

Document Retention: What You Need to Know

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What should you do with that mountain of files, documents, correspondence, e-mail and other records in your office? There's no one-size-fits-all answer, but it's important to come up with a policy and stick to it.

There are several reasons why your firm should retain records: First, you might want to refer to project documents later on, perhaps when designing additions or alterations. Federal and state agencies and regulations (such as OSHA, EPA and HIPAA) impose record retention obligations. And some clients may require you by contract to maintain records for defined periods.

You must be prepared to comply with potential litigation demands (and make sure your subconsultants are, too¹). Additionally, courts sometimes impose "litigation hold" duties on firms involved in (or that reasonably expect) litigation, requiring them to take measures to prevent destruction of records that might be relevant.

Establish a Policy

Set up a document retention policy that details how information should be created, obtained and used—and how it should be saved and stored. The idea is to ensure that records are retained in an orderly way and in an accessible format so they can be retrieved easily, quickly and with a minimum of expense. The policy should also provide for regular identification and destruction or disposal of information that no longer serves a useful business purpose.²

Just as important, you must have policies in place to prevent the destruction of any information—electronic or paper—that may be relevant to a dispute.

No single record retention policy will be appropriate for every firm, and the requirements for each project may differ, too, depending on:

- Applicable laws. Laws vary depending on the state and the project. If a project is out of state, the laws that will govern disputes may be designated in the contract. If you work for federal entities or in other countries, you may be subject to laws that differ from those at the state or even federal level.
- Your contract(s). Each agreement will differ; requirements in the American Institute of Architects (AIA) or the Engineers Joint Contracts Documents Committee (EJCDC) standard form agreements may be vastly different from those in a public agency contract.

How long should you keep records?

Many defense attorneys will answer "forever." Since that's unrealistic, you're going to have to make decisions that reflect the factors above, as well as any archival and other business needs, and craft your policy around them.

What Should You Keep?

Unfortunately, there is no easy answer. Some attorneys will say "everything" because the non-final, marked-up versions of documents often contain critical notes that help explain the choices made in the final version of the document. Another camp feels that only the final document should be retained so that, for example, a scribbled note on a draft document doesn't take on inappropriate importance and confuse a jury.

But between "keep everything" and "toss all non-final documents," there is a middle ground: Try to create and retain "good" documents. This means training your staff not to create "bad" documents in the first place (such as documents that read, "Oops, I messed up that design!"). Review the file at the close of the project and get rid of the misleading, inappropriate or extraneous documents.

Whichever path you choose, work with your attorney to develop a policy that reflects your projects, your jurisdiction and your risks.

Just having a policy isn't enough, however. Everyone at your firm must understand and follow it. Management will need to make sure this is happening by spot checking records and documenting such oversight. This preserves the documents that establish that your work met the standard of care and shows that your firm made reasonable efforts to preserve important documents.

Any destruction of records must be routine and in good faith. Courts have shown they are willing to accept a company's explanation that records were destroyed in accordance with company policy but only if the firm can show that its policy was consistently implemented.³ If you choose to keep all your documents, then follow that policy. If you choose another arrangement, then follow that policy.

Finally, if there's trouble, immediately move to ensure that all files and records—including electronically stored information—related to the case are secured and maintained, and make sure your subconsultants do the same.

For additional information on this or other professional liability topics visit www.xldp.com.

¹*Because prime consultants can be held responsible for the negligent acts, errors and omissions of their subconsultants, in the event of a lawsuit, both parties are going to have to produce documentation. For that reason, consider including a record retention requirement in your subconsulting agreements.*

²*The United States Supreme Court, in a case involving the demise of the Arthur Andersen accounting firm, recognized the validity of disposal of information pursuant to an appropriate document retention policy.*

³*Per the landmark decision, [Carlucci v. Piper Aircraft Corp](#), 102 F.R.D. 472 (S.D. Fla. 1984), in which Piper Aircraft had a records management program but was unable to demonstrate that the program was consistently followed on a routine basis.*

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Sample Document Retention Policy¹

The corporate records of COMPANY, INC. and its subsidiaries (hereinafter, the "Company") are important assets. Corporate records include essentially all records you produce as an employee, whether paper or electronic. A record may be as obvious as a memorandum, an e-mail, a contract, plans, photographs or jobsite notes, or something not as obvious, such as a computerized desk calendar, an appointment book or an expense record.

