

Information Requirements Clearinghouse

Phone: 303-721-7500

E-mail: irch@irch.com
[Home](#) | [Products](#) | [Resources](#) | [Support](#) | [Web Store](#)

Friday May 6, 2005

PDF Version

Establishing Retention Periods for Electronic Records



- ▶ [News](#)
- ▶ [About Us](#)
- ▶ [Products](#)
- ▶ [Support](#)
- ▶ [Resources](#)
- ▶ [Web Store](#)
- ▶ [Contact Us](#)

Information is created and maintained in many forms: paper, microfilm, computer, and optical disk. When establishing a legally valid records management program, most organizations realize that all records, not just paper and microfilm records, must be included. A records retention schedule establishes the retention period for all records, regardless of form. Records Management principles such as records retention and official version designation (Office of Record) also apply to electronic records.

This article reflects upon some major records management issues that affect computer records. Rather than consider all forms of computer-generated information as part of the records management program, the discussion below attempts to apply traditional records management concepts of "record" and "non-record" (work-in-progress) status to help determine the retention of computer records.

The computer industry and the courts refer to all computer information as "records." For purposes of evidence, all computer records would be subject to subpoena by the adverse party under rules of discovery. This could include computer records related to the general ledger, communications in the electronic mail system, or even the word processing files used to create documents.

From an organization's perspective, however, some of these so-called "records" are really tools used to create official company records, not the official records themselves. Computer information may be just "work-in-progress" to facilitate the preparation or revision of the final printed paper documents. For example, computer information such as word processing files are merely tools or work-in-progress used to prepare drafts and the final official paper records. The author does not intend for the work-in-progress to be reviewed by others, to be treated as official records, nor to reflect the official position of the organization. Similarly, electronic mail records and voice mail records provide a convenient substitute for non-documented verbal communication. In short, some of these "computer records" only represent a step in the process of creating official company records.

In order to apply records management principles to computer information, you first determine which computer information is a "record" and which is a "non-record." You may elect to establish some of the following principles:

- Electronic mail is a non-record unless converted to records by some formal process.
- Voice mail is always a non-record.
- Word processing files and superseded printed drafts are non-records. The final printed outputs are records.
- One set of computer data containing accounting and tax information plus one copy of the visible output (e.g., printed report or computer output microfilm) are records under the Internal Revenue Service's Revenue Procedure 91-59.
- Computer back-up tapes and other duplicate computer files are non-records.
- Databases and other data compilations that are used for multiple purposes are records.

Some of these principles are reflected in the discussion below. The exact implementation will depend on the needs of your organization.

When computer information is characterized as "record" material, it must be retained according to your organization's records retention schedule. When computer information is characterized as "non-record" material, it can be destroyed at the discretion of the user — generally, after a relatively short period of time or after the official record is produced.

Some common types of computer information are discussed below.

Electronic Mail

Most larger organizations have established electronic mail systems. Electronic messages can be sent within the electronic mail network, or between the network and other computers through modems. Once created and sent, these electronic messages will often remain available on the system for many years, until the sender or recipient exercises the option to destroy the electronic records. Electronic mail messages may be printed onto paper at the users option.

Information system managers generally develop elaborate procedures to backup and preserve the electronic mail records for many years. The backups can be used to reconstruct the electronic records in case of system failure or inadvertent destruction of records. Even after the original electronic records have been removed from the primary on-line storage media, many years of electronic mail history remain available on magnetic tapes.

Unfortunately, organizations rarely determine the records retention period for electronic mail. Most believe that "longer is better."

When individuals communicate via electronic mail, they often utilize "loose" language that may be appropriate for internal conversations but would be totally inappropriate for formal written documents. Some people use verbiage that reflects personal opinions or biases, believing that electronic mail is personal or private.

Court cases have now confirmed that electronic mail is neither personal nor private. Electronic mail messages can legitimately be reviewed and used by supervisors without infringing on the rights of employees.

During litigation or government investigation, all electronic files of an organization are subject to subpoena and review by the other party. Electronic mail messages will be treated like records of the organization — reflecting the position and actions taken by the organization! It is possible for the other party to require an organization to examine the entire electronic mail history to identify all communications between certain individuals or related to certain subjects. If electronic mail records have been backed-up over several years, this would represent a significant burden, and a significant legal risk.

The informal nature of the electronic mail messages could also be harmful to the organization. Messages and "loose" language could easily be taken out of context by judges or regulators, leading to inappropriate conclusions and potentially

damaging conclusions.

