



New South Wales

Attorney General's Guidelines

Making Access Directions under the State Records Act 1998

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1. Introduction

1.1 Purpose

These guidelines are issued by the Attorney General in accordance with section 52(3) of the *State Records Act 1998* (the Act). The purpose of the guidelines is to assist public offices (as defined in section 3 of the Act) in meeting their responsibility to make access directions under the Act.

All public offices should refer to these guidelines when deciding whether to open or close records to public access (this includes deciding whether records at least 30 years old should be open or closed to public access under section 51, and considering whether earlier public access to records less than 30 years old may be authorised under section 57). The guidelines set out the matters that must be taken into account when making any decision.

1.2 Principles of public access

Public access to the records of Government is a fundamental right in a democratic society. The State Records Act promotes the principles of accountability and access by providing for the creation, management and protection of State records and for public access to those records. The underlying principle is that all records of continuing value will be publicly available in due course.

Part 6 of the State Records Act creates a framework for regulating public access to State records which have been in existence for at least 30 years (the 'open access period'). The 30 year period has been determined on the basis that most records no longer affect significant interests or are considered sensitive after this time has passed.

1.3 Scope of the guidelines

Public offices must have regard to the guidelines when deciding whether to open or close records to public access. The guidelines do not, however, limit the grounds on which a public office can open or close records to public access under the Act (s. 52(4)).

The guidelines apply both to records in the custody of a public office and to records in the custody of the State Records Authority of New South Wales ('State Records'). They apply regardless of whether the records are to be retained indefinitely as State archives, are to be retained for an identified finite period, or are yet to be appraised for retention requirements.

The focus of the guidelines is the matters to be taken into account when considering whether records should be open or closed to public access. The guidelines do not cover procedures for making access directions and notifying State Records. These are detailed in the *Procedures for making access directions (Revised 2004)*, available on State Records' website at <http://www.records.nsw.gov.au/>.

2. Making Access Directions

2.1 Open access period for records

A State record is in the open access period once it is at least 30 years old (s. 50). The fact that a record is in the open access period, however, does not mean that it is open to public access automatically.

2.2 Obligation to make access directions

Each public office must ensure that the State records for which it is responsible that are in the open access period are the subject of an access direction (s. 51(1)). This can be either an open to public access (OPA) direction or a closed to public access (CPA) direction.

When to make access directions

The obligation to make access directions applies only to records in the open access period.

A series, group or class of records that have been, or were, created over an extended period of time may include records that are less than 30 years old as well as records that are at least 30 years old. In this case, records will become the subject of an access direction made for that series, group or class as they enter the open access period.

All State records in the open access period must be covered by an access direction. This means that a public office should make a given access direction before any of the records that it is to cover are 30 years old.

It may be desirable to make the access directions well before this time to take advantage of current knowledge of the records. It may, on the other hand, be considered necessary to wait until the records are close to 30 years old, to understand adequately the likely impact of public access once the records are in the open access period.

State Records' *Procedures for transferring records as State archives* require that all records being transferred to State Records' control as State archives are covered by an access direction or directions, regardless of the age of the records.

If an open period record is not the subject of an access direction, anyone can apply to the relevant public office for an OPA direction for the record (s. 54). The public office must deal with the application expeditiously. If no access direction is made (whether OPA or CPA) within 14 days, an OPA direction is presumed to have been made.

2.3 The duration of access directions

An OPA direction remains in force until it is revoked, while a CPA direction can operate for up to 5 years, unless it is revoked or renewed sooner. A CPA direction can be renewed any number of times.

An access direction can be revoked by giving an OPA direction to revoke a CPA direction, or vice versa. An access direction can be selectively revoked in relation to some records, so that the original direction continues to apply to the remaining records (s. 55).

2. 4 Presumption in favour of public access

When making an assessment as to whether records should be open or closed to public access, a public office must have regard to the presumption that State records in the open access period should be open to public access (s. 52(1A)). That is, open period records should be open to public access unless there is a good reason to close them.

While the large majority of records which are in the open access period should be given an OPA direction, the relative proportions of records covered by OPA to CPA directions made by a public office will depend on the role and functions of the public office.

2.5 Manner of assessment

The assessment should be made on the basis of the known or likely contents of series, groups or classes of records. It should not be on the basis of the contents of individual records unless such an assessment is considered warranted (s. 52(1)).

