



When the Government Comes Knocking at Your Nonprofit's Door

How to Be Prepared and What to Do



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Document Retention Policies

Best Practices and Tips

Document Retention Policies: What Are They, and Why Do You Need One?

What is a Document Retention Policy?

- Document Retention Policy = Document Management Policy








Why Do Nonprofits Need Document Retention Policies?

- Good governance policy
 - It's even a question on your Form 990!
- Cost-saving mechanism
- A document retention policy is important if litigation occurs



Document Retention Policies

Components of a Strong Document Retention Policy

-  Identifies who has to comply with the policy
-  Identifies the employee responsible for compliance with the document retention policy
-  Identifies relevant types of documents for your specific nonprofit and appropriate time periods for retention/deletion
-  Includes or references communication and acceptable use of personal device protocols
-  Specifies the procedure for automatic deletion of non-retained documents
-  Contains a written protocol for how the policy changes in case of a legal hold
-  Specifies annual review period and training mandate

Document Retention Policies: Identifying Relevant Parties



Step 1: Parties to Involve in Pre-Document Retention Policy Revision

1. Your IT personnel
2. Legal counsel (in-house and outside)
3. Relevant company stakeholders



Step 2: Parties Subject to Document Retention Policy

Staff, board members, outside advisors, even volunteers



Step 3: Parties Responsible for Training, Implementation, and Compliance

Document Retention Policies: Deciphering retention periods

- State Law Will Govern Retention Periods for Certain Categories of Documents:
 - For example, DC and Virginia law both require that nonprofits keep meeting minutes and records of all actions taken by members or the board of directors permanently
 - Consider relevant statute of limitations for certain claims:
 - E.g., employee-related documents should be maintained for at least the state-specific statute of limitations for employee claims
 - E.g., contracts should be maintained for the lifetime of the contract plus the relevant statute of limitations for breach of contract
- IRS Requirements:
 - Certain records related to IRS filings must be kept for at least three years after the tax return due date
- Don't Forget about Routine Emails and Messages!
 - Much of a nonprofit's everyday communications will not fall within a specific retention category
 - Important to establish a routine document deletion protocol (in coordination with IT personnel) that will apply to company email, documents, messaging apps, and company cell phones
 - Consider deletion protocol of between 90 days and 1 year

Document Retention Policies: Identifying Documents to Maintain Permanently

Consider Maintaining Certain Categories of Documents Permanently, including:

- Articles of incorporation
- Audit reports
- Corporate resolutions
- Checks
- IRS Determination Letter and other IRS correspondence and filings
- Year-end financial statements
- Insurance policies
- Minutes of board meetings and annual meetings, as well as meeting materials
- Real estate deeds and mortgages
- IP-related documents, like patents and trademarks

Personal Device and Communication Policies

Best Practices and Tips

Personal Device and Communication Policies: Email and Messaging Etiquette

Communication Best Practices:

- Remember the *New York Times* discretion rule!
- Preferred methods of communication
 - Face-to-face vs. phone vs. email/messaging
- Do not permit meeting participants to record video meetings

Important Points to Include in the Policy:

- Always be professional
- Business correspondence is owned by the entity, not the individual
- Humor and sarcasm do not translate easily or accurately
- Prohibit misleading, fraudulent, offensive, and discriminatory language
- Include possible consequences for violations—and enforce them!

Additional Guidance for Teams and Slack Messaging

Consider training your staff on appropriate use of Messaging Applications, like Slack and Teams, including:

1. Keep a professional chat tone (it's not a private conversation)
2. Limit your personal conversations
3. Keep your messages concise
4. Be cautious about GIFs
5. Don't be shy about threading your conversations and
6. Use channels to organize important projects or topics
 - a. Clearly define the channel's purpose
 - b. Pin important chat conversations or use channel descriptions
 - c. Consider appointing staff moderators to oversee important channels

Personal Device Use

If staff is permitted to use personal devices, your document retention policy or personal device usage policy should outline permissible and impermissible uses.

Consider prohibiting the following practices:

- Use of personal email addresses to conduct work
- Use of text messages to discuss substantive work issues
- Storing documents on an employee's personal drives or desktop
- Remember to document the consequences for violations—and enforce them!

Consider requiring the following practices:

- Use of phone applications linked to work accounts, like Blackberry Work and Teams/Slack application
- Remote login to work in shared spaces to save written work product

Responding to Government Inquiries

Best Practices and Tips

The Question That Comes to Mind When You Receive Government Process

What Is This About and Is This About My Organization?

- Who Is Asking?
- How Are They Asking?
- What Are They Asking For?

What Is This About and Is This About My Organization?

Who Is Asking?

- **State or Federal?**

- State AG's Office
- DOJ (e.g., U.S. Attorney's Office)

- **Civil or Criminal Enforcement Authority?**

- **Type of Requesting Agency?**

- Taxing authority (IRS)
- U.S. Health & Human Services
- U.S. Department of Labor
- ICE
- DOJ

What Is This About and Is This About My Organization?

