

Information Requirements Clearinghouse

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Legal Requirements for Filing Systems and Indexes

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The law generally does not require organizations to maintain any particular type of filing system or index to facilitate retrieval of files or individual documents. Instead, the law often specifies functional recordkeeping requirements — records must be available for inspection and audit, maintained for the requisite time period or submitted to government agencies.

Even without specific filing or indexing requirements, an organization must be able to find relevant records within a reasonable time frame to meet its operational needs for information. Records do not serve the needs of an organization if they cannot be found or can only be found after an extensive, expensive search. "De facto destruction" occurs when records exist but cannot effectively be found — since they cannot be found it is like they have been destroyed.

Some regulations do specify specific indexing requirements for records. Appropriate filing systems and indexes may be required in other circumstances as the only means of complying with the regulation. Finally, some courts have imposed adverse legal consequences on organizations for poor indexing and filing systems that deprive parties in litigation of relevant information.

Specific Regulations Requiring Indexing Systems

Some legal requirements for indexing systems relate specifically to microfilm programs, others relate to specific types of records, regardless of record media. The following is an extensive (but not exhaustive) listing of specific indexing requirements found in United States federal law:

The United States Department of Agriculture, Agricultural Stabilization and Conservation Service, requires that indexes be maintained when records from cotton warehouses are microfilmed: ¹

- **§735.17. Copies of receipts.**

* * * * *

(c) If copies are retained on microfilm, the warehouseman shall:

* * * * *

(2) Arrange, index, and file the films in such a manner as to permit the immediate location of any particular microfilm record * * *.

The U.S. Department of Agriculture, Animal and Plant Health Inspection Service, requires that an index be maintained on pedigree certificates for animal breeds maintained on microfilm: ²

- **§151.11 Form of books of record.**

* * * * *

(b) * * * The microfilm carton shall be indexed to state the numbers of the pedigree certificates on the roll of film it contains.

The U.S. Department of Energy requires manufacturers to maintain an index of records supporting the certification tests for energy conservation: ³

- **§430.62. Submission of data.**

* * * * *

(d) *Maintenance of records.* (1) The manufacturer of any covered product subject to any of the energy performance standards or procedures described in this part shall establish, maintain, and retain the records of the underlying test data for all certification testing. Such records shall be organized and indexed in a fashion which makes them readily accessible for review. * * *

The U.S. Department of Transportation, Federal Aviation Administration, requires air carrier records maintained in machine-readable media to be appropriately indexed: ⁴

- **§249.3 Preservation of records.**

* * * * *

(b) Each record kept in a machine-readable media shall be accompanied by a statement clearly indicating the type of data included in the record and certifying the information contained in it is complete and accurate.

* * * * *

The record shall be indexed and retained in such a manner so that they are easily accessible and the carrier shall have the facilities available to locate, identify and reproduce the records in readable form without loss of clarity. * * *

- **§249.4 Photographic copies.**

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(c) Microfilm records should be indexed and retained in such a manner as will render them readily accessible, and the company shall have facilities available to locate, identify and read the microfilm and reproduction in paper form. * * *

§249.20 Preservation of records by certified air carriers.

Each certified air carrier shall retain * * *

1. General and subsidiary ledgers or their equivalents:

* * * * *

(b) Indexes to general and subsidiary ledgers [3 years].

The Department of Commerce, Bureau of Export Administration states that any party required to maintain records for export clearance shall maintain an index for records maintained on microfilm: ⁵

• **§787.13. Recordkeeping.**

* * * * *

(g) *Requests for exceptions to recordkeeping requirements.*

* * * * *

(3) *Guidelines for micrographic systems.* To maintain records under this exception, a micrographic system shall have the following minimum requirements:

* * * * *

(iv) A detailed index of all micrographic data shall be maintained, and arranged in such a manner as to permit the immediate location of any particular record, location of all documents relating to a given transaction, and determination of disposition of corresponding original documents.

