

SCHECHTER & BRUCKER, P.C.

ATTORNEYS AT LAW

ANDREW P. BRUCKER*
HOWARD SCHECHTER
DAVID H. OSTWALD

KENNETH H. AMORELLO
THOMAS V. JUNEAU, JR.*
JOSE A. SALADIN
CHRISTIAN P. DAGLIERI
LLOYD F. REISMAN
JULIE F. SCHECHTER

* LL.M. (Taxation)
* N.Y. and Conn. Bars

350 FIFTH AVENUE
EMPIRE STATE BUILDING
SUITE 4510
NEW YORK, NY 10118

TEL: (212) 244-6600
FAX: (212) 244-6784
www.sblaw.com

MEMORANDUM

TO: All Cooperatives, Condominiums and Managing Agents

FROM: Howard Schechter, Andrew Brucker and Julie Schechter

DATE: October 9, 2012

RE: Record Retention and Disposal Guidelines

Like other businesses, managing a cooperative housing corporation or a condominium includes the daunting task of maintaining its books and records and handling large quantities of documents. Files must be kept by the organization to document its actions and legal relationships, pursue or protect itself in litigation, ensure compliance with federal and state laws and regulations, and resolve disputes. But a cooperative or condominium is not required to keep documents forever.

Different types of documents should be kept for different periods of time depending upon their topic, any legally required retention period and the statute of limitations for litigation to which they may relate.

ESTABLISHING A DOCUMENT RETENTION POLICY

When adopting a document retention policy, the organization should consider the types of documents that must be retained and for how long. Legally mandated retention periods must be observed, yet a retention policy that is simple to administer has merits in itself. Attached as an exhibit to this memo is a list of typical cooperative and condominium document types and our suggested retention periods. **We have divided the document retention periods into three easy to administer categories: permanent retention, 7 year retention and 1 year retention.** We have put any document that is not required to be retained permanently but must be retained longer than one year in the seven year category. In some instances, this period is longer than legally required, but we believe that

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a simpler policy will be easier to administer and more likely to be followed and that these considerations outweigh a more complicated classification system.

The custodian of the various types of documents should be identified in the policy. In most instances, management is the repository of the organization's documents. In some cases, some or all of the key documents may be kept at the building. Consideration should be given to where and with whom the documents to be permanently retained will be housed to assure their permanent availability.

The policy should also provide for periodic review and disposal of documents. It is important to consider who will be in charge of deleting the outdated documents and how they will be eliminated. The responsible party should be identified in the policy.

Paper can be shredded or incinerated, so as to preserve its confidentiality, while destroying electronic documents can present more of a challenge since deleting a computer file does not actually remove the information. Even deleting the file from the Recycle Bin on the desktop will not fully eliminate it. Special software can be purchased to fully erase electronic data, and discs with the information should be physically destroyed.

Like other company policies, the document retention plan should be reviewed periodically and the rules for retention and destruction should follow a systematic, uniform schedule to prevent inconsistencies. Additionally, agents and employees should be informed of the policy to ensure that it is strictly followed. These requirements should be included in the plan itself.

The following is a discussion of retention guidelines for specific types of documents and some special considerations in establishing a policy.

CORPORATE, ORGANIZATIONAL PAPERS

Current and past corporate and organizational documents including articles of incorporation, bylaws, condominium declarations, rules and regulations and all amendments, should be kept permanently. Minutes from membership and board meetings should also be kept permanently, as should audit reports, the names and addresses of shareholders or unit owners and the number of shares or the percentage of condominium common interests for each owner. Additionally, property records such as costs, depreciation reserves, year-end financial statements, depreciation schedules, blueprints and plans should be kept permanently. All business licenses and government permits held by the cooperative or condominium, such as a public assembly permit or a building permit, should also be permanently retained.

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TAX RETURNS

Government reports dealing with tax liability and all tax returns should be kept permanently, but the documents used to prepare them do not need to be. The statute of limitations for most tax issues is six years, so cooperatives and condominiums should keep any records that document income or deductions for seven years after they are filed. Supporting documents that relate to the entity's income or deductions include employment records, cancelled checks, bank statements, accounts receivable ledgers and schedules, and schedules and information relating to uncollectible accounts and write-offs. Income tax payment checks should be kept for the life of the entity.

