

In this era of technology, smart phones and cloud storage solutions, more businesses are choosing to use electronic record management systems over paper records. There is currently software available in the market, for example, which allows users to monitor a building's fire safety and create electronic fire inspection records on demand. The question is whether, in light of Ontario Fire Code provisions specifically prescribing the use of written fire inspection records, choosing to use technological solutions that create electronic records complies with the record keeping obligations under the Fire Code.

In this commentary, we will provide some thoughts on the question. However this commentary is not a legal opinion. If readers have questions or wish to obtain legal advice on which they can rely, they should contact their legal advisers or a member of Deeth Williams Wall LLP's technology law group.

Fire Safety Legislation and the Written Record Requirements

In Ontario, the Office of the Fire Marshal ("OFM") administers the provincial legislation that promotes fire protection, fire prevention and public safety. The municipal fire departments, on the other hand, conduct inspections to enforce the Fire Code¹ under the *Fire Protection and Prevention Act, 1997* which may result in tickets, fines and prosecution.² The property owners are responsible for maintenance of the fire safety equipment in their buildings (including checks, inspections and tests) in compliance with the Fire Code. This includes property owners using professional fire service companies to conduct inspections and produce appropriate records that are made available to the municipal fire department and the OFM if required.

The Fire Code states that the fire inspection records are to be made in written form and retained at the building premises for examination by the Chief Fire Official for a period of at least two years after being prepared.³ There is nothing in the Fire Code that explicitly precludes the use of electronic records.

Electronic Commerce Act, 2000

The Ontario *Electronic Commerce Act, 2000* ("ECA")⁴ provides that where there exists a legal requirement to provide a document in writing, that requirement can be satisfied by a document in electronic form, unless otherwise prohibited by another provision of law.⁵ Furthermore, a reference to written documents in provincial legislation does not in itself constitute prohibition on the use of electronic documents.⁶ Therefore, the *ECA* gives the same legal effect to an electronic record as to its paper-based version.

Electronic Records Permissible in light of the ECA

The *ECA* lists the requirements which allow an electronic record to satisfy an otherwise prescribed written record requirement in the Fire Code:

1. Electronic Records: An electronic record in respect of a check, inspection or test meets the written record requirements of the Fire Code provided that the electronic record:⁷
 - (i) is accessible to the recipient;
 - (ii) may be used for subsequent reference;
 - (iii) is capable of being retained by the recipient; and
 - (iv) is retained at the building premises to which the record relates.

2. Original Records: Where an original record requirement exists, there must be a reliable assurance that the information in the electronic record is complete and unaltered from the time of the record's creation in its final form, except for any changes that may arise in the normal course of communication, storage and display.⁸
3. Records Retention: The requirement to retain records under the Fire Code may be satisfied by retaining electronic copies of the electronic records provided that the electronic record is:⁹
 - (i) in the format in which it was created, sent or received, or in a format that accurately represents the information in the record that was originally created, sent or received;
 - (ii) in an accessible form so as to be usable for subsequent reference; and
 - (iii) where the record was sent or received, in a manner where the information, if any, about its origin, destination, date and time when it was sent or received, is also retained.
4. Records to Public Bodies: Additional requirements exist when providing electronic documents to public bodies (e.g. municipal fire departments and the OFM):¹⁰
 - (i) the electronic document must meet the information technology standards, if any, of the public body; and
 - (ii) the public body must acknowledge receipt of the electronic document in accordance with its own acknowledgment rules, if any.

Companies that are creating records of fire safety equipment checks, inspections and tests as evidence of compliance with the Fire Code, where the records would later be provided to the municipal fire department or the OFM, should consult with these public bodies to determine whether they have set any information technology standards and whether they would formally acknowledge the receipt of electronic records.

Location Considerations of Electronic Records

The Fire Code requires that written records are to be retained at the building premises.¹¹ Companies are able to satisfy the on-site record retention requirements, for example, by having the electronic record printed and keeping the paper copies on the premises or keeping electronic copies on a hard drive or a CD-ROM at the building premises for examination by the fire officials.

No provision expressly permits electronic records to be retained at off-site processing facilities that are accessible from the building (e.g. in the Cloud) and it is unclear whether providing access on-site to electronic records stored elsewhere satisfies this requirement. However, nowadays, off-site document storage is prevalent with numerous IT solutions available on the market that ensure accessibility, security and integrity of the information. Accordingly, in our view, such off-site storage should be permitted under the Fire Code since:

- (i) it reflects how companies carry on business now, using the services of IT service providers that store information at off-site facilities offering greater physical security;
- (ii) electronic records stored at off-site facilities are no less secure than those stored on site; and
- (iii) off-site storage is arguably more consistent with the objectives of the Fire Code as these records are unlikely to be destroyed if a fire were to break out at the premises where the records would otherwise be kept.

Unfortunately, it remains uncertain whether in any particular situation the court will be persuaded by such arguments or whether it would adopt a "black-letter law" approach. Since there is not much guidance from

the courts on these questions, it is difficult to predict how courts would treat the off-site document storage solution.

Other Thoughts

As technology continues to advance, the use of electronic record management systems is expected to grow and the reliance on paper records will inevitably decrease. Particularly, using systems that ensure electronic fire records are backed up, securely stored, easily accessible and cannot be altered is more efficient than keeping written fire inspection records on-site.

The OFM appears to have recognized these benefits. The OFM issued guidance in 2012 which explicitly permits fire inspection notes to be produced electronically as evidence in court in a way that protects them from revisions, amendments or deletions after they have been completed.¹² The OFM's acceptance of electronic notes signals that the OFM acknowledges the use of electronic records.

As set out above, companies using electronic record management systems are able to satisfy existing on-site record retention requirements. However, in recognition of how technology has evolved, it would be appropriate for regulators to confirm their support for the use of electronic records and off-site storage technologies by acknowledging that requirements that records "be retained at a buildings site" can be satisfied if the records are "accessible from the building site".

If you have further questions, please contact a member of our technology law group:



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¹ *Fire Code*, O. Reg. 213/07.

² *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4.

³ *Fire Code*, supra note 2 at ss 1.1.2.1, 1.1.2.2.

⁴ *Electronic Commerce Act, 2000*, S.O 2000, c.17 [ECA].

⁵ *Ibid* at ss 5, 26(1).

⁶ *Ibid* at s 26(3).

⁷ ECA, supra note 5 at s 6(1); *Fire code*, supra note 2 at s 1.1.2.1(3).

⁸ ECA, supra note 5 at s 8.

⁹ ECA, supra note 5 at s 12(2).

¹⁰ ECA, supra note 5 at s 16.

¹¹ *Fire Code*, supra note 2 at s 1.1.2.1(3).

¹² Office of the Fire Marshal, *Fire Safety Inspections and Enforcement*, OFM-TG-01-2012 (May 2012).