



# Bulletin

## Records Retention

### INTRODUCTION

It is important for mechanical contractors to properly maintain and store their records and documents for many reasons, especially the potential for litigation involving a construction project. A company's records encompass many things including project correspondence, employee personnel files, accounting records, etc. These records may be on paper or in electronic format.

Unfortunately, the cost of document storage can be huge. These costs can be somewhat mitigated with an effective company record retention and destruction program whereby your records, except for those of permanent value, can be systematically destroyed without running afoul of government regulations.

A good policy will include guidelines for storing, using, retaining, and destroying documents. While no single policy will suit all companies, there are some rules that are universal. The policy must be in writing and known to all employees. The policy should be implemented and controlled by a specific individual with adequate authority. The policy should be enforced uniformly to all projects and all employees.

### RECORD RETENTION POLICIES

Your record retention program should provide for:

- (a) maintenance of records in accordance with applicable governmental and legal requirements;
- (b) safe storage of vital business records (e.g. articles of incorporation, mortgages); and
- (c) an orderly system for the retention, retrieval and disposal of records.

An important step in creating a record retention policy is to understand which documents do not need to be retained at all. All records not necessary for legal and business reasons can be destroyed in order to reduce the high cost of storing, indexing and handling the vast amount of documents and paper which would otherwise accumulate. Included in this category might be miscellaneous records such as:

- (a) cover letters or correspondence and internal memoranda which serve only as simple acknowledgment;

(b) notices of meetings, invitations or regrets, arrangements for functions, speakers, etc.; and

(c) stereotyped replies, notices, reports, releases, tabulations and publications of general information unrelated to a particular project that require no administrative action.

Other documents no longer necessary for day-to-day operations must nevertheless be stored for certain periods of time. Your company is most certainly subject to statutes, regulations or other laws that require documents to be retained for a minimum number of years. Your record retention policy will need to distinguish what records need to be retained for how long. Additionally, many important documents must be maintained permanently (your articles of incorporation, mortgage, etc.). If such records cannot be easily replaced, the originals of such documents should be maintained safely and securely with extra copies stored away from the originals in a safe deposit type vault or with your attorney.

## **RECORD RETENTION/ DESTRUCTION SCHEDULE**

Your record retention program must insure that you keep those records to meet your governmental and legal requirements. All records are retained for the period required by applicable state and federal laws and regulations. This is usually accomplished with a record retention/destruction schedule. This schedule identifies each type of record to be maintained, and lists the duration that record should be stored.

There are different retention periods for different types of records. A record retention/destruction schedule is a valuable tool for showing governmental agencies that your company is

disposing of its records in compliance with regulations.

In creating a record retention/destruction schedule, first identify all types of documents that your company utilizes. Such a list might include:

- Human resource and administration
- Accounting and financial
- Corporate
- Insurance
- Tax
- Property
- Legal
- Safety
- Construction Project Documentation
- Non-project specific correspondence
- E-mail and electronic files

Within each category, you will further identify the different types of documents and the time you will keep them. Different states have different requirements. Additionally, most federal governmental agencies (EPA, OSHA, IRS, etc.) with which your company interacts have set record retention requirements.

Every company will have different specific requirements for retaining records. It is therefore strongly recommended that your attorney and CPA review and approve your record retention policy. A sample of a record retention policy can be reviewed at <http://apps.americanbar.org/lpm/lpt/articles/sampledestructionpolicy.pdf>.

Regarding construction project documentation, all states have a “statute of limitations” within which time a contractor might be sued on a project and must defend using their project records. Statutes of limitations usually run from the date a cause of action is

discovered or should have reasonably been discovered (the “discovery rule”). Therefore, many states also have a “statute of repose,” which creates an absolute end to the period of time within which a contractor might be sued on a project, even if the cause of action has not yet been discovered. Statutes of repose set definite time limits under which a cause of action can be brought against a contractor (e.g. 10 years from project substantial completion).

For example, a state’s statute of limitations might require that a lawsuit be filed within three years of discovery of property damage resulting from an improperly installed air conditioning system. If the property damage resulting from the defective installation is discovered 12 years after the project’s substantial completion then the claim may not be barred by the three-year statute of limitations. Such suit could be brought up to three years after the discovery of the damages. However, if, for example, the state’s statute of repose is 10 years from the project’s substantial completion, the lawsuit would then be barred as it was not filed within the statute of repose period.

In states with statutes of repose, project records should be maintained through at least the end of that period. Your attorney will recommend the correct retention period for construction documents in the jurisdictions where your company works, and this duration should then be reflected in your record retention/destruction schedule.

Once a destruction date established in your record retention/destruction schedule is reached, you must insure that all documents in the applicable category are consistently destroyed. This includes the shredding of paper and the destruction of various forms of electronic data and computer metadata. It is a good idea to maintain a log of

destroyed documents and your record retention policy should include this as a requirement.

## **RECORD STORAGE**

Contractors with a high volume of stored paper records often employ outside companies and pay them for remote storage on a monthly basis. Other contractors maintain their own record storage at the office or at a nearby facility. In either case, stored records are best kept in corrugated boxes with sheets stored flat in the containers. If possible, remove rubber bands, tape and other materials that might deteriorate and discolor the records.

Businesses can choose to store their records via electronic record retention. When a company implements an electronic record retention plan for paper files, the original paper copy is destroyed and only a scanned image of the original exists. As far as the admissibility of these documents in court, the imaged documents should meet the required criteria needed as long as the imaged document accurately reproduces the original document and does not give rise to concerns regarding the authenticity of the original or have the appearance that the document was tampered with.

Emails and other data created and maintained in electronic format in computers are usually considered to be “documents” for litigation purposes and your record retention program should include a detailed explanation as to how these documents will be treated. Such electronic documents contain metadata not visible on the face of the document, including the document’s creation amendment history, transmittal history and the author’s name, etc. You and your employees need to understand that even emails deleted from an individual’s mailbox may remain elsewhere in the

system. Thus the complete destruction of electronic documents can be challenging and should be coordinated with your Information Technology professionals.

Electronic record retention is a great benefit for most documents; however, you should confer with your attorney to see which, if any documents should be maintained in their original, paper format in your state.

## **LITIGATION**

Notwithstanding any destruction dates set forth in your record retention/destruction schedule, your company must immediately suspend regular retention and destruction procedures when litigation or a legal document request is pending or imminent. Once you recognize that a dispute may result in litigation or a complaint is already filed, all documents related to the disputed, including electronic records, must be preserved.

Destroying relevant documents when you know a claim is likely can be interpreted as an attempt to eliminate damaging evidence, and the potential civil and criminal liabilities from the destruction of documents needed for litigation is enormous. Many states permit an independent cause of action for "spoliation of evidence," which is the destruction of evidence relevant to litigation. You can avoid even the appearance of impropriety if you retain and destroy documents on a regular basis in compliance with your record retention policy

## **CONCLUSION**

A thorough and well-implemented record retention policy will benefit your company in many ways. It will reduce the volume of documents by ridding your organization of documents that are no longer required to be retained by law or otherwise necessary for the conduct of its business. A good policy will ensure your compliance with applicable state and federal laws and insure your records are properly maintained in case of future litigation. Finally, by following a comprehensive retention and destruction policy, you will protect your company from charges that it improperly destroyed documents relevant to litigation.

**The information in this bulletin should not be construed as legal advice. A person should contact their local counsel for specific legal advice regarding the information contained in this bulletin.**