The Commodity Futures Trading Commission specifies indexes for records maintained on microfilm or optical disk: ⁶

• **§1.31. Books and records; keeping and inspection.**

(a) * * *

(2) In order to permit the immediate location of any particular record:

(i) Arrange, index and file microfilm or microfiche and preserve the index and file in such a manner as to permit the immediate location of any particular record; and

(ii) Create a directory structure for files of records and an index for records on optical disk, and preserve the files, index and directory structure in such a manner as to permit the immediate location of any particular record. * * *

The Securities and Exchange Commission states that records maintained by broker-dealers on microfilm must be appropriately indexed: ⁷

• **§240.17a-4. Records to be preserved by certain exchange members, brokers and dealers.**

* * * * *

(f) The records to be maintained and preserved pursuant to §17a-3 and 17a-4 may be immediately produced or reproduced on microfilm and be maintained and preserved for the required time in that form. If such microfilm substitution for hard copy is made by a member, broker, or dealer, he shall (1) at all times have available for Commission examination of his records, pursuant to §17(a) of the Act, facilities for immediate, easily readable projection of the microfilm and for producing easily readable facsimile enlargements, (2) arrange the records and index and file the films in such a manner as to permit the immediate location of any particular record * * *

The Securities and Exchange Commission issued a No-Action Letter dated June 18, 1993 that adds the following indexing requirements for optical disk records:

• 3. The broker-dealer must arrange the records and indexes, and file the optical disks in such a manner as to permit the immediate location of any particular record.

* * * * *

7. The broker-dealer must organize and index accurately all information contained in every original and duplicate optical disk to ensure prompt access to the records.

(a) At all times, a broker-dealer must be able to have such indexes available for examination by staffs of the Commission and the SROs of which the broker-dealer is a member.

(b) Each index must be duplicated and the duplicate copies must be stored in an off-site location, separately from the original copy of each index.

(c) Original and duplicate indexes must be preserved for the time required for the indexed records.

The Department of Energy, Federal Energy Regulatory Commission, states that records maintained by public utilities and licensees in microfilm or computer media shall be properly indexed: ⁸

• **§125.2 General instructions.**

* * * * *

(g) *Media.* (1) All records created or maintained in a media or format other than readable entries on paper shall:

(i) Be prepared, arranged, classified, identified, and indexed as to permit the subsequent location, examination, and reproduction of the record to a readable media;

* * * * *

(m) *Index of records.* At each office of the public utility or licensee where records are kept or stored, such records are herein required to be preserved shall be so arranged, filed, and currently indexed that they may be readily identified, and made available to representatives of the Commission.

The Department of Health and Human Services, Food and Drug Administration, requires manufacturers of medical devices to maintain appropriate indexes for records: ⁹

- **§814.82 Preapproval requirements.**

* * * * *

(6) Maintenance of records for specified periods of time and organization and indexing of records into identifiable files to enable FDA to determine whether there is reasonable assurance of the continued safety and effectiveness of the device.

* * * * *

The Environmental Protection Agency requires manufacturers of new motor vehicles to maintain emission certification records with an appropriate index: ¹⁰

- **§86.090-7 Maintenance of records; submittal of information; right of entry.**

(a) The manufacturer of any new motor vehicle (or new motor vehicle engine) subject to any of the standards or procedures prescribed in this subpart shall establish, maintain and retain the following adequately organized and indexed records.

* * * * *

The Environmental Protection Agency also requires that manufacturers of pesticides maintain records of product testing with an appropriate index: ¹¹

- **§160.190 Storage and retrieval of records and data.**

* * * * *

(e) Material retained or referred to in the archives shall be indexed to permit expedient retrieval.

The Department of Health and Human Services, Health Care Financing Administration, requires that hospitals receiving Medicare payments maintain appropriately indexed medical records: ¹²

- **§482.24 Condition of participation: Medical record services.**

* * * * *

(b) *Standard: Form and retention of record.*

* * * * *

(2) The hospital must have a system of coding and indexing medical records. The system must allow for timely retrieval by diagnosis and procedure, in order to support medical care evaluation studies.