Electronic mail rarely represents the "official" position of the organization. These communications reflect preliminary thought or ideas, have not been reviewed by the organization and typically only reflect the personal opinion of the parties involved. Yet, since employees of the organization created these communications, courts and regulatory agencies can construe these records to reflect the organizational view.

Electronic mail messages should automatically be erased from the system after a short period of time — 15 to 30 days. Backup tapes of the electronic mail should also be destroyed within this period.

Some individuals may need to preserve electronic messages for a longer period of time. The system can allow users to select an option to preserve selected messages for an additional 15 to 30 days.

Alternatively, selected messages can be "formalized" and converted into an official company record by either moving the records to a special electronic storage area on the computer or producing paper prints. The electronic method would require some formal activity such as assigning a record series or records retention code to the records or otherwise identifying the records as official organization records.

Electronic mail systems generally allow the transmission of messages to multiple locations. Rather than reproducing the electronic file at each location, the electronic record is typically maintained at one location on disk but made accessible to multiple users. Other systems may replicate the electronic message in the other locations. The rules established above for electronic mail messages must apply to all locations containing the message.

The discipline of managing electronic mail can readily be accomplished within a network. The problem occurs when stand-alone or multiple networks communicate messages. In these cases, actual copies of the electronic mail message could exist in multiple locations.

Within an organization, procedures can be established to control the retention of each electronic mail message at the source. Even company-operated stand-alone microcomputers could contain an "executive program" or other software product that imposes records retention discipline similar to that discussed for the electronic mail networks. For example, all company-purchased microcomputers could contain identical electronic mail software that would automatically erase electronic mail messages (even those transmitted to or received from an outside source) after the requisite period of time. Additionally, the procedures for formalizing records or converting electronic mail records to official company records could also be incorporated.

An organization, however, has no control over electronic mail messages created by or sent to computer systems outside the organization. This case is similar to when an outside organization creates a document and then submits it to your organization. Both your organization and the outside one would maintain a set of records according to their respective records retention programs.

Due to the potential legal risks associated with electronic mail messages, special care should be taken for messages sent outside the organization. Perhaps, only official company records should be sent outside your organization — regardless of whether the records are in paper or electronic form.

Voice Mail

Voice mail is similar to electronic mail except that the messages consist of voice communication rather than typewritten communication. Voice mail consists of even more informal messages than electronic mail. The potential for misinterpretation or use of loose language is even greater.

Voice mail is typically used to communicate short messages within an organization when the individual is not available to receive a telephone call. Procedures should generally be established to redirect or transcribe voice mail messages when an individual is unavailable for an extended period of time.

Voice mail, including all backups, should automatically be erased within the same 15 to 30 day period. Due to the short-term nature of voice mail, no procedures should be established to allow the formalization of voice mail records nor the preservation of voice mail for a longer period of time.

Electronic Records with Tax Implications

Most organizations now utilize computers as part of their accounting system. Accounting transactions are recorded in the regular course of business and incorporated into the general ledger and other reports that reflect the status of the accounting system.

In Revenue Ruling 71-20, the Internal Revenue Service recognized that computer records meet the requirements for recordkeeping under the Internal Revenue Code. Revenue Procedure 91-59 specifies that taxpayers utilizing computer records must maintain the computer records in both electronic ("machine sensible") and visible format (paper or microfilm) for the period of time they are subject to a tax audit. A taxpayer may be asked to produce the electronic records in a form that is readable on a current computer system and make that data available to the IRS auditor. For this legal reason, computer records related to accounting and tax matters should be treated as official company records.

Taxpayers should then maintain the electronic records related to tax matters for the period of time they are subject to tax audit. According to Title 26, United States Code, Section 6501, the Internal Revenue Service may audit you for the following periods:

- within three years after you file a tax return for normal circumstances,
- within six years after you file a tax return if you understate your gross income by 25% or more, and
- indefinitely, in case of false return, willful attempt to evade tax, no return or extension by agreement.

Most organizations have established a records retention period of six years (and sometimes even the traditional seven years) to protect themselves during the most likely time period during which an audit could occur. This time period must be extended if the taxpayer signs an agreement to extend the audit with the Internal Revenue Service. The electronic version of records subject to tax review will normally be maintained for the full records retention period.

