



Document Retention Policies – What Every Nonprofit Should Know

Recently, the Internal Revenue Service (the “IRS”) released a significantly revised Form 990, the annual information return filed by most publicly supported exempt organizations. Through the release of the revised Form 990, the IRS indicated its intent to continue its scrutiny of the corporate governance policies of exempt organizations. Specifically, Part VI of the Form 990 includes several questions regarding corporate governance, including questions about board structure and organizational policies. In particular, in Question 14, the IRS now asks exempt organizations whether they have a written document retention policy in place. Although not required by tax law, the IRS increasingly views such policies and good governance practices as a means to establishing transparency and ensuring compliance.

Furthermore, exempt organizations should be aware of certain requirements of the Sarbanes-Oxley Act of 2002 (the “Act”) that apply to nonprofits: specifically, the imposition of criminal liability on exempt organizations that destroy records with the intent to obstruct a federal investigation. While the Act does not explicitly require the adoption of a document retention policy, it is recommended that exempt organizations

adopt and abide by a document retention policy as a “best practice.”

Document Retention Policies

A document retention policy sets guidelines for the length of time that various documents – ranging from contracts to employment agreements to vendor receipts – will be held in the files of the organization. The adoption of a document retention policy serves to notify employees, officers, and directors of the time periods for which documents should be maintained, and helps to guard against improper disposal or destruction of documents with the intent of obstructing an investigation.

A document retention policy should contain a list of document categories, along with the length of time (months or years), that the organization should retain such documents. In addition, these policies should contain a provision that restricts employees, officers, and directors of the organization from destroying documents in anticipation of litigation. Prior to establishing document retention time periods, organizations should consult with its legal counsel regarding local laws, as they vary by jurisdiction, paying particular attention to both statutes of limitations and statutory and regulatory requirements to maintain originals or copies.

May 2008

Public Inspection

There are two documents that a tax-exempt organization must retain and make available for public inspection:

- The organization's original IRS Form 1023 – application for exempt status. This must be retained permanently.
- The organization's Form 990 or 990 EZ – annual information return. This should be kept for a minimum of seven years.

Part C of Section VI of the revised Form 990 asks each organization whether it makes these and other organizational documents available to the public through:

- its website,
- a third party website, or
- upon request.

A nonprofit is required to make Forms 1023 and 990 available for public inspection at its offices and must provide copies to the public upon request unless the forms are widely available on the Internet.

As a result, many nonprofits post their Form 990s on their websites. In addition, websites like www.Guidestar.org make most nonprofits' Form 990s available to the public. At this time the IRS has not stated that forms which are available on a third party website will meet its requirements.

Sample Policy

A sample document retention policy is attached to this notification. The sample policy may not be appropriate for every exempt organization. Your organization's

actual policy should be drafted in consultation with your legal counsel.

Additional Resources

You may find the following information helpful in reviewing your organization's good governance practices:

- Redesigned Form 990, Schedules and Instructions
<http://www.irs.gov/charities>
- Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations (October 2007)
<http://www.nonprofitpanel.org>
- Guide to Nonprofit Corporate Governance in the Wake of Sarbanes-Oxley, ABA Coordinating Committee on Nonprofit Governance, American Bar Association (2005)

This communication is provided by the D.C. Bar Pro Bono Program and Winston & Strawn LLP as a public service solely for informational purposes, without any representation that it is accurate or complete. It does not constitute legal advice and should not be construed as such. It does not create an attorney-client relationship between the recipient and any other person, or an offer to create such a relationship. This communication contains information that is current as of the date it is written. However laws change, and as a result the information may no longer be timely. Consult an attorney if you have questions regarding the contents of this communication.

May 2008

DOCUMENT RETENTION POLICY

[NAME OF ORGANIZATION]

ARTICLE I

PURPOSE

The purposes of this document retention policy are for [Name of Organization] (the "Organization") to enhance compliance with the Sarbanes-Oxley Act and to promote the proper treatment of corporate records of the Organization.

ARTICLE II

POLICY

Section 1. General Guidelines. Records should not be kept if they are no longer needed for the operation of the business or required by law. Unnecessary records should be eliminated from the files. The cost of maintaining records is an expense which can grow unreasonably if good housekeeping is not performed. A mass of records also makes it more difficult to find pertinent records.