* * * * *

The Federal Communication Commission requires communication common carriers (including telephone companies) to maintain an index of records: ¹³

- **§42.4 Index of records.**

Each carrier shall maintain at its operating company headquarters a master index of records. The master index shall identify the records retained, the related retention period, and the locations where the records are maintained. * * * At each office of the carrier where records are kept or stored, the carrier shall arrange, file, and currently index the records on site so that they may be readily identified and made available to representatives of the Commission.

- **§42.5 Preparation and preservation of reproductions of original records.**

* * * * *

(b) A paper or microfilm record need not be created to satisfy the requirements of this part if the record is initially prepared in machine-readable medium * * * The records shall be indexed and retained in such a manner that they are easily accessible, and the carrier shall have the facilities available to locate, identify and reproduce the records in readable form without loss of clarity.

The Interstate Commerce Commission states that records of freight carriers shall be appropriately indexed: ¹⁴

- **§1220.3 Preservation of records.**

* * * * *

(b) Records not originally preserved on hard copy shall be accompanied by a statement executed by a person having personal knowledge of the facts indicating the type of data included within the records. * * * The records shall be indexed and retained in such a manner as will render them readily accessible.

§120.6. Schedule of records and period of retention.

M. Miscellaneous

1. Index of records (Maintain: until revised as record structure changes.)

The Internal Revenue Service states indexing requirements for taxpayer records maintained on microfilm: 15

- **Revenue Procedure 81-46.**

§5. Requirements.

* * * * *

8. A detailed index of all microfilmed data must be maintained and arranged in a manner that permits the immediate location of any particular record;

* * * * *

Although many of the requirements for indexing relate to microfilm or computer records, some of the requirements relate specifically to paper records required to be maintained by an organization. While the listing above identifies most of the specific requirements for indexes, the list is not exhaustive. You should check the specific legal requirements for your regulatory agencies to determine whether specific requirements exist.

Indexing Requirements Apparent But Not Specifically Stated

Although most regulatory agencies do not specifically require that indexes or adequate filing systems be maintained, they do require that organizations maintain the required records and make those records available during an audit by the agency.

For example, the Internal Revenue Service states the following recordkeeping requirement for taxpayers: 16

- **§1.6001-1. Records.**

(a) *In general.* Except as provided in paragraph (b) of this section, any person subject to tax . . . shall keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, and other matters required to be shown by such person in any return of such tax or information.

The Internal Revenue Service does not specifically state the type or form of records to be maintained, nor does it specify that an index of these records be maintained. However, the presumption in tax law is that a taxpayer can deduct certain items from gross income (e.g., expensed, salaries, depreciation, depletion, etc.) and reduce their tax amount, provided that those deductions can be substantiated. During a tax audit or request for information, the Internal Revenue Service can deny deductions when taxpayers cannot find records to support their claims. 17 Indexes thus become a critical basis for finding records that support the deductions in case of challenge. The economic implications of additional taxes for failure to find records and prove deductions can be catastrophic to an organization.

Similarly, other regulatory agencies reserve the right to audit an organization's records to determine compliance with the law. If an organization cannot find records due to poor indexes, the agency may treat it as if it never maintained required records and failed to comply with the law. Such organizations can be subject to severe penalties such as fines, loss of rights, imprisonment and even revocation of licenses to do business. Again, the economic ramifications of poor recordkeeping and indexes can severely affect an organization.

Court Requirements for Filing Systems and Indexes

Courts typically do not specify requirements that organizations maintain any particular form of filing system or indexing scheme. But they do have an interest in whether each party can appropriately produce relevant records requested by the other party under court-ordered subpoena or Rule 26 requirements. 18

Courts recognize some appropriate reasons for failing to provide requested records. For example, the records may have been destroyed in the regular course of business under an approved records retention program.

Alternatively, the records may be covered by certain privileges (e. g., attorney-client privilege) that excuse the party from turning them over to the other party.

