

## **CAN I DESTROY MY ORIGINAL DOCUMENTS AND STILL PROTECT MYSELF?**

### **ESTABLISHING A MICROGRAPHIC PROGRAM FOR DOCUMENTARY EVIDENCE**

#### **Acknowledgement**

Datawitness Online Ltd. would like to thank you the reader for considering the environment in addition to the well-being of your organization before embarking upon a progressive policy of records archiving. Datawitness would also like to acknowledge the Canadian General Standards Board from whom the majority of these guidelines have emanated. Datawitness is a strong advocate of taking paper source documents out of expensive warehouse facilities, putting their content onto microfilm, and recycling the paper. However, the difficult question always posed is: how does an organization maintain documentary evidence when it disposes of its paper originals? The answer is complicated but this paper is a modest attempt at guiding us in the correct direction.

#### **Introduction**

Microfilmed images as an information medium are important to companies because they offer the potential for reduced paper record storage costs, helping the environment, increased efficiencies in information retrieval, and accurate reproduction of the original. However, there is uncertainty over the admissibility of such evidence in court proceedings. The legal issue is whether a microfilm image-produced copy will be admissible and credible in court proceedings as the source record after the paper source record has been disposed of.

The business record and banking record provisions of the Canadian Evidence Acts (and corresponding acts of the provinces) require that business records be made “in the usual and ordinary course of business” in order to be admissible as evidence in court proceedings. Therefore the image program must be part of an organization’s “usual and ordinary course of business”.

The admissibility and credibility of image-produced copies cannot be equal to that of the source records without proper authority to dispose of source records and to keep the organization’s permanent records on electronic or micrographic media. In the absence of such authority, a court might find that although the copying of source records such as paper documents is part of the organization’s “usual and ordinary course of business”, the disposal of those source records is not. Such a finding might prevent admissibility into evidence of the image-produced copies or greatly reduce their credibility even when they are admissible. In addition, the absence of such authority might give rise to an adverse inference that the source records were disposed of in bad faith.

Copying without the disposal of source records is merely the production of another copy. To allow source records to continue to exist after copying is to risk an inference that the copies made from them are not as reliable, secure, or accurate as those source records.

The purpose of a microfilm image management program is the creation of new source records having exclusive authority as the official and authoritative records.

It is necessary, therefore, that an organization have guidelines and procedures in place to demonstrate to a court, tribunal, or inquiry, that it has a credible image management program capable of copying source records accurately, reliably, and in a timely fashion without loss of value. Therefore, unless otherwise prohibited by law, an organization's senior management can give authority to dispose of its paper source records and rely exclusively on its captured records in the conduct of everyday business.

At all times, an organization must be prepared to produce its imaged copies as evidence. This is accomplished by the witness or affidavit evidence specified by the Evidence Acts. The evidentiary requirements for business, banking, and photographic documents arise from the Canada Evidence Act, the Evidence Act and Ordinances of the provinces and territories, the common law, and from any specialized legislation that deals with documents for particular uses.

This paper provides rules and guidelines for organizations to establish and operate a credible image management program with the ability to demonstrate that the resulting captured images are accurate reproductions of source records thus maximizing the probability of admissibility and weight given in court.

According to Canadian General Standards Board (CGSB) and American National Standards Institute (ANSI) the following steps have been prescribed as guidelines for establishing a micrographic program to maintain documentary evidence.

### **Steps 1, 2, 3 to Establish Program**

1. **Corporate Policy to Authorize.** The company embarking upon such a program must in writing authorize by way of corporate policy the establishment of a micrographic program. As indicated in Part 1 S.1.1, CGSB 72.11-93 the corporate policy shall authorize:
  - establishment of the micrographics image management program
  - the records or types of records to be captured
  - the records or types of records to be retained
  - the disposal of source records
  - the method of recording and certifying that the activities authorized were in fact carried out as required

Lastly, the authorization must indicate and from time to time verify that program is part of the normal course of business of the company. All changes and revisions in the program shall be authorized by management before implementation.