Assessment on an individual (record-by-record) basis is generally unworkable in this context because of the volume of records involved. Assessment by series, group or class provides a workable, risk-based approach.

Risk managed assessment

Risk management involves assessing both the probability and the impact of adverse effects, rather than seeking to eliminate risk altogether.

Decisions should be based on a public office's knowledge and understanding of the nature and content of records as these relate to the functions of their office. Within the constraints of assessment by series, group or class, the assessment should be cautious.

2. 6 Categories of information that favour a CPA direction

The possibility of closing records in the open access period to public access should be considered where the records contain:

- a) information provided under an expectation of confidentiality, or to which a legal obligation of confidentiality still applies;
- b) information which is protected under secrecy or confidentiality provisions in other legislation;
- c) culturally sensitive Indigenous information or information that would disclose secret or sacred Indigenous tradition;
- d) personal information which should be protected from disclosure or information which unreasonably discloses personal affairs;
- e) information whose disclosure could jeopardise the future provision of information to a public office, particularly a public office performing an investigatory function;
or
- f) information whose disclosure could compromise the security of the public office, an organisation or place regulated by the public office or any other public office, or threatens the safety of any person.

More than one category of information can apply to a given series, group or class of records.

Each of these categories is discussed in more detail in the next chapter.

2.7 Other matters to consider

2.7.1 Similar information already publicly available

The risk associated with public access to open period records containing one of the categories of information that may need a CPA direction will be greatly diminished where:

- a) the class of records or similar classes of records are already publicly available;
- b) similar classes of records of the public office or other public offices have been made the subject of OPA directions; or
- c) information which in itself may be thought of as sensitive is already public knowledge or is readily available from a publicly available source.

A useful source for a) and b) is the register of access directions maintained on State Records' website.

2.7.2 Labels for sensitive information

The New South Wales Government has adopted standards for labelling and handling sensitive information, much of which is likely to be contained in State records. There are three types of labels: X-in-confidence (e.g. Staff-in-confidence); Protected; and Highly Protected.

These labels generally reflect the level of sensitivity of information at the time it is created or collected, rather than after 30 years. The classification of the information should be downgraded, and labels removed, when the information is no longer sensitive.

Labels identifying sensitive information should not, by themselves, be taken as grounds for closing State records in the open access period to public access. In some cases, however, such labels will be a useful pointer to categories of information that may favour a CPA direction when assessed on a risk management basis.

A guide to labelling sensitive information is available on the website of the Government Chief Information Office at <http://www.gcio.nsw.gov.au/>.

2.7.3 Secrecy provisions do not apply when making access directions

A provision of other legislation that prohibits the disclosure or divulging of information does not apply to the disclosure or divulging of that information under the State Records Act, provided that the record containing the information is in the open access period and is subject to an OPA direction; and provided that the provision does not expressly override the State Records Act (s. 53).

2.7.4 Cabinet documents

Any Cabinet documents are to be examined to determine whether they contain sensitive personal or commercial-in-confidence information. Cabinet documents that may contain

such information are to be returned to The Cabinet Office for assessment (Note to s. 52(1)).

2.7.5 Additional matters and representations

After considering the matters covered in the guidelines a public office should consider:

- a) any additional matters which are specially applicable to the records held by that public office; and
- b) any submission or representation made by a member of the public in support of a CPA or OPA direction.

2.8 Early access

In certain limited circumstances, a public office may permit public access to records not yet in the open access period by authorising early access to those records (s. 57). Generally this is used where there is a strong public interest in permitting public access and where the records concerned contain information that is already in the public domain or that is so innocuous that even the normal 30 year closure is unnecessary.

In deciding whether to authorise early access, a public office is to apply the principles of assessment set out in s. 52. The early access provisions do not authorise a public office to breach any duty or obligation, such as a duty of confidentiality, that it may have in respect of the records. This includes a public office's obligations to comply with the information protection principles in the *Privacy and Personal Information Protection Act 1998*, and the health privacy principles in the *Health Records and Information Privacy Act 2002*.

When records covered by an early access authorisation enter the open access period, they are taken to be the subject of an OPA direction.

2.9 Deciding how long records should be closed

Once a decision is made that the risk associated with public access to a series, group or class of open period records outweighs the presumption and other considerations in favour of public access, it is necessary to determine how long the records should remain closed.

Depending on the age of the records comprising the series, group or class, a decision needs to be made whether an appropriate period of time has already elapsed to allow records to be made publicly available or when an appropriate time is likely to occur.

