

DOCUMENT RETENTION GUIDELINES

–A RISK MANAGEMENT WHITE PAPER–

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I. GENERAL CONSIDERATIONS.

As business practices become increasingly complex, the cost of keeping and maintaining documents indefinitely can grow to astronomical proportions. On the corporate front, state and federal requirements relating to business operations and administrative procedures generate increasing volumes of records that must be retained for specific periods of time. In a similar manner, both by regulatory policy and project administrative practices, design and construction project records continue to grow.

Aside from certain legal requirements, or specific contract terms, companies are not expected to keep documents forever. Companies that develop and follow a document retention protocol will also be allowed to destroy documents after a set period of time provided there is no pending or threatened litigation that would involve those documents. A design firm will generally not face sanctions from a court if they can demonstrate they had a reasonable document retention policy and destroyed documents in a manner consistent with the policy.

When developing a firm's document retention (and destruction) protocols, management representatives should consult with competent legal counsel and trusted tax and financial advisors to obtain assistance in preparing both a document retention policy, and a procedure for conducting audits to insure compliance.

In the event of litigation, it is important that a designated senior officer issue a "litigation hold" to prevent the destruction of records and to work with IT personnel and legal counsel in order to be certain that involved records are located and properly maintained for purposes of review and discovery.

From a risk management perspective, there may be incidents other than active litigation that would also warrant a "litigation hold" to protect and preserve records. The duty to preserve documents can arise long before a lawsuit is filed, and that duty can arise even if the claim or potential dispute seemingly has nothing to do with the firm. By way of example, a company that provides construction phase services on a project would be wise to place a "litigation hold" on project records if and when a construction worker fatality occurs. The same precaution might also be considered for projects which greatly exceed construction budgets, or are plagued by an unusually high number of information requests.

And finally, a good document retention protocol is important for reasons other than litigation. Records retrieval may be needed for any number of purposes. Management may want to review terms in old contracts it signed with past or present clients. Old records may need to be retrieved for marketing analyses, historical research, or other non-litigious purposes. For all these, and other reasons, a sound document retention policy is a good and worthwhile business practice.

II. RETENTION OF PROJECT RECORDS.

Most design firms provide services that are in one way or another associated with the built environment. The types and complexity of projects undertaken by firms are endless. Consequently, the types and complexity of project records that must be considered for archiving vary widely. A project document retention policy and related protocols for one firm may be overly burdensome for another firm, or insufficient to meet the needs of yet another firm. In fact, the same may be true for different projects within a single firm especially for those firms providing services for military or intelligence agencies.

A policy establishing document retention protocols should be sufficiently flexible to allow the development of appropriate, but consistent, retention protocols for different project types and complexity. Having stated that, it is also true that document retention protocols should be uniformly applied within each project category designation to the greatest extent possible.

One consideration would be to set document retention protocols for projects based on two or three levels of risk categories. The lower the risk category, the lesser the requirements would be for the type of records to be maintained or the period for which the records would be preserved. By way of examples:

- (a) Consulting studies and project designs that are abandoned prior to construction may be seen as Low Risk.
- (b) Construction projects developed for condominium ownership, industrial projects built on fast-track schedules or with output performance guarantees, projects with excessive change orders and RFI activity, and projects that are undercapitalized or built by clients prone to litigation or seeking a high level of value engineering may be seen as High Risk and in need of meticulous documentation and retention protocols.
- (c) For most projects, the presumed risk level might be classified a Medium, or Moderate Risk with normal documentation and records retention protocols.

- (d) Protocols for government agencies, companies within the military-industrial complex, and other clients with high level security requirements necessitate document retention and destruction protocols that are beyond the scope of this paper and will likely be mandated by that governmental agency or other entity.

For all projects which involve improvements to real property (construction), the recommendation is to preserve archived documents for a period not less than the Statute of Repose (commencing with Substantial Completion of the project) plus three years. The Statute of Repose period would be based upon the jurisdictional statutes cited by contract, or those in the state where the project is located, whichever period is greater. Discussion for the types of project files to be retained follow.