How Are They Asking?

AO 110 (Rev. 01-09) Subpoena to Testify Before a Grand Jury

UNITED STATES DISTRICT COURT
for the
District of Maine

SUBPOENA TO TESTIFY BEFORE A GRAND JURY


John Doe
To:

YOU ARE COMMANDED to appear in this United States district court at the time, date, and place shown below to testify before the court's grand jury. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place: Edward T. Gignoux Federal Courthouse 156 Federal Street Portland, ME 04101	Date and Time:
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You must also bring with you the following documents, electronically stored information, or objects (if not applicable):

Date: _____


Christa K. Berry
Christa K. Berry
Clerk, U.S. District Court

The name, address, e-mail, and telephone number of the United States attorney, or assistant United States attorney, who requests this subpoena, are:
Daniel J. Perry, AUSA
100 Middle Street, 8th Floor, East Tower
Portland, ME 04101
Dan.Perry@usdoj.gov 207-780-3257

Types of Government Process

The type of the government outreach and process you receive will give you important clues about the government's investigation.

- Informal Request
- Administrative Subpoena / Civil Investigative Demand (CID)
- Grand Jury Subpoena
- Search Warrant

What Is This About and Is This About My Organization?

What Are They Asking For?

- **Documents Only?**
 - About Third Parties or Person(s) You Serve?
 - About Certain Employee(s)?
- **Testimony?**
- **Related to Certain Statutes?**

How to Respond

First Steps

- **Forward the subpoena to counsel.** They will review the subpoena carefully and let you know of the implications and responsibilities that your nonprofit will have in responding.
- **Make sure the subpoena properly addresses your organization.** There can be legal consequences for sharing certain types of information without proper justification. A properly addressed subpoena can provide you with legal justification for providing materials to the government.
- **Make sure you understand what information is being requested.**
- **Confirm that the subpoena allows for disclosure of the subpoena.**
- **Check the response date.**

How to Respond

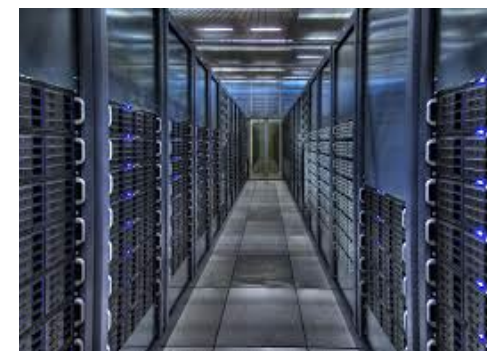
Have Counsel Reach Out to the Investigating Agency

- **Determine whether you are a:**
 - Target
 - Subject
 - Witness
- **Limit the scope of the subpoena request**, if possible.
- **Make objections**, if reasonable.
 - Overbroad
 - Burdensome
- **Request an extension**, if necessary. Unless requests are limited, it is usually good to request an extension to give yourself time to find and review the appropriate data.
- **Request updated subpoena with proper legal entity name**, if necessary.
- **Determine whether third-party obligations and rights are impacted by producing materials.**
- **Determine whether an internal investigation is necessary.**



Preserving & Collecting Responsive Materials

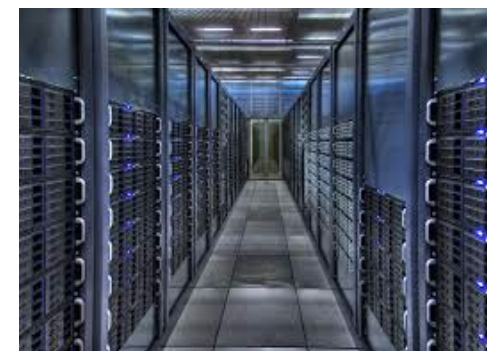
- **Confirm that your nonprofit still has the relevant data.**
As we use and store more data, organizations often have a fairly short window of data preservation.
- **Identify employees (custodians) who may have responsive materials.**
- **Send a litigation hold to relevant employees.**
 - Litigation holds alert employees who may reasonably have responsive materials that they should not destroy or delete relevant data. Counsel can help you draft a litigation hold.
 - Destruction of relevant documents or data after the subpoena receipt can be seen as obstruction.



Preserving & Collecting Responsive Materials

(Cont'd)

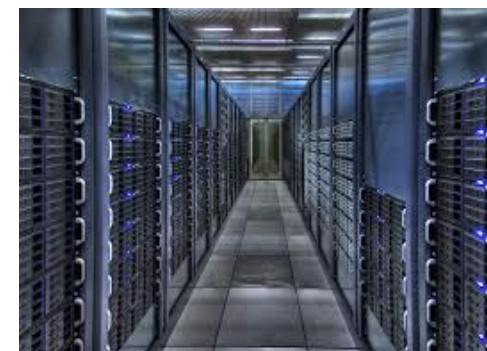
- **Contact the IT Department.**
 - Pause any relevant deletion or destruction protocols.
 - Capture or image email folders and/or hard drives.
 - Discuss potential electronic data storage capacity issues.



