Record Retention, Document Management, and Mitigating Risk

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Agenda

- What are Documents
- Types of Documents Created by You
- Who Wants your Documents
- Document Management and Retention
- How to Mitigate Risk
- Examples of Sticky Situations

What are documents?

- Anything written down in any form, using any medium
  - Paper
  - Social Media
  - Reviews
  - Spreadsheets
  - Cocktail Napkins
  - Texts
  - Emails
  - E-docs
  - Mad scribblings of a deranged mind

Types of Documents Created by You

- Financial Records (the stuff you are really good at)
- Contracts
- Official Memorandums
- Official Letters
- Official and Unofficial Emails
- Informal Notes
- Texts
- Photographs
- Payroll
- HR Documents (the stuff that keeps me up at night)
- FMLA/ADA (that which gives me heartburn)

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Who Wants Documentation?

- Citizens
- Media
- Employees
- Unions
- Other Government Bureaucracies
- Plaintiff's Attorneys
- Juries
- Medical Professionals
- **THE STATE OF OHIO**

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What do they ALL have in common?

- (1) They thrive on paper;
- (2) they believe that if something was important, you wrote it down
  - If you didn't write it down, it must not have been important

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What Happens to it when you Write it Down?

Know what happens to your paper – be purposeful

- Think about what happens to each document you create before you create it
- Know where it is going
- Know who is going to see it
- Know how long it will be kept
- Know where it will be kept and how
- Know how it will be destroyed and when
- Know whether it is a public record

Develop a Paper Plan

- Tell each member of your team what documents to create, how to create them, how to store them, and how long to keep them

- Your plan should also consider who is responsible for making sure the right paper comes in the door

Public Records: What is a record?

- A **RECORD** is:
  - (1) information stored on fixed media (paper, tapes, electronic text, photos, films, videos, etc); ***and***
  - (2) is created, received or sent under the jurisdiction of the public office (the public office used the record in some way); ***and***
  - (3) documents the organizations, functions, policies, decisions, procedures, operations, or other activities of the public office.
  - R.C. § 149.011(G)

Public Records: What is a public record?

- A **PUBLIC RECORD** is a record ***kept by*** a public office.
  - "Kept by" means that the record is actually in existence and in the possession of the public office or person responsible for public records.
  - Examples of records not "kept by" a public office:
    - (1) a record not yet in existence
    - (2) a record that has been disposed of lawfully
- R.C. § 149.43(A)

Public Records: Transitory

- **Transitory Records** are those that are temporary in nature and created for the purpose of transferring their content to an official file, database, report, etc.
- **Personal Notes** and **drafts** are transitory records if they meet the three-part definition of a "record."
  - Notes are <u>not</u> records if they are:
    - (1) kept as personal papers;
    - (2) kept for the employee/official's own convenience; and
    - (3) not accessible to other members.
  - The content of the draft determines how long it should be kept.

Public Records: Electronic Documents

- Records are analyzed based on their **content**, rather than their storage medium
- **Electronic records** (e-mails, text messages, IM chat messages) are treated no differently than any other tangible record
- **Databases:** if an existing program can perform a search and produce a compilation or summary as described by the requester, that output is deemed to "exist" as a record for the purposes of the Public Records Act

Public Records and Public Records/Open Meetings Issues

- Social media as records:
  - Definition of the term "records" includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

Private E-mail/Social Media Considerations

- A private e-mail/social media account ***can*** be subject to the Public Record Act if the content of the account serves to document the organization, functions, policies, procedures, operations, or other activities of the public entity
- Hillary Clinton's e-mail controversy highlights the danger of using personal online accounts for work
  - Clinton told reporters that she set up the private email server because she did not want to carry two devices with her
  - She was in the habit of deleting emails she considered personal and keeping emails she considered work-related

The Ohio Electronic Records Committee

- Identifies best practices and develops resources concerning the creation, maintenance, long-term preservation and access to the electronic records of Ohio's public entities
- Advocates for implementation of best practices

OhioERC
Ohio Electronic Records Committee

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Records Management Challenges

- Capturing content – how to access and search
- Ownership and control of data – third-party administration
- Application of records retention policy
- Management of non-record content
- Management of posted information
- Public records requests
- Employee use and access

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Schedule Contents

- A retention schedule consists of the following:
  1. Record title and description;
  2. Length of time the record must be retained; and
  3. The media type of the records series (paper, microfiche, digital, film or videotape)
- Retention schedules are designed for people who have no knowledge of the records
- An efficient retention policy is one that refrains from using legal jargon and acronyms

