

For the Record

A GOOD DOCUMENT RETENTION POLICY CAN HELP KEEP CONTRACTORS, ARCHITECTS AND ENGINEERS OUT OF HOT WATER WITH REGULATORS OR LITIGATION. **By Karen P. Layng**

In this age of instant messaging and the “virtual” construction project where contract change directives and RFIs are sent via personal hand-held units, grappling with how a company should organize, maintain and ultimately disregard documents is increasingly confusing. This is why companies should develop, implement and police a formal document-retention policy; failure to do so can have negative consequences in the form of litigation.

As is true in many instances, the law has not kept pace with our ever-changing technological society. In the Federal Rules of Civil Procedure and the discovery rules in most states, the term “docu-

ment” is now defined to include “all retrievable information in computer storage.” Accordingly, although most trial or discovery subpoenas or requests now address the requirement to produce electronic files – as well as paper documents – the extent to which a firm must search its electronic records, files, servers, employee hand-held units and the like remains unsettled, particularly for items that were electronically generated but deleted or changed online. As an industry notoriously poor at record-keeping, construction and engineering firms are thus increasingly instituting document-retention programs to guide project superintendents and managers on how to deal with the “paperless” project.



It is imperative, from a legal perspective, to implement a plan and to follow it religiously. A record of the project drawing and specification changes, architectural reviews, inspections and approvals is important for not only later warranty, workmanship, dealer, acceleration or other project specific/close-out claims, but for potential negligence (wrongful death or other suits) that can be filed years later arising out of alleged deficient construction or architectural errors and omissions.

What is It?

A records-retention program defines the period of time during which records are maintained, and specifies procedures for the disposition of documents, of all forms and types. Any records retention program should address the following six points:

- The period of time during which records have operational, legal, fiscal or historical value
- The period of time records are considered active and must be maintained in the primary filing areas
- The point in time when records can reasonably be transferred to a secondary storage facility
- The method of records disposal
- The procedures for operation and ensuring compliance with the retention program
- The relationship between records retention and other aspects of the records management program

Why Do You Need It?

Many benefits can be derived from implementing a records-retention program. First, such a program can reduce storage expense and volume. Next, a records program mandates a uniform and consistently applied plan including specific procedures and actions to be taken, and the timing of the same. This reduces the opportunity for inconsistent, reckless or personally motivated records disposal.

Further, in many jurisdictions, businesses are subject to state and federal requirements governing the maintenance, protection and/or retention of the records. A proper program identifies the legal requirements that apply and specifies the period of time records must be retained. Without such programs, companies may retain records too long or destroy them too soon.

The existence of a program may be introduced as evidence to demonstrate that the firm has attempted to dispose of records in accordance with published laws, in the ordinary course of its business and with no motivation to conceal unfavorable information. In addition, the program will allow for the creation of a log of destroyed files so opposing counsel cannot argue a box of records is conveniently lost or misplaced.

The program must also direct that any document destruction be immediately suspended when litigation or a government investi-

gation is pending or imminent. Further, a comprehensive records-retention program will not only preserve existing records but will ensure that records are not "created" during the course of a case or proceeding which were not contemporaneously produced in the course of the project.

What is required?

Rules mandate periods of retention for numerous categories of documents, including but not limited to tax filing, OSHA and ADA compliance. Failure to comply can result in significant fines and court-ordered sanctions under Federal Rule 24 or similar state statutes, or worse, adverse judgments or rulings. Also, numerous states have adopted guides to records-retention requirements and/or statutes.

Any document-retention program must focus on the company's use and creation of electronic records. For instance, if the project superintendents and managers use handheld messaging, efforts must be made to gather and store such records at a minimum at the conclusion of a project, but more appropriately, at regular intervals during the course of the job.

If a company maintains such records in the ordinary course of its construction job files, most states, and Federal Rule of Evidence 1003, will allow for its introduction as evidence, even if no paper original records were ever generated until the course of discovery in a case. Failure to comply with these policies can be viewed by a court or jury as presumptive evidence of document spoliation and bad faith, however.

Implement It and Adhere to It

No matter the size of your organization, a prudent construction or engineering firm will systematically develop a records-retention program that:

- Covers all records including copies and electronic files
- Identifies appropriate procedures for obtaining written approvals for all records-retention schedules
- Provides for the suspension of document destruction where litigation is imminent

In addition, the firm will implement and strictly adhere to the policy and will institute appropriate control and management provisions. Although sources such as the nonprofit Association of Records Managers and Administrators have literature on records-retention policies, this is no substitute for legal advice. You should seek counsel as to any governing standards, rules, regulations or laws applying to your firm. ■

Karen P. Layng is the chairperson of the Construction Law Practice at Vedder, Price, Kaufman & Kammholz PC. The law firm maintains offices in Chicago, New York City and Roseland, N.J. For more information, call 312-609-7500 or e-mail kplayng@vedderprice.com.