



Email archiving in Switzerland

The key laws that affect your business

Email is a primary source of documentation for many organizations and it has taken on an increasingly critical role in corporate litigation and court cases.

The need to archive all email correspondence is growing in importance because companies are realizing that being in a position to retrieve an old email could save them thousands of dollars (euros) in legal fees and fines as well as their credibility.

Today, more than ever before, legal and compliance issues are driving the case for email archiving. Email archiving legislation is complex and varies greatly from country to country. Unless companies are well versed in compliance and email compliance law, the various regulations affecting email can be a minefield.

This document provides an overview of the archiving legislation in your country.

Basic provisions for document retention: Obligation to archive for 10 years

In Switzerland, every company listed in the Commercial Register (Handelsregister) is required by law to retain its books, accounting records and written business correspondence for a period of 10 years (Article 962 of the Swiss Code of Obligations, SCO). This requirement does not only apply to paper records or letters, but also to electronic data and electronic correspondence (such as emails). According to Art. 957 para. 2 and 3 SCO, accounting records and business correspondence may be stored on paper, **electronically** or in a comparable manner, provided that the stored document correspond with the underlying business activities and can be accessed at any time. This general provision has been further detailed in the Ordinance on Business Records (OBR).

Tax law requirements

General

Most tax laws in Switzerland contain certain record keeping and archiving obligations. In many cases, those laws, to the extent that they do not contain specific provisions, implicitly or explicitly refer back to the basic provisions for document retention as set forth in Art. 957 et seq. SCO and the OBR.

Value-added tax law

Concerning value-added tax (VAT), the Federal Department of Finance (FDF) recently defined a separate set of rules that needs to be considered whenever invoices or other documents comprising VAT are transmitted and stored electronically. The most important field of application is "e-billing". These rules are found in the Ordinance of the FDF on Electronically Transmitted Data and Information (OEIDI) and are even more strict (and specific) than the ones found in the OBR. Among other things, they require the use of digital signatures based on digital certificates of accredited certification authorities. In addition, they do not allow the retention of electronically submitted invoices on paper either. If these rules are not considered, the electronic documents at issue will not be considered as having evidential value (Art. 3 OEIDI). A value-added taxable company receiving such an invoice may not be allowed to deduct the VAT it paid to its subcontractor on its own VAT return.

Sector specific requirements

Financial Sector

In general, the document retention obligations applicable for the financial sector follow the basic provisions of the SCO by reference. Below we list a few examples:

- **Federal Banking Act:** This act refers implicitly to the basic provisions of the SCO (cf. Art. 6 para. 2). To underline the importance of careful document retention, the act provides for prosecution of violators (Art. 46 para. 1 lit. I).
- **Federal Act on Mutual Funds:** By authorising the supervisory authority to stipulate various information from all individuals and companies concerned by this act (Art. 61 para. 1), this act implicitly statutes an obligation to retain according documents. Again, violators face prosecution (Art. 70 para. 1 lit. a).

- **Federal Act on Stock Exchanges and Securities Trading:** This act too, refers to the basic provisions of the SCO (Art. 16 para. 2). For banks, it refers to the Federal Banking Act (Art. 16 para. 4). However, as lined out above, the Federal Banking Act does not provide for special rules on document retention, but again refers to the SCO.
- **Federal Act on Money Laundering:** This act stipulates an obligation for the financial intermediary to document concluded transactions as well as the results of the enquiries a financial intermediary is required to perform under this act (Art. 7 para. 1). He has to retain these documents for a minimum of ten years after terminating the business relationship or after concluding the transaction in question (Art. 7 para. 3).

Insurance

- **Federal Act on Accident Insurance (FAAI) and Federal Ordinance on Accident Insurance (FOAI):** Employers are required to keep records of various data regarding their employees, e.g. on the salary or the number of days they worked (Art. 93 para. 1 FAAI). All documentation needs to be retained for at least five years, starting at the end of a calendar year, during which the last entry was made (Art. 116 para. 3 FOAI).

Telecommunications

- **Decree concerning Telecommunication Services:** As long as customers are entitled to contest their invoice, they can ask their operator to produce the data, which has been used by the operator to prepare the invoice (Art. 60 para. 2).
- **Federal Act on Surveillance of Postal and Telecommunication Traffic:** In order to allow for an effective criminal prosecution, during six months, operators are required to retain all data on traffic and invoicing as well as all data, which the law enforcement agency may require to identify the customer.

Legal consequences of non-compliance

Non-compliance with above rules can have several consequences. The three main risks are:

- **Criminal prosecution:** An intentional or negligent violation of the obligation to retain books, accounting records and business correspondence can be punished with a fine or imprisonment up to 3 months (Art. 325 Swiss Penal Code, SPC). Under certain circumstances, the punishment may be more severe in case of a bankruptcy (Art. 166 SPC).
- **Legal disadvantages:** A business may not be able to prove or enforce claims due to lack of sufficient evidence. While normally it is within the judge's discretion to assess the evidential value of a document, in case of an electronic document, such an assessment will depend, among other things, on whether it has been retained in the way prescribed by the OBR.
- **Damages claims:** A business may be subject to damages claims should another person incur damage due to the fact that a business has not complied with its obligation to retain certain documents in a particular way.

The violation of specific document retention requirements (e.g., VAT law) may have specific consequences (e.g., refusal of certain VAT deductions).

Conclusion

As one can see from the above, it is essential that each enterprise (and public authority) sets out a comprehensive and tailor-made archiving or data retention strategy, not only at a general level, but also at an individual record level. If documents shall be retained and archived electronically for maximum efficiency and usability, powerful, rational and especially flexible tools are required.

GFI MailArchiver

GFI MailArchiver is used by thousands of administrators to comply with the various pieces of legislation that cover email archiving. GFI MailArchiver provides a secure central storage for all company email while allowing fast and easy access to old and deleted email if required.

Using the auditing functionality, management can access any email that is requested for eDiscovery/email compliance purposes and provide a guarantee that these emails have not been tampered with – a major requirement in corporate litigation cases.

With GFI MailArchiver, companies can also rest assured that they can:

- Reduce reliance on cumbersome PST files and manage and reduce mailbox quotas on Microsoft Exchange server
- Access and manage all archived email from anywhere in the world using their web browser
- Retrieve old and deleted emails on demand – with full thread and conversation
- Use advanced email search and 'Saved Search' capabilities

More information about GFI MailArchiver can be found at <http://www.gfi.com/mailarchiver/>.

