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Retention of Records on Congregational Members

by Amy Hereford, CSJ, JD*

Each institute should develop record retention policies that deal with the broad scope of documents that are received and produced by the institute. This memo will address only one particular area of the record retention policy, namely, the retention of records concerning members of the institute.

The institute should develop and follow a policy regarding those member records the institute needs for its purposes. This policy should treat everything from those documents required by canon law, to records of the members ministry and records of accusations, misconduct and the response of the institute.

Some basic questions should guide the articulation of a record retention policy in this regard:

Why was the record made? And, who had access at that time?

Why was the retained made? And, who has access currently?

Is there an ongoing interest in retaining the record? E.g. archival information, providing information for decisions regarding the member, protecting interests of the member or the institute.

Are there contravening interests advising against retention of the record? E.g. liability, confidentiality, space considerations.

In addition to the question whether or not to retain various types of records, decisions must be made as to how and where to maintain the records and who will have access and under what circumstances. Some records are more sensitive than others, and provisions should be made to ensure that these are held in confidentiality. Many records, if they are available, are subject to subpoena in a law suit. This may be true, even if efforts are made to keep the records confidential.

Another consideration in this regard is that of who has the authority to purge files when information is determined to be outdated. If records are made, and access is limited to a few individuals, then those individuals must be responsible for purging the files. It may assist in this process if records are marked with a destruction date when they are created. This will facilitate the efficient maintenance of files.

Certain confidential documents may be placed in sealed envelopes, labeled on the outside to indicate who has access and when the record should be destroyed. If a summary of the confidential document is required, that should be prepared at the same time. If this is done when records are made, it ensures both efficiency and confidentiality in record management. It is particularly helpful when a leadership team is going out of office if records have been pre-designated in this manner.

There are many types of records an institute may have on its members:

1. Legal records: civil and canon law
2. Basic biographical data and administrative information
3. Religious institute records
4. Professional and ministerial records
5. Medical records

6. Psychological records

7. Financial records

8. Misconduct allegations and follow-up

1. Legal Documents

Some basic legal documents should be retained throughout the life of the member, unless the document is updated, e.g. the member's last will and testament. Some of these documents may be transferred to the institute archives on the death of the member.

Civil Law documents include: the birth certificate, Immigration and naturalization papers if applicable. Documents on remuneration, powers of attorney, and advanced directive, durable healthcare power of attorney, living will, etc. The current last will and testament together with any codicils.

Canon law documents include the certificates of baptism and confirmation, papers documenting vows, transfers of vows, and separation if applicable. Renunciation and cession of administration documents.

These documents continue to have legal significance throughout the persons life, and may have archival significance after the person's death. Provision should be made for their retention and security.

2. Basic biographical data and administrative information

This category contains basic personal information about the member, including name, date and place of birth, family, academic and employment background and contact information. The institute may preserve a variety of biographical and administrative information on the member for the lifetime of that member. The institute may maintain archives and preserve these records beyond the lifetime of the member for the lifetime of the institute. It is possible that these records may contain statements that are untrue, unproven or unfavorable to the member. The policy should state what information will be retained, perhaps stating that the record should be limited to verifiable factual information.

3. Religious institute records

These records contain correspondence between the member and various leadership persons and administrative offices of the institute. The nature and scope of these records may be transient in nature and the records may therefore be subject to frequent purging. However if

information of an enduring value is contained in these files, that information should be so designated and treated as such. E.g. such correspondence may indicate a change of address, or contain important information about family or about funeral arrangements, or it may provide insights that will be useful to future generations researching the history of the institute.

Some personal correspondence may provide substantial evidence giving credence to future allegations against the member. E.g. correspondence with the member regarding unexplained monies being spent may later be used if the member is accused of financial misconduct. Correspondence relating to accusations of misconduct will be treated separately below.

4. Professional and ministerial records

There may be a list of ministries and the years the member served in these ministries. In addition, there may be a record of professional preparation of the member for his/her ministry and records of professional licensing. There may be some record of why or how this member chose or was chosen for this ministry. There may be letters of commendation or complaint. In certain ministries, it is not uncommon to receive complaints suggestive of

sexual misconduct, e.g. teaching, counseling, spiritual direction or the use of healing techniques requiring physical contact.

