a prescription-based standard.

### 5.2.2 *Performance-based standards*

Performance-based standards provide overall guidance on acceptable performance requirements. They outline general principles or goals and build performance by giving organisations the freedom to achieve these goals in whatever way is most efficient and effective for them. They acknowledge the impact of real-world circumstances on outcomes and methods, and they encourage innovation. Performance-based standards often include lower-level rules, supporting guidance and examples to assist understanding and compliance. For example, Archives New Zealand's *Information and records management standard (16/S1)* is a performance-based standard.

## 5.3 Principles

Archives New Zealand has established three sets of principles to guide decisions on the development and maintenance of standards.

The first set of principles (section 1.3.1) relate to the **processes** Archives New Zealand will follow. The second set (section 1.3.2) relates to the **purpose** of the standards that we will develop and maintain, whilst the last set of principles (section 1.3.3) relate to the **approach** Archives New Zealand will take to managing our standards work as a whole.

### 5.3.1 *Process principles*

- **Open and transparent**

The development or adoption of standards will be publicised and decisions will be communicated to those public sector organisations that are subject to the standards and to other stakeholders.

- **Collaborative**

Standards will be developed in collaboration with relevant public sector organisations and other stakeholders. Stakeholder representatives will be invited to participate, and their opinions will be actively sought and considered when making decisions about standards.

- **Consistent**

Archives New Zealand will follow consistent methods and processes for developing and maintaining standards.

- **Timely**

Archives New Zealand will develop and maintain standards in a timely manner. Existing standards will be reviewed regularly. Once decided, new standards will be developed promptly.

- **Sustainable**

When considering the development of new standards, Archives New Zealand will consider our capability to support them over the medium- and long-term.

### 5.3.2 *Purpose principles*

- **Effective**

Archives New Zealand will develop and maintain standards that achieve specified outcomes, can be implemented and interact consistently with each other.

- **Accepted practice and innovation**

Archives New Zealand will ensure that our standards take account of the latest thinking and developments. International standards may be adopted or adapted to cater for the specific characteristics of the New Zealand environment. We will use standards to drive innovation when appropriate.

- **Accessible**

Archives New Zealand will develop and maintain standards that are understandable on their own terms and are easy to read and use. Standards will be made freely available unless there are valid reasons not to.

- **Harmonised**

Archives New Zealand will develop and maintain standards that align with other public sector information management frameworks and with relevant international standards. We will ensure that our standards are consistent with those external frameworks and standards, reuse existing knowledge where possible, and identify and actively collaborate with key contacts.

- **Auditable**

Archives New Zealand will ensure that mandatory compliance requirements in standards are auditable and enforceable.

### 5.3.3 *Approach principles*

- **Managed**

Archives New Zealand will manage the number of standards issued by the Chief Archivist to:

- maximise the impact of each standard
- optimise the sustainability of our standards work
- improve the accessibility of principles and requirements, and
- reduce the likelihood of inconsistencies in content and tone.

- **Maintained**

Standards will be reviewed regularly. Any changes made will be explained and communicated to public sector organisations. Appropriate lead-in times for compliance with mandatory requirements will be set. Archives New Zealand will monitor the use and impact of standards issued under the Act to ensure they are, and continue to be, fit-for-purpose.

## 6 COMPLIANCE EXEMPTIONS

### 6.1 Purpose

Section 30(1) of the Act enables the Chief Archivist to agree to exempt a requesting public sector organisation from compliance with a standard or instruction issued under the Act. The compliance exemption may be agreed to under any terms and conditions that the Chief Archivist considers appropriate. If the Chief Archivist declines an exemptions request, the public sector organisation has the right to appeal against the decision to the Minister under section 51(1)(c).

## 6.2 Approach

The following section outlines principles that will guide the Chief Archivist when dealing with requests for an exemption from compliance, and factors that will be considered when seeking decision on such requests.

### 6.2.1 Principles

- **Consistent with the Act**

A request for exemption from compliance will only be agreed where the Chief Archivist is satisfied that the exemption is not detrimental to the overall purposes of the Act, and that the public office or local authority will still comply with the provisions of the Act.

- **Specific and limited**

Exemptions will generally be:

- from a specific requirement or requirements within a standard or instruction rather than the whole standard or instruction; and
- for a limited time period.

Exemptions will also only apply to a particular standard or instruction while it is current. If a standard or instruction is reviewed or revoked, all exemptions to it that were in place at that time will become void.

