

**NSBS Template File Retention/Destruction Policy**

2023

NSBS is in the process of creating a revised file retention standard that recognises the important role of privacy law (currently PIPEDA) among other factors. At the time of writing, new privacy legislation is before the House of Commons, which is expected to make privacy obligations tighter.

The goal of this work is to update our standard and guidance to better protect the public by:

* Assuring that personal information is retained for a valid purpose and destroyed in a timely manner in accordance with the law;
* Simplifying the rules to achieve better compliance and reduce costs that would otherwise ultimately be borne by clients;
* Improving access to justice by recognising that prolonged retention of files and other data is an obstacle to succession and thus the viability of small, and particularly rural practices.

Guidance is changing to recommend specified minimum retention periods, based on what happens in British Columbia. Each firm should make a policy for retention and destruction, then follow it for all paper and electronic files. Exceptions should only be made for broad categories (eg minors, will files), never by file or client, and should be expressed in your policy.

Questions? [lss.nsbs.org](mailto:lss.nsbs.org?subject=File%20Retention%20&%20Destruction)

You may use this draft template subject to your own skill and judgement. Please email us with feedback, including suggestions for improvement.



**NSBS Template File Retention/Destruction Policy**

**Date \_\_\_\_\_\_\_\_\_\_\_\_\_, 202\_**

**Firm Name\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

Footnotes, and italicized words, apart from statute names, do not form part of this policy.

**Main Purposes**

1. To provide for retention of closed files for a reasonable time in case of a need to respond to a possible liability claim or a professional misconduct complaint; and
2. To provide for the timely destruction of records to protect privacy.

**Scope**

Applies to all client files, paper and electronic, now or hereafter in our possession.

**Recital**

We considered the twin purposes of this policy, the applicable law and our professional obligations to our clients and colleagues including:

Obligation to follow all privacy laws including *PIPEDA,* including an obligation not to retain personal information longer than necessary;

The *Limitation of Actions Act;*

Limitations which might apply to some files (e.g., children) and whether they are relevant to the issue of retention/destruction.

**See attached Schedule A**

Signed:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Schedule A to File Retention & Destruction Policy Dated \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

1. Retain long enough to satisfy client ID Reg as well as virtually all potential complaints and insurance claims.
2. Destroy entire file when that time ends, both paper & electronic content.
3. Longer retention than the suggested minimums requires a valid reason and consent. You should write it in your policy in place of the below.

Retention periods start at the closing of the file. Suggested minimum retention periods are as below.

**Part A General** **Retention Period** (everything not listed below as an exception): **6 yrs.**

*Reasoning: given the Limitation of Actions Act and other factors, very few claims or complaints are made beyond this time. Our Regulations require keeping client ID for 6 yrs.*

**Part B Exceptions to the General Retention Period**

1. **Real Estate**
2. Foundation documents: indefinite, required by regulations.
3. The rest of the real estate file: (both LRA and non-LRA files): **15 years**
4. Where an authorised lawyer has a duty to correct per LRA Adm Reg s. 22, the 15 year retention period restarts when the file is reclosed after a correction.

*Reasoning: real estate files have a greater possibility of a claim in later years, relative to most other files. Because claims, if they happen, are sometimes made directly against the lawyer in contract and tort, as opposed to through the RG, claims can arise after 10 years.*

*Some firms want the option to cull real estate files before 15 yrs whenever there is a subsequent transaction that truncates the risk. See page 5 for this option.*

1. **Wills (client property) & will instructions & supporting file:**

*Recommend not keeping original wills unless your firm has a good way to protect them and to maintain contact with clients. Consider what might needed beyond the practice of the lawyer.*

**Wills & client property**: return to client. (If you hold them, have an agreement covering the terms of retention).

**Will instructions** – when any subsequent estate file is destroyed. Or, the following *(check as appropriate)*

* The life of the lawyer
* \_\_\_\_\_ years.

*Spell out your policy in a retainer letter.*

1. **Minute Books & seals (client property):** if holding a minute book for a client to whom it cannot be returned, and if the company has been struck off at RJSC, recommended minimums:
2. For single shareholder companies for which there are no minutes documenting assets which could still be important: destroy after strike-off. (*Put in retainer agreement)*
3. For other companies: retain evidence of ownership (legal and beneficial) and minutes for \_\_\_\_\_ years after strike off, if then reasonable to assume it is abandoned and of no value. *(Insert your preference after due reflection; recommend you put this in your retainer agreement)*
4. **Client is a minor:** the latter of the date determined above and client’s 19th birthday plus 6 years.
5. **Client is known to have incapacity** (s 19 *Limitation of Actions Act*): *set a retention period at file closing that considers the risks (privacy and liability for the type of file) and your comfort therewith. The representative for the client should sign a retainer agreement, if possible, that covers retention*.
6. **Tax \_\_\_\_ years.** *At the time of writing, we have no suggested minimum for tax law files. You will have to determine what retention period is appropriate. The same holds true if you have a niche area of practice where you know 6 yrs is not appropriate.*
7. Write any other exceptions into your policy.

Option (check if you choose this provision)

* **8. Criminal Law, acquittal:** 2 years after appeal period passes, but must keep client ID information for 6 years. *(or you may simply use the General Retention Period of 6 yrs)****.***

*Optional. Some firms want a mechanism to further cull paper property files; others prefer to keep things simple. You may opt to cull certain real estate files before 15 years have elapsed where a subsequent transaction truncates the risks. Check if you want to adopt either as part of your policy.*

* A. If the firm represented a client to purchase and/or finance a property, and then subsequently acts for that client to sell or refinance that property, it has actual knowledge of the subsequent transaction. It may:
  + 1. If the property is **sold by the firm**, retain the sale file. Destroy any preceding purchase or mortgage files once 6 yrs have passed from the date they were closed, and, in the case of the mortgage file, it is discharged.
    2. If the property is **refinanced by the firm**, retain the new financing file, destroy the original mortgage file once the mortgage is properly discharged and 6 yrs have passed from the date the original mortgage file was closed.

*Firm should apply this consistently to avoid the suggestion the selection of files for destruction was arbitrary.*

* B. The firm may at its discretion at any time or times and as its resources allow systematically review all closed real estate files between certain dates along with the parcel registers on Property On Line to determine if the risks have been truncated by a subsequent transaction.

1. If a property the firm acted on for the client was subsequently **sold by a different firm**, destroy the purchase file once 6 yrs have passed from the date they were closed. Also destroy any mortgage file at that time provided it is discharged.
2. If a mortgage which your firm placed is subsequently **discharged by a different firm** or entity, destroy the file once the mortgage is discharged and 6 yrs have passed since the mortgage file was closed.

*This provision is intended to be used perhaps once for any file, after perhaps 8 or 10 yrs of storage, as a means of reducing volume, particularly of paper files. It could also be useful as a lawyer prepares to retire and seeks to cull paper files. If you wish to destroy real estate files pursuant to B, have a process, for your protection, for systematically checking your closed real estate files to identify sold properties and discharged mortgages. That is, check all files of a certain date range on POL to see if any properties were sold or mortgages discharged by a different lawyer. You could, for example, once a year check all files that have been closed 10 years, (but not 11 yrs or greater which would have been checked in a previous year). This is to avoid any suggestion your destruction decision is arbitrary. You will have observed that this is only useful if the client has not returned to your firm for the subsequent work; otherwise, procedure A, above. would be applicable.*