Contracts

All professional service agreements and modifications to the agreements should be maintained and should be preserved for a minimum period of three years beyond the applicable statute of repose date. For the firm, this includes its Prime Agreement and all consultant agreements. For projects with a construction component, it is recommended that a copy of the Owner-Contractor agreement be maintained as well as any other documents that may be incorporated by reference into the professional service agreement. A copy of all certificates of insurance applicable to consultant agreements should be maintained. If at all possible, file copies of the agreements and agreement modifications should be fully executed copies.

General correspondence and proposal documents related to contract negotiations may be discarded at the end of the project unless incorporated by reference in the agreement, or unless retention is directed for other purposes.

Studies and Reports

For many projects, the end product is a study or report. Data supporting the conclusion(s) in a study or report may or may not be included in the end product. For record retention protocols, the following is recommended:

- (a) For studies and reports that are time sensitive (e.g., utility rate studies and project feasibility studies), maintain the end product and supporting data for a period of three years beyond the applicable statute of repose date that would make the conclusion obsolete, but not less than six years.
- (b) For master planning studies and reports, maintain the end product and supporting data for a for a minimum period of three years beyond the applicable statute of repose date.

Calculations and Design Notes

The following protocol guidelines are recommended for calculations and design notes, all of which should be preserved for a minimum period of three years beyond the applicable statute of repose date:

- (a) Final design calculations for all disciplines, but especially for structural, mechanical, and process systems.
- (b) Owner (or client) supplied data including design criteria.
- (c) Final run computer analyses (input and output).
- (d) Final submittal packages to client and jurisdictional authorities.
- (e) Reports and other documents (soil reports, etc.) that were relied upon for the design of the project.

Construction Documents

Construction documents include drawings, specifications, conditions of the contract, contractor submittals, all forms of documented correspondence, reports of field tests and inspections, and other records furnished to the firm as part of its roles and responsibilities in construction and post-construction phase services.

For document retention purposes, we recommend the following documents be preserved for a minimum period of three years beyond the applicable statute of repose:

- (a) Final issue (preferably Record) drawings.
- (b) Final issue (including addenda) specifications.
- (c) Important contractor submittals and submittal logs.
- (d) RFI submittal and responses, and RFI logs.
- (e) Construction observation reports.
- (f) Other project records deemed to be important.

There is no uniform agreement on the retention of interim submittal drawings, working drafts, and other similar documents. These are judgment decisions to be made within each firm. The authors of this paper, however, believe that non-final drawings and other “progress” documents should be destroyed as part of project closeout procedures unless there is some specific reason to retain them.

But whatever course is taken, firms should be consistent from project-to-project in their approach to these type documents.

The guidelines discussed above are intended only for professional services by the design firm in responsible charge for one or more parts of the project design and any post-design services. In those circumstances where the design firm serves as a Construction Manager or a Construction Contractor, the construction records and record retention protocols will expectedly be much greater than those presented in this paper.

III. RETENTION OF CORPORATE RECORDS.

Protocols for the retention of corporate business records should be developed in conjunction with, or reviewed by, corporate counsel. The following retention period guidelines are considered to be generally typical for most business entities:

Corporate Structure

Articles of Incorporation, bylaws, related amendments to the AI and bylaws, corporate minutes, merger and acquisition records, and similar corporate records should, in general, be kept in perpetuity.

Capital and Fixed Asset Records

Copies of records related to capital and fixed asset holdings should be preserved for the life of the asset, plus seven years.

Accounting Records and Bank Statements

Preserve for seven years.

Salary Records

Preserve for seven years.

Personnel Records

Preserve for seven years past termination.

IV. LOGISTICS OF RETAINED RECORDS.

Paper files, or electronic files, or both – that is the question many firms ask. The answer can be complicated and depends on a variety of factors including the project type, client needs, the firm's level of involvement on the project, and how the firm generally creates documents on a project. Tactics discussed in this paper consider various forms in which records, especially electronic records, are generated and limits consideration to records of low to medium security levels. For records with security classifications established under federal classification systems, and for highly sensitive classified information controlled by contract terms, the company should engage outside counsel with experience in this area to assist in developing the security controls to be associated with the relevant document retention policy and related protocols.

Paper Files

The most traditional forms of record retention files have been in hard copy format.