This is also a risk-based decision. The aim is to identify a period of time beyond which the risk associated with public access will have diminished sufficiently that it no longer outweighs the presumption and other considerations in favour of public access.

2.9.1 How closure periods work

While a CPA direction can only be in force for up to 5 years (subject to renewal), it can operate by reference to a longer period. The State Records Act uses the example of a direction to close adoption records for 100 years and to be in force for the next 5 years. While the direction remains in force it operates to prevent public access to records in that class that are less than 100 years old.

2.9.2 Formulating closure periods

The following are the most suitable ways of formulating closure periods:

'X years'	Until a given record covered by the CPA direction is X years old.
'X years from [specified event]'	Until a period of X years has passed since the date of a specified event (such as the birth of the subject of the record or the closure of a facility) that is easily discernible from the record.

In both of these cases, where the records comprising the series, group or class were created over an extended period of time, records will continually become open to public access as they, or the trigger events, become more than X years old.

The age of relevant people at the time records were created should be taken into account.

The following are generally not suitable ways of formulating closure periods:

Records created after a specified year	This is not suitable because the length of time the records will have been closed will increase as time passes. This is inconsistent with the principle that the sensitivity justifying closure beyond 30 years diminishes with time. The 'X years' formula should be used instead.
'Indefinitely' or 'permanently'	<p>Closing State records to public access indefinitely can be justified only in the rarest of cases, such as records containing information that would disclose secret or sacred Indigenous tradition. Otherwise it is inconsistent with the principle that the sensitivity justifying closure beyond 30 years diminishes with time. In the vast majority of cases, such sensitivity eventually diminishes to the point where it no longer outweighs the presumption and other considerations in favour of public access, even if this is after a very long time.</p> <p>Records should not be closed indefinitely to avoid determining a suitable risk-based, finite closure period.</p>
'Ongoing'	Records remain closed while this CPA direction is in force. This may be appropriate if a further passage of time is needed to understand the effects of sensitive information in the records and, therefore, how long they should be closed. It should not be used to avoid determining a suitable risk-based, finite closure period.

Examples of closure periods for sensitive records can be found in the next chapter and on the register of access directions maintained on State Records' website.

2.10 Notification of access directions

Access directions must be given to State Records in an approved form (s. 55(1)). A standard form for making an access direction is available from State Records' website.

A public office must give reasons for a CPA direction if requested by State Records or if requested by a person who made an application for an OPA direction under s. 54 (s. 55(6)).

State Records is required to keep a publicly accessible register of access directions (s. 61). This is published on State Records' website.

2.11 Ministerial review of access directions

State Records can request a public office to have an access direction reviewed by the Minister responsible for the public office (s. 55A). The review has to be finalised within 3 months and the public office must comply with the Minister's direction within 14 days.

2.12 Protection from liability

The State, agencies of the State and access providers are indemnified against actions for breach of confidence or defamation as a result of access authorised under the Act (s. 62).

This provision is designed to protect public offices and their staff in relation to actions performed in good faith or in accordance with the risk-based approach prescribed by the Act. It does not mean that a public office is justified in disregarding the probability that a disclosure would be defamatory or involve a breach of confidence when this would be reasonably obvious from the nature of the records in the relevant series, class or group.

3. Discussion and examples

This chapter discusses the categories of information that favour a CPA direction and their application, and suggests considerations which may be relevant when assessing typical series, classes or groups of records. This discussion is intended to provide guidance, not to prescribe ready-made answers.

Examples of access directions that have already been made are included to illustrate how the categories have been applied to real records and to promote a degree of consistency in the regulation of public access to open period records across the sector. Any decision, however, on how to apply the categories and determine closure periods should be based on an understanding of the nature and content of records as they relate to the functions of the public office.

3.1 Information provided under an expectation of confidentiality, or to which a legal obligation of confidentiality still applies

Confidentiality is the legal or ethical obligation arising from the circumstances in which a person or organisation discloses information to another person or organisation under an express or implied expectation that the information will not be used to affect adversely the discloser's interests. The obligation is primarily owed to the person who provided the information in the first place.

This category may include:

- information which the confider has a legitimate interest in keeping confidential, is not in the public domain or is not able to be found out by anyone without substantial effort;
- personal or non-personal information; and
- a contractual agreement or circumstances surrounding the provision of information which give rise to reliance or trust.