- **Based on agreement**

The Chief Archivist will seek to establish exemption terms and conditions by agreement with the public office or local authority concerned. The agreement must include a compliance plan which outlines how the organisation will manage any risks to the information and records under an exemption. All requests for exemption must be accompanied by this compliance plan.

Note: This principle does not mean that the Chief Archivist **must** agree to an exemption.

### 6.2.2 Considerations

- **Whether Compliance is Possible**

There may be circumstances when it will not be possible for an organisation to comply with a standard or an instruction. For example, organisations with overseas offices may not be able to comply with some requirements in those offices if they are inconsistent with local laws or regulations.

- **Whether Compliance is Reasonable**

There may be circumstances where compliance may be possible, but not reasonable. For example, if an organisation is about to be disestablished, it may not be reasonable to require them to invest in new systems or buildings. If there are other options which exist to mitigate risks to information and records, such as transfer to Archives New Zealand, these should be explored.

- **Value of the information and records**

Not all information and records are of equal value. For example, some information and records are vital to the functioning of government or have been identified by the Chief Archivist as having archival value and should be protected and maintained in an accessible form. If information and records are determined to be of high value, for these or other reasons, an exemption that undermines their maintenance will not normally be granted.

- **Costs and Benefits**

The costs and benefits of compliance should be considered from a long-term perspective considering the impact on the whole of government and on the public interest. An exemption will not normally be granted solely based on the costs and benefits to a single organisation over a limited period of time.

## 7 INSTRUCTIONS

### 7.1 Purpose

The Chief Archivist may make use of the various sections in the Act that empower him/her to instruct public sector organisations and approved repositories in the maintenance, protection, preservation and accessibility of public sector information, records and archives.

### 7.2 Approach

The Act enables the Chief Archivist to issue instructions when it is necessary or important to:

- communicate specific information and records management requirements to individual organisations or particular sectors
- proactively intervene and/or respond to specific information and records management issues, and/or
- ensure non-compliant organisations move to a state of compliance.

The Chief Archivist may also issue instructions to repositories (such as a museum, library, other archive or an iwi-based or hapu-based repository) that are approved as repositories for public archives under section 26.

#### 7.2.1 *Types of instructions*

There are a number of different types of instructions that the Chief Archivist may issue under the Act:

- To ensure the continued maintenance of digital information and records that are 25-years old and older and still in the custody of a public office, the Chief Archivist may choose to instruct the public office to continue to maintain and control the information and records (s.22(1)).
- Under section 26(2), the Chief Archivist may also issue instructions to an approved repository on the safekeeping and public accessibility of any public archives deposited in their care and to ensure that the Crown's interests are maintained.
- To ensure certain local authority information and records are preserved for administrative, accountability, heritage or research reasons, the Chief Archivist may also issue instructions to local authorities for their adequate protection under section 40.

## 8 DIRECTIONS

### 8.1 Purpose

There are several directions that the Chief Archivist may choose to issue under the Act to public sector organisations, approved repositories or individual persons. The directions power is a broad and flexible regulatory tool that can be specific to a topic or organisation or that can be used to gather broader sector information.

## 8.2 Approach

The Act enables the Chief Archivist to issue different types of directions to ensure the preservation and public accessibility of information and records that support the accountability of the public sector and/or enhance or contribute to the memory of government.

### 8.2.1 *Directions to transfer*

The Act enables the Chief Archivist to issue directions to various organisations or individuals to transfer information and records from their custody or control to another organisation or repository.

From	To	What	Transfer where	Compliance obligation
Chief Archivist	An approved repository	A public archive(s)	<ul style="list-style-type: none"> <li>Archives New Zealand</li> <li>Another approved repository, or</li> <li>The controlling public office</li> </ul>	Must comply (s.26(2)(d))
Chief Archivist	A person (in possession of an estray record)	An estray record(s)	<ul style="list-style-type: none"> <li>The Chief Archivist, or</li> <li>The controlling public office, or</li> <li>The controlling local authority</li> </ul>	Must comply (s.37(1)(c) and (d))
Chief Archivist	A person (who possesses a prescribed record)	A prescribed record(s)	<ul style="list-style-type: none"> <li>Archives New Zealand</li> <li>An approved repository</li> <li>A public office, or</li> <li>A local authority</li> </ul>	May transfer and must not otherwise transfer without offering to the Chief Archivist to purchase (s.38(4)(a) and (b))
Chief Archivist	A local authority	A protected record(s)	<ul style="list-style-type: none"> <li>The Chief Archivist</li> </ul>	Must comply (subject to agreed conditions) (s.40(4)(a))

### 8.2.2 *Directions to report*

The Act also enables the Chief Archivist to issue a direction to a public office or an approved repository to report on their information and records management practices, and/or on the public information and records or public archives they control or hold in custody (s.31). The Act does not restrict the purposes for which these directions can be used. They may be issued in response to a complaint or a suspected breach of the Act. Directions to report may be used to drive improvements in an organisation's compliance, capability and/or performance, or to obtain information on which to base guidance or advice. They are also used to support monitoring.

