

Storage and Retrieval

of Electronic Records by State Agencies

Fast Facts

State agencies and local governments are responsible for selecting and using a recordkeeping system that meets the standards adopted by the Michigan Department of History Arts and Libraries for the storage and reproduction of government records.

To be trustworthy, electronic records must be authentic, reliable, and usable and have integrity.

By G. Ann Baker

Introduction

Electronic transactions and online access to information and public records are continually expanding. As a cost-savings measure, some information and records may be solely available online as electronic documents. The recordkeeping system used must provide continued accessibility and usability of the records. When a public record is only available electronically, it may become unavailable unless preserved in some manner.

Some information available online may be unofficial information. For example, a name availability search on the Department of Energy, Labor & Economic Growth website provides: "This is a preliminary search for name availability." The final determination of whether a name is available for use is made after the document is submitted.¹ The Michigan legislature website provides: "The information obtained from this site is not intended to replace official versions of that information and is subject to revision."²

Records Reproduction Act

The Records Reproduction Act³ requires the Michigan Department of History Arts and Libraries (HAL) to adopt standards for the storage and reproduction of records of state and local governments. Governmental entities are not required to select any particular recordkeeping system, but are required to ensure that public records remain usable. HAL has established technical stan-

dards and best practices to ensure that public records are accessible and usable and to ensure the authenticity and integrity of the records, regardless of the format and media used.⁴ Each agency is responsible for implementing appropriate policies, procedures, and business practices to meet those standards.

The Records Reproduction Act describes the manner in which an agency may store a record and how a record may be reproduced. As recordkeeping systems change, the agency must convert records to ensure that information does not become inaccessible.⁵ The use of technology has allowed agencies to shorten turnaround time and provide online access to many entity records.

Corporation Division's Current Recordkeeping System

Since 1978, the Corporation Division has used a database to index filed documents. The index initially included only records for active corporations. The related corporation documents were microfilmed. A six-digit number was assigned to the microfiche jacket containing the corporation's documents, and the number was stored in the database. The card index has been retained for corporations dissolved or withdrawn before 1978, and the related documents are stored in liber books and paper files. In 1990, records for active corporations and limited partnerships were converted from microfilm to optical disk images. As technology

changed, the documents were converted to newer storage systems, and the database was converted to Oracle in 2001. All documents filed by the Corporation Division since 1990 are stored as electronic images.

The agency retains filed corporation, limited partnership, and limited liability company documents permanently. To ensure that only authorized additions, deletions, or changes are made to the database or images, access to the system is limited to authorized users. Electronic documents are stored as tiff files, which do not permit alteration. To ensure that the information is reliable and accurate, the system is backed up daily.

The statutes administered by the Corporation Division require the records and files of the administrator relating to corporations, limited partnerships, and limited liability companies to be open to reasonable inspection by the public. Business Entity Search⁶ provides online access to find specific entity records, view filed documents, and check the status of recently submitted documents. It provides easy access to entity records and is searchable by entity name, key word, or the file number assigned by the Corporation Division.

Limited partnership documents were transferred to the Corporation Division from the counties in 1983.⁷ Railroad corporation records were transferred from various agencies in 1994,⁸ and street railway company records were transferred from various agencies in 2009.⁹ At the time of their transfer, the records for limited partnerships, railroads, and street railways were added to the database. Documents for these entities are available online, except for limited partnerships cancelled before 1990, which are stored on microfiche.

The database is updated each time a document is filed or a document is received that includes a new name. Paper documents, including annual reports and statements, are available online after they are scanned and indexed. Documents are scanned daily, and filed documents, other than annual reports and statements, are mailed back to customers. Documents filed through MICH-ELF¹⁰ and corporation annual reports or limited liability company annual statements filed online are available online immediately after filing. For a document submitted via MICH-ELF, the agency has statutory authority to notify the submitter by electronic transmission of the reasons for refusal to file the document.¹¹

Retention and Disposal Schedule

To ensure that records are properly retained, each state agency is required to have a retention and disposal (R & D) schedule for the official records of the agency, with consideration given to their administrative, fiscal, legal, and archival value.¹² All records must be listed on the R & D schedule, whether stored as paper, microfilm, digitally, or in some other manner, and list the specific retention period for each type of rec-

ord.¹³ Verification is required before any record is destroyed.¹⁴ General R & D schedules apply to all state agencies and pertain to nonrecords, such as transmittal letters that do not document significant agency activities, and general administrative records.¹⁵

The entity statutes permit the agency to store documents in their original form or in microfilm or other reproduced form.¹⁶ Section 5 of the Records Reproduction Act¹⁷ permits the image system in use by the Corporation Division on January 3, 2005, to continue to be used unless it cannot create reproduced records that meet the requirements of the act.