3.1.1 Records containing information which was given in confidence

Records should not be closed simply because they are labelled as 'confidential' or 'in confidence'. For the disclosure to be a breach of confidence the information should meet all of the following criteria:

- the information was originally communicated in confidence; and
- it is still confidential (not generally known or publicly available); and
- a disclosure would still breach the confidentiality of the original confider when the records are more than 30 years old.

A specific form of confidential information is that which discloses the existence or identity of people providing information to public offices responsible for investigating criminal offences or collecting intelligence relevant to security, and where public access would impair the recruitment or maintenance of confidential sources. Such information would normally be the subject of a CPA direction for an extended period of time. This category does not extend, however, to people who routinely report or complain about routine infringements of the law, for example to a local council.

Example from the register of access directions	Closed period
Formal investigation records, including matters dealing with witnesses, statements, evidence and property seizures, covert operations and intelligence, legal briefs, litigation and appeals	90 years

3.1.2 Records containing information which could have an adverse effect on the business affairs of an individual or organisation (commercial confidentiality)

A claim of commercial confidentiality arises where there is a need to protect commercial negotiations conducted by public offices, or details of internal business operations of State owned corporations or of firms contracting with public offices.

After 30 years there will usually no longer be any competitive disadvantage from disclosure of such information and the public interest in permitting public access to information about Government business operations will outweigh any adverse effects of disclosure. The information or similar information about the business may well be available through other disclosure regimes.

Public offices also collect information on the financial position of individual clients. Most records containing individuals' financial or taxation information are destroyed before the age of 30 years. Consequently it would be unusual to have to consider an adverse business effect resulting from the disclosure of such information. The category of personal information should be considered if the records contain detailed information about an individual.

Examples from the register of access directions	Closed period
Commercial records containing commercial in confidence material: these records relate to delivery, construction, commercial developments and activities.	30 years from date of last action or expiry of agreement
Agreements and deeds: Includes agreements for sale, mortgage agreements, joint ventures and financial agreements	50 years
Records relating to client loans	50 years
Bad debts ledgers and registers	50 years

3.1.3 Records containing information given under legal professional privilege

Legal professional privilege or client/solicitor privilege is intended to protect information or advice which has been prepared for the purpose of litigation. The privilege is exercised by a legal practitioner on behalf of their client and is intended to protect the client.

Generally legal practitioners employed by public offices provide advice within their public office or to other public offices, rather than to private individuals or corporations. Given that the records being assessed are at least 30 years of age and that there is a presumption in favour of open access, legal professional privilege alone is usually not an appropriate ground for closing State records to public access. Such intra-government

legal advice may, however, contain information falling into one of the categories favouring a CPA direction, which should be assessed on a risk management basis.

When assessing records that may contain information provided by members of the public that has been incorporated into legal advice the category relating to personal information should be considered.

3.2 Information which is protected under secrecy or confidentiality provisions in other legislation

Under section 53 of the State Records Act, a provision of any Act that prohibits the disclosure or divulging of information does not apply to disclosures under Part 6, provided that the information is in a State record in the open access period and the subject to an OPA direction. The existence of standard secrecy or confidentiality provisions in legislation therefore should not be relied on when making a closed access direction unless the provision expressly overrides the State Records Act.

Consideration should, however, still be made as to whether the sensitivity which the secrecy or confidentiality provisions were intended to protect remains relevant when the records are more than 30 years old. Examples might include the protection for spent convictions under the *Criminal Records Act 1991*, protection of HIV information under Part 3, Division 4 of the *Public Health Act 1991* or protection of the identity of complainants under the *Protected Disclosures Act 1994*.

Example from the register of access directions	Closed period
Records identifying persons protected under the Protected Disclosure legislation	90 years

3.3 Culturally sensitive Indigenous information or information that would disclose secret/sacred Indigenous tradition

There are two categories of records relating to Aboriginal and Torres Strait Islander people which may call for special consideration:

- Records containing information about the beliefs or ritual practices of particular traditional communities or groups (sacred/secret matters), and
- Records documenting the activities or social conditions of Indigenous people which contain derogatory or distressing judgements or otherwise single out Aboriginal people for adverse comment either as individuals or groups.

Records containing information which is regarded as secret or sacred under Indigenous tradition or is restricted to particular groups of people should normally be subject to a CPA direction unless accredited representatives give specific consent to it being placed in open access. The precise balance between closure and openness in relation to these records is best developed in consultation with representatives of relevant communities and in accordance with established protocols.