Courts reject contentions that the duty to provide records to other litigants or to the court is excused by poor, ineffective record systems or indexing. In *Alliance to End Repression v. Rochford*, 19 the court rejected an objection to the discovery request on the ground that the production of the information would be unduly burdensome because the materials were not in an organized filing system:

- To allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purpose of the discovery rules. 20

The judge in *United States of America v. ABC Sales & Service, Inc.* 21 cited the *Alliance* case when rejecting a contention by the defendant that it had made "diligent efforts" to locate the files requested but that they were buried among several million files.

In *Shatzkamer v. Eskind*, 22 the court sanctioned the City of New York for not keeping legally-required notices of defects in roads and sidewalks so that injured parties could determine whether the city had prior notice of any defect. The

indexing system for these notices was so ineffective, it prevented the plaintiffs from finding information that would prove that the city had prior notice of defect:

- While the defendant was not required to use any particular system of indexing under [the applicable law], it could not and cannot choose to index notices of defect... in so scattered and Byzantine a fashion as to deprive those with legitimate claims against the city of the right to maintain civil action for damages because prior notices of defect that exist cannot be found, either by the city or by the plaintiff.²³

On December 31, 1994, the Supreme Court approved a revised version of the Federal Rules of Civil Procedure, Rule 26. The new Rule 26 imposes fundamental new requirements on litigation in federal courts. No longer must a party request relevant information from the other. Instead, near the beginning of each federal lawsuit (generally within 85 days), each party now has an affirmative duty to identify relevant records and make information about those records available to the other party.

Previously, courts tolerated delays in responding to discovery requests for many months and even years. Under the new law, the required time period is stated and could reasonably be enforced without extension.

Unless an organization properly maintains records, and maintains adequate indexes to allow them to quickly find records throughout the organization, many may not be able to comply with the short time period. Failure to comply could result in the imposition of sanctions and the loss of rights in litigation.

While the courts may not require an appropriate filing system or indexing scheme, they will require an organization to reasonably be able to find its own records and, under Rule 26, find those record within a relatively short period of time.

¹ 7 CFR §735.17.

² 9 CFR §151.11.

³ 10 CFR §430.62.

⁴ 14 CFR §249.3, §249.4, §249.20.

⁵ 15 CFR §787.13.

⁶ 17 CFR §1.31.

⁷ 17 CFR §240.17a-4. *Also see* SEC No Action Letter dated June 18, 1993 permitting optical disk records to be used in place of originals.

⁸ 18 CFR §125.2. *See also* 18 CFR §225.2 for indexes of records maintained by natural gas companies and 18 CFR §356.6 and §356.8 for records of oil pipeline companies.

⁹ 21 CFR §814.82.

¹⁰ 40 CFR §86.090-7. *See also* §86.078-7, §86.091-7, §86.440-78, §86.605-88, §86.1005-88, §86.1108-87.

¹¹ 40 CFR §160.190.

¹² 42 CFR §482.24

¹³ 47 CFR §42.4, §42.5.

¹⁴ 49 CFR §1220.3, §1220.6.

¹⁵ Internal Revenue Service, Revenue Procedure 81-46 §5.8.

¹⁶ 26 CFR 1.6001-1.

¹⁷ *See Yoffe et al v. United States*, 153 F.2d 570 (1st Cir. 1946) cited in *Law, Records and Information Management: The Court Cases*, Information Requirements Clearinghouse (Denver: 1994), p. 103.

¹⁸ *See Skupsky, Donald S.*, "The New Legal Reason for a Records Management Program", *Records Management Quarterly*, April 1994.

¹⁹ *See Alliance to End Repression v. Rochford*, 75 F.R.D. 441, 447 (N.D.Ill. 1977) cited in *Law, Records and Information Management: The Court Cases*, pp. 151-152.

²⁰ *Id.*, quoting *Kosloski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (1976), p. 152.

²¹ *United States of America v. ABC Sales & Service, Inc.*, 95 F.R.D. 316, (D.Ariz. 1982) cited in *Law, Records and Information Management: The Court Cases*, p. 512-513.

²² *Shatzkamer v. Eskind*, 528 N.Y.S. 2d 968 (N.Y. City Civ. Ct. 1988) cited in *Law, Records and Information Management: The Court Cases*, p. 152.

²³ *Id.* at 972.