Non-compliance with a direction to report may be considered an offence under section 61(c) of the Act.

### 8.2.3 *Directions for estray records*

The Chief Archivist may issue other directions to a person in possession of an estray record(s) to:

1. Produce the estray record(s) for inspection at a specified time and place (s.36)
2. Manage the estray record(s) in accordance with any relevant standards or instructions (s.37(1)(a)), and/or
3. Make the estray record(s) available for public access or copying (s.37(1)(b)).

Non-compliance with any of the directions for estray records may be considered an offence under section 61(c) of the Act.

## 9 MONITORING

### 9.1 Purpose

One of the functions of the Chief Archivist is to monitor how public sector organisations are complying with the Act (s.11(1)(b)(vi) and (d)(iv)). The Chief Archivist's role also includes issuing, reviewing, amending or revoking criteria under section 33 for independent audits of public offices' recordkeeping practices, and reporting to the Minister on the state of public sector information and records management under section 32.

Monitoring, auditing and reporting are key regulatory tools for assuring that public sector information and records are being well-managed and maintained. This is critical for maintaining public trust in the quality and care of government information, records and archives, and for empowering public sector organisations to lift their performance.

### 9.2 Approach

Archives New Zealand seeks to implement a targeted, intelligence-led monitoring framework that uses all our monitoring, auditing and reporting tools in an integrated, complementary way and that covers all regulated organisations.

Enabling public sector organisations and members of the public to have a more joined-up, comprehensive picture of public sector information and records management will not only enhance public confidence in the integrity of the public record but will also enable Archives New Zealand to focus and adapt our regulatory efforts dynamically and effectively.

Through our monitoring approach, we will:

- form a complete picture of the information and records management performance of public sector organisations
- track improvement in performance over time
- identify and respond to risks, challenges, and opportunities in information and records management
- identify emerging trends in public sector information and records management
- report on regulated organisations' performance
- provide recommendations and insights on how to improve performance
- inform the improvement of our regulatory activity such as education, advice and future monitoring



- identify ways to improve our relationship management and leadership of public sector information and records management, and
- support the work of other regulators and leaders in related fields, including official information, privacy, security and public sector data.

## 10 INSPECTIONS

### 10.1 Purpose

The Chief Archivist may choose to use the various inspection powers in the Act (s.26(2)(a) and s.29) to monitor the protection and management of public sector information and records or archives, or in response to alleged or suspected non-compliance

The Chief Archivist may also inspect estray records under section 36(1).<sup>4</sup>

### 10.2 Approach

The Chief Archivist may issue the following types of inspection notices under the Act.

To whom	When	To ensure that:
An approved repository	At any time after reasonable notice	...the Crown's interests in the public archives are preserved, and that the public archives are appropriately maintained and accessed.
A public office	After reasonable notice	... full and accurate records of the affairs of central government are created and are maintained in an accessible form until their authorised disposal.
A local authority	After reasonable notice	... full and accurate records of the affairs of local government are created.
A local authority archive	After reasonable notice	... all protected records are maintained in an accessible form until their authorised disposal.
A person in possession of an estray record(s)	At a specific but reasonable time and place	... estray records are managed in accordance with the provisions of the Act.

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<sup>4</sup> Estray record:  
*means a public record, public archive, or protected record that has been disposed of otherwise than—*  
*(i) in accordance with an authorisation of the Chief Archivist under this Act; or*  
*(ii) as required by or under another enactment; but*  
*(b) does not include a discharged public record (s.4).*

## 11 OFFENCES

### 11.1 Purpose

Prosecution is a regulatory tool available to Archives New Zealand. Under section 61 of the Act, anyone who wilfully or negligently damages a public record, or disposes of a public record without the Chief Archivist's authority, or who does not comply with any provision of the Act, commits an offence.

### 11.2 Approach

Although the Act does not include a formal complaints mechanism, Archives New Zealand may evaluate, assess and review any ad hoc allegations of offences against the Act, as well as any irregularities or instances of suspected non-compliance discovered through our monitoring and audit processes.