Records that document the activities or social conditions of Indigenous people should be assessed against the category relating to personal information.

See also the *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services* (1995), published by the Aboriginal and Torres Strait Islander Library and Information Resource Network, for general guidance on the treatment of Indigenous records (available online at <http://www.cdu.edu.au/library/protocol.html>).

Example from the register of access directions	Closed period
Cultural heritage information pertaining to Aboriginal relics, sites and places of significance	Permanently

3.4 Records likely to contain personal information which should be protected from disclosure or information which unreasonably discloses personal affairs

3.4.1 Personal information which should be protected from disclosure

Personal information is information about an individual whose identity is apparent or can reasonably be ascertained from the information. Many records will contain personal information such as names, addresses, dates and places of birth. Some records will contain personal information such as an individual's medical, employment or financial details.

If consideration is being given to providing early access to records not yet in the open access period, public offices must comply with their legal obligations under NSW privacy laws. That is, early public access to records less than 30 years old and containing personal information must not be authorised if it would breach the disclosure principles of the *Privacy and Personal Information Protection Act 1998* or the *Health Records and Information Privacy Act 2002* (discussed in the next chapter). Those Acts protect personal information from inappropriate disclosure.

For records at least 30 years old and in the open access period, however, the privacy concerns are less acute. These records will generally no longer affect significant interests or be considered sensitive. Personal information contained in such records generally no longer requires protection from disclosure. This is because the personal information is generally no longer capable of being used to make decisions about the person. Nor will its disclosure generally have an adverse impact on the person.

Public offices should consider making a CPA direction for records in the open access period in circumstances where the records contain personal information still requiring protection. That is, where the record contains personal information which, if disclosed, would likely have an adverse impact on the person. Records typically containing personal information which should be protected by way of a CPA direction include personnel records, client files of welfare agencies and medical and health records.

As access directions are made for whole series, classes or groups, it is not generally appropriate to seek the views of the individuals concerned before making a direction, except in relation to culturally sensitive Indigenous information or health information.

3.4.2 Unreasonable disclosure of personal affairs

A disclosure of personal affairs is unreasonable when the disclosure would adversely affect the person concerned by causing them either material loss, loss of reputation, shame, humiliation, serious embarrassment or other significant inconvenience. Just because a record refers to a person by name does not mean that the document relates to that person's personal affairs.

3.4.3 Some personal information relating to deceased people

As stated above, sometimes personal information in records more than 30 years old requires protection where disclosure of the information would have an adverse impact on

the person to whom it relates. This is generally extinguished once the person to whom it relates has died. A CPA direction covering records about deceased persons may, however, be considered in exceptional circumstances where one or more of the following considerations apply:

- the records deal with sensitive matters which may cause embarrassment or distress to close relatives, for example, health information;
- the deceased person might reasonably have expected restrictions on future access at the time information was originally compiled, (see 3.1 above); and
- the information relates so closely to a survivor that it could equally be seen as information about the survivor.

3.4.4 Length of closure for personal information requiring protection

If a CPA direction is made on the grounds that the records contain personal information requiring protection from disclosure, it is necessary to decide when the records can be made open to public access.

The age of relevant people at the time records were created should be considered. Records containing information relating to children require longer periods of closure.

Examples from the register of access directions	Closed period
Staff summary records, including registers and history cards	50 years
Tenancy agreements	70 years
Criminal matters – case files	75 years
Staff personnel records, excluding summary records such as history cards	100 years from date of birth
Patient identifying medical records	110 years

3.5 Information whose disclosure could jeopardise the future provision of information to a public office, particularly a public office performing an investigatory function

Records which disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of breaches or evasions of the law which, if publicly available, would be likely to prejudice the effectiveness of those methods or procedures may require a CPA direction.

A public office should ensure that there is still a real concern at the time a CPA direction is made or reviewed and should not rely on broad presumptions which applied when the information was originally recorded.

Example from the register of access directions	Closed period
Formal investigation records, including matters dealing with witnesses, statements, evidence and property seizures, covert operations and intelligence, legal briefs, litigation and appeals	90 years

3.6 Information whose disclosure could compromise the security of the public office, an organisation or place regulated by the public office or any other public office, or threatens the safety of any person

Information that could endanger life and physical safety could include information which is inherently dangerous or information which could render an employee, client or informant vulnerable to violent retaliation or retribution.