EMPLOYMENT RECORDS

Retirement and pension records, retirement plan returns and reports, retirement plan accounting records, employee benefit plans and profit sharing plans, as well as employment applications of current employees, should all be kept permanently. All other employment records, such as union agreements (with the building service employees), employment applications from those who were not hired, personnel files of *former* employees, employment and withholding tax records, and payroll records and summaries should be kept for seven years.

CONTRACTS

Maintenance, Services & Improvements

Contracts that are in effect for management, building maintenance, elevator or laundry services and other similar services should be kept until seven years after they expire or are terminated. Contracts which include warranties, and of course separate warranties, should be retained for seven years, commencing from the expiration of the warranty or other continuing obligation.

Insurance

Insurance policies are contracts created between the building and the insurer. There are two types of insurance policies: "claims made" policies and "occurrence" policies. Claims made policies provide coverage for claims made in the period the policy is in force. Claims made policies provide coverage only so long as the insured continues to pay premiums for the initial policy and any subsequent renewals – once premiums stop, the

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coverage stops for any claims not known or made to the insurance company during the coverage period. Occurrence coverage is insurance that provides coverage for the act when it occurs – regardless of when it is reported. Therefore, claims made policies should be kept for seven years after they expire while occurrence policies should be kept permanently.

Mortgages and Deeds

Mortgage and loan documents should be retained for seven years after the *mortgage or loan* has been satisfied. Deeds should be kept permanently.

Alteration Agreements

Cooperatives and condominiums should permanently save all alteration agreements as well as the plans and specifications for the alteration, since the responsibility for maintaining the alteration typically falls on the shareholder or unit owner and their successors (i.e. future owners of the unit). Purchasers of units affected by alteration agreements should be required to sign an assumption agreement when they purchase, and the assumption agreements should similarly be retained permanently.

SPECIAL CONSIDERATIONS

Email

Boards should be aware that emails are considered organization records. Emails with third parties, among Board members or between Board members and the managing agent are subject to subpoena and disclosure in a lawsuit. This includes emails sent and received by Board members from their work email addresses since those are considered property of their employer. For this reason, and since as electronic records, emails present the practical impossibility of complete deletion, care should be taken by Board members to insure that email messages are appropriate and not damaging to the corporation or condominium.

It is important for Board members to be aware that emails can be discoverable and used as evidence in a litigation. Even emails that would otherwise have been *confidential*, for example, if they were protected by the attorney-client privilege, may not actually be protected if they were sent from a third party server, such as a person's work email address. Therefore, **we recommend that Board members create email addresses which they use solely for building governance**. This will make recovery of necessary emails easier as well as protect confidentiality.

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Social Security Number (SSN) Safeguarding and Disclosure

By law, reasonable measures must be taken by organizations that collect SSNs to ensure against their disclosure or use for a non-necessary purpose¹ and that access to them is limited to only those people who need access for a legitimate purpose related to the conduct of the business (such as a credit check). Therefore, it is recommended that the document retention policy take this into account in determining which documents to keep and how to dispose of documents that may contain SSNs.

For more information on this subject, please consult our February 22, 2011 memorandum which deals with the safeguarding and disclosure of SSNs.

Bedbug Infestation Histories

Boards and managers should be aware of bed bug disclosure requirements which became effective on August 30, 2010 and require New York City building owners to provide each tenant signing a vacancy lease a notice setting forth the bedbug infestation history for the previous year for the apartment being leased and the building in which it is located. While it is unclear whether this law applies to condominiums, we recommend that both cooperatives and condominiums retain records of bedbug infestations and treatments for at least a year. All bedbug reports, histories and records of remediation should be maintained.

Purchase Applications

Boards and managers collect documents containing personal and financial information from applicants seeking to buy a cooperative or condominium apartment and often request multiple copies. **A single copy of each approved application should be retained permanently (preferably by management). Additional copies of all applications should be destroyed.**

Cooperatives and condominiums need to handle rejected applications differently. Since Boards are subject to discrimination laws, if a prospective purchaser's application is denied, it could lead to an administrative investigation or a litigation. The statute of limitations for filing a discrimination suit is two years, however, a rejected applicant can file a complaint with HUD within a year of the alleged discrimination and time does not run while HUD has the complaint. **Therefore, we suggest that one copy of the rejected application should be retained for seven years.**

¹ such as identifying the person in organization records (even a portion of the number such as the last four digits may not be used for this purpose)

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Shareholder Complaints and Incident Reports

Reports of incidents in and around the building, as well as complaints from tenants (about other tenants, their guests or the building employees) should be retained for seven years after the matter is concluded or becomes dormant. However if there is a long outstanding and continuous problem with a tenant (or his family), a longer retainage period may be considered if it is deemed advisable by counsel.

