

HOW LONG DO I HAVE TO RETAIN THESE RECORDS - COMMON RECORD RETENTION AND DESTRUCTION ISSUES

Tony J. Renning
Strang, Patteson, Renning, Lewis & Lacy, s.c.
2935 Universal Court
Oshkosh, WI 54904
(920) 420-7527
trenning@strangpatteson.com

I. INTRODUCTION

School district accumulate all types of records (both paper and electronic) every year – records that soon become obsolete and cumbersome to retain.

Issues routinely arise regarding record retention and destruction.

II. WHAT IS A RECORD RETENTION POLICY?

A record retention policy provides for the systematic review, retention and destruction of documents received or created in the course of business. A record retention policy will identify documents that need to be maintained, contain guidelines for how long certain documents should be kept and save valuable computer and physical storage space. In addition, a record retention policy that is adhered to will be of assistance in the event of litigation.

Board policy.

III. WHY DO YOU NEED A RECORD RETENTION POLICY?

A. Business Efficiency. A record retention policy promotes efficiency in several ways:

1. Destruction of useless documents frees up valuable storage space.
2. A consistently enforced records retention policy means that you should be able to quickly locate important documents when you need them.
3. A records retention policy will reduce the time you and your employees spend handling and retrieving documents.

B. Protection in Litigation.

1. A record retention policy that is consistently followed may aid significantly in any litigation that may arise.
2. Not having the right document can mean the difference between winning and losing in litigation.

3. The intentional destruction of documents relevant to pending or future litigation (spoliation) may also severely undermine your position in litigation.
 4. If you do find yourself in litigation, or believe that litigation is imminent, the record retention policy must be suspended immediately – documents relevant to the pending or reasonably foreseeable litigation must not be destroyed.
- C. Compliance with Federal and State Laws and Regulations. Many documents must be kept for a specific period of time pursuant to federal, state or local laws. These laws include tax, employee benefit, occupational safety and wage and hour provisions, among others.
1. Tax-related documents – The Internal Revenue Service (IRS) can audit tax records for up to six (6) years in cases of suspected fraud.
 2. Employment-related documents – Employment laws such as the Fair Labor Standards Act (FLSA) require the retention of certain records for up to three (3) years.
 3. Health and safety-related documents – The Regulations of the Occupational Safety and Health Administration (OSHA) include record retention requirements that require retention of logs documenting work-related injuries and illnesses for five (5) years.
 4. Environmental records – The Environmental Protection Agency has record-keeping requirements related to the storage of certain chemicals.

This is only a short list of some of the federal laws and regulations that may affect the retention of documents. There are also specific state laws and regulations that apply specifically to school districts.

IV. WISCONSIN RECORDS RETENTION SCHEDULE FOR SCHOOL DISTRICTS.

- A. Wis. Stat. § 19.21. Wis. Stat. § 19.21(6) provides statutory guidance for the policy development, retention, transfer and destruction of school district records. A school district, except a first class city school district, may provide for the destruction of obsolete school records. Prior to any such destruction, at least 60 days' notice in writing of such destruction shall be given to the Wisconsin State Historical Society, which shall preserve any records it determines to be of historical interest. The Wisconsin State Historical Society may, upon application, waive the notice. The period of time a school district record shall be kept before destruction shall be not less than the current year plus six years unless a shorter period of time is fixed by the Public Records Board under Wis. Stat. § 16.61(3)(e) and except as provided under sub. (7). Wis. Stat. § 19.21 does not apply to pupil records under Wis. Stat. § 118.125.

B. Wis. Stat. § 19.21(6) provides for the following:

1. School districts may provide for the destruction of obsolete school records except for pupil records under Wis. Stat. § 118.125. However, prior to any destruction, at least 60 days' written notice must be given to the Wisconsin State Historical Society. The prior notice requirement enables the preservation of school records determined by the Wisconsin State Historical Society to be of historical interest. The Wisconsin State Historical Society may waive the notice requirement.
2. The period of time a school district record must be kept before destruction must not be less than seven (7) years, unless a shorter period of time is fixed by the Public Records Board.
3. The Wisconsin School District Records Retention Schedule provides recommended retention periods for records common to all school districts, denotes records of historical importance and describes a process for transfer of records to the Wisconsin State Historical Society as well as a procedure whereby the Wisconsin State Historical Society may waive the notice requirement.