A decision should take into account information whose disclosure could compromise the security of a public office or place, its clients or the public, such as details about technologies, or the location of hazardous materials or devices, or detailed design or building plans that may indicate vulnerable points or security measures.

Example from the register of access directions	Closed period
Records documenting the design, construction, operation and maintenance of utility assets and related security issues	30 years from date of the closure of the facility

4. Other legislation regulating access to government information

Public offices making access directions need to understand how the State Records Act interacts with other legislation governing access to government information.

4.1 Freedom of Information Act 1989

The *Freedom of Information Act 1989* (FOI Act) gives individuals a right to access any documents held by a public authority which are not subject to a specific exemption under that Act.

The FOI Act primarily applies to records less than 30 years of age and its exemption categories are designed to protect sensitive information in current records. As sensitivity diminishes over time more records will be available for public access under the State Records Act than under the FOI Act.

The FOI Act also involves the examination of individual documents and the application of exemption categories to them. This is in contrast to the risk-based approach and the assessment at the level of series, group or class of records under the State Records Act.

Relationship with State Records Act

The different public access regimes in the FOI Act and the State Records Act are intended to complement each other and to provide entitlements and protections appropriate to their own contexts without affecting the operation of the other.

The fact that a record is not open to public access under the State Records Act does not affect any entitlement to access to the record under the FOI Act. Consequently it is open to a person to use the FOI Act to seek access to a record that is the subject of a CPA direction, as well as to records not in the open access period. It is possible for a public office to grant such access under the FOI Act without affecting the continued application of the CPA direction to the series, group or class to which the record belongs.

4.2 Privacy and Personal Information Protection Act 1998

The *Privacy and Personal Information Protection Act 1998* (PPIP Act) gives legal recognition to the public interest in the protection of privacy. Privacy is the right of individuals to exercise control over the availability and use of personal information about themselves.

The PPIP Act protects privacy by regulating the way NSW public sector agencies deal with personal information. Personal information does not include information about someone who has been deceased for more than 30 years.

The key to the PPIP Act is set out in the 12 information protection principles (IPPs). They are legal obligations that describe what public sector agencies (including statutory bodies and local councils) must do when they handle personal information. The IPPs cover the collection, storage, use and disclosure of personal information as well as access and correction rights.

Relationship with State Records Act

The IPPs set out in sections 18 and 19 of the PPIP Act restrict the disclosure of personal information held by public sector agencies. By itself this would mean that State Records or another public office would breach one or both of these principles by giving public access under the State Records Act to open period State records containing personal information about anyone who is still alive or who has been dead for less than 30 years, whether that information is still sensitive or not.

Section 25 of the PPIP Act, however, permits non-compliance with these and some other IPPs where it is permitted under other legislation, including, explicitly, the State Records Act. This means that the PPIP Act and the IPPs do not affect the making of access directions for open period State records under the State Records Act. Rather, personal information which is in open period State records and which requires protection is protected from inappropriate release by the mechanisms of the State Records Act, notably by public offices giving CPA directions to close the records to public access for a long enough period.

This is based on the principle that sensitivity in personal information diminishes with time. Most of the personal information which is held in State archives or other inactive records after 30 years does not require the same level of protection as personal information which is still being used to make operational or commercial decisions about people. Some personal information remains sensitive for much longer and should be protected by an appropriate CPA direction.

A privacy code of practice made under s. 29 of the PPIP Act may provide for the protection of personal information contained in a record that is more than 30 years old. Any such code must, to the extent that it relates to personal information contained in a State record that is more than 30 years old, be consistent with any relevant guidelines issued under s. 52 of the State Records Act, that is, these guidelines.

The disclosure provisions of the PPIP Act and the public access provisions of the State Records Act are intended to complement each other and to provide appropriate protections for personal information in their respective contexts without affecting the operation of the other.

Personal information remains an important issue to consider when assessing the content of series, groups or classes of State records for making an access direction. These guidelines identify the kinds of personal information that may require a period of protection of more than 30 years by the giving of a CPA direction.

Early access

As noted at 2.8, in certain limited circumstances the State Records Act provides for public access to records not yet in the open access period by enabling a public office to authorise early access. In doing so a public office must not breach any duty or obligation, such as a duty of confidentiality, that it may have in respect of the records. This includes obligations under the PPIP Act. Consequently a public office considering whether to permit early access under the State Records Act must still comply with the PPIP Act and the IPPs relating to the disclosure of personal information if the records concerned contain personal information.