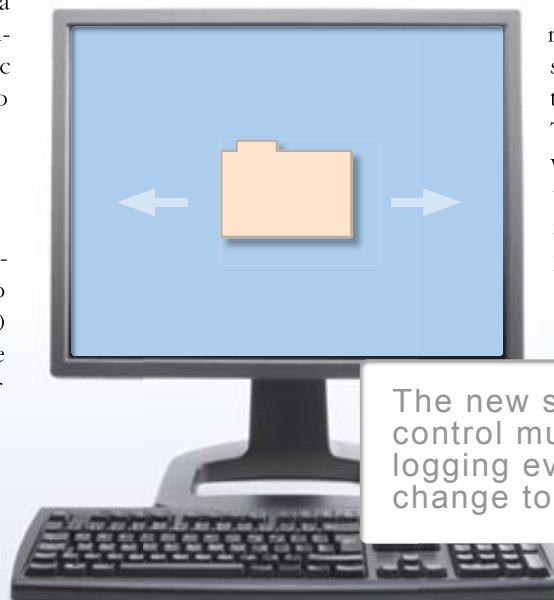
Corporation Division's New Information Storage and Retrieval System

Using electronic formats requires significant commitment to maintenance of the current system, migration to future systems, and system redesigns to ensure that the records remain accessible and usable. The Corporation Division is currently working with the Department of Information Technology on the development of a new system for storage, retrieval, and reproduction of records.

The functioning of the new system is dependent on hardware and software, and appropriate system design is critical to ensuring the accuracy, reliability, integrity, and usability of the records. The system design must take into account the entity statutes under which the records are created, the characteristics of the documents, the tasks the agency is required to perform, and the agency's business requirements. The programs and functions must be in a secure environment that protects the records from unauthorized alteration or destruction.

The new system will allow multiple user access, with access controlled by assigning specific functions to each user role. The system will log every transaction and change to the entity records. Indexing is critical to the retrieval of electronically stored images, and the new system will include safeguards to ensure that documents are correctly indexed. These features will protect against unauthorized additions or alterations and increase control of the creation, maintenance, and changes to records.

A comprehensive conversion plan is necessary for implementation of the new system. All information in the current system must be migrated to the new system. The conversion must ensure that the converted records are authentic, reliable, and usable and have integrity. Additionally, new fields and features will be added to permit the new system to capture necessary information, such as future effective dates for filed documents, and to connect



The new system will allow and control multiple user access, logging every transaction and change to the entity records.

records together for corporations and limited liability companies created by conversions.¹⁸ The new system will assure continued access to current records while permitting the future migration to new hardware and software. It will allow rapid retrieval of information while providing frequent backups and disaster recovery.

Privacy Concerns

Concerns about personal privacy and identity theft occur when public documents are available online. In 2006, Ohio's secretary of state was sued after posting online UCC filings, which contained Social Security Numbers. Several jurisdictions have restricted access or redact Social Security Numbers or other personal identifying information from public documents available online. Michigan's Social Security Number Privacy Act¹⁹ contains an exception for the use of all or more than four sequential digits of a Social Security Number when it "is authorized or required by state or federal statute, rule, or regulation, by court order or rule, or pursuant to legal discovery or process"²⁰ The Protecting the Privacy of Social Security Numbers Act pending in the U.S. Congress²¹ would prohibit governmental entities, with some exceptions, from displaying Social Security Numbers on public records available online.

Limited liability partnership registrations are the only documents on file with the Corporation Division that require Social Security Numbers, and therefore are not currently available online. The new system is being designed to permit confidential information, such as a Social Security Number, to be redacted from the document that is available to the public while retaining a secure image of the unredacted document.

Electronic Signatures

The ability to affix a signature is inherent in the use of electronic documents. The federal Electronic Signatures in Global and National Commerce Act (ESIGN), 15 USC 7001 through 15 USC 7033, and Uniform Electronic Transactions Act (UETA) permit documents to be signed electronically.²² ESIGN preempts state laws that conflict with its national rules regarding the validity of electronic records and signatures and its requirement of neutrality for various electronic technologies. However, ESIGN does not preempt state law if a state adopted UETA as it was originally approved by the National Conference of Commissioners on uniform state laws in 1999.