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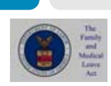
Sample Schedule

Suggested Records Retention Periods for OHIO MUNICIPAL RECORDS			
Section 1 – General Administrative Records			
Records listed in this section are generally found in most municipal offices. These General Administrative and General Financial records retention schedules (Section 7) apply to every municipal department, board commission or other municipal related entities unless superseded by a specific schedule.			
	Records Series Title	**Suggested Retention Period**	**Media Type**
1	**Accident Reports\Files** Employee Injury Report Bodily injury to non-employee Damage to Municipal Vehicle or Property	 Place in personnel file 6 years provide no action pending 6 years provide no action pending	 Paper and/or Digital Paper and/or Digital Paper and/or Digital
2	Activity Reports – All types	2 years	Paper and/or Digital
3	Agendas	6 years	Paper and/or Digital
4	Annual Departmental Budget	5 years	Paper and/or Digital
5	Annual Departmental Report	Permanent – at 50 years appraise for historical value	Paper and/or Digital
6	Annual Municipal Budget	Permanent – at 50 years appraise for historical value	Paper and/or Digital
7	Annual Municipal Report	Permanent – at 50 years appraise for historical value	Paper and/or Digital
8	Attendance Reports\Records	3 years	Paper and/or Digital
9	Audiovisual, PR & Training Materials	Until information is superseded, obsolete, or replaced; then appraise for historical value	Paper and/or Digital
10	Badges and IDs	Turn in upon termination	Paper and/or Digital
11	Blank Forms	Until obsolete or superseded	Paper and/or Digital
12	Blueprints/Vellums	Until information is superseded, obsolete, or replaced; then appraise for historical value	Digital

Retention Periods

- A record retention period can be:
  - A set period of time with subsequent instructions
    - Routine e-mail correspondence must be kept for 6 months, then destroyed
    - Executive e-mail correspondence must be kept for 2 years, then transferred to State Archives.
  - An event-driven period
    - Mailing lists shall be kept until superseded or obsolete
  - A set period of time and an event driven period
    - Contracts shall be retained for 15 years after expirations

A Note About FMLA Document Retention (3 Years)



- Covered employers who have eligible employees must maintain records that disclose the following:
  - Basic payroll and identifying employee data;
  - Dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave), including the hours of the leave, if FMLA leave is taken in increments of less than one full day;
  - Copies of employee notices of leave provided to the employer under the FMLA, if in writing, and copies of all eligibility notices given to employees as required under the FMLA (copies may be maintained in employee personnel files).
  - Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leave.
  - Premium payments of employee benefits.
  - Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for designation and for the disagreement.

Some thoughts about retention schedules….

- This is an art – not a pure science
- Reasonable minds can disagree
- It involves a risk/reward analysis
- You must be consistent
- The most relevant statute of limitations in Ohio is 6 years
- The federal rules of civil procedure have changed

Guidelines for Managing Email

- Categories of Email Retention:
  - Non-Record Materials – can be deleted at any time. May include personal correspondence and publications and promotions from vendors
  - Official Records:
    - Transient Retention – includes telephone messages, drafts and other limited documents that serve to convey information of temporary importance in lieu of oral communication
      - Retain until no longer of administrative value, then destroy

Guidelines for Managing Email

- Intermediate Retention – documents that have more significant administrative, legal and/or fiscal value but are not scheduled as transient or permanent should be categorized as appropriate, which may include:
  - General correspondence – letters/memos. Retain for 1 year then destroy
  - Routine correspondence – requests for routine information. Retain for 6 months, then destroy
  - Monthly and weekly reports. Retain for 1 year, then destroy

Guidelines for Managing Email

- Permanent Retention – documents that have significant administrative, legal and/or fiscal value should be categorized as appropriate, which may include:
  - Departmental Policies and Procedures – retain until superseded, obsolete, or replaced

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Best Practices for Managing Email

- Record and copy email – generally speaking, the individual who sends an email message should maintain the record copy of the message
- File email – create other folders to facilitate ease of retention
- Subject lines – fill in the subject line to both help your recipient identify and file messages, and to help you file your messages that must be retained for some period. Should be as descriptive as possible

Poor or confusing subject lines	Better, descriptive subject lines
"helpful info"	"contact info"
"report"	"quarterly financial report"
"minutes"	"Jan 99 board minutes"
"important"	"revised admin. procedures"
"today?"	"lunch plans today?"
"news"	"new agency head appointed"

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Managing Personnel Documents

- What goes in a personnel file
  - Application
  - Offer
  - Acknowledgements
  - Resume
  - Reviews
  - Training
  - Job Description
  - Exit Interview
  - Discipline
  - Awards and Kudos
  - Benefit forms

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Why do we maintain personnel files?