The law requires the Company to maintain certain types of corporate records, usually for a specified period of time. Failure to retain those records for those minimum periods could subject you and the Company to penalties and fines, cause the loss of rights, obstruct justice, spoil potential evidence in a lawsuit, place the Company in contempt of court, or seriously disadvantage the Company in litigation.

The Company expects all employees to fully comply with any published records retention or destruction policies and schedules, provided that all employees should note the following general exception to any stated destruction schedule: If you believe, or the Company informs you, that Company records are relevant to litigation or potential litigation (e.g., a dispute that could result in litigation), then you must preserve those records until Legal Counsel determines the records are no longer needed. That exception supersedes any previously or subsequently established destruction schedule for those records. If you believe that exception may apply or have any question regarding the possibility of that exception, please contact the Company's Legal Counsel.

From time to time, the Company establishes retention or destruction policies or schedules for specific categories of records in order to ensure legal compliance, and also to accomplish other objectives such as preserving intellectual property and cost management. Several categories of documents that bear special consideration are identified below. While minimum retention periods are suggested, the retention of the documents identified below and of documents not included in the identified categories below should be determined primarily by the application of the general guidelines affecting document retention identified above, as well as any other pertinent factors.

(a) *Tax Records*: Tax records include but may not be limited to documents concerning payroll, expenses, proof of deductions, business costs and accounting procedures, and other documents concerning the Company's revenues. Tax records should be retained for at least six years from the date of filing the applicable return.

(b) *Employment Records/Personnel Records*: State and federal statutes require the Company to keep certain recruitment, employment and personnel information. The Company should also keep personnel files that reflect performance reviews and any complaints brought against the Company or individual employees under applicable state and federal statutes. The Company should also keep all final memoranda and correspondence reflecting performance reviews and actions taken by or against personnel in the employee's personnel file. Employment and personnel records should be retained for six years.

(c) *Board and Board Committee Materials*: Meeting minutes should be retained in perpetuity in the Company's minute book. A clean copy of all Board and Board Committee materials should be kept for no less than three years by the Company.

(d) *Press Releases/Public Filings*: The Company should retain permanent copies of all press releases and publicly filed documents under the theory that the Company should have its own copy to test the accuracy of any document a member of the public can theoretically produce against the Company.

(e) *Legal Files*: Legal counsel should be consulted to determine the retention period of particular documents, but legal documents should generally be maintained for a period of ten years.

(f) *Marketing and Sales Documents*: The Company should keep final copies of marketing and sales documents for the same period of time that it keeps other corporate files, generally three years.

(g) *Specific Project-Related Documents*: Project documents should be kept in one location so that they are accessible as needed once the project has been completed. Documents retained should include contracts, drawings, specifications, calculations, reports, design criteria and standards, meeting minutes, submittal and substitution logs, schedules, manufacturers' warranties, telephone records, product research, site visit reports, all correspondence including but not limited to correspondence with contractors, owners, vendors, agencies or consultants, change orders, advisory letters, photographs and close-out documentation. Such project documentation should generally be maintained for a period of at least ten years.

(h) *Development/Intellectual Property and Trade Secrets*: Development documents are often subject to intellectual property protection in their final form (e.g. patents and copyrights). The documents detailing the development process are often also of value to the Company and are protected as a trade secret where the Company:

- (i) derives independent economic value from the secrecy of the information; and
 - (ii) the Company has taken affirmative steps to keep the information confidential.
- The Company should keep all documents designated as containing trade secret information for at least the life of the trade secret.

(i) *Contracts*: Final, executed copies of all contracts entered into by the Company should be retained. As noted in (g), the Company should retain copies of final project agreements for at least ten years. The Company should retain copies of other final contracts for at least four years beyond the life of the agreement, and longer in the case of publicly filed contracts, or as noted elsewhere in this Document Retention Policy.

(j) *Electronic Mail*: E-mail that needs to be saved should be either:

- (i) downloaded to a computer file and kept electronically or on disk as a separate file; or
- (ii) printed in hard copy and kept in the appropriate file.

The retention period for electronic mail depends upon the subject matter of the e-mail, as covered elsewhere in this policy.

Failure to comply with this Document Retention Policy may result in punitive action against the employee, including suspension or termination. Questions about this policy should be referred to [Company Manager; companymanager@company.com], who is in charge of administering, enforcing and updating this policy.

READ, UNDERSTOOD, AND AGREED:

Employee (Print Name)

Employee's Signature

Date

¹ Adapted from a Sample Policy developed by the American Bar Association.
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