2. **Responsibility.** The corporate policy should designate a person to be responsible for the micrographics program. The assigned authority shall be clearly defined.

- Outsourcing the Program.** If the company elects to use an external service bureau to carry out its microfilming program, the company must:
- be satisfied that the bureau's program provides security for the documents and adequate certificate and filming procedures
  - obtain an account of the bureau's program and confirm that the bureau's procedures are satisfactory
  - review the bureau's operations from time to time and regularly inspect the register of microfilms
  - carry out these procedures for the purpose of ensuring that the microfilm produced in the service bureau is as admissible and credible as if the microfilm were produced in-house. (Part 1, CGSB 72.11-93)
3. **Procedures Manual.** A manual shall be prepared that describes the operations and specifies the procedures required in the program. The manual shall:
- identify and record the types or categories of documents to be microfilmed
  - identify the indexing techniques and the appropriate reduction ratio of each application
  - describe the microfilming procedures, technical standards to be used, quality control procedures, storage and preservation practices, and the quality assurance auditing system
  - describe the affidavits required, when they must be completed and by whom
  - be an integral part of the training aspects of the micrographics program

Source records must be available for retake until images on transitional storage are quality assured.

Source records shall not be disposed of until the quality assured image record in question is accurately and completely transferred from transitional storage onto secure storage.

**Revisions to the Manual.** Changes in the system and procedures shall be documented in the manual with the appropriate authorization. The procedures manual must always be up-to-date because it is the organization's most persuasive evidence of its usual and ordinary course of business. It must be written before litigation.

A manual entry that is written after the image management program is challenged can destroy the credibility of the program. It therefore puts at risk the admissibility and weight of its imaged records, if such an entry is shown to be contrived evidence, or written to justify the challenged procedure, practice, or rule.

## **Steps 1, 2, 3 for Microfilming**

When the company has a corporate policy in place and has designated a person in charge of administering the micrographics program and procedures manual, the company can start microfilming.

### **1. Preparation of Documents for Microfilming**

The images on the microfilm should be identified and indexed to ensure that an individual document or series of documents can be easily located on the film.

In situations where very special or important source records such as contracts or executed documents are filmed, a verification process such as a sequential numbering system should be used so the operator can attest to the fact that all source records intended to be filmed were in fact filmed (Part II, S. 4.2.2, CGSB 72.11-93).

### **2. Microfilming Procedures**

It is important that microfilming and processing are carried out in a controlled manner. Monitoring the established and documented procedures should be as frequent as necessary to ensure consistent quality. Certificates or affidavits shall be prepared and signed as required.

**Integrity of Source Records** – The whole of the source record with all detail and any imperfections shall be captured on microfilm without alterations or retouching of the source record to improve the legibility.

**Enhancement of Source Records** – Enhancement of source records shall be properly authorized by the micrographics manager or equivalent. If the legibility of a source record is below the generally accepted threshold, the sequence of microfilming shall be as follows: the unacceptable microimage shall be followed immediately by a certificate stating that the preceding document has been enhanced and the process clearly stated, and that the following image is that of the enhanced document. To avoid confusion between the two images during retrieval, the enhanced image should be identified in a manner that does not cover or interfere with any information on the document.

**Procedures for Capture** – The capture operator should log on, perform quality assurance of equipment, and certify that the image file is a complete record of the documents passed to him/her for capture. This log should be a mandatory part of the image management system. If the certificate of image authorization is a paper document and it is captured, the operator need only log completeness at the end of the document batch. If the certificate is an electronic file, it may be electronically logged into the image management system.

**Retakes** – In applications where a chronological or batch filing arrangement is used, retakes shall be spliced at the beginning of the applicable roll of film. Where a random file arrangement is used, usually in conjunction with a computer assisted retrieval (CAR) system, the retake images shall be reindexed to the subsequent roll of film.

### **3. Inspection of Processed Microfilm.**

After development, the microfilm shall be inspected to ensure that the photographic requirements in the company's procedures manual have been met, and that the documents described and identified on the microfilming authorization certificate and the camera operator certificate, together with appropriate control targets, have been microfilmed as directed. In order to get a better understanding of some of the photographic requirements please see ANSI/AIIM MS23.