4.3 Health Records and Information Privacy Act 2002

The *Health Records and Information Privacy Act 2002* (HRIP Act) protects the privacy of people's health information.

The Act covers information created and collected by hospitals, doctors, and other health care organisations. It also includes other public offices that hold any type of health information. Health information includes information about people who have been dead for less than 30 years.

The HRIP Act contains 15 health privacy principles (HPPs) outlining how health information must be collected, stored, used and disclosed. HPP 11 limits the disclosure of health information beyond the purpose for which it was collected, subject to a number of exceptions.

Relationship with State Records Act

One of the exceptions to HPP 11 is non-compliance permitted under other legislation, including, explicitly, the State Records Act.

In addition, section 5(3)(d) provides that the information is not personal information if it is '...information about an individual that is contained in a State record under the control of the State Records Authority that is available for public inspection in accordance with the State Records Act'.

As with the PPIP Act, this means that the HRIP Act and HPP 11 do not affect the assessment and the making of access directions for open period State records under the State Records Act. Rather, health information in open period State records is protected from inappropriate release by the mechanisms of the State Records Act, notably by public offices giving CPA directions to close the records to public access for a long enough period.

A health privacy code of practice made under s. 38 of the HRIP Act may provide for the protection of health information contained in a record that is more than 30 years old. Any such code must, to the extent that it relates to health information contained in a State record that is more than 30 years old, be consistent with any relevant guidelines issued under s. 52 of the State Records Act, that is, these guidelines.

As with the PPIP Act also, the disclosure provisions of the HRIP Act and the public access provisions of the State Records Act are intended to complement each other and to provide appropriate protections for health information in their respective contexts without affecting the operation of the other.

Health information is a highly sensitive type of personal information. Health records often reveal more intimate, private and comprehensive details about a person than can be found in any other records.

When making access directions about series, groups or classes of State records likely to contain health information, public offices should refer to the advice relating to personal information earlier in these guidelines to determine a closure period that will ensure that the information is appropriately protected.

Early access

As with the PPIP Act, a public office may not breach its obligations under the HRIP Act and HPP 11 when authorising early access under the State Records Act to records that may contain health information.

4.4 Local Government Act 1993

Under section 12 of the *Local Government Act 1993* anyone is entitled to inspect a range of council documents, which must be made available free of charge. These are kinds of

current documents in which members of the community may be expected to have a direct interest.

These documents include annual reports, financial reports, minutes of meetings, development applications, records of approvals granted, and environmental planning instruments. Certain parts of development applications and applications for approval to erect a building are not available for inspection.

Councils must also allow inspection of their other documents, unless it would be contrary to the public interest. Documents dealing with certain matters are not subject to this requirement.

As with the FOI Act, the focus of s. 12 of the Local Government Act is primarily on providing public access to current or relatively recent information.

Relationship with State Records Act

The public access provisions of the State Records Act do not affect a council's obligations to make documents available for public inspection under s. 12 of the Local Government Act.

At the same time, all council records — including both those available and those explicitly not available for inspection under s. 12 — are subject to the public access provisions of the State Records Act. Like other public offices, councils must make access directions for the records in the open access period for which they are responsible, regardless of their status under s. 12.

Councils should use these guidelines when considering whether council records in the open access period should be open or closed to public access under the State Records Act.

As with the other legislation discussed earlier, s. 12 of the Local Government Act and the public access provisions of the State Records Act are intended to complement each other and to provide entitlements and protections appropriate to their own contexts without affecting the operation of the other.

As a matter of good public policy, council documents that have been available for public inspection under s. 12 should also be available for public access under the State Records Act once they are in the open access period.

The sensitivity associated with categories of documents not available for inspection under s. 12 is likely to diminish over time and, in some cases, will be irrelevant after 30 years. In other cases, continuing sensitivity may be found to equate to factors favouring a CPA direction under the State Records Act, as discussed in these guidelines, and justifying closure to public access for a period beyond 30 years.

As noted earlier, a provision of other legislation that prohibits the disclosure or divulging of information does not apply to the disclosure or divulging of that information under the State Records Act, provided that the record containing the information is in the open access period and is subject to an OPA direction. Consequently, the provisions in s. 12 of the Local Government Act concerning categories of documents not to be available for inspection do not apply to council records that are in the open access period and subject to an OPA direction.