

ENGINEERING INC.

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Winning the Battle of the (Paper) Bulge

In this Age of the “digital business,” paper documents might seem almost quaint—especially to younger professionals.

But the fact is, many organizations—especially engineering and design firms—still rely on huge volumes of paperwork along with their ever-growing stores of electronic files. And the management and retention of all these documents is a critical legal and administrative issue for professional firms.

The basic questions seem simple: How long do I keep this paper/email/file/record, and what is the best method to store it? But the process of document retention can be challenging, especially if there are no guidelines in place. Engineering firms need to create and maintain a comprehensive strategy.

As with many other types of businesses, engineering firms are experiencing an unprecedented rise in the volume of information they must handle.

“With modern engineering firms generating an incredible amount of hard copy and electronic information in the form of email, reports, letters, calculations, plans, field documentation, etc., it is extremely important that firms adopt a document retention policy that is specific to their own operations and needs,” says Jim Messmore, chairman, ACEC Risk Management Committee and senior vice president of Hanson Professional Services.

“It is necessary not only for the practical management of the documents but also from a risk management perspective,” Messmore says.



Patricia Harris
Special Counsel
Zetlin & De Chiara LLP

Design and construction projects typically involve copious amounts of paper and electronic records that are generated traditionally but also through increasingly varied means of communication, including cloud-based communication, emails, text messaging, voicemails and even social media, says Patricia Harris, special counsel at Zetlin & De Chiara, which advises engineering and design

firms on document retention policies.

A document retention policy should be thorough, experts say, but it doesn't need to be complex.

“It is important that a document retention strategy be easy to follow and comprehensive,” says Theodore Levin, a partner with the law firm Morris Polich & Purdy and also a member of the ACEC Risk Management Committee.

A good policy will cover basic information and lay out all the key requirements, Levin says.

That includes the types of documents to be retained; in what format they should be retained; the length of time particular documents need to be kept; the method and policy for destruction; how and when to suspend the policy (for example, during a “litigation hold”); and an efficient filing system for the organization of records.

“In addition, the policy needs to be practical enough to allow easy compliance and flexibility but can be uniformly applied as much as possible,” Levin says.

Although there are commonalities across all document retention programs, firms should customize their strategy as needed. “A document retention strategy needs to be tailored to the specific needs of the firm and its clients,” Messmore says. “The policy should have consistent protocols for the project types that the firm undertakes. Not all project types have the same risk profile, so in some cases certain project records can be disposed of sooner than others.”

“Just as importantly,” Harris says, “firms should have policies for managing records in each phase of the ‘document life cycle’—acquisition, storage, usage/access, distribution/ sharing and archiving or purging records.”

The Relevant Laws

“When establishing a records retention policy,” Harris says, “firms should refer to various sources to set appropriate retention periods.”

For project records, where the establishment of retention periods can be particularly complex, firms should first look to the statutes of limitation and repose of the state where the project is located, and plan to hold documents for at least those periods.

“Second, the project contract itself might contain responsibilities regarding post-project records retention,” Harris says. “Finally, certain states may have legal or regulatory document retention requirements specifically for design professionals.”



For example, a New York Board of Regents rule requires a licensee to maintain for at least six years “all preliminary and final plans, documents, computations, records and professional evaluations prepared by the licensee, or the licensee’s employees, relating to work to which the licensee has affixed his seal and signature.”

“Storing records electronically is the most cost-effective option,” Harris says, “but it is also the option that most threatens the integrity of the records.”

If paper records are ultimately to be retained electronically, the firm should have quality-control procedures that ensure the information stored retains its original content, context and structure.

In addition,” Harris says “firms must be prepared to address hardware, software and media obsolescence from time to time so that records remain accessible as long as they are required to be.”

New Media

Firms must keep in mind new methods are always emerging for the creation and storage of records.

“In the last several years, we have been advising clients to focus on their policies regarding approved ‘means of communication,’ in order to limit where records may end up,” Harris says. “For instance, employees should not use personal email accounts for business communications, texts should be limited to administrative items such as setting up meetings, and any discussion of projects through social media should be prohibited unless specifically authorized by firm management or a specific point person.

And all staff members need to understand the policies.