School districts that adopt the Wisconsin School District Records Retention Schedule will find the retention, destruction and transfer of records to the Wisconsin State Historical Society more manageable.

Adoption of the Wisconsin School District Records Retention Schedule will:

- a. Enable disposal of some records in less time than the seven years generally required by the statutes.
 - b. Provide guidance regarding those school district records that should be preserved locally or are of interest to the Wisconsin State Historical Society; and
 - c. Eliminate paperwork for both the school district and the Wisconsin State Historical Society.
- C. District Options. The Schedule serves as a guidance against which to check the individual needs of each school district. A school district may adopt the entire Schedule, individual sections or a modified version. The Public Records Board along with the Wisconsin Department of Public Instruction recommends that school districts adopt the Wisconsin School District Records Retention Schedule and submit the Notification Form to the Wisconsin Historical Society.

D. Retention of Records applies to both hard copy and electronic formats.

Because of frequent technological change, including hardware and software obsolescence and media degradation, agencies must take steps to manage and protect

electronic records for as long as they are needed. To meet business needs and protect the legal, financial and historical interests of internal business operations and Wisconsin citizens, agencies must prepare and execute migration plans for electronic records as necessary to prevent them from becoming inaccessible during their retention periods.

- E. To Adopt The Schedule. School districts are advised to adopt the Schedule even though they may not have all the records listed in it. A school district may adopt the entire schedule, individual sections or a modified version. A school district may develop a Schedule with different retention periods from those listed. For records to be retained less than seven years, the school district may not adopt a retention period shorter than that indicated in the Schedule without the approval of the Public Records Board. A new Schedule, or list of modifications must be sent with the Notification Form. An adopted Schedule becomes the school district's policy on record retention, destruction and local preservation and/or transfer of records to the Wisconsin State Historical Society.
- F. Retaining Records. Records may be delayed from destruction, but only under the following conditions:
 - 1. Records are required for an IT system, business program, performance, financial or security forensic audit;
 - 2. Records are relevant to an actual or imminent legal proceeding; or
 - 3. A relevant public record request has been received and not completed.

Before disposing of a record, the office managing the record must determine if an audit, litigation or public record request is pending. And notably, after a public records request has been filed, Wisconsin law forbids the destruction of any relevant record until the request is granted, or at least 60 days after the request is denied, and court orders may extend this time period.

- G. Confidentiality of Records. Some records, in whole or in part, contain confidential records as related to security and protected personal information.
- H. Personally Identifiable Information. Some records in the schedule contain personally identifiable information as defined by Wis. Stat. § 19.62(5). Public access to and security of personally identifiable information is often restricted by law.
- I. Electronic-Mail. Electronic-mail records that have administrative, legal, fiscal, historical or audit significance should be saved beyond the designated system retention to either a secure network folder or a shared network file in a manner that facilitates backup and access. Staff should, on a regular basis, review electronic-mail and delete items that do not need to be retained. Such maintenance can reduce the burden on

servers and improve the overall performance of the system yet ensure that the requirements of records management are observed.

V. DECIDING HOW DOCUMENTS SHOULD BE KEPT. Consider the following factors:

- A. The expense of storage. Backing up electronic documents is fairly inexpensive. The expense of maintaining paper documents may be prohibitive.
- B. The space of storage. Store older records or records that may not need to be accessed as often in a less accessible area.
- C. Difficulty of retrieval. Store documents that will be needed where they are easily accessible.
- D. Security. Some documents need to be kept safe. Contracts, employment documents, employee medical records, student records should not be accessible to everyone. Very important documents should be protected from potential fire damage.

VI. DETERMINING HOW DOCUMENTS SHOULD BE DESTROYED. Documents should be destroyed using a method that renders them unreadable, such as shredding. This is particularly true of sensitive materials. The same goes for electronic records.

VII. ENFORCING THE RECORD RETENTION POLICY. Follow the policy, as the benefits of having a policy, space reduction, accessibility and professionalism, only apply if the policy is followed in its entirety.

If you fail to follow your record retention policy, a litigation opponent may claim you selectively destroyed records – Most courts will consider a partially enforced records retention policy unreasonable, exposing the school district to an adverse inference in litigation, fines and in extreme circumstances, criminal penalties.