

Chapter 20

Record Retention

Nonprofit organizations and associations routinely maintain many kinds of files and other records covering membership, programs, personnel, donors, sponsors, and many other subjects. What documents should be kept, and for how long, are serious questions. Various federal or state laws require some records to be maintained for stipulated periods. Although it is important to store and retrieve documents to meet legal mandates and support an entity's activities, retaining records and poring through them at later times can be very expensive.

The key insight for designing a record retention program is that records should be viewed much like other assets of the organization. That is, they have value to the extent—and only to the extent—that they can be used to achieve the organization's goals and meet its legal responsibilities. Records that cannot be readily accessed, or that are kept after any legal or business requirement has expired, are not worth much if anything after the costs of storage and review are considered. So the program's twin goals should be to enhance the efficient search and retrieval of information and to retain records of such information so long as there is a legal or business need to keep them.

Obviously, all records cannot and should not be purged periodically. Certain categories of documents have long-term usefulness. A few categories never should be destroyed. In addition to laws of general application, state nonprofit incorporation laws sometimes dictate that particular records be made and kept by organizations subject to those laws. All nonprofits must heed federal and state taxation and employment law requirements for maintaining documentation in those areas.

A well-planned and carefully followed record retention program ensures that out-of-date and unused information will not be kept around to clutter the organization's offices and other record storage facilities, whether via paper files or via electronic files. Equally important, adherence to the program ensures that current and useful information—as well as that which is legally required—will not be destroyed.

Summary

- Determining which records shall be routinely maintained—and for how long—involves consideration of both practical and legal implications. Opening, using, storing, and retrieving files consume valuable resources. To retain documents beyond their periods of usefulness entails substantial costs in the event of later claims, investigations, or audits.

- More broadly, the current version of the IRS Form 990 annual tax return for exempt organizations requires disclosure as to whether the organization has a document retention/destruction policy.
- As with all employers, nonprofit employers must retain records concerning employees' wages and taxes withheld from wages, unemployment tax records, and records of Social Security taxes. A common retention period is four years from the later of the due date of the tax or the actual date of payment.
- The Labor Department requires that several types of employment records be retained as specified under the Fair Labor Standards Act and other laws. Some large employers also may be required to maintain specified records under the Age Discrimination Act of 1967. Finally, unless an entity has fewer than seven employees and has had no death or serious occupational accident, certain recordkeeping requirements must be met to comply with the Occupational Safety and Health Act. Some records of occupational injury or illness must be kept for 30 years after employee separation.
- Beyond federal and state statutory requirements, there are other legal reasons for which material should be retained. Contracts, insurance policies, deeds, leases, trademark or patent registration certificates, and similar documents should be maintained while they are in effect and for a period of time after they expire to protect the rights of the organization under the documents. Claims based on these kinds of documents made after a certain number of years specified in applicable state statutes of limitation will likely be barred.
- Setting an appropriate retention period for electronic mail (email) is a difficult undertaking. A major concern is that some documents meeting the definition of "records" that, from a legal or business standpoint, must be kept for longer periods (e.g., contracts, correspondence evidencing exercise of rights) may come to the organization only in the form of email. Before adopting any policy or automated feature that destroys email after a given time period, the organization should ensure that it has clear policies and actual practices in place so that those mandated records are captured (electronically or in hard copy) and moved into storage files that are not subject to automatic deletion.
- Once an investigation, audit, or claim by a government or private party has been initiated or is reasonably anticipated by an organization, its files or records relevant to that matter should not be destroyed lest the organization be accused of obstruction of justice or be exposed to other sanctions.

State and federal laws dictate the maintaining of files and records in some subject areas. Any record retention policy or program must begin with a cataloging of the items the organization is required by law to retain.

- State nonprofit corporation laws often stipulate that certain documentation be made and kept. Ohio, for example, has this provision: "Each corporation shall keep correct and complete books and records of account, together with minutes of the proceedings of its incorporators, members, trustees, and committees of the trustees or members." Although prescribing that such documentation as financial records, minutes, or lists of members' names and addresses be kept, state corporation laws on record retention typically do not indicate how long to keep the specified documents. In the absence of state agency or court decisions interpreting the laws, nonprofits must assume that the specified documents are to be retained indefinitely.
- Specific requirements for record retention emanate from tax laws, both at the federal and state levels. The Internal Revenue Code specifically requires organizations that have federal income tax-exempt status to maintain records and to make them available for inspection by Internal Revenue Service (IRS) agents, for example, in an audit. Records held for IRS purposes to detail receipts and disbursements, gross income, unrelated business income, exempt activities, and other books and records must be available for IRS inspection as long as the IRS can levy tax assessments against the organization. The IRS can challenge a tax return filed within three years of the challenge. The period for challenge is six years if a major error in stating gross income is made; it is unlimited if the IRS claims that a tax return is false or fraudulent or if no return had been filed. The challenge period can be extended. Accordingly, the following specific recommendations can be made:
 - Permanently retain articles of incorporation, other organizing and governing documents, the IRS tax-exemption determination letter, minute books, and bank statements.
 - Retain for at least seven years all canceled checks and other supporting documentation for income and expenses. Exempt organizations that fail to maintain adequate records to substantiate annual informational returns, on IRS Form 990, can lose their tax-exempt status. National organizations also are required to retain records relating to their chapters if the chapters hold federal income tax exemption under a group exemption obtained by the national.

- In Department of Justice criminal antitrust investigations, where evidence is typically gathered by grand jury subpoena, separate federal criminal laws prohibit attempts to obstruct or impede the investigations by, for example, intentional destruction of documents covered by grand jury subpoenas.
 - In Department of Justice civil antitrust investigations, where information typically is gathered by civil investigative demands, intentional destruction of documents covered by the demands is also a separate criminal offense.
 - In Federal Trade Commission (FTC) investigations, where information is typically gathered by subpoena, it is likely that intentional destruction of materials sought by the FTC would constitute a separate violation of the Federal Trade Commission Act, for which criminal penalties can be applied.
 - For all federal investigations, including those in the antitrust area, criminal penalties could apply under the Sarbanes-Oxley law.
 - Even where there is no specific penalty provision applicable to the destruction of materials, it is clear that civil penalties, adverse legal inferences, or default judgments can be imposed in any litigation where it can be shown that an organization failed to maintain, or willfully purged, pertinent files and records.
 - Accordingly, the retention program must obligate employees to notify management that such a claim has been made or is foreseeable, and must enable legal and records personnel to order and implement the immediate suspension of destruction of any potentially relevant records.
- Assuming that retention of particular documents is not required by law, the mere possibility of perusal of those files and records by others suggests that an organization not retain them beyond the periods of their usefulness or necessity. It is unwise to facilitate a scenario in which a memorandum drafted for an organization today, for example, might be misconstrued by those seeking to find fault with the organization (or interpreted under the antitrust laws as they might exist 30 or 40 years from now). No organization can protect itself completely against the possibility of receiving or disseminating a document that is written in haste or without clear understanding of its legal implications. Although the document may be innocuous, it could be interpreted out of context. Similarly, a document that is appropriate today could seem prejudicial in other times, especially when reviewed by a government or private-sector antagonist.

- Every nonprofit should develop and follow a record retention program to ensure that necessary files and records are retained and unnecessary ones are systematically removed and destroyed. The program consists of several elements:
 - The retention policy defines what roles are played by any employee who creates or acquires records, by any employee who has custody of records, and especially by key legal and records personnel.
 - An attached schedule specifies the periods of time for holding specified categories of files and records. The schedule must be kept up-to-date with changes in law and changes in the organization's activities.
 - For every category of files or records, electronic versions must be addressed to be sure that necessary information is maintained and unnecessary information is purged.
 - The record retention program should be communicated effectively to employees and should be audited to make sure it is routinely followed. Exceptions should be made only for good reason and on the authority of senior staff.
- The importance of regular and systematic enforcement cannot be overemphasized. Periodic training sessions, reminders, and audits aimed at continuous compliance will be viewed more favorably by courts and prosecutors than would the jarring initiation of the very same activities under the looming shadow of a claims situation.

Chapter 20 Resources

Books

- Cipriani. "Protecting Organization and Membership Data." In *Associations and the Law*. Jacobs, ed. Washington, D.C.: American Society of Association Executives, 2002, p. 110.
- Cunningham. "Records Management." In *Nonprofit Governance and Management*. Chicago: American Bar Association and American Society of Corporate Secretaries, 2002, p. 509.
- Hackett. "Record Retention Policies." In *Associations and the Law*. Jacobs, ed. Washington, D.C.: American Society of Association Executives, 2002, p. 108.
- Jacobs. *Certification and Accreditation Law Handbook, Third Edition*. Washington, D.C.: American Society of Association Executives, 2016, p. 129.
- Rugg. "The Electronic Trail: Keeping Electronic Documents under Control for Discovery." In *(2000) Legal Symposium*. Washington, D.C.: American Society of Association Executives, 2000.