

Public Records Board Guidance on the Use of Contractors for Records Management Services

As more units of state and local government consider the use of electronic technologies for the creation and storage of government records, and as governments continue to obtain software implementation and data storage services from private contractors, it is appropriate to remind records personnel of the general principles that apply to the use of contractors for records management services generally. This statement by the Public Records Board is intended to provide guidance to units of state and local government when considering whether to enter into such contracting arrangements. While this guidance paper focuses on electronic records management, many of same principles apply to contracting for the management of paper records, as well.

Two principles underlie a government's responsibilities for records maintained by contractors:

- (1) units of government are responsible for their records to the same extent whether the records are maintained by a contractor or by the governmental entity itself; and
- (2) retention of public records is determined by their content, not the physical form in which they are maintained.

Any unit of government considering the use of third party contractors for the management of its records, including electronic records, first should be aware of any statutes, rules or other sources of law applicable to the specific records held by that unit of government. Such specific laws may include, for instance, requirements regarding the security of records. Governments contracting out their records management work must ensure first of all that their contractors comply with such requirements.

For all electronic records, units of Wisconsin state and local government are obliged to maintain their electronic records in a secure environment for the duration of the period those records must be retained. *See generally* Wis. Admin. Code § ADM ch. 12 (Electronic Records Management – Standards and Requirements). This obligation continues even if records are maintained by a contractor under contract with the government.

Therefore, any unit of state or local government that intends to obtain electronic records retention services from a contractor should ensure that the contractor can provide a secure storage environment for any records. Compliance with the standards set forth in Wis. Admin. Code § ADM 12 should be a term of any contract with a unit of government that involves the retention of government records in electronic form by the contractor.

In evaluating whether a contractor's records storage environment is satisfactory, governmental entities should consider the following questions, which are derived from Wis. Admin. Code § ADM 12.05:

1. Can the contractor maintain the records so they are accurate, authentic, reliable, legible, and readable throughout the record life cycle, as that cycle is determined by state and federal law and/or the applicable record retention schedule?
2. Can the contractor guarantee it can delete or purge the electronic records in accordance with the approved retention schedules?
3. Can the contractor maintain required confidentiality or restricted access conditions throughout the life cycle of the records, including confidential destruction if so required?
4. Can the contractor export records that require retention to other systems without loss of meaning?

Units of Wisconsin state and local government are obliged to provide public access to records maintained by their private contractors to the same extent as if the records were maintained by the governmental entities themselves. *See Wis. Stat. § 19.36(3)*. Therefore, any unit of Wisconsin state or local government that wishes to obtain records management services from a contractor should ensure that the contractor agrees to provide access to records maintained by the contractor upon demand by the governmental unit, so that the government can comply with its obligations under the Wisconsin Public Records Law.

Officials of Wisconsin state and local government also should remember that, even if the contractor charges the government a fee for access to its records, the unit of government may only pass on to the public records requester the "actual, necessary and direct costs of reproduction or transcription" of the records. *Wis. Stat. § 19.35(3)(g)*. In other words, although the contractor may make a profit for the service it provides to the government, the government may not recoup that profit from the public records requester; it can only recoup the actual, necessary and direct costs of reproduction or transcription and must absorb any difference.