

Ed Cloughton, President

PRI Management group

The confusion regarding whether an item is a record or evidence can be easily eliminated with one simple statement: it can be both. This confusion typically occurs when the time comes to purge records and/or evidence, as well as when agencies begin utilizing a new property and evidence system, or digital evidence management system. Physical items such as records on a DVD, copies of statements, or any other item which transcends the traditional meaning of "records" and "evidence", can pose a retention challenge.

While each state's laws define a "record" slightly different, they all generally say the same thing. Here are two key examples.

Florida defines a record in statute 119.011 as *"all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency"*.

The California Public Records Act says a record is *"any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics"*. The word "writing" typically refers to any type of communication or information, whether in paper, electronic, digital, or audio formats.

Notice how the elements of these definitions are the same, as they are in nearly every state. A record is:

- ⇒ Any material, which...
- ⇒ Pertains to government or agency-related business, which...
- ⇒ Was made, received, or maintained by a government agency, regardless of...
- ⇒ The information's format or media type.

Accordingly, many things in the possession of a police agency which have these elements can be either a piece of evidence, or a record. Consider the following:

- ⇒ A DVD with PDFs, digital statements, or video pertaining to a criminal investigation contains information which meets the definition of a record.

- ⇒ A body-worn camera recording of an officer's investigation meets the definition of a record.
- ⇒ A video recording of a statement provided by a victim meets the definition of a record.
- ⇒ An agency's copy of a bank's surveillance video which recorded a robbery meets the definition of a record.
- ⇒ An internal email which contains information related to official business is a record.

All of these can also be evidence, if they will be used as such.

So, what determines whether records are evidence, and vice versa? In the eyes of the law, the answer is not where they are stored within a law enforcement agency. Rather, it is how they are, or will be used. Records and evidence are not mutually exclusive entities. One can simultaneously be the other.

Similar to the term "record", evidence is defined in a slightly different way from state to state. Nonetheless, the meaning is universally the same. The Cornell Law School's Legal Information Institute defines evidence as *"an item or information proffered to make the existence of a fact more or less probable. Evidence can take the form of testimony, documents, photographs, videos, voice recordings, DNA testing, or other tangible objects."*

WHY THE CONFUSION?

Storage Location

With the understanding that a record can be evidence, and evidence can be a record, why is there any confusion? Several reasons.

First, the belief that storing an item in the property and evidence room qualifies the item exclusively as evidence is incorrect. Where an item is stored does not determine how it is defined in the eyes of the law. Whether a DVD containing investigative information is stored in Records or in Property is immaterial to how it must be managed according to *legal* requirements. If the DVD will be used as evidence, then it is evidence...and a record. If the DVD will not be used as evidence, then it is only a record. Herein lies the confusion for many agencies.

Items stored in the property/evidence room are viewed as, and managed as, evidence, often to the exclusion of realizing they may also be a record. This postulation is often solidified in agency policy, typically written in a manner that is reflective of a strictly evidence-based perspective, absent of any records-based perspective. Accordingly, when the time comes to purge items in the property room, or to purge records, the inevitable question of retention becomes a difficult one. When can these things be destroyed? When the court says so? When disposition has been met? When a retention schedule says so?

Terminology: "DEMS"

Further driving the confusion is the terminology that has become so prevalent in the world of “digital evidence”. Industry lexicon for the systems used to manage digital information inherently suggests everything is evidence. They are called after all, *Digital Evidence Management Systems*, despite the fact they mostly contain records. Think of what currently resides in your DEMS. Most likely the majority of the content are records. Why then, are they called evidence management systems?

The core purpose of a DEMS is protection of the chain of custody, and maintenance of the authenticity of the files within the system, to validate their originality and viability as evidence, when they are needed as evidence. But, they are also in many cases, records.

A law enforcement agency cannot properly manage both records and evidence operations effectively, and at lower risk, when these two areas do not work closely with one another. Police cases should never be purged without first, in part, knowing if there is any related property/evidence still in custody. Conversely, property/evidence should never be purged without first collaborating with the records function to determine if case disposition has occurred, and if there is anything which indicates that retention of the items should continue.

Many agencies are unable to determine what can be purged because they do not have operational reconciliation between these two units. Their policies do not provide guidance, and they often lack standardized procedures, much less a manual for such.

WHAT'S THE SOLUTION?

Fixing outdated, risk-prone operations begins with a plan. Records and P/E personnel should begin by developing a committee and strategic plan to tackle the issue. Collaborate, research, plan, train, execute. Set and assign tasks, task owners, and deadlines. This group will work on the following:

- ⇒ First, understanding what state law says is a must. Is there law governing retention periods of evidence, or is it determined by the court on a case-by-case basis, per an order?
- ⇒ Are there current records retention schedules in place and if not, they must be created.
- ⇒ Develop standardized procedures which help to unite the records and evidence units in their approaches to disposition and purging. This should include ensuring that someone is assigned the responsibility of maintaining case disposition information, documenting case actions within the RMS and P/E systems to reflect when cases and evidence are eligible for destruction via supplements, field updates, etc.

- ⇒ Develop a procedural manual that creates policy-driven, standardized management and purging procedures to get everyone on the same page.
- ⇒ Schedule time on a departmental calendar for annual purging activity, enabling records and evidence purging to be conducted collaboratively.
- ⇒ If your department does not have the technology to properly manage records and evidence, add this to the list. Property/evidence systems are a must. Procuring the right one for your department's needs is itself a significant project. Research, pricing, needs assessments, an RFP, are all part of the equation.

Help is here. Building an effective, compliant, policy-driven records or evidence operation is a major undertaking. PRI has a team of experts who can guide you through the process, and even handle the majority of the tasks.

From training, policy development, retention schedules, and procurement services, our end-to-end services can lower your risk, reduce your workload, and resolve your challenges.

Contact PRI For Help

info@policerecordsmanagement.com

305-460-0096