Evidence of the member's preparation for ministry and success in that ministry, together with commendations help to support the member's integrity. Complaints or allegations of misconduct should be treated with care, however, they may have enduring value for the institute, as well as providing leadership with a fuller picture of the member's service. Further treatment of this topic will occur below in a section dedicated specifically with allegations of misconduct.

5. Health records

Medical reports may include examinations upon admission to the institute and significant medical issues since that time. These records may be held by the member and his/her health care providers.

Alternatively, the institute may have a central location for such records if they are required for payment of bills, or if the institute is actually providing the health care. Medical professionals have record keeping standards; if the institute holds the records, basic medical records should be held for 10 years, after which time summary information is sufficient. These records are also subject to federal and state requirements.

Records may have ongoing legal significance for at least two reasons. First, past medical history will be significant in determining underlying causes for the current state of health. This would be particularly significant in the case where a member's health has been injured and the member is suing for damages. Second, records of treatment for substance abuse may be used to support a future claim of misconduct. See the treatment of psychological records and misconduct allegations below for a further treatment of this issue.

6. Mental Health records

The treating professional is required to maintain records. The member may have received copies of these records and the religious institute may request copies as well. Institutes routinely seek assessments upon entrance to the institute. In addition, the member or the institute may seek a subsequent assessment for a variety of reasons. If the assessment was made for the purpose of a decision, the report may be discarded thereafter, since these reports are valid only for a limited period of time. The evaluation may have a further purpose to provide a record of the rationale for decisions. In this case, the record, or a summary of it may be maintained.

These records often contain sensitive information and every effort must be made to ensure that the records are not available to the casual inquirer or to persons who have routine access to other member information.

Communications between a client and a mental health professional are privileged in most jurisdictions. However, once a report is made to a third party, the privileged status no longer applies. Therefore the documents may be subpoenaed by an adverse party in a law suit. Favorable records may be helpful in defending against allegations of misconduct and unfavorable records may lend credence to these allegations. However, these reports rarely contain information that is conclusive regarding whether or not misconduct occurred. The records may however, indicate that the institute knew or should have known of the member's propensity for certain types of conduct. This inference could give rise to a perceived duty to supervise the ministry of the member, or ensure that further misconduct did not occur. This is an area of law where we are seeing changes in the legal requirements and social expectations.

This can be a two edged sword, since the institute requires this information in order to make decisions and recommendations about the future ministry of the member. Therefore it is important to

balance 1) the need for these records for its ongoing life and ministry and to provide a corporate memory of the strengths and weaknesses of the member, and 2) the confidentiality of information contained in the records, and 3) the potential negative impact of the information in the event of legal action.

If an assessment indicated the need for treatment, some record of the follow-up and resolution of the case should be maintained along with the assessment information. When the record is established determination should be made regarding what is to be retained, for how long, with what access, and what summary information should be maintained when the full record is purged.

7. Financial records

There are lists available from many sources indicating retention time for various financial records. These can be very helpful and are generally based on the applicable statutes of limitation. However, there are certain member financial records that deserve special mention.

Records relating to Social Security and Pension benefits for which a member may be eligible should be maintained through the life of the individual. In addition, records relating to patrimony and its administration and any disposition of patrimony should be maintained.

8. Misconduct allegations and follow-up

These records may be discussed in other categories, however, it is important to carefully consider the issues associated with these records. In addition to the principles indicated above, several general principles should guide consideration of these records.

A congregation needs to have certain information in order to ensure endurance and integrity of its ministry, the ongoing care of its members, the good of all those served by its ministry and its members and the good reputation of the congregation, its members and the Church.

Members have a right to a good reputation. Canon 220 states "No one may unlawfully harm the good reputation which a person enjoys, or violate the right of every person to protect his or her privacy." This right should be respected in developing this area of the policy.

Child sexual abuse is a crime and is subject to reporting requirements. In some jurisdictions, all persons are required to report, and in many jurisdictions, non-reporting itself is a

crime. There are other types of misconduct that are not criminal and do not carry an automatic reporting requirement.

The discussion that follows assumes that mandatory reporting statutes have been complied with. This discussion will focus on the legal implications of various record keeping policies.

Records may include allegations, investigations, determinations of fact, follow-up and resolution. These elements have the potential to give rise to criminal or civil liability or scandal.

Liability may arise 1) for a member from past behavior if facts indicate illegal or tortious conduct, 2) for an institute for later misconduct if prior allegations show the member has a propensity or history of the conduct in question, or 3) for an institute for later misconduct if the record shows that the institute knew of the danger the member posed and did not take sufficient care to prevent further misconduct.

