

Document Retention - You Are What You Keep

By Lisa A. Stegink

Every business - large or small, for-profit or not-for-profit - should adopt and follow a good records retention policy. By doing so, businesses can minimize their exposure to liability and reduce costs.

Unnecessarily-saved documents more often than not can be used against an organization and those who work for it. In fact, rather than serving as helpful historical documentation, company records can be a treasure trove of information for plaintiffs. Rarely are those same documents needed for the organization to defend itself. And if records are not regularly maintained (or destroyed) according to a set policy but instead are never destroyed or, worse, destroyed selectively after an issue arises, an organization could be exposed to substantial liability.

The first element of a good records retention policy is to implement good records development practices. In other words, employees and others who create documents for the company (e.g., third-party contractors, association members) should be educated on appropriate means to document actions, and on how to avoid inadvertently creating material that could be used as a "smoking gun." For example, minutes should record actions taken, not who says what. Similarly, everyone should be reminded that e-mail messages are written records which can be and are preserved. E-mail messages should not be treated like casual conversations, which aren't preserved. Another way to assure that only appropriate records are created in the first place is to have certain documents – agendas, minutes, sensitive correspondence, standards, and technical publications – reviewed by legal counsel prior to their publication or distribution.

The records retention policy should be in writing. It should be distributed widely within the organization, and applied uniformly and consistently. While certain records are required to be maintained by law or are necessary for the organization to carry out its purposes and activities, not all records need to be maintained and few need to be kept forever. Articles of Incorporation, bylaws, minutes of board meetings, annual information and income tax returns, and copyright and trademark registrations are a few examples of documents that should be permanently kept. Some records need only be kept for specific lengths of time (such as contracts for ten years after their termination, employee files for six years after the employee leaves employment, or bank statements for seven years). The organization's record retention policy should specify the appropriate length of time for every type of document the business might develop or acquire.

Records that have passed their retention period, and records that the policy doesn't require to be kept, must regularly be destroyed. A records retention policy is as much about the appropriate destruction of records as it is their retention. Generally, it is a good idea for an organization to designate one person as the "records administrator," responsible for assuring that the policy is regularly and appropriately implemented. The records administrator, in conjunction with the organization's chief executive or legal counsel, also can be responsible for interpreting and applying the policy to specific situations.

Be aware of the existence of more elusive documents such as paper files, electronic data, and all of the copies kept by third parties. The policy is of little use if the organization's employees are diligent in destroying paper and electronic files in the office, but others separately maintain those same records outside the office. The organization should develop a system for reminding anyone with access to the organization's records when and which records should be destroyed. It may help to adopt an annual "record destruction day" in which regular work is stopped while the past year's accumulation of unnecessary files and documents is cleaned out.

While the overall goal is to rid the organization of unnecessary records, normal record destruction procedures should be suspended immediately if a request to produce documents is received, if a government inquiry is underway, or if there is even a likelihood of litigation or government inquiry. Recent corporate accounting scandals are a good reminder that failure to prevent the destruction of documents could result in criminal obstruction of justice charges or contempt of court proceedings against the company, its employees, or others involved.

Finally, it is a good idea to periodically review and update the company's records retention policy. For example, the FCC's new rules requiring all businesses to obtain express written authorization to fax unsolicited advertising materials will create a whole new need for retention of fax authorization forms. It is unlikely that anyone's current policy covers such forms.

The benefits of a records retention policy are several: it can reduce costs associated with record storage and management, responding to third party subpoenas, and even litigation. A good policy that is consistently put into practice also reduces the likelihood of liability for the organization.

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