Archives New Zealand will assess and review any evidence to determine the nature of the breach and an appropriate level of response(s). This evidence can be gathered through the Chief Archivist's use of the following powers as appropriate:

- The power to inspect public records or local authority records and local authority archives, and the system(s) for maintaining these (s.29)
- The power to direct the administrative head of a public office or of an approved repository to report on their recordkeeping practices, and/or the public records they control or the public archives they possess (s.31).

### 11.3 Considerations

The following factors may be considered by Archives New Zealand when determining what course of action to take in response to alleged or suspected offences of the Act. The purpose of these factors is to ensure that all possible breaches are evaluated, assessed and reviewed in accordance with the Chief Archivist's regulatory responsibilities, and that all outcomes are fair and consistent:

- The Chief Archivist's primary focus is to ensure compliance with the Act.
- Each decision to inspect, direct or instruct an organisation, or to initiate a prosecution will be considered on its own merits, having regard to the nature of the offence, the duration of the offending, the implications of the offending, and whether the offence is a one-off case or systematic.
- Any previous history of non-compliance by the relevant organisation, as well as findings from audit reports or any other interactions with Archives New Zealand may also be considered.
- Prosecution is only considered when other actions by Archives New Zealand have failed to elicit compliance and/or in response to wilful or negligent non-compliance.

## 12 PRESCRIBED RECORDS

### 12.1 Purpose

Under section 38 of the Act, the Chief Archivist may recommend that the Minister declare a record or class of records to be a prescribed record(s) for the purposes of the Act, for the safekeeping of public and/or local authority information, records or archives that may no longer be under the control of a public office or local authority. Prescribed records are afforded a level of protection until their prescribed status is revoked by the same legislative process.

The Chief Archivist is also obliged to maintain a public register of all information and records that are prescribed and their status (s.19(1)(c)).

## 12.2 Approach

There are a number of different obligations under the Act that may be taken into account by the Chief Archivist when making recommendations to the Minister.

Who	Must	May
Chief Archivist	Document the status of a prescribed record in the Register of Prescribed Records.	Direct that a prescribed record is copied at the Chief Archivist's expense.
	Notify a person who possesses a prescribed record in writing if the status is revoked.	Direct a person who possesses a prescribed record to transfer it to Archives New Zealand, an approved repository, a public office, or a local authority.
		Acquire a prescribed record on agreed conditions, with or without compensation to the holder.
Person who has custody, management, control, or ownership of a prescribed record	Not transfer a prescribed record to any other person without first giving the Chief Archivist the opportunity to purchase.	Transfer a prescribed record as directed by the Chief Archivist.
	Not transfer a prescribed record to any other person without informing them that the record is a prescribed record.	

## 12.3 Considerations

The Chief Archivist may consider recommending to the Minister that a record or 1 or more classes of records is prescribed if the record:

- complements the public archives, and
- documents significant historical events
- relates to an existing or former public office or organisation connected to the New Zealand government, or
- relates to persons who are or have been significant in New Zealand history, politics or culture; and

The record(s) is not:

- a public record under the control of a public office
- a public archive under the control of the Chief Archivist, or
- a local authority record, or a local authority archive, under the control of a local authority.

The Chief Archivist may also take the above factors into consideration when issuing a direction to copy to a person in possession of a prescribed record(s) or when deciding to acquire a prescribed record or classes of records.

## 13 DISCHARGED RECORDS

### 13.1 Purpose

Public offices may ask the Chief Archivist to authorise the discharge<sup>5</sup> of suitable public information and records under section 20(1) of the Act. The Chief Archivist must determine if the information and records are suitable for discharge and under what conditions the information and records may be discharged (sections 25(1) and 25(2)).

Although discharged public information and records are no longer subject to the Act, it is important to note that this does not revoke other legislative rights and obligations (such as those under the Copyright Act 1994) which continue.

The Chief Archivist is also obliged to maintain a public register of all discharged information and records (s.19(1)(b)).

### 13.2 Approach

As discharge is a disposal action under the Act, the discharge of information and records must be authorised by the Chief Archivist. If any of the factors outlined below are not able to be met, the Chief Archivist cannot authorise disposal of the information and records by discharge.

If the information and records have already been authorised for disposal by destruction and are considered suitable for discharge, the request will be treated as an amendment to the relevant Disposal Authority. Where the Chief Archivist has considered whether information and records are suitable for discharge and determined that they are not suitable, this shall be noted in the public notice of an Intention to Dispose, and/or in the Disposal Authority.