An inspection report shall then be completed, stating that the microfilm (batch/roll etc.) was inspected, that the bibliographical information was compared to the microfilm authorization certification as well as to the camera operator certificate, and that all the necessary control procedures were applied during the process. It should also state a minimum 5% visual inspection of randomly-selected microfilmed images was performed and that there was no reason to believe that any source records were omitted. It shall be signed and dated by microfilm inspector.

**Audit** – The person(s) who conduct(s) the quality control and inspection procedures during normal operations shall not be involved in audit activities.

### **Steps 1, 2, 3 to Maintain Evidence**

#### **1. Evidentiary Requirements (Microfilm)**

At all times a company must be prepared to produce its microfilm as evidence. This is accomplished by witness or affidavit evidence as specified by the Evidence Acts. The affidavit evidence should include statements that the particular equipment involved (i.e., camera, reader, printer, etc.) was in good operating order at the time of the process, that the microfilm program was properly authorized, and that the microfilming and disposal of source records was carried out in the usual and ordinary course of business.

**Certificate of Microfilming Authorization** – The certificate authorizes the filming of source records by the custodian in accordance with corporate policy in order to keep a permanent record thereof. It should include:

- the date
- the name of the authorizing person
- sufficient biographical information to clearly identify the source records. It may be filmed with the records or kept separately.

**Camera Operator Certificate** – The camera operator should sign:

- a form giving his/her name and the date of filming
- certification that the microfilm is a complete record of the source records passed to him/her for filming

The form should be filmed immediately before and after the source records to which it refers. If the Certificate of Microfilm Authorization is filmed, the camera operator

certificate need only be filmed at the end of the batch. If a batch of source records fills more than one roll of film, a continuation certificate should be filmed at the end of the first roll and at the beginning of the second, and so on.

If there is a change of operator during the production of a roll, the first operator should film his/her certificate immediately after the last source record he/she films, and the next operator should film his/her certificate immediately before the first source record he/she films. If retakes are necessary, the camera operator should complete another certificate before and after the source records and state the reason for re-filming. Retake certificates are not necessary in a random-filed CAR system because the documents are treated as a first-time filming and are reindexed in the new roll of film.

**2. Certificate of Disposal of Source Records** – Most of the photographic documents provisions in the Evidence Acts require proof (which can be in the form of an affidavit or sworn declaration) that the source record was disposed of before a microfilm copy will be accepted as evidence in court. Although proof of disposal is not expressly required by the business and banking document provisions of the Evidence Acts, it should always be expected that proof of an acceptable reason for the absence and replacement of source records will be an aspect of a court's interpretation and application of those provisions. (Part II, S. 4.4, CGSB 72.11-93)

If the source record has been authorized to be disposed of immediately or shortly after microfilming, the affidavit of disposal may be incorporated into the certificate of microfilming authorization. However, it may not be practical to incorporate it with the certificate of microfilming if the source record must be kept for a designated period after microfilming (e.g., business documents under an Evidence Act requiring that the source record be kept for a specific retention period).

In either case, the certificate should identify the source records completely as well as the identifying numbers assigned to the microfilmed images. It should state that the bibliographical information assigned to the source records and the microfilm were compared to the microfilm authorization certificate, the camera operator certificate (including retake certificates), as well as the quality control inspection report, and were all found to be the same documents. It should also authenticate that the source records were subsequently disposed of in accordance with the authorized disposal schedule of the organization, and identify the person in whose presence they were disposed of.

### **3. Storage and Preservation**

**Original Microfilm** – The storage medium and the preservation program should be such that the film can be preserved for the intended life of the record (100 to 500 years).

**Duplicate Film** – To preserve the life of the original microfilm, duplicate microfilms should be made for reference or distribution.

### **Conclusion**

We trust that this information has been informative, please do not hesitate to visit our website: [www.datawitness.com](http://www.datawitness.com).