



# PRACTICE ADVISORY

## CONTRACTUAL PROVISIONS REGARDING RETENTION AND DISCLOSURE OF PROJECT DOCUMENTATION

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### BACKGROUND

Engineering and Geoscience Professionals (“Registrants”), or firms through which they provide engineering/geoscience products or services, may be requested by clients to enter into professional service agreements containing provisions which purport to prohibit or restrict the retention and disclosure of project documents. This practice advisory clarifies the professional obligations of Registrants who negotiate and approve such professional service agreements. As per Section 7.8 of the Bylaws, Registrants must not enter into any contract that would result in or require the breach of any duty under the *Professional Governance Act*, associated regulations, or the Bylaws, except as required or authorized by law. This advisory does not address the practical implementation of document retention processes by Registrants and their firms. Instead, the purpose of this advisory is to assist Registrants in ensuring that the terms and conditions of professional service agreements do not put the Registrants at risk of breaching their professional obligations under the *Professional Governance Act* or the Bylaws of Engineers and Geoscientists BC.

### CONSIDERATIONS

Registrants must concurrently adhere to the following:

- Principle 1 of the Code of Ethics in Schedule A of the Bylaws, which provides that Registrants must “hold paramount the safety, health, and welfare of the public, including the protection of the environment and the promotion of health and safety in the workplace”;
- Section 58 of the *Professional Governance Act* requires that Registrants must report situations where they have reasonable and probable grounds to believe that other Registrants are engaged in a manner of practice that poses a risk of significant harm to the environment or to the health or safety of the public or a group of people, even if the information on which the belief is based is confidential and its disclosure is prohibited under another Act.

- Principle 9 of the Code of Ethics in Schedule A of the Bylaws, which provides that Registrants must “report to Engineers and Geoscientists BC and, if applicable, any other appropriate authority, if the registrant, on reasonable and probable grounds, believes that:
  - the continued practice of a regulated practice by another registrant or other person, including firms and employers, might pose a risk of significant harm to the environment or to the health or safety of the public or a group of people; or
  - a registrant or another individual has made decisions or engaged in practices which may be illegal or unethical;”,
- Principle 13 of the Code of Ethics in Schedule A of the Bylaws, which provides that Registrants must “conduct themselves with fairness, courtesy, and good faith towards clients, colleagues, and others”;
- Section 7.3.2(3) of the Bylaws which provides that “complete project documentation must be retained for at least 10 years after the later of the completion of the project or when the documentation is no longer used”.

See the Engineers and Geoscientists BC *Guide to the Quality Management Standard: Retention of Project Documentation* (Engineers and Geoscientists BC 2021) for a more detailed discussion of the applicable standards for document retention.

Document retention is necessary to ensure that complete project information is available to address professional or regulatory issues that might arise after the completion of a project. Retention of project documents enables Registrants, among other things, to appropriately respond to:

- future public safety concerns;
- investigations by authorities having jurisdiction or other regulatory bodies;
- allegations against them for unprofessional conduct, negligence, or other breach of obligation; and
- future engineering or geoscience questions relating to the project such as upgrades or maintenance.

Document retention is not optional and the requirements which apply to Registrants under the Bylaws (particularly those set out at section 7.3.2.) cannot be varied by the terms or conditions of professional service agreements which the Registrants, or their firms, enter into with clients.

It is reasonable for clients to request for the inclusion of contractual provisions for the protection of their confidentiality. Regardless of such contractual provisions, the Registrants themselves have a professional obligation under the Bylaws to maintain confidentiality of clients’ confidential information.

Nevertheless, it is important for both Registrants and clients to be mindful that in certain circumstances, despite the existence of a contractual confidentiality provision that purports to restrict a Registrant (or the Registrant’s firm) from making disclosures of information, the Registrant may still be obligated under the *Professional Governance Act* and the Bylaws to make certain disclosures to public authorities or others for the purposes protecting public safety, or if the disclosure is required for an audit, practice review or investigation by Engineers and Geoscientists BC. Therefore, in effect, a Registrant may be required to breach contractual provisions which are in

conflict with the Registrant's statutory professional obligations. Furthermore, in certain instances, a contractual provision which purports to limit a Registrant from performing on statutory obligations, or which is in conflict with the public interest, may be deemed illegal and unenforceable.

It is beyond the scope of this advisory to discuss all situations where Registrants must weigh their obligations of confidentiality against their obligations to make disclosures under the *Professional Governance Act* and the Bylaws, and the nature and extent of the necessary disclosures in each of those situations. Where uncertain about their obligations, Registrants and/or their firms should consider obtaining legal advice from their own lawyers. Registrants may also consider contacting Engineers and Geoscientists BC for practice advice where they feel that they face an ethical dilemma.

## STANDARD OF PRACTICE

Where Registrants are responsible for reviewing or approving wording in professional service agreements on behalf of their firms, they must ensure that the agreements do not purport to prohibit or restrict the Registrants or their firms from retaining complete project documentation or making necessary information disclosures as required of them under the *Professional Governance Act* and the Bylaws.

Registrants and their firms may consider including within their professional service agreements a general provision which expressly provides that, despite any other terms or conditions of the agreement, the parties do not intend to restrict or limit the engineering or geoscience service provider from its document retention and disclosure obligations under the *Professional Governance Act* and the Bylaws. For example, an appropriate general provision might be the following:

The parties agree that, notwithstanding any other term or condition of this agreement, the parties do not intend in any way to restrict or limit [the engineering/geoscience firm], its directors, officers, employees or contractors from performing or complying with their statutory or professional obligations under British Columbia's *Professional Governance Act* or the Bylaws of Engineers and Geoscientists BC, including without limitation their obligations to:

- (a) retain complete project documentation for at least 10 years after the later of the completion of a project or when the documentation is no longer used;
- (b) report a risk of significant harm to the environment or to the health or safety of the public or a group of people, or report decisions or practices which may be illegal or unethical, to applicable regulatory bodies or other appropriate authorities;
- (c) disclose information and documents required for an audit, practice review or investigation under British Columbia's *Professional Governance Act* or the Bylaws of Engineers and Geoscientists BC.

The parties further agree that to the extent that this agreement, or any other agreement between the parties, contains any provision which is inconsistent with the intention of the parties as set out in this section, then this section will supersede the inconsistent provision, and in no event will [the engineering/geoscience firm], its directors, officers, employees or contractors be restricted or limited from performing or complying with their statutory or

professional obligations under British Columbia's *Professional Governance Act* or the Bylaws of Engineers and Geoscientists BC.

However, with respect to the above example, Registrants are strongly encouraged to review such provisions with their own legal advisors.

## SUMMARY

Registrants and their firms may not contract out of their obligations under the *Professional Governance Act* and the Bylaws, including their obligations to retain complete project documentation and to disclose information when required to do so under the *Professional Governance Act* or the Bylaws to protect the public interest. When engineering or geoscience firms enter into professional service agreements with clients, the Registrants responsible for negotiating and approving such agreements must ensure that the agreements do not purport to restrict the firms or Registrants from their document retention and disclosure obligations under the *Professional Governance Act* or the Bylaws.

## REFERENCES AND RELATED DOCUMENTS

Engineers and Geoscientists BC. 2021. Guide to the Standard for Retention of Project Documentation. Version 2.0. Burnaby, BC: Engineers and Geoscientists BC. [accessed: 2021 March 3]. <https://www.egbc.ca/Practice-Resources/Individual-Practice/Quality-Management-Standards>

## VERSION HISTORY

VERSION NUMBER	PUBLISHED DATE	DESCRIPTION OF CHANGES
1.0	March 25, 2021	Initial version.

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