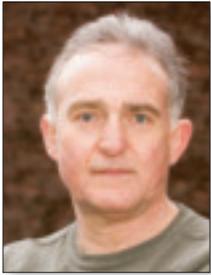


▶ LEGAL BRIEFS



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Why the Retention of Public Health Records Matters

Editor's Note: The *Journal* recognizes the importance of providing readers with practical and relevant legal information and is pleased to bring back the popular Legal Briefs column in the January/February 2012 issue. In every other issue of the *Journal* this information will be presented by the attorneys at Seattle-based Marler Clark, LLP, PS (www.marlerclark.com). Marler Clark has developed a nationally known practice in the field of food safety. They represent people who have been seriously injured or the families of those who have died after becoming ill with foodborne illness during outbreaks traced to restaurants, grocery chains, and other food suppliers.

Andrew Weisbecker has been involved in the litigation and resolution of numerous significant personal injury claims brought on behalf of persons injured in food liability incidents and foodborne illness outbreaks since the foundation of Marler Clark in 1998. His practice has been especially concerned with the representation of minor children, and with the presentation and resolution of their personal injury claims.

“Truth is confirmed by inspection and delay; falsehood by haste and uncertainty.”
—Tacitus

The topic of records management and retention policies usually does not generate much excitement. The rapid advance of technology results in vast quantities of information, however, and accordingly a need exists for an effective records and information management program. A good records management program in turn involves the establishment of retention requirements based upon the records' legal, fiscal, administrative, and historical requirements and values. Without such requirements, organizations either destroy records that should be retained or retain

everything, thereby taking a legal risk or assuming unnecessary costs.

Initially, agencies should be aware of all the laws and regulations directly relating to their records and record-keeping requirements. Federal, state, or local laws and regulations may apply regarding the record keeping and records retention for specific agencies or specific types of records. Given our firm's focus on foodborne illness cases, this article briefly addresses the retention of records generated and maintained by public health agencies as related to food safety issues and enforcement.

Texas provides an example of how such laws and regulations affect the retention and disposal of public health agency records.

The Texas State Library and Archives Commission has issued retention schedules for records common to all types of local government, including every “local public health agency.” No local public health agency may dispose of a record listed in the schedule prior to the expiration of its retention period. For example, reports of sanitary inspections carried out by local health authority personnel as required by state law or regulation or by local ordinance must be retained for three years (Texas State Library and Archives Commission, 2011).

The retention period for a record applies to the record regardless of the medium in which it is maintained. Electronically stored data used to create a record must be retained, along with the hardware and software necessary to access the data. A local government record may not be destroyed if any litigation, claim, or other action involving the record is initiated until the resolution of all related issues. Anyone destroying local government records without legal authorization and contrary to the provisions of the Local Government Records Act or the Public Information Act may also be subject to criminal penalties and fines.

The Records Schedules page at the Council of State Archivists Resources Center Web site (<http://rc.statearchivists.org/Resource-Center/Topics/Records-schedules.aspx>) provides a helpful listing of similar state and local record retention schedules in place across the country.

A second reason to implement a document retention policy is to comply with public record request requirements. According to most public record statutes and regulations,

the custodian of a public record may not dispose of a record for a period of a minimum of specified days after the date on which a written request to inspect or copy the record was made. If a civil action is then instituted, the custodian shall not dispose of the record except by order of a court.

Courts have already found that public health agency records related to agency investigation of outbreaks clearly fall within the statutory definition of public records. A Maryland court had to decide if a woman who contracted hepatitis from an unknown establishment was entitled to information regarding the results of the investigation conducted by the department of health, pursuant to the Maryland Public Information Act. The department refused to disclose the requested information, asserting in part that the information was "confidential." The court instead found that the department's desire to maintain the confidentiality of records that identify persons who were the subject of case investigations was not a sufficient ground upon which to avoid disclosure under the act (*Haigley v. Department of Health and Mental Hygiene*, 1998).

A third important reason to implement a proper document retention policy is the need to respond to potentially diverse litigation needs. Records provide documentation, if necessary, that reasonable care was exercised by the agency, and that appropriate actions were taken. Accordingly, when a public agency has been given notice that a potential cause of action is pending or underway, or when an

agency can reasonably anticipate that litigation might occur, records related to that cause should not be disposed of in any manner.

Public health records are frequently essential to establish the source of our clients' foodborne illnesses and to support their claims against the responsible parties. Recent litigation following an outbreak of *Salmonella* tied to cantaloupes, however, provides a striking example of how a public health agency may at times itself have to depend on its records in support of its own legal position. Federal and Oregon state officials in the spring of 2011 traced the *Salmonella* outbreak to a farm in Guatemala that grew cantaloupe for Del Monte Fresh Produce. The Food and Drug Administration (FDA) then urged a recall of the cantaloupes imported into the U.S. from the farm, and issued an alert banning any further imports from the farm.

Del Monte responded in August 2011 with court actions against the FDA and Oregon, contending that its cantaloupes never tested positive for *Salmonella* and that federal and state investigators did not have proof of the contamination. Del Monte asserted that the government actions were based upon an "erroneous speculative assumption, unsupported by evidence (*Del Monte v. United States of America*, 2011)." Del Monte also filed notice to sue the Oregon Public Health Division and its senior epidemiologist for misleading allegations regarding Del Monte's cantaloupe.

On September 27, 2011, Del Monte dropped its suit against the FDA, and the FDA lifted

its import ban on the same day. Neither entity would comment on the timing of the actions. Clearly, however, the FDA and the Oregon Public Health Division would have had to rely heavily on their documentation of the investigation to support their original outbreak findings and conclusions.

State and local governments need appropriate policies and procedures to provide for the systematic retention and disposal of records. At a minimum, a local government record should never be destroyed if any litigation, claim, negotiation, audit, public information request, administrative review, or other action involving the record is initiated, until the completion of the action and the resolution of all issues that arise from it. 🌐

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References

- Del Monte v. United States of America, No. 8:11-cv-02338-JFM (D. Md., filed August 22, 2011).
- Haigley v. Department of Health and Mental Hygiene, 736 A. 2.d. 1185 (1998).
- Texas State Library and Archives Commission. (2011). Local schedule HR 13 TAC §7.125(b) (10) (2nd ed.), "Retention schedule for records of local public health agencies."

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