Preserving & Collecting Responsive Materials

(Cont'd)

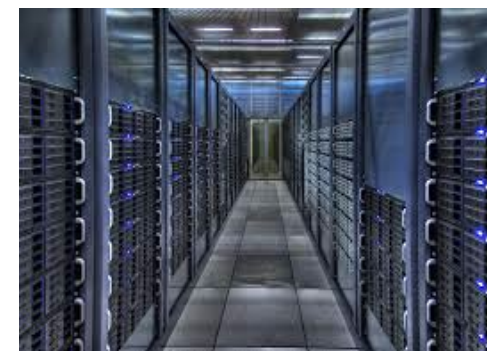
- **Identify Custodians and Relevant Data Repositories.**
 - **Work top-down.** Interview higher-level employees to pinpoint who knows where and how all the relevant data is stored (custodians).
 - **Interview identified potential custodians.** Talk with anyone identified to ensure you have closed any data gaps and to confirm that potentially responsive material is being properly preserved.
 - **Identify all employer-sponsored communication apps** (e.g., Slack, Microsoft Teams, Lark Chats, Zoom) as well as non-standard communications applications (e.g., Telegram, Signal, Confide).
 - **Don't forget off-channel communications and materials.**



Preserving & Collecting Responsive Materials

(Cont'd)

- **Alert any third parties, contractors, or affiliates who may have relevant information.**
- Subpoenas cover not only documents you store but also documents that you have “control” over—which includes data stored by anyone with a contractual obligation to store data for you.
- If you have access to the data or the ability to retrieve it, even if it is not physically in your possession, it is considered in your “control.”



Collecting & Reviewing Documents

- **Work with counsel to collect potentially responsive material.**
 - Government typically requires production of metadata that can be lost through improper collection.
 - Data collection, processing, and transfer can implicate other areas of law, like privacy legislation.
- **Track the data collection.** You will want to be able to defend the reasonableness of your approach.
- **Consider applicable data protection laws and privacy concerns.** Some data protections regimes are demanding (e.g., GDPR).

Collecting & Reviewing Documents

(Cont'd)

- **Ensure a principled and defensible approach to document review.**
 - Confidentiality protections
 - Training and oversight of review team
 - Quality control
- **Preserve Privilege.** Have counsel run and oversee the collection and review.
- **Review proposed productions.** You want to know that everything being produced complies with the subpoena and that there will be no surprises when the government brings up documents you produced.

Document Productions

- If requests are broad, you will likely make “**rolling productions**” (multiple productions as you continue to review and produce documents).
- **Government typically prefers a steady pace of document productions.** Produce low-hanging fruit upfront where possible. Keep review consistent to keep productions moving.
- **Government might send additional requests as they home in on the topics they are looking for.**

Search Warrant

What Is It?

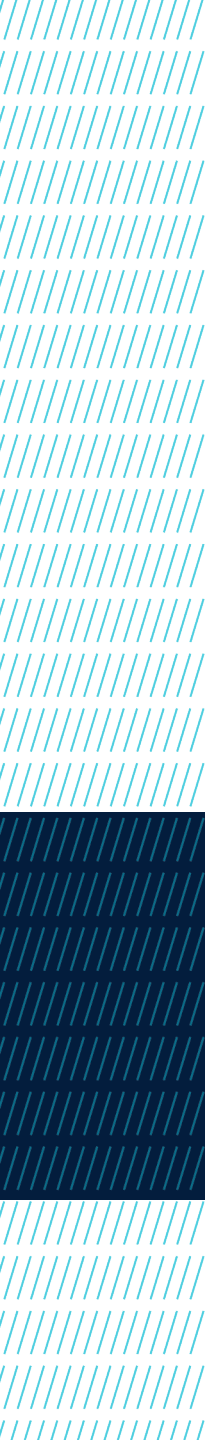
- Judge Ordered
- Probable Cause (i) to search a specific place; (ii) to seize evidence of a specified crime.

What Should You Do?

- **Pre-warrant** – Have a plan and ensure that employee(s) who would be potentially interacting with agents has contact information of counsel.
- **Day of warrant** – (i) Obtain contact information of lead agent; (ii) contact counsel and put on phone with lead agent; (iii) if counsel cannot get to premises immediately, keep her on the phone to tell her what is taking place; (iv) copy of warrant to counsel; (v) read warrant carefully and do not consent to search of areas not listed on warrant or seizure of materials not listed on warrant; (vi) until counsel arrives, designate employee to document (without interfering) what agents are doing to debrief counsel later; and (vii) ensure employees understand that interviews are voluntary.

Questions?

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