It is Archives New Zealand's preference that requests to discharge are received prior to the Chief Archivist forming an Intention to Dispose in the disposal authorisation process.

### 13.3 Considerations

When the Chief Archivist receives a request to discharge information and records, he/she must consider whether the information and records are suitable for discharge under the conditions factors in sections 25(1) and 25(2) of the Act.

Under section 25(1) of the Act, the Chief Archivist may approve the discharge of a public record only if:

- the Chief Archivist considers that the record is suitable for discharge; and
- the record is classified as open access and is not in current use; and
- the release is consistent with principles of the Privacy Act 1993; and
- the record is not subject to a request under the Official information Act 1982; and
- the administrative head of the controlling public office agrees to the discharge; and
- the person receiving the discharged record is not in a role identified in section 25(1)(f) of the Act.

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<sup>5</sup> Discharged record:

*means a record the status of which as a public record is cancelled in accordance with section 25 (section 4 of the Act).*

Under section 25(2) of the Act, the Chief Archivist may approve the discharge of public records that contain information about identified persons only if:

- the Chief Archivist considers that the records suitable for discharge; and
- the administrative head of the controlling public office agrees to the discharge; and
- the Chief Archivist and the administrative head have an agreement for the discharge on a record by record basis; and
- procedures are in place to ensure that the records are only discharged to the person who is the subject of the record or to a duly authorised agent of that person; and
- the discharge is consistent with the principles of the Privacy Act 1993.

## **14 DEFERRAL OF TRANSFER**

### **14.1 Purpose**

Under section 22 of the Act, public offices can ask the Chief Archivist to agree that the mandatory transfer of certain public information and records meeting the requirements of section 21 can be deferred or postponed. These agreements may be subject to any conditions that the public office and the Chief Archivist consider appropriate, and although for a specified period, the agreements may be renewed.

The Chief Archivist is also obliged to maintain a public register of all transfers that are deferred (s.19(1)(a)).

### **14.2 Approach**

The following factors may be taken into account by the Chief Archivist when assessing a request to agree to defer the transfer of information and records that are 25 years old or older and when setting appropriate conditions for that agreement:

- Whether the information and records are:
  - still active or required for ongoing business; and
  - identified as having archival value under a current authorised Disposal Authority and/or General Disposal Authority and have a disposal action of “Transfer to Archives New Zealand” (or equivalent).
- Whether the controlling public office has:
  - determined the access classifications of the information and records; and
  - ensured that the information and records are protected from unauthorised or unlawful access, alteration, loss, deletion and/or destruction.

## **15 LOCAL AUTHORITY PROTECTED RECORDS**

### **15.1 Purpose**

Section 40 of the Act empowers the Chief Archivist to protect and manage the disposal of certain local authority information and records. This enables local government to be accountable through the creation, maintenance and accessibility of full and accurate information and records, and the protection and preservation of those of long-term value.

## 15.2 Approach

In addition to any other requirements that may exist in law, the Chief Archivist may declare that certain local authority information and records are, in his/her opinion, worthy of preservation for administrative, accountability, heritage or research reasons. The current list is found at <https://gazette.govt.nz/notice/id/2013-go5534>.

Circumstances when it may be appropriate for the Chief Archivist to declare certain local authority information and records to be protected records include:

- Where information and records formerly held by a public office are transferred to the custody of a local authority.
- Where local authority functions are or have been contracted to a private company. This applies to information and records created by a private company for the period of time that the private company was contracted by the local authority.
- Where information and records formerly created and maintained by a local authority were transferred to the custody of a private company after 1989.
- Where information and records belonging to merged, preceding, abolished or other authorities are now in the custody of the local authority. This includes information and records formerly held by any public office now in the custody of a local authority.

Local authority information and records that are declared as protected (unless specifically stated), apply regardless of the media on which they are created and stored.

## 16 PUBLIC OFFICE AND LOCAL AUTHORITY STATUS

### 16.1 Purpose

The Act applies to “public offices” and “local authorities” as defined in section 4. Archives New Zealand will determine the coverage status of central and local government organisations to ensure organisations know whether they are subject to the Act.

Note that while local authorities are covered by the Act and may be inspected, they will not be audited.

The determinations processes and considerations outlined in this statement should not be used by organisations to determine their own status - that is the role of Chief Archivist as a regulator.

### 16.2 Approach

Archives New Zealand uses the following principles to guide determinations of the coverage status of central and local government organisations.

