



MML 2018
SUMMER CONFERENCE

Welcome to the Records Retention Session

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DOCUMENT RETENTION

Can't I just throw that
document away?



What is document retention?

- It refers to documents and data
 - *Includes anything written or electronic*
- Retention requirements mean the document or data can't be discarded UNLESS
 - *There is a process and*
 - *An approved “retention schedule” listing when categories of documents can be discarded*



So, do you need to worry about document retention?

State law generally requires state agencies to retain any record (State Government Article, Title 10)

- *But State Government §10-616(a) requires **any public official** to offer any public record to the State Archives if not needed*
- *Public official is not defined in a limited way, and thus **includes any state or local official***
- *And §8-606 of the Criminal Law Article makes it a misdemeanor to destroy any public record without proper authority*

State law specifically requires retention

- §10-619(a) of the State Government article specifies that “the head of a unit” of State government or a county or municipality
- May only destroy original material after offered to the Archives and they refuse
- Maryland Regulations at C.O.M.A.R. §14.18.02.05(a) requires all officials and employees to retain records



Additional requirements prior to any destruction

- *State Archives must approve preservation of any copies (if the original is destroyed)*
- *Under §10-619(b) of the State Government article, after destruction a list must be sent to the Archives*



Retention Schedules

- A schedule specifies when a specific category of document may be discarded
- That schedule must be approved by the State Archives
 - *Identifying document types*
 - *Categorized by department*
 - *Identifying length of minimum retention*



Record Retention Schedule Approval

- A schedule allowing a document to be discarded is only effective
 - *After approval by State Archives, which usually requires changes based on their comment*
 - *Note that even with a schedule, State Archives must be notified prior to (and after) discarding a document*

Can documents be discarded without a schedule?

- Multiple copies can be
- The originals (individually or as a group) can't be except per a retention schedule
- Without an approved schedule, there is no timeline and documents can't legally be discarded
- *Sample schedules are on the Archives website to provide guidance on timelines and format*

Regulatory Requirements

- Code of Maryland Regulations (C.O.M.A.R.) at §14.18.02.07 requires
 - *An inventory*
 - *A schedule for transfer to Archives and destruction*
 - *Approval by the Archives of any such schedule*

Are Local Archives Possible?

- Code of Maryland Regulations (C.O.M.A.R.) at §14.18.03.01 establishes authority for a local archivist
 - *Would be controlled locally*
 - *Only effective upon approval by State Archives, per their authority to set record retention standards (State Government Article §10-609(3))*

If local archives are approved

- Must still follow all applicable State laws and regulations
- Must preserve records in acid-neutral folders
- Must adopt and enforce security procedures
- Must allow public access to records

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“Yeager’s Record Retention Policy”



Open Meetings Act



Open Meetings Act



- Meeting minutes must be retained for five (5) years
- Minutes can be written summaries
- Minutes can also be in the form of an audio recording of the entire meeting.
- No requirements to audio record meeting if written minutes are kept
- If meeting is recorded, recording must also be retained for five (5) years.

Open Meetings Act



- Closing statements must be kept for one year
- Written meeting notice must be kept for one year

Public Information Act

- Must identify a records custodian
- What to do if a requested record has been destroyed or lost
 - Notify requestor that record is not available
 - Explain reasons why



Litigation filed or threatened....
How does this affect normal
record retention policies?



COMPANY LAWYER

THE COURT ORDERED
US TO TURN OVER ALL
OF OUR E-MAIL
RECORDS.



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GOSH. I SURE HOPE
THEY DON'T GET
DELETED DURING
REGULARLY SCHEDULED
SYSTEM MAINTENANCE.



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OH NO.
THAT
WOULD
BE BAD!
WINK!
WINK!



GOOD GRIEF,
MAN! HOW
CAN YOU BE
FLIRTING AT
A TIME LIKE
THIS?



Nah, we'll never get sued.....



Duty to preserve record

- May arise before suit is filed or threatened



- Arises at point in time when litigation is reasonably anticipated whether the town is the initiator or the target of the litigation.

Reasonably anticipated

- Receipt of a local government tort claim notice
- Receipt of a subpoena regarding an investigation
- Receipt of an accident report showing extensive property damage and/or personal injuries



Litigation Hold (also known as a legal hold)



■ What

- The process by which an organization such as a municipal corporation notifies potential custodians of records to preserve information in paper, electronic and other form

■ Why

- To preserve evidence for future litigation
- To avoid sanctions for spoliation

Litigation Hold Letter

- From Town Attorney
- From outside counsel or insurance defense counsel such as LGIT
- Attorney/Client privileged?



What to do when a litigation hold letter is received.....

- Acknowledge Receipt
- Get clarification if needed
- Forward to individuals who may have relevant documents
 - I.T. department
 - Town attorney (if sent by outside counsel)
 - Designated records custodian
- Suspend document retention policy so relevant documents are preserved
- Identify, locate and maintain information relevant to the litigation
- Continue to preserve new information

Spoilation

- Evidence destroyed or otherwise failed to be preserved
- Can result in sanctions
- Sanctions weaken the town's position in the litigation
- Result could be adverse verdict or settlement on less than favorable terms



What about electronic/computerized data?

- Such records are covered by the same requirements
 - *Record means “any documentary material in any form.” State Govt Article, §10-614(e)*
 - *And thus includes any record which is stored in any way, including the “cloud” or any other electronic/intangible manner*

Electronic storage of paper documents is an option

The Maryland Uniform Electronic Transactions Act

The Maryland Commercial Law Article (§21-101 et seq)

- Generally refers to commercial transactions
- Generally authorizes electronic transactions, including electronic signatures

Electronic retention option

The Uniform Electronic Transactions Act defines “Government agency” is defined to include:

- Any county, municipality or political subdivision

And the law applies to document retention

Other document retention requirements will still apply

Maryland Commercial Law Article §21-111(g) states that a government agency may:

- Specify additional retention requirements
- And State Archives has done so

Electronic Retention Requirements

§21-111(a) of the Md. Commercial Law Article specifies that:

- If a law requires that a record be retained, the requirement is satisfied
 - ***By retaining an electronic record of the information in the record which:***
 - (1) Accurately reflects the information
 - (2) Remains accessible for later reference.

Approval of electronic retention process

- Retention schedule must be approved by State Archives
- This includes approving the manner of retention – such as transferring paper documents to electronic or “cloud” storage
- Before destruction, State Archives must be informed in advance (and receive a copy)
- After destruction, State Archives must receive a list

Questions?