- They help make employment decisions
- They provide a means to track activities related to such things as training, vacations, accolades, conflicts
- We're required to by law
- They can provide records of activities, conversations, reviews, etc., that can help reduce liability
- They help provide consistency

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What goes in a personnel file?

- Resumé
- Application
- Records regarding employment decisions
- Education and training
- Policy acknowledgements
- Letters of recognition/awards
- Disciplinary notices or documents (final)
- Performance evaluations and goal setting records
- Termination records
- Orientation Checklist
- Emergency Contact Information
- Employees Withholding Allowance
- W-4
- State Specific Employees Withholding
Signed Receipt of Employee Handbook
- Employment-at-will Statement
Change in Personal Data Form
- Position/Rate Change Forms
- Absentee Record
- Requests for Time Off
- Training Requests
- Documentation of Certification and/or License (if applicable)
- Requests to Review Personnel File
- Resignation
- Signed job description

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Anything that helps make employment decisions

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What does NOT go in the personnel file

- EEO information
- Interview notes and employment test results
- Reference/background checks
- Drug test results
- Medical exam results
- Immigration (I-9) forms
- Medical/insurance records (medical questionnaires, benefit enrollment forms and benefit claims, doctors notes, accommodation requests, and leave of absence records)
- FMLA
- Child support/garnishments
- Litigation documents
- Workers' compensation documents
- Investigation records
- Requests for employment/payroll verification

If you have a benefit file…

- Benefits Declination Form
- Health, Dental, Vision, and/or Pharmacy Insurance
- Enrollment Forms
- Other Insurance Enrollment Forms (Life Insurance, STD, LTD, etc)
- Flexible Spending Account Forms
- Election Form/Compensation Reduction Agreement
- Employee Direct Deposit Signup Form
- Claims
- Enrollment Form, Retirement Forms, Profit Sharing Forms
- S125 Premium Only Plan Forms
- Beneficiary Designation Form
- COBRA or State Continuation paperwork, if applicable

If you have a payroll file…

- Direct Deposit Authorization
- Payroll Deduction Authorization Forms
- Overtime Requests, if applicable
- Time Sheets
- Employee Expense Report
- Auto Mileage Reimbursement Vouchers
- Garnishments/Income Executions
- Requests for Pay Advances/signed repayment plans

Other files/documents….

- Medical:
  - FMLA (all)
  - Background Check and Drug Testing Results
  - Medial Information
  - Documentation of Investigations
  - Workers' compensation
  - Accommodation requests
  - Employee incident report
  - Disability information
- Other
  - Lawsuit or DOL/EEOC investigation correspondence
  - EEOC and Affirmative Action Data
  - OSHA Forms

Where do personnel files go?

- Restricted access
- Locked
- Locked again
- Cyber secure

SO – HOW DO YOU DOCUMENT?

Proper Documentation Has a Purpose

- You must first determine the purpose of the document to determine what and how to document
  - If it's a government function, do you simply need to record the events that occurred?
  - Is it to assign follow-up tasks?
  - Is it to document discipline in an effort to change behavior?
  - Is it to tell somebody to do something?

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Creating a Paper Trail

- In "government" functions, you often need documents to, essentially, create a paper trail
  - Who you talked to
  - When you talked to them
  - What was said
  - What are the follow-up steps required
  - Were those follow-up steps completed
  - *Be careful of the contracts you have and those you may make or alter mistakenly*

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Creating a Paper Trail

- In other areas which deal with employees, the opposite is true, and documentation should have a purpose *other* than to create a paper trail
  - Convey to the employee, this is important!
  - Tell them what to do! (Or not to do)
  - Develop a plan
  - Document an infraction
  - Give credit where it is due

following my paper trail

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Papering the File

- The correct purpose is NEVER to paper the file
- An outraged individual (or their representative) will sniff that out in a heartbeat