#### 16.2.1 Consistency

Archives New Zealand will ensure that determinations or decisions regarding coverage by the Act are consistent. The coverage status of one organisation will be considered within the same decision framework as another.

#### 16.2.2 Transparency

This statement outlines factors taken into consideration when determining public office and local authority status to ensure that public confidence in Archives New Zealand’s administration of the Act is maintained and understanding of the role of the Chief Archivist is enhanced.

### 16.3 Public office determinations

Determinations on the public office status of central government organisations are often straightforward but may sometimes be more complex. Where the coverage status is clear, this statement provides general considerations for the determination process.

Where the coverage status is not clear, an assessment on whether an organisation is an agency or instrument of government (and therefore a “public office”) will be undertaken by application of the Crown control test in *Commissioner of Inland Revenue v Medical Council of New Zealand (Medical Council)*<sup>6</sup>. This test assesses the nature and degree of *de jure* (by right of law) control which the Crown (via the executive branch of government) may exercise over an organisation.

### 16.4 General considerations

There are two instances where an organisation can be defined as a public office by legislation:

1. If an organisation is defined as a public office in section 4 of the Act; or
2. If an organisation is otherwise defined as such in other legislation.

Section 5 of the Act also provides for the Governor-General (on the recommendation of the Minister) to vary application of the Act and to declare an organisation and/or any of its records as a ‘public office’ and/or as ‘public records’ by Order in Council.

Although Mixed Ownership Model companies are not public offices, under section 5(7) information and records about a company’s affairs dating up to immediately before it became a mixed ownership company are public records regardless of when the information and records were created (i.e., the information and records might have been created after becoming a mixed ownership company).

#### 16.4.1 Defined as such in Section 4 of the Act

The following organisations are defined as public offices in the Act:

- All departments as defined in section 2 of the State Sector Act 1988 and all non-public service departments as listed in that Act.
- All Offices of Parliament as defined in section 2(1) of the Public Finance Act 1989.
- All state enterprises as defined in section 2 of the State-Owned Enterprises Act 1986.
- All Crown entities as listed in Schedule 1 and Schedule 2 of the Crown Entities Act 2004 including:
  - Crown agents
  - Autonomous Crown entities
  - Independent Crown entities
  - Crown entity companies.
- All Crown entities as defined in section 7(1) of the Crown Entities Act 2004 including:
  - boards of trustees for state and state integrated schools
  - tertiary education institutions including colleges of education, polytechnics, specialist colleges, universities, and wananga.

#### 16.4.2 Defined as such in other legislation

Some organisations are defined as a public office in other legislation, for example:

- All inquiries (including Royal Commissions, public inquiries and government inquiries) as stated in section 33 of the Inquiries Act 2013.

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<sup>6</sup> *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA).

- The organisations named in Schedule 6 of the New Zealand Public Health and Disability Act 2000.
- The Families Commission as stated in section 60 of the Families Commission Act 2003.

### 16.5 Crown control assessments

To determine whether an organisation is an agency or instrument of the executive government (and therefore a “public office”), an assessment of the factors relevant to the control test in *Commissioner of Inland Revenue v Medical Council of New Zealand (Medical Council)*<sup>7</sup> will be undertaken.

These factors concern the nature and degree of control over an organisation that could be lawfully exercised by the executive government (for example, by a Minister (or Ministers) of the Crown) and are weighted as being strongly, moderately or weakly, for or against that organisation being an agency or instrument of the Crown.

### 16.6 Local authority determinations

Determinations on the status of local government organisations are generally straightforward but may occasionally be more complex. Where the coverage status is clear or where precedence has been set, this statement provides general considerations for the determination process.

Where the coverage status is unclear, an assessment on whether an organisation is covered by the Act or is excluded, will be undertaken by application of the definitions in sections 6 and 124 of the Local Government Act 2002. This assessment is focused on whether a local authority (or authorities) has, either directly or indirectly, the majority share of control over an organisation.

### 16.7 General considerations

Under section 4 of the Act, local authority has the same meaning as in section 5(1) of the Local Government Act 2002, and includes the following organisations:

- (i) a council-controlled organisation:
- (ii) a council-controlled trading organisation:
- (iii) a local government organisation.

### 16.8 What is not covered

The Act only applies to public offices and public information, records and archives, and to local authorities and local authority information, records and archives. It does not apply to many organisations or their information and records including for example:

- Privately owned companies
- Political parties
- Private schools’ boards of trustees
- State Owned Enterprise subsidiaries
- Health practitioner bodies
- Church organisations

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<sup>7</sup> *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA).