

Document Retention: What Not to Trash

By F.P. Maxson

Have a document retention policy at your association? Never thought about it? Well, there are now new reasons you should. First, the recent amendments to the Federal Rules of Civil Procedure (FRCP) increase the need for an association to adopt a policy. Second, a good document retention system is an effective risk management tool.

At the very least, a policy will reduce an association's discovery costs during any future litigation. Just look at J.P. Morgan. A Florida court entered a \$1.4 billion award against the company in May 2005. The primary reason for this award? The company failed to properly maintain e-mails and produce them during the discovery process. If J.P. Morgan had in place an effective document retention system, it likely would have avoided the judgment in this case. Although the award was recently reversed on appeal, it still illustrates the dangers of not having a document retention policy.

Changes to the Federal Rules of Civil Procedure

The recent changes to the FRCP, which govern civil litigation in the federal judicial system, became effective Dec. 1, 2006. These changes revolve around electronically stored information and are designed to give some structure to retaining and sharing electronic data in a trial.

The new rules require a business litigant to be able to explain its system for maintaining and destroying information, including maintenance of its electronic information. As such, it has become more important that a company have a document retention policy in place. NAR strongly recommends that all associations adopt such a system.

Creating a document retention system

Although NAR cannot provide associations with a sample policy—because no single record-retention model fits all—detailed guidance is posted on realtor.org/letterlw.nsf/pages/0307recordpolicy and is summarized below to help you create a document retention system.

Identify sources and types of information

The first step in creating a document retention policy is to identify

the types of information your association produces—from the financial information your accountants produce to the content of your association publication. Depending on the size of your association, this may require gathering staff to discuss and identify all information. Be sure to include your technology staff in any such meetings so the policy can document how they maintain backup computer systems.

Draft the policy

The association should address a number of items in its retention policy. Basic elements of a policy include:

- * Policy's effective date and date of last review
- * Person responsible for the policy
- * Purpose of the policy
- * Definitions (if needed)
- * Process for preserving records in the event of litigation

At this point, the association should consult legal counsel to discuss any state or federal requirements for maintaining certain information. Legal counsel also can help you navigate the requirements for each association that vary based on a number of factors. For example, certain employment statutes don't apply until a workplace reaches a minimum number of employees.

Another issue to consider is the format the association uses to maintain its documents. Reducing paper documents to an electronic format saves space but could present authentication issues in court. Therefore, all electronic documents should be stored in a read-only format or other unalterable format to demonstrate that the documents are in their original state.

Once the record retention policy is created, it needs to be distributed to all employees. The association should make sure its employees are familiar with the policy, either through some sort of education program or a memo. How the association handles this will be a product of its size and the depth of detail in its policy. Most important, the association should make sure that employees are adhering to the policy. Having a policy that is ignored is probably worse than no policy at all.

Finally, the association should plan on periodically reviewing the policy to make sure it is still relevant and serves the association's needs. The association counsel also should periodically review the policy as part of this process.

How long should you keep documents?

Accounting Records

- * Accounts payable and receivable (seven years)
- * Annual financial statements (permanently)
- * Bank statements (seven years)
- * Accounting correspondence: routine (four years)
- * Deeds and closing papers (permanently)
- * Deposit slips (four years)
- * Employee expense reports (seven years)
- * Income tax returns (permanent)
- * Inventory count & costing sheets (seven years)
- * Insurance policies (four years after expiration)
- * Investments (seven years after disposal)
- * Payroll journals & ledgers (permanently)
- * Purchase orders (except accounts payable copy) (one year)
- * Purchase invoices & orders (seven years)
- * Receiving sheets (two years)

Association Corporate Records

- * Articles of incorporation and amendments (permanently)
- * Bylaws and amendments (permanently)
- * Corporate filings (permanently)
- * Corporate minute book (permanently)
- * IRS exemption letter (permanently)

Employment Records

- * Documents relating to job recruitment: advertising, job orders submitted to employment agencies, interviewing, testing, hiring, training, demotions, promotions, layoffs, discharges, and other personnel decisions (one year)
- * Employee benefit plan documents (duration of plan)
- * Garnishments/wage assignments (three years)
- * Immigration I-9 forms (duration of employment plus one year, minimum of three years)
- * Payroll records showing name, address, date of birth, occupation, rate of pay, and weekly compensation (three years)
- * Personnel records (ten years after employment ends)

Legal Documents

- * Contracts (ten years after expiration)
- * License applications (one year after expiration)
- * Licenses (one year after expiration)
- * Trademarks, patents & copyrights (permanently)
- * Warranties & guarantees (two years beyond terms of the warranty)
- * Legal correspondence: (permanently)

MLS Documents

- * Rules and regulations (permanently)
- * MLS policies (permanently)
- * Listing agreements (until expiration of listing)
- * Sold property information (permanently)
- * Lockbox key agreements/leases (one year after agreement terminates)
- * MLS service mark license agreements (permanently)
- * Contracts (seven years after expiration)
- * Subscription agreements (ten years after expiration)
- * Participation agreements (ten years after expiration)
- * Web site click-through confirmations (ten years)

NAR/Association Documents

- * NAR charter (permanently)
- * Territorial jurisdiction (permanently)
- * Realtor® Agreement (until superceded)
- * Member file & membership applications (two years after membership terminates)
- * Professional standards policies (five years)
- * Professional standards hearing records-- Ethics (result of hearing-permanent; rest of hearing file- minimum of 1 year after satisfaction of sanctions (if any) and there is no threat of litigation)
- * Arbitration/mediation (minimum of 1 year after payment of award (if any) and there is no threat of litigation)

Note: These requirements vary by state and so the timeframes below are only advisory. Consult with your attorney when creating a record retention policy.

F.P. Maxson is an associate counsel in NAR's legal department. He can be reached at fmaxson@realtors.org.