Business records are normally compiled and retired on a calendar basis, typically scheduled to occur within some period of time following the close-out of fiscal year end activities. Important business records should be assembled in an orderly fashion, cataloged, logged, and stored in file boxes marked to facilitate retrieval when necessary and when scheduled for destruction. We recommend the records storage logs (retention logs) containing file content and location be maintained in the active administrative electronic files, which in turn are routinely backed up as part of the company's business continuation protocols.

We recommend that hard copy project files be organized, cataloged and not comingled with general business records. The type of project records to be preserved have been discussed elsewhere in this paper. Unimportant papers should be culled and disposed of in a proper manner. Remember however, care should be taken in reviewing any contractual requirements that address specific document retention issues. Like business records, the project files assembled for storage should be cataloged using the firm's protocol for project identification, logged, and stored in containers marked to facilitate retrieval when necessary for review, and when scheduled for destruction.

Other considerations to address with the logistics of hard copy records retention deal with warehousing requirements and storage arrangements for identification and retrieval of the records. Physical space requirements grow as the volume of records increase. To be considered are such basic decisions as location (onsite/offsite), physical security, and temperature/humidity control.

Electronic Files

Paper files screened and prepared for retention can also be scanned and filed in an electronic format. The format should not allow further manipulation of the data. This method works well for business and project records and is encouraged as a space saving method for records retention. There are concerns, however, that should be considered in conjunction with a firm's decision to convert paper files to electronic form, and the overall management of electronic records.

Electronic files developed as part of studies, reports and calculations are generally captured within the project files as part of the company's standard operating procedures. These records are easy to manage within a records management protocol. Electronic communication records are, however, much more difficult documents to manage effectively. Project communications occur in many electronic forms – emails, text messaging, social sites, cloud-based files, and voice mails just to name a few. Company policies concerning electronic messaging should be developed with a sensitivity for records assembly and retention. All important project communications do need to be captured, incorporated into the project records, and retained as part of the project records. Doing this is a major challenge for most companies. A few options for consideration follow:

- (a) Require all business emails to be sent from and addressed to employees' addresses on the company's server. Firms should strongly discourage the use of personal email accounts.
- (b) Prohibit the use of social media and text messaging for transmitting project communications. This prohibition need not apply to such routine communications as scheduling meetings, confirming appointments, or other relatively benign communications. The goal is to capture important communications, those that relate to criteria, decisions, delivery commitments, information needs, and similar project-specific messaging.
- (c) Require employees to copy outgoing, and to forward important incoming emails to the project file. Establish administrative routines that facilitate transfer of these communications to the project files. Insure that web-based links such as drop-box documents have the content files downloaded to the project-specific data base.
- (d) As part of the project close-out protocols, work with IT personnel and project personnel to scan electronic files by key word terms to screen and capture important communications not in the project files. Similarly, firms should encourage employees to use a common project identifier or name in electronic correspondence in order to facility proper cataloging and capture of information.

- (e) If the project files to be retained as paper records, make hard copy prints of the message and any attachments for important outgoing and incoming emails,

Preservation of electronic records requires routine effort to manage records in a way to avoid software and technological obsolescence, and to mitigate media deterioration. We recommend for electronic records retention that best quality available media be used, that both onsite and offsite storage be provided, and that records be refreshed at intervals of no more than ten years.

V. DESTRUCTION OF RECORDS.

Record retention protocols are not just about storage of records. Good records management practices also provide for the routine destruction of certain records after a defined period of time. The manner in which records will be destroyed and documentation of the destroyed files are important considerations. Actions for consideration follow.

- (a) Develop and maintain a Records Destruction Log. Log entries should document by subject, by storage file reference number, and by date and manner of destruction. A single log should be used for recording destruction of both paper and electronic files.
- (b) Paper files should be destroyed by shredding or burning.
- (c) Electronic media destruction should be done in consultation with qualified IT experts. The method of destruction will be influenced by the type of media used to store the records and the level of destruction to be obtained. Simply “deleting” an electronic file does not destroy the electronic data. For complete destruction, shredding or degaussing may be necessary.
- (d) For project files containing classified materials associated with federal agencies or other “sensitive information” contracts, check with legal counsel or a contract manager associated with the agency or private entity client to insure the means of destruction complies with approved means, methods and documentation requirements.
- (e) For project files that are the subject of a litigation hold, legal action, or potential legal action, firms should preserve the related documents, and consult with trusted legal and insurance advisors to establish subsequent action plans.

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