A firm can have an excellent records management and retention policy, but if it fails to communicate the policy to its employees, then there might as well be no policy in place,” Harris says. “We recommend an oral presentation or discussion for all new employees plus an annual meeting for all employees to review the firms’ policies and expectations.

If the firm distributes a written policy,” Harris adds, “it might be a good idea to have each employee sign a written acknowledgement that he or she has read it, understands it and agrees to abide by it.”

Firms should also stress that document retention needs to be taken seriously throughout the organization. “It does no good to have a policy that everyone ignores,” Levin says.

Litigation and You

Document retention that is taken lightly could come back to haunt firms, specifically in the event of litigation.

“Documentation is important for defending cases,” Levin says. “If you don’t have the documents, you can’t prove what you did on the project and what you did not do on the project. To a large degree, it is true that if it isn’t in writing, it didn’t happen—a large number of construction disputes resolve by settlement, but it is still necessary to prove your case through the use of documentation to achieve the best result.”

If a firm does not have a strategy, piecing together documents when you need them will be difficult. “Each person who worked on a project file may have done something different with their documents,” Levin says.

Another risk is being accused of “spoliation” of evidence if documents are destroyed without following a policy. “A rule of thumb is to preserve documents for at least the statute of repose in your state plus six years,” Levin says. “For example, if the statute of repose in the engineer’s state is 10 years, it would be conservative to preserve the documents for 16 years—the 10 years, plus five years maximum to take a lawsuit through trial and one year to account for indemnity claims.”

“Legal and regulatory requirements regarding maintaining records are ever evolving.

It is crucial that firms have a policy that allows for suspension of any document disposal or destruction in the event of anticipated, threatened, pending or actual litigation. I cannot stress enough that the document disposal and destruction should stop prior to the receipt of an actual complaint,” Harris says. “If you think a problem may be on the way, then preserve your records.

Given the speed at which communications technology is advancing, firms may want to revisit their records management and retention policies every three years or so.

Being vigilant about the management of records is well worth it. From our experience as attorneys involved in complex construction cases, companies that have a well-thought-out records retention policy and also follow that policy will fare much better should litigation arise.”



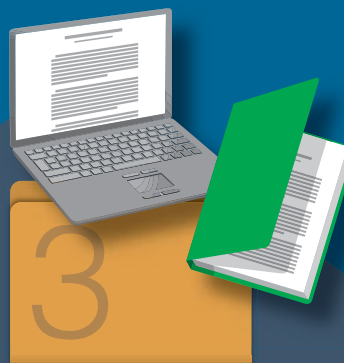
Identify records by type

Types of records might include business and financial records, tax filings, evidence of intellectual property, licenses, insurance documents, personnel records, contracts and work product.



Prescribe length of retention

Most business and intellectual property records should be kept permanently; other types of records are typically keyed to statute of limitations periods, statute of repose periods, contractual requirements and, for design professionals, ethical or other regulatory requirements.



Define method of retention

Records can be stored in original media or electronically. If the records are to be converted to electronic records for purposes of storage, the firm must ensure that the content, context and structure of the original records remain intact.



Establish ability to access records

The firm must identify who will have access to stored records. It should periodically review the format of those records that have been stored electronically and that such records remain accessible in light of changes in technology.

8 STEPS FOR AN EFFECTIVE RECORDS RETENTION POLICY



Provide authority in the event of uncertainty

Define a chain of command within the records management team. Often, old records will need to be accessed only if litigation arises, so decision-makers should be selected with that in mind.



Establish destruction policies and methods

Define destruction milestones, particularly in the context of projects and project close-outs, when most people are involved with the records. Set policies to minimize that data is out of the company's control, e.g., on personal devices. Make sure that destruction of paper and electronic records is thorough and complete.



Communicate the policy

In addition to communicating the records management policy in writing to all employees and obtaining their written agreement to abide by the policy, an effective policy will minimize individual discretion in each of the steps above.



Construct rules to apply in light of pending or threatened litigation

These rules should include identifying a team to oversee the process of a "litigation hold," developing a plan to preserve and/or suspend destruction of all records that might be related to the litigation, creating policies regarding distribution of a litigation hold notice, ensuring compliance with the litigation hold, modifying the hold if necessary and removing the hold when allowable.