Be Objective

- Regardless of the purpose:
  - Be objective – don't editorialize or speculate
  - Don't use buzz words "discrimination, harassment, disability claim, citizen safety concern"
    - Don't concede any points
    - "Wrong" does not equal "unlawful"
  - Don't offer opinions as to a citizen's or employee's past or future conduct
  - Don't be dramatic – if someone's life wasn't at risk, don't say it was

Be Objective

- Be specific – even if it hurts or causes embarrassment
  - Don't say poor attitude – say how the attitude manifested itself
  - Don't just say "he allegedly harassed her" – say how he allegedly harassed her
  - Don't just say "he touched her" – say how, where, and when
  - Sometimes you can't be nice – honesty is more important
  - BUT - focus on the behavior, not the person

Tips for Proper Documentation

- Be consistent – do the same thing every time
- Consider making “how to” cards for common situations
- Make it legible
- Date it
- Sign it
- If possible and applicable, let the employee review and sign

Tips for Proper Documentation

- Don’t speculate on possible legal claims
- Make sure your “facts” are facts
- Don’t use shorthand or code
- Be mindful of your personal notes
- Be complete - you may know what you know but others will not

Tips for Proper Documentation

- Keep your documents filed and organized
- Follow the document retention policy
- Be careful about what you throw away
- If you don’t want to see it on the nightly news –don’t write it down

Confidentiality

- Keep it safe and confidential
  - Don't let your hard work disappear
  - Don't feed the rumor mill
  - Don't ever be in the position to attempt to explain how and why it happened
  - If it can't go in the regular personnel file, it's REALLY confidential

And While We're on the Subject…

- Mind your e-mails!
  - E-mails are not informal notes – they are Company documents that are stored just like contracts
  - E-mails have no tone – a good plaintiff's lawyer will present your words in the worst light possible
  - E-mail is an extremely easy form of communication, which makes it a very dangerous means of communication

And While We're on the Subject…

- Mind your e-mails!
  - Remember – every one of your e-mails (even the deleted ones) may be read by a third party
  - Think before you type and re-read your entire message (including addresses) before you send.
  - Do not e-mail when angry - Ever
  - Do not discuss sensitive personnel matters in an e-mail, even with a "confidential" recipient like HR or another manager
  - When in doubt, don't put it in an e-mail – pick up the phone or walk down the hall

STICKY SITUATIONS

Situation 1

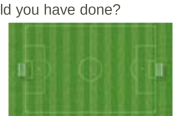
- You are reviewing an invoice from a City approved vendor and you notice that the employee has put in an order for both the City and for personal use. You note a 10% discount applied to each.
- Do you have any concerns?
- How do you handle those concerns?
- What sort of documents get created?
- What should you think about in creating those documents?

Situation 2

- Emmy Sue Suesalot comes into your office in tears claiming that Knucklehead Ned touched her whatnots.
- Any concerns?
- Do you get a statement from Emmy?
- Ned?
- Do you call anyone?
- What if you have to do the investigation? What do you do and how?
- What do you need to remember in documenting things?

Situation 3

- You get an email from a citizen angry that her son didn't make the City's soccer team. She is certain it is because the practice fields are subpar and thinks you should allocate more funds for better fields. You forward her email to your friendly attorney. In the course of the email exchange back and forth, you may or may not use some Scottish curse words to describe the citizen. The attorney wisely ignores your tomfoolery and offers you advice on how to handle the situation. You both develop a plan. You then forward that email on to a number of other people – including the consultant who is working with the City on new soccer fields.
  - What did you do to cause me to die inside a little?
  - What could happen?
  - What should you have done?



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Situation 4

- You just got promoted (yay, you!) and have a new direct report, Dolly Doesnothing. While the former person in your position seemed happy with Dolly, you can't image why. She is often late. She doesn't keep track of her time. She wears yoga pants to work. She chews with her mouth open. She makes mistakes in public documents. She takes naps at work. Then, one day, she mouths off at a vendor and jeopardizes the relationship. You want her fired – AND NOW. But, you wisely call your favorite attorney.
- What questions does she ask you?
- What will she expect to see?
- What will make her heart hurt?
- What could you have done from the beginning?

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Situation 5

- Hoarder City has been a bit lax about document retention and management. All supervisors maintain their own records and files, and no one has ever destroyed anything (on purpose). Malcontent Malory, a former employee, sues the City when she gets fired for engaging in shenanigans at work. Her clever attorney serves both discovery requests and a public records request on the City.
  - What issues might the City have?
  - What does the City have to do?
  - What happens if the City doesn't find everything?

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THANK YOU!

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