Litigation

Document destruction may sometimes need to be suspended despite the standardized deleting procedures found in a document retention policy. If a litigation or government investigation is anticipated or currently underway, the organization should not discard or apply its standard document disposal policy to any documents pertaining to the potential suit since this could be considered destroying evidence and result in sanctions. Prudence dictates that questions about whether to retain particular documents should be resolved in favor of retention. Our office should be consulted to determine which documents may be relevant and which may be destroyed.

Boards should involve our office as well as their managing agent, accountant and insurance broker to assure the development of a comprehensive document retention policy that complies with applicable law and effectively reduces potential liability and loss for the organization.

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EXHIBIT TO RECORD RETENTION AND DISPOSAL GUIDELINES MEMO

RECORDS COOPS AND CONDOS SHOULD RETAIN PERMANENTLY

Corporate Records

- Cooperative certificate of incorporation and all amendments with proof of filing and by-laws and all amendments;
- Condominium declaration and by-laws and all amendments;
- Rules and regulations and all amendments;
- Minutes of shareholder or unit owner meetings;
- Minutes of meetings and other records of official action of the Board of Directors or Board of Managers;
- Offering plan and all amendments;
- No-action letters procured by the cooperative or condominium and the underlying applications for the same together with executed offeree affidavits;
- All business licenses and government permits held by the cooperative or condominium.

Shareholder / Unit Owner Records

- Stock ownership records (stock certificate books and stock ledgers) or records of unit owners and their respective ownership interests and transfers of the same;
- In the case of cooperatives, proprietary leases and all assignment and assumption agreements;
- Alteration agreements and related plans, specifications, approvals, sign-offs, inspection reports and assumptions.

Property Records

- Deeds and records that reflect improvements to the property and the payment of the cost of the same;
- Floor plans and construction drawings, permit applications, permits, sign-offs and completion certificates for the original construction and all subsequent alterations made by the cooperative or condominium;
- Asbestos/engineering surveys;
- Lead based paint records;
- Conversion closing binder.

Tax and Financial Records

- Audited financial statements;
- Government reports dealing with tax liability and all tax returns (but not necessarily the documents used to prepare them);
- Canceled checks used to pay income and other taxes;
- Canceled checks used to pay the cost of all improvements to the property.

Employment Records

- Retirement and pension records;
- Retirement plan returns and reports;
- Retirement plan accounting records;
- Employee benefit plans and profit sharing plans;
- Collective bargaining agreements.

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RECORDS COOPS AND CONDOS SHOULD RETAIN FOR SEVEN YEARS

Shareholder / Unit Owner Records

- Shareholder/unit owner files other than proprietary lease and alteration agreements such as correspondence to or from shareholders/unit owners;
- Applications of residents who have sold their apartments;
- Non-approved resident applications.

Property Records

- Expired commercial/store/garage leases;
- Mortgage and loan documents for which the final payment has been made and the mortgage or loan satisfied.

Tax and Financial Records

- Documents relating to the entity's income or deductions;
- Bank statements and reconciliations;
- Cancelled checks;
- Employment records: W-2, W-4, 1099 forms etc.;
- Invoices;
- Accounts payable;
- Accounts receivable ledgers and schedules;
- Schedules and information regarding uncollectible accounts and write-offs;
- J-51 and other tax abatement records.

Employment Records

- Withholding tax statements;
- Employment files of former employees;
- Payroll records and summaries;
- Union welfare and pension benefit records;
- Employment tax records.

Contracts and Insurance

- Expired contracts;
- Expired warranties;
- Expired insurance policies.

Note: the seven year time period does not begin to run until all obligations under the contract, including all warranties, or the warranty itself, have expired

Miscellaneous

- Accident reports and claims (settled cases).

RECORDS COOPS AND CONDOS SHOULD RETAIN FOR AT LEAST ONE YEAR

- General correspondence, memos and email should be periodically destroyed provided:
 - They do not relate to one of the categories listed above;
 - They do not relate to pending or threatened litigation;
 - They do not relate to a continuing matter, such as an unresolved dispute.