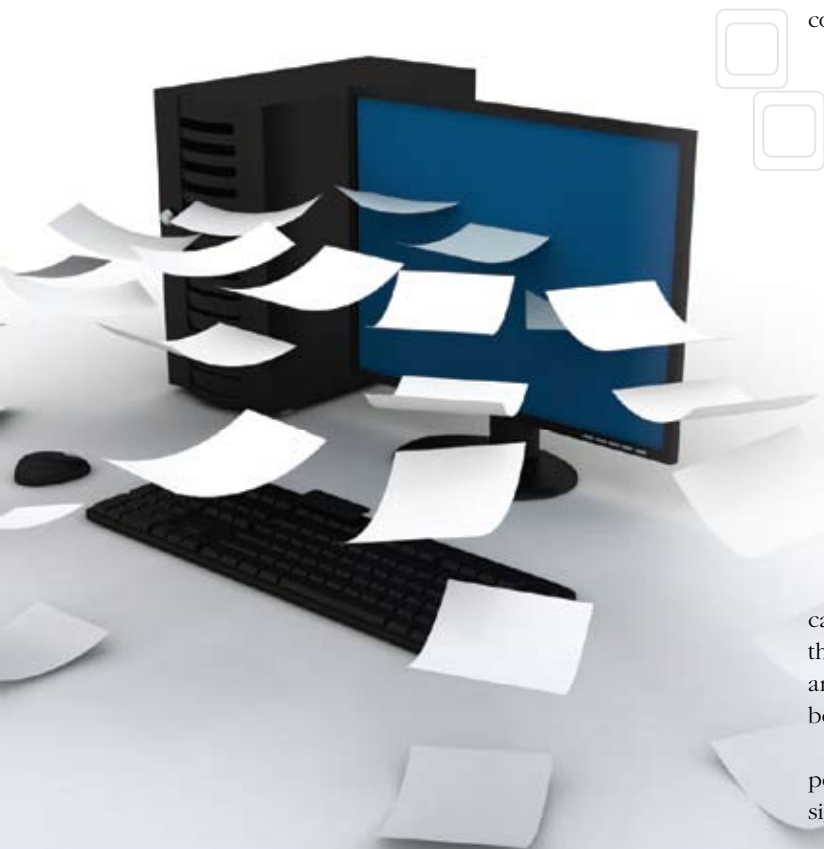
Michigan adopted UETA in 2000, MCL 450.831 through MCL 450.849. ESIGN and UETA provide that a document cannot be denied legal effect or enforceability solely because it is in electronic form. Neither act, however, requires a transaction to be conducted by electronic means, and it is up to the parties to determine how they will conduct a transaction. Parties retain the right to use paper and ink documents. UETA has broad application with specific exceptions for wills, codicils, or testamentary trusts and some transactions governed by the Uniform Commercial Code.²³

Section 18 of UETA, MCL 450.848, provides that the Department of Management and Budget²⁴ "shall determine whether, and the extent to which, each state department will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures." Section 18 provides that, to the extent a state agency uses electronic records and signatures, the department, giving due consideration to security, may specify:

- (1) the manner and format in which the electronic records must be created, generated, sent, communicated, received, and stored and the systems established for those purposes;
- (2) if electronic records must be signed by electronic means, the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process;
- (3) control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and
- (4) any other required attributes for electronic records which are specified for corresponding nonelectronic records or reasonably necessary under the circumstances.

Section 19 of UETA addresses use of electronic records by local units of government. The attorney general concluded in 2007 that a county register of deeds may, but is not required to, accept and record documents affecting title in electronic format and bearing electronic signatures.²⁵

The legal enforceability of an electronic document may depend on the strength of evidence that the document was validly signed.²⁶ A dispute may be about sufficiency of the signature,



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whether it is attached or logically associated with the document, or whether it was executed or adopted by a person with intent to sign.²⁷ The person claiming the signature is valid has the burden of proof. The user needs a method to review the document before signing, the ability to link signing to the document, and the ability to preserve signature for the life of the transaction. Permitting parties to store a document as a pdf creates a record to reflect what was signed. Authentication and identity data need to attach to the electronic signature. In *Kloian v Domino's Pizza LLC*,²⁸ the Michigan Court of Appeals discussed an exchange of e-mails regarding a settlement agreement, and made a distinction between "signed" and "subscribed," as that term is used in MCR 2.507(H).²⁹

