

DIGITAL/REMOTE WORLD

Project Data Retention

reexamining the dos and don'ts

By William Thomas

Recent advances in technology make project data retention an increasingly difficult, expensive, and complex proposition. Cloud-based project management platforms, remote work environments, and digital devices forever changed construction professionals' work flows and methods. While greatly increasing efficiencies and productivity, they exponentially multiply the volume of data: raw numbers, emails, attachments, drawing revisions, text, video and voice messages, not to mention faxes and letters—actual paper ones.

Making decisions *now* about the project data to keep and to discard is like trying to pick who will win the Super Bowl in the year 2034. You may be required by law or contract to keep records for specific time frames. Further, if you are aware of a potential claim, you may be required to maintain everything on a project to avoid legal sanction. This article will offer suggestions on categories of critical project data necessary to maintain, and those you can discard.

NEW FRONTIER

Since early 2020, the traditional office environment is no more, with work taking place from decentralized, remote locations, leading to

multiple repositories for project data, often on personal devices, laptops, cell phones, tablets, and stored on desktops, cloud platforms, or, hopefully, office servers. Communications routinely occur on diverse messaging platforms and devices, such as personal cell phones, through app-based messaging, Microsoft Teams, and cloud-based project management platforms. Communication occurs on numerous locations and devices and may need to be proctored and maintained. Electronic Stored Information (ESI) becomes cumbersome and expensive to maintain and, at the appropriate time, collect and archive so that it is available and searchable.

IN OR OUT?

When it comes to project documents, keep materials required by law, contract, or crucial for proving or defending claims, not non-essential material that does more harm than good. Innocently keeping material in draft form, or superseded by later revisions, with internal edits and notes, may fuel an otherwise unfounded claim. Segregate internal documentation related to claims into "circumstance," "potential claim," or "claim files." This includes lessons learned

material or critical self-analysis, peer review or other post-completion audit material. If you believe a claim is inevitable, and are working with an external teammate, you should consider a joint defense agreement to protect communication. Further, all correspondence with counsel or your insurance carrier should be segregated from the file at large to prevent disclosure of privileged items.

The American Institute of Architects (AIA) and other industry organizations suggest categorizing and segregating project documents considered "temporary," works-in-progress, or early drafts, and those considered "permanent," like sealed reports or drawings. Permanent records should be kept, while temporary ones can be discarded at project completion.

Signed and sealed drawings and specifications are perhaps the most critical as they represent the project to be constructed. This should include field personnel copies with notes and as-built information that documents conflicts, changes, and claim-related material. Contracts, including all proposals, drafts, revisions and edits should be kept to establish the negotiations. For engineers, the raw data of the calculations and design criteria should be held. Keep critical project

data like submittals, requests for information, applications for payment, site visit reports, and important communications. A sound exercise of professional judgment must be based on a sufficient amount of due diligence. Litigation usually focuses on things like substitutions of products, or change orders or decisions that altered the original path. Consider maintaining a separate file on these issues.

Maintain an archived version of the files in a uniform and organized fashion. Make sure your storage solution for electronic documents is secure and backed up. When discarding material, make sure it is disposed of securely, using shredding or other irreversible methods. Consult with your legal counsel on the applicable statutes of limitations and repose in your jurisdiction, which will guide you on how long to maintain the data.

LITIGATION HOLD

Unfortunately, if you know of or suspect a claim arising out of a specific project, you should suspend destruction of any project-related data. Some claimants will go so far

as to send a "litigation hold" letter early on in the claim process, even before suit is filed, placing you on notice not to destroy any data in your possession. If any records are destroyed thereafter, it will allow your adversary the opportunity to argue it was done for an improper purpose, in an effort to cover up or destroy unfavorable evidence, even if there was none there.

The clear message here is to refrain from discarding anything once a claim has materialized, and immediately discuss the issue with counsel in your jurisdiction if you have questions. You should also be careful what you put in writing once there is indication of a claim, and discuss the situation

immediately with your carrier and lawyer, as they can assist you through the process.

CLOSING THOUGHT

Finally, if any documents are being maintained electronically, and are produced in their "native format," great care should be taken by your IT department to remove all Metadata before documents are produced. This article only addresses retention of construction project data and not corporate, HR, or tax records. These are only suggestions, and you should discuss implementation of any document retention program with your chosen legal and accounting advisors in your specific jurisdiction. ■

about the author

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