

Information Requirements Clearinghouse

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Destruction of Records . . . Your Legal Obligations!

All organizations destroy records. Preferably, records are destroyed under a records retention program when they are no longer needed for any legal, user, historical or other purpose. Records are also destroyed after microfilming or scanning as part of an electronic imaging system. Courts expunge records to eliminate any traces of an event such as an arrest or criminal conviction.

Various procedures affect the destruction of records including the form of destruction (shredding, pulping, etc.). Frequently, destruction is undertaken by outside firms under contract.

This article describes your legal obligations related to destruction of records. When does records destruction occur? How should you legally destroy records? It does not attempt to identify when or why you should destroy records. Records, however, should only be destroyed as part of a records retention program.

Destruction of Records Under a Records Retention Program

In most organizations, the long-term storage of inactive records is costly and reduces efficiency. Records can legally be destroyed in the regular course of business under an approved records retention schedule prior to litigation, government investigation or audit. The records retention schedule specifies when records must be kept for any legal, user, historical or other purpose.

Under most records retention programs, records that are candidates for destruction will first be identified, reviewed for their continuing appropriateness for destruction, separated from other records and then ultimately destroyed. Most organizations establish some type of review process. Often, the departments responsible for the records are notified prior to destruction and are given an opportunity to halt the destruction process for specified reasons. Typically, records destruction should be halted only when litigation, government investigation or audit arise, or when circumstances change resulting in a continuing need for the record that could not be anticipated.

When records are approved for destruction, they are typically removed from the records center and placed in a staging area awaiting destruction. When the records are actually destroyed, the records center indexes will be modified to indicate the destroyed status and a Certificate of Destruction will be prepared to demonstrate that the records were actually destroyed under the organization's records retention program.

Some organizations complete all the steps toward destruction stated above but then delay the actual destruction of records. They may modify the records center indexes to show the records have been destroyed once approval for destruction is received but prior to destruction. They may also let records stand in staging areas until a large enough quantity has accumulated to justify the transportation costs to a destruction facility.

Records technically are not destroyed until they are actually physically destroyed. Modifying an index, completing a Certificate of Destruction, shipping records to a commercial destruction center or other acts may make the records "difficult to find" but do not result in the destruction of records. In each case, the records will continue to exist until they are actually physically destroyed.

Until the records are physically destroyed, they will still be accessible by adverse parties during litigation, government investigation or audit, or for use by requesters in the organization. If you or a commercial destruction firm are holding records in a staging area, you will be obligated to immediately halt the destruction of records and retrieve requested documents under court or regulatory subpoenas. You may not respond to these requests by saying "the records have been destroyed" when you know they actually exist. The mere fact that your index indicates that the records have been destroyed or that you have prepared a Certificate of Destruction does not relieve you of your obligation to respond to legal requests for records not yet destroyed. Failure to comply with these requests could result in prosecution for obstruction of justice or contempt of court, fines and penalties, or other adverse consequences to you or your organization. You will be relieved of your legal obligation, however, if the records were actually destroyed.

You may alleviate your space problems by removing records from the records center and placing them in a staging area, or by sending them to an outside commercial destruction firm. Although this may be a useful interim step, the movement of records does not constitute destruction.

Record center indexes may be changed to indicate that records have been destroyed even though they remain in the staging area. This may discourage company employees from requesting these records, but it does not constitute destruction. Similarly, the preparation of a Certificate of Destruction form prior to destruction does not constitute destruction, but it may raise questions about the trustworthiness and reliability of the entire records retention program.

During a legal proceeding or investigation, you are obligated to reveal to the other party the existence of these records. Your superiors may not request you to "lie" about the existence of these records. In fact, it is illegal for an employer (i.e., your supervisor) to require you to lie about any matter. It would also be illegal for your organization to fire you for merely telling the truth especially after someone with authority told you to lie.

For these reasons, records that have been approved for destruction and placed in a staging area should be destroyed immediately. Do not wait to destroy these records based on any economic, emotional or other reason. Destroy them immediately!

You should also periodically audit your outside commercial destruction firms to ensure that records shipped to their facilities are destroyed within a short period after receipt, such as 24 hours. If the commercial destruction firm stores these records for some period rather than destroying them, you will be liable for any adverse consequences that result from the continued existence of these records. You may also be subject to substantial costs during litigation to retrieve those records, review them for relevance under a court-ordered subpoena and produce copies of the record for adverse parties.

You may have a legal course of action against the commercial destruction firm if you experience adverse consequences as a result of their delay. For this reason, you may want to require the contractor to post a bond of sufficient dollar value to cover your liability in case of their failure to destroy your records in a timely manner.

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Destruction of Records After Microfilming or Scanning

A microfilm or scanning program by itself has no legal ramifications until the original records are destroyed. All public and private organizations, regardless of the degree of regulation, may utilize microfilm or electronic imaging technology provided they continue to maintain the original paper records. In essence, these programs result in duplication of the records rather than any change in the records themselves.

The cost advantages and improved efficiency offered by these reproduction technologies, however, can often only be realized if the original records are destroyed after microfilming or scanning. Many programs, therefore, require that the original records be destroyed after inspection and quality control of the duplicates have been successfully completed. Public agencies will generally follow the requirements of the federal or state archives. Private organizations can generally destroy the records after reproduction, without any explicit permission, unless a specific statute or regulation covers the reproduction process.

When original records are destroyed after reproduction (provided all legal requirements have been met), the records continue to exist. Only the original records are destroyed. The duplicate records preserve the same information contained in the original records, except in a different form. For this reason, the process of duplicating and then destroying the original records does not constitute destruction of records under a records retention program.

The records retention program specifies the retention period for records regardless of form. In the case of microfilming or scanning programs, the records are merely changed from one form to another. The retention period remains the same and continues to specify when the records, regardless of form, can be destroyed.

Some organizations utilizing microfilm or electronic imaging technology have elected not to destroy the original records. They want the originals to be available just in case something goes wrong with the duplicates. They then proceed to utilize the microfilm or optical disk records to conduct daily operations.

During the document preparation stages for microfilming and scanning, pages are removed from folders and staples removed from multi-page documents. After microfilming and scanning, these loose pages are then typically placed in record storage boxes and transferred to a records center for long-term storage. Since the originals remain unusable for most practical purposes, they rot in the basement costing you space and resources.

Unfortunately, in case of litigation, government investigation or audit, these original records can be and often will be requested by the adverse party or investigating agency. Although your organization may operate an extremely efficient technology system to manage records on a daily basis, it will be required to rummage through these loose pages to respond to requests for information. Since the boxes and individual pages are not indexed (because it would be a waste of money since they are not needed for any purpose by the organization), the cost to respond to these requests could be enormous. Of course, the organization will also incur costs to preserve these original records even though they serve no useful purpose to the organization.

Some organizations that keep the original records mistakenly believe that the microfilm or optical disk records represent the official records of the organization. This may not be true even though the organization relies completely on the duplicate records. Most lawyers still believe that the original records are the "best evidence" even though the duplicate records may be better managed. They will require you produce the original records if they exist, even though you could find the records faster from the microfilm or optical disk system.

Once the organization has established effective inspection quality control for microfilm and electronic imaging systems, the original records should be destroyed within a short period (a few days or weeks) after reproduction. The destruction of the original records precludes any legal request for the originals. The microfilm or optical disk records become the "best evidence" — in fact they are the only evidence!

Expungement of Records

Black's Law Dictionary defines expunge as follows:

- . . . to destroy or obliterate; it implies not a legal act, but a physical annihilation . . . to block out; to efface decidedly; to obliterate; to strike out wholly.

This definition makes it clear that expungement is a process by which a record is totally and completely destroyed.

Expungement occurs primarily in the judicial system to eliminate the existence of certain records with the approval of the court. For example, after a criminal has completed the court-mandated sentence (e.g., jail time, probation, community services, remedial education, etc.), some judges will order that all traces of the criminal matter be destroyed. This is to protect the individual from future ramifications relating to the conviction. The courts reason that the individuals have suffered the penalties and have fulfilled their obligations to society, and therefore no further adverse consequences should result. This hopefully will allow the individuals to start life over again without the burdens of the past conviction.

In the private sector, we often establish procedures that are similar to expungement but in a different context. For example, a personnel file may contain records of reprimands or disciplinary actions taken against an employee. Company procedures may require that this information be removed from the file, if no further complaints are received for a specified period of time.

Credit agencies periodically post an incorrect credit report against an individual. The individual is permitted by law and credit agency procedures to submit a letter indicating the error and requesting that the adverse credit report be corrected. Once the credit agency determines that an error has been made, the individual's credit report should be corrected in such a manner such that the error no longer can be considered in determining the individual's credit rating.

