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The Law on What Documents Scientists Must Keep and Disclose

Michael B. Gerrard
Columbia Law School, michael.gerrard@law.columbia.edu

Elizabeth Sheargold
Columbia Law School, Sabin Center for Climate Change Law

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Recently, several climate scientists have received demands to produce their raw data, working notes, e-mails, letters, or other communications. These demands may come in the form of subpoenas, U.S. Freedom of Information Act (FOIA) requests, or requests during litigation. Below are some general guidelines for scientists about complying with their document retention and disclosure obligations, both as a matter of routine practice and in the event of legal action. This article concerns only U.S. laws and is not legal advice, which should be sought from the scientist's lawyers or those of his or her employer.

Routine Document Retention

Even where there is no legal obligation to retain documents or data, it is advisable to keep them for a reasonable number of years. Any person can be made to look bad if it is later discovered that there are important gaps in their files, and where there is no evidence of what was actually said or done, imaginations can run wild and hostile parties may draw adverse conclusions.

How and when scientists are legally required to retain documents or data will depend largely on what kind of institution employs them, the sources of their funding, and whether litigation is "reasonably anticipated." As a starting point, staff or consultants to both private and public institutions should check the details of any data or document retention policies adopted by their employer.

The broadest requirements apply to those employed by, or who consult to, public bodies such as government agencies or laboratories or state universities. This is a result of the FOIA and comparable state laws that govern the management of public records. Whether or not something is considered a public record will depend more on its content than its form or where it is kept. Letters, written reports, working papers, notes, electronic data, and e-mails may all be covered. While the specific requirements vary among jurisdictions, these rules usually apply only to documents that relate to public business, and exclude purely personal communications.

Document retention may also be a requirement of a grant or public funding received by scientists, even if they are employed by a private institution. For example, the National Science Foundation (NSF) and many other federal agencies require that recipients of funding retain their "research data" from the project, which includes anything that an investigator would need to reproduce the published results, including databases. These NSF document retention requirements do not include peer reviews, communications with colleagues, preliminary analyses, or draft papers; however, such documents may have to be produced in civil lawsuits.

This is only general guidance on the types of document retention requirements that may apply to the everyday work of a scientist. The range of documents that have to be retained, and the length of time for which they have to be kept, may vary significantly.

Retaining Documents or Data Relevant to Litigation

An additional legal obligation to retain documents or data arises if they are relevant to any ongoing litigation or if there is a reasonable anticipation that they may be relevant to future litigation. The knowing destruction of documents or data when there is a likelihood of litigation is known as spoliation of evidence, which is a serious offense subject to fines. Litigation may be "reasonably" anticipated if there is credible information that a person or entity has an intention to bring legal action, even if that action is not imminent. If a different scientist or a research institute has been sued or investigated in relation to a particular practice and you also follow that practice, then this may give rise to a reasonable anticipation of litigation. However, vague threats or the mere possibility of future litigation do not create an obligation to preserve documents.

If litigation has begun or is anticipated, there is an obligation to make reasonable and good-faith efforts to preserve any document or information that is relevant to the issues in dispute. This could include e-mails or posts on Facebook or Twitter, even if they are from a personal account, and documents stored outside of the workplace (e.g., on a personal laptop or a cloud service such as Dropbox). Documents that are typically considered confidential, such as peer reviews, may have to be produced in litigation. Typically, a lawyer for an organization involved in litigation will issue a "document hold notice" to relevant employees concerning what documents must be preserved.

How to Preserve Documents

While preserving hard-copy documents is largely a matter of common sense, selecting the best method of preserving electronic information can be a very technical issue. Consult with data management or IT specialists at your organization on how best to preserve both the content and, where necessary, metadata for electronic data, e-mail, and social media communications. If litigation has been brought or is imminent or likely, it is important to stop the routine deletion of old e-mails and destruction of paper files.

Disclosure of Documents

How and when documents must be disclosed depends on the nature of the request. FOIA requests are generally handled by a designated person in the relevant public body. Producing documents in response to a subpoena or during litigation is almost always managed by legal counsel. If you receive a direct request or demand to disclose documents from an adverse party, you should immediately contact your employer's law department or your attorney.

Scientists should also be aware that other parties may be required to disclose documents in their possession, custody, or control that you have authored. For example, any documents provided to a government agency may later be subject to a FOIA request.

Good-Faith Efforts

Although the document retention and disclosure obligations for scientists may seem complicated and onerous, it is important to make good-faith efforts to comply with them in order to avoid allegations of destruction of evidence, or the implication that you have something to hide.

Author Information

Michael B. Gerrard and Elizabeth Sheargold, Center for Climate Change Law, Columbia University Law School, New York, N. Y.; E-mail: michael.gerrard@law.columbia.edu

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Editor's note: Gerrard will present a lunchtime seminar on these issues on Monday, 3 December 2012, as part of AGU's Fall Meeting in San Francisco (see page 444). AGU and the Climate Science Legal Defense Fund also hosted a webinar on this topic with Gerrard on 19 September 2012. The slides and an audio recording of that webinar are available online (see http://www.agu.org/sci_pol/events/).

M. B. Gerrard and E. Sheargold