Electronic Communications

Several statutes specifically provide for government use of electronic communication and records. MCL 24.208(5) provides: "An agency shall electronically transmit a copy of the proposed rules and notice of public hearing to the office of regulatory reform for publication in the Michigan register." MCL 28.425e requires the state police to create and maintain a computerized database of individuals who apply for a license to carry a concealed pistol. MCL 55.287 provides for electronic notarization of signatures. MCL 168.500b permits the secretary of state to electronically transmit voters' address changes to the clerk. MCL 168.509p requires a computer file and electronic network designed to permit counties, cities, or townships that are capable of accessing the interactive electronic communication system to add, change, or delete records regarding qualified voters in the qualified voter file.

The Michigan courts have expanded their use of electronic communication and electronic records. Michigan Supreme Court Administrative Order 2007-1 and Administrative Order 2009-1 provide for an electronic document filing pilot project and the extension and expansion of the pilot project in Oakland County. ADM File No. 2007-30 allows courts to electronically serve parties with notices, etc. Recent amendments to MCR 2.107 allow parties or attorneys to voluntarily agree to receive by e-mail notices and other documents from the court.

ADM File No. 2007-24 includes in Michigan court rules many of the federal rules regarding the retention of electronically stored information. If discovery of stored information is requested from sources that a party identifies as not reasonably accessible because of cost, MCR 2.302(B)(6) and MCR 2.506(A)(3) allow the court to shift the cost of discovery to the requesting party. MCR 2.302(B)(5) and MCR 2.313(E) provide that, absent exceptional circumstances, if information is lost or destroyed as a result of the routine, good-faith operation of an electronic information system, the court may not impose sanctions.

Conclusion

While the use of electronic transactions provides many benefits, a recordkeeping system must ensure that records that should be retained are accessible and usable. The records must be retained in a secure environment to guarantee their authenticity and integrity, and the records must be retrievable for their full retention period. ■



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FOOTNOTES

1. Michigan Department of Energy, Labor & Economic Growth, *Michigan Corporation Division Name Availability Search* <<http://www2.dleg.state.mi.us/CORPORATIONS/html/db/#p=210:1:1376330597983230173>>. All websites cited in this article were accessed May 24, 2009.
2. Michigan legislature <<http://www.legislature.mi.gov/>>.
3. MCL 24.401 through MCL 24.406.
4. Michigan Department of History, Arts and Libraries, *Best Practices for Reproducing Public Records* <http://michigan.gov/documents/hal_mhc_rms_bp_for_reproduction_125530_7.pdf>.
5. Michigan Department of Management & Budget, *Administrative Guide to State Government* <http://www.michigan.gov/dmb/0,1607,7-150-9131_9347--,00.html#900PRESERVATION> (900 series addresses preservation of records).
6. Michigan Department of Energy, Labor & Economic Growth, *Corporate Division Business Entity Search* <www.michigan.gov/entitysearch>.
7. MCL 449.2105(b).
8. MCL 462.207.
9. MCL 472.27.
10. Documents submitted by fax or e-mail through MICH-ELF are processed as electronic documents.
11. MCL 450.1151; MCL 450.2151 and MCL 450.4105.
12. See MCL 18.1285 through MCL 18.1292.
13. Michigan Department of Management & Budget, *Administrative Guide to State Government, 0920.04 Electronic Records* <http://www.michigan.gov/documents/dmb/0920.04_182695_7.pdf>.
14. MCL 18.1289.
15. Michigan History, Arts and Libraries, *Retention and Disposal Schedules* <http://www.michigan.gov/hal/0,1607,7-160-17451_18673_31548--,00.html>.
16. MCL 450.1131, MCL 450.2131, MCL 450.4104, and MCL 449.1206.
17. MCL 24.405.
18. See MCL 450.1745 through MCL 450.1746 and MCL 450.4707.
19. 2004 PA 454.
20. MCL 445.83(2)(a).
21. SB 141 and HB 122.
22. PL 106-229 and 2000 PA 305, MCL 450.831 through MCL 450.849.
23. MCL 450.833.
24. Executive Order 2006-19 transferred responsibility from the Department of Management and Budget to the Department of Information Technology.
25. OAG, No 7207 (October 2, 2007).
26. *In re Melinda Ebel*, 371 BR 866 (2007).
27. MCL 450.839.
28. *Kloian v Domino's Pizza LLC*, 273 Mich App 449; 733 NW2d 766 (2006).
29. The current rule is MCR 2.507(C).