In all these circumstances, it is necessary to expunge or totally obliterate the old records rather than "making them hard to find".

Some courts mistakenly interpret expungement to mean removing any index entries regarding the matter from the records index. They believe that this results in sufficient protection for the individual and prevents outsiders from determining that an expungement has taken place. Especially with microfilm records (e.g., computer assisted retrieval) the actual documents continue to exist. A similar procedure for erasing index entries has been suggested for optical disk records.

This procedure clearly does not result in the destruction of the original records. It only makes the records more difficult to find. If someone wants the information badly enough, they can still scan through the original records (without the aid of the index) to perhaps uncover the records in question. If this occurs, the purpose of the law or procedure will have been thwarted.

In a paper records system, expungement of records is accomplished by destruction of the actual paper and elimination of any index entries. The elimination of index entries alone is not sufficient to satisfy the legal requirement.

Expungement in a roll microfilm system is extremely difficult. It is generally not practical or prudent to eradicate selected images or splice the microfilm to exclude offending records. In fact, no complete solution exists in the roll microfilm domain. This problem should be carefully considered before establishing a microfilm program that might be subject to expungement requirements.

Expungement can better be accomplished in an electronic imaging system, even using WORM ("write once read many times") technology. In an erasable optical disk system, the offending images can periodically be erased and the disk space used for future images. In a WORM system, the offending images can be marked in the index for deletion. Some WORM systems allow you to overwrite an existing image with data that will effectively preclude the original image from being read. Alternatively, the disks containing expunged information can annually be copied to new disks. Current images are copied while those marked for expungement or destruction under a records retention program are not. The old disks can then be obliterated and the records will be destroyed.

Some microfilm vendors offer a "record sealer" to place a black or other obliterating mark over selected images. This can be used to effectively expunge a record provided that the coating cannot be removed.

This record sealer approach does create a problem, however, when selected frames in individuals personnel file are slated for destruction. Someone reading the file cannot determine whether certain images were sealed or obliterated because an operator made a filming error or because reprimands or disciplinary actions were expunged. That person may reach inappropriate conclusions regarding why certain images were sealed — thwarting the purpose of the expungement procedure.

When selected records are expunged, you need to identify and expunge the same records from any duplicate or backup records that contain the same records. Frequently, microfilm and optical disk systems produce backup records to enable reconstruction of the system in case of disaster. Until images on duplicate records have been expunged, the requirements of legal expungement has not been met.

Destruction Techniques

The law typically does not specify a particular technique for destroying records. The technique used must fully annihilate or at least sufficiently obliterate the records to prevent any information from being used for any purpose.

Some mistakenly believe that special destruction techniques must be followed for confidential records. You do have a legal obligation to prevent confidential records from being used by unauthorized individuals or for unauthorized purposes. Organizations typically shred confidential records to accomplish this purpose.

Realistically, any technique can be used to destroy confidential information. Your responsibility is to make sure these records do not fall into the wrong hands. If for example, you place these records in a garbage can and they are then destroyed by the trash disposal company, you will incur no legal obligation. However, if you place them in the trash can and someone finds the record in your garbage, you may be subject to severe fines and penalties. The goal therefore is to prevent an unauthorized access or use of the records at the time of destruction.

Shredding does provide an appropriate method for achieving the legal goal for destruction of confidential records but at a high cost. Alternatively, you can pulp or macerate records, incinerate them, bury them in a landfill, or follow other appropriate techniques that prevent the records from falling into the wrong hands.

If you utilize an outside records destruction firm to pick up these records and destroy them, make certain that the firm posts an adequate bond to protect you in case it fails to perform adequate legal destruction. If they haul these records to a trash dump and scavengers uncover confidential documents, you will be liable for any adverse consequences. When a bond is posted, you at least will be compensated for your losses because of the inappropriate acts of your contractor.

The law prohibits the unauthorized viewing of confidential records — even if the information is not used for any harmful purpose. For example, each individual has the legal right to privacy of information in a personnel file or even in a loan file. If that information is shown to an unauthorized person, the individual has a legal course of action for invasion of privacy.

Employees of a records destruction firm may gaze upon certain confidential records during the destruction process. Since they are operating under contract to you, this activity is authorized since they are acting as your agent. However, if they utilize the information for any unauthorized purpose, both you and the firm may be liable for invasion of privacy or other adverse consequences.