Revenue Procedure 91-59 describes an exceedingly difficult burden for the taxpayer related to the preservation of electronic records. Taxpayers must maintain the electronic records for the requisite period but also must make the records available on a current computer system. This burden is exceedingly difficult because as taxpayers will usually convert to newer, perhaps, incompatible technologies over time. After a period of just a few years, the organization may not have equipment or software that can read the old tapes. Even if the equipment and software exist, magnetic tapes start to deteriorate and may become unreadable after a few years, even if the tapes are properly stored and periodically rewound.

With the increased use of electronic data interchange, attention to the retention requirements for electronic records becomes even more important. Revenue Procedure 91-59 recognizes electronic data interchange records and specifies that these records may be retained in electronic form unless a visible record is requested by a tax auditor. The taxpayer will be responsible for ensuring the continued preservation and retention of these electronic records for the full period they are subject to the administration of any tax law.

Other than this revenue procedure, no other law known to this author requires an organization to maintain both the electronic and visible form of the same information. You may, therefore, maintain records in any form unless the law either specifies the form or restricts the forms that can be used. In the case of tax records, however, you must maintain both the electronic and visible version of the same information.

Databases

Databases may consist of a number of files and fields of data that provide useful information to the organization. Typically, databases are modified over time through the addition, deletion, or modification of records. Reports are periodically prepared to reflect information from the databases that may be useful for specific purposes. Due to the large volume of information typically maintained in databases, reports rarely reflect "all" the information found on the database. Well-operated systems will provide periodic backups to restore databases in case of accidental erasure or disaster.

Many databases contain tax-related information. Their records retention period will be established based upon the tax issues raised above.

Organizations maintain some databases for reasons other than tax. The information could include mailing lists, customer information, marketing information, parts inventory, etc. Since reports typically do not reflect the entire content of the database, the electronic form of the database contains different information than the visible reports. Regardless, the electronic databases are often more useful than the paper reports. For this reason, visible reports are not equivalent to electronic databases.

For records retention purposes, most organizations will want to uniquely define a database as an official record of the organization, even though it is a computer record. The retention period might appropriately be established as "until superseded (SUP)" to reflect that only the current version needs to be maintained. Backups can then be destroyed after a relatively short period of time such as one month. Other organizations may elect to maintain a "snapshot" of the database in electronic form on an annual basis and retain the snapshot for a designated retention period to reflect user or operational needs. For example, the annual snapshot of the database may be appropriate to determine the state of certain activity at the close of previous years.

Word Processing Files

Many organizational documents are prepared using word processing. A draft of the document is generally typed into the word processing system from hand-written notes or other materials, or transcribed from automated dictation devices. The word processing document is then printed and revised until the final printed version is accepted by the author.

For records retention purposes, the original notes and recorded media from dictation should be considered non-record material or work-in-progress. This version should be destroyed in a relatively short period of time after the final draft has been accepted. Similarly, successive drafts of a document and the successive revisions of the electronic word processing file should be considered non-record or work-in-progress. Only the final approved, paper record should be considered an official organization document.

If the final product of the word processing process is a communication in an electronic mail system, the communication will only become an official record of the organization if the formalization process discussed above is followed.

For operational reasons, you may want to maintain some of the electronic-word processing files for extended periods of time to facilitate the revision of drafts. These decisions should be made based upon the importance of the final document produced and the likelihood of revision or use of the material for other purposes. The word processing operator would then destroy the computer version when it is no longer needed.

Lawyers often argue for the preservation of multiple drafts of contracts. They argue that problems with a final contract can often be resolved by determining the party's intent through the use of previous drafts. In some cases, the final agreement fails to include provisions that had been included and approved in previous drafts. Other attorneys argue that the "Parole Evidence Rule" prohibits the consideration of any evidence in court outside of the final written document of the parties. In fact, most contracts contain a clause that prohibits the consideration of previous drafts or other information that has not been incorporated into this final written document.

To meet the needs of attorneys, it may be appropriate for the Legal Department to maintain multiple, printed drafts of contracts as part of the final contract file. This decision must be made based upon the needs of the attorneys and experience in this area. But versions of the computer files related to each draft should not be kept — only the most current version.

Word processing computer information should be treated differently than databases. The computer information from a word processing file is generally printed letter-for-letter onto a final paper document. In essence, the paper document "mirrors" the information in the word processing systems so only the most useful version — the printed, paper version — should be kept.

Summary

Records retention of computer records present difficult challenges. This article analyzes some common types of computer records. Organizations addressing records retention of computer records should first determine which form of the records will be the official organization records — computer, paper, or microfilm — and what will be the status of the computer records. With this approach, some computer information will be treated as official records of the organization while others will be considered non-records or work-in-progress.