Creating and Destroying Documents



Business organizations have often adopted document “retention” policies to provide a uniform means for destroying their business records. The commonly offered justification for such policies is the need to control the cost and burden of archiving and storing the enormous universe of records and documents that businesses generate.

Quite often, however, the tangible concern has not been implementing good corporate housekeeping practices, but, rather, that potentially damaging business records be destroyed at the earliest possible date. The premise is that the corporation will usually be far better off having fewer, rather than more, business records in its possession or control if some litigant or government agency comes calling.

For both legal and practical business reasons, the answer most often is a resounding “no.” Even the adoption of and strict compliance with a policy that is absolutely compliant with minimum retention periods required by state or federal law may fail to provide the sought-after safe harbor for the destruction of records. Even when the law does establish a minimum time for the retention of specified types of documents, it will always impose an ongoing obligation to maintain those records for longer periods when the company knows, or has reason to know, that these records may be relevant to some foreseeable litigation, claim, or investigation.

In such cases, strict compliance with the cold terms of some “retention” policy will likely be of no positive benefit or value to the company, and both the corporation and the persons within it who are responsible for directing the destruction (or for not preventing the destruction) when they know of facts that should lead the company to preserve the records, despite the policy’s terms may face obstruction of justice charges, other sanctions and damages, and loss of employment. At best, the destruction of documents deemed relevant to a suit or investigation will create a damaging distraction for the company and its counsel and may well irrevocably taint the merits of its case in the eyes of the judge, jury, or law enforcement officials. The company can never benefit from a race to the shredding machine in an effort to beat the filing of a complaint or demand for records. Such efforts themselves will usually constitute the commission of criminal offenses, and, at a minimum, are likely to prejudice the company in the eyes of courts, litigants, and government.

Relying on a “retention” policy to provide the ostensible justification for destroying potentially damaging documents is an attempt to lock the barn door after the horse has already bolted. The real problem usually resides in the propensity of individuals within the organization to author documents and electronic records that they were never obligated to create in the first place. No manager or employee should ever create a tangible record of feelings, observations, impressions, or concerns that may create embarrassment for themselves or the company if they were to fall into the hands of an outside party, unless such a record is required by law or company policy.

The heated creation of memoranda, e-mails, or correspondence designed to excoriate others or to protect the writer’s backside will often return to haunt both the author and the corporation. To protect itself to the maximum extent, business organizations should emphasize to all employees the need for reason and restraint when memorializing events, mental impressions, and concerns. Looking to document “retention” policies to cleanse a problem will usually be ineffective and, worse, may only exacerbate the company’s problems.