Records should indicate that adequate measures were taken by an institute to prevent any further misconduct by the member. The best damage control against having incriminating records is to ensure that allegations are taken seriously and responded to appropriately. In this way,

incriminating records are never made.

When a congregation receives allegations of member misconduct, it should maintain objective records of the allegation and of the congregation's response to that allegation. The records should reflect that the congregation complied with its own policy on misconduct, or that it departed from the policy for good reasons. Once the incident has been resolved, a summary should be prepared for the file. Report the facts without comment: statements of the person making the allegation, statements of other persons supporting or contradicting the allegation, chronology of actions and events. Include copies of any investigation conducted by others, civil authorities, employer or diocesan officials, etc. This is all public information that can be obtained from other sources and it can be obtained by a subpoena if there is good cause. However, it is also available from other sources.

There may be a response from the member who is accused of misconduct. This should be reported without comment. However, the congregation should advise the member that any admission of misconduct made to the congregation may be obtained through discovery.* In situations that may give rise to litigation, the member should speak with his/her legal counsel prior to responding to the allegation.

If the congregational leadership requested a psychological or psychiatric assessment of the member, there are some issues to consider before seeking a report of the assessment. First, the test will show conclusively that a person has or has not engaged in misconduct. Second, any report which the congregation receives may be subpoenaed. Therefore, the member cannot be promised that a report to the congregation will not be further disseminated in the event of criminal prosecution or of civil action. This should be explained to the member before (s)he agrees to release a copy of the psychological or psychiatric assessment to the congregation.

A congregation should maintain a record of the information relied upon by and the action taken by the congregational leadership in response to the allegation. This record should show that congregation acted reasonably under the circumstances. In litigation against the congregation, one issue is what the congregation knew of the member's propensity for or history of misconduct or what they should have known and when they knew it. For example, has the member received credible accusations of sexual misconduct in the past? A second issue is whether the congregation took

reasonable steps to prevent future misconduct. What action did the congregation investigation, assessment and reassignment? What treatment did the congregation direct the member to undergo? What professional reports did the congregation have concerning the success of the member's treatment? Did the congregation act reasonably in its realm of authority to prevent the victimization of others by this member?

In the past some may have considered it advisable to keep no records of allegations of misconduct in order to avoid any subpoena or court order in litigation. However, in today's climate this is indefensible. A religious congregation must be concerned for its members and for persons who may have been injured by its members through serious misconduct. The congregation should keep a record of these allegations. This information should be factual and should be gathered and recorded in a respectful and responsible manner.

Even factual information should be held in confidence since it may cause damage to a persons reputation, especially if allegations were made, and were later found to be unsubstantiated.

Information thus held may be used when a member applies for a ministry situation. In this case the member may

consent to certain information being disclosed in a letter from the congregational leadership. This must be done responsibly, information about unsubstantiated allegations is not appropriate, however, statements of the existence of non-existence of untreated / treated problems of abuse of any kind, and substantiated allegations of misconduct should be communicated, depending on the type of position sought.

In addition, confidential files may be opened by court order or subpoena. There is a growing interest in transparency in record keeping. This will certainly be expanding the authority of courts and plaintiffs to obtain confidential information. Destruction of records that are requested in litigation is simply not an option. Records may be destroyed a timely manner in keeping with a well thought out policy. However, even in this case, if there is pending legal action, no files should be altered until that action is resolved.

Conclusion

Each congregation should develop a record retention policy covering congregational records, business and financial records and member records. There will be varying levels of access and varying lengths of retention. It is important to thoughtfully consider each type of record that an institute develops, and to consider the four preliminary questions regarding the purpose for making and retaining the record. From this consideration decisions can be made what is to be retained in full or in summary, how long it is to be retained and who has access.

* Amy Hereford, CSJ, JD is in private practice and frequently advises religious institutes and their leaders on matters relating to record keeping, liability, and confidentiality.

* Discovery is a legal term referring to compulsory disclosure of information that relates to the litigation. Through this process, lawyers obtain information and documents from the opposing party to develop their own case. Discovery has broad scope; generally, parties may obtain "any matter, not privileged, that is relevant to the subject matter of the action." (Federal Rules of Civil Procedure, Rule 26)