From time to time, the Organization may establish retention or destruction policies or schedules for specific categories of records in order to ensure legal compliance, and also to accomplish other objectives, such as preserving intellectual property and cost management. Several categories of documents that warrant special consideration are identified below. While minimum retention periods are established, the retention of the documents identified below and of documents not included in the identified categories should be determined primarily by the application of the general guidelines affecting document retention, as well as the exception for litigation relevant documents and any other pertinent factors.

Section 2. Exception for Litigation Relevant Documents. The Organization expects all officers, directors, and employees to comply fully with any published records retention or destruction policies and schedules, provided that all officers, directors, and employees should note the following general exception to any stated destruction schedule: If you believe, or the Organization informs you, that Organization records are relevant to litigation, or potential litigation (i.e., a dispute that could result in litigation), then you must preserve those records until it is determined that the records are no longer needed. That exception supersedes any previously or subsequently established destruction schedule for those records.

Section 3. Minimum Retention Periods for Specific Categories.

- (a) Organizational Documents. Organizational records include the Organization's articles of incorporation, by-laws and IRS Form 1023, Application for Exemption.

Organizational records should be retained permanently. IRS regulations require that the Form 1023 be available for public inspection upon request.

- (b) Tax Records. Tax records include, but may not be limited to, documents concerning payroll, expenses, proof of contributions made by donors, accounting procedures, and other documents concerning the Organization's revenues. Tax records should be retained for at least seven years from the date of filing the applicable return.
- (c) Employment Records/Personnel Records. State and federal statutes require the Organization to keep certain recruitment, employment and personnel information. The Organization should also keep personnel files that reflect performance reviews and any complaints brought against the Organization or individual employees under applicable state and federal statutes. The Organization should also keep in the employee's personnel file all final memoranda and correspondence reflecting performance reviews and actions taken by or against personnel. Employment applications should be retained for three years. Retirement and pension records should be kept permanently. Other employment and personnel records should be retained for seven years.
- (d) Board and Board Committee Materials. Meeting minutes should be retained in perpetuity in the Organization's minute book. A clean copy of all other Board and Board Committee materials should be kept for no less than three years by the Organization.
- (e) Press Releases/Public Filings. The Organization should retain permanent copies of all press releases and publicly filed documents under the theory that the Organization should have its own copy to test the accuracy of any document a member of the public can theoretically produce against the Organization.
- (f) Legal Files. Legal counsel should be consulted to determine the retention period of particular documents, but legal documents should generally be maintained for a period of ten years.
- (g) Marketing and Sales Documents. The Organization should keep final copies of marketing and sales documents for the same period of time it keeps other corporate files, generally three years.

An exception to the three-year policy may be sales invoices, contracts, leases, licenses, and other legal documentation. These documents should be kept for at least three years beyond the life of the agreement.

- (h) Development/Intellectual Property and Trade Secrets. Development documents are often subject to intellectual property protection in their final form (e.g., patents and copyrights). The documents detailing the development process are often also of value to the Organization and are protected as a trade secret where the Organization:

May 2008

- (i) derives independent economic value from the secrecy of the information;
and
- (ii) has taken affirmative steps to keep the information confidential.

The Organization should keep all documents designated as containing trade secret information for at least the life of the trade secret.

- (i) Contracts. Final, execution copies of all contracts entered into by the Organization should be retained. The Organization should retain copies of the final contracts for at least three years beyond the life of the agreement, and longer in the case of publicly filed contracts.
- (j) Correspondence. Unless correspondence falls under another category listed elsewhere in this policy, correspondence should generally be saved for two years.
- (k) Banking and Accounting. Accounts payable ledgers and schedules should be kept for seven years. Bank reconciliations, bank statements, deposit slips and checks (unless for important payments and purchases) should be kept for three years. Any inventories of products, materials, and supplies and any invoices should be kept for seven years.
- (l) Insurance. Expired insurance policies, insurance records, accident reports, claims, etc. should be kept permanently.
- (m) Audit Records. External audit reports should be kept permanently. Internal audit reports should be kept for three years.

Section 4. Electronic Mail. E-mail that needs to be saved should be either:

- (i) printed in hard copy and kept in the appropriate file; or
- (ii) downloaded to a computer file and kept electronically or on disk as a separate file.

The retention period depends upon the subject matter of the e-mail, as covered elsewhere in this policy.