

Records Retention Policy and Practice

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Agenda

Overview

The Sedona Conference on RIM

How to Prepare for Litigation

Litigation Hold



Overview

Records and Information

What is Information?

... is a basic resource that organizations harness to meet their operational, legal, historical and institutional needs – TSC

What is a Record?

Records are a special subset of information deemed to have some enduring value to an organization and warranting special attention concerning retention, accessibility, and retrieval.



Overview

Records and Information

What is Records Management?

The systematic control of records throughout their lifecycle –
ARMA

Lets refer to Records & Information Management (RIM)



Overview

What is a Litigation Hold?

Duty to preserve arises when a party acquires notice or should know that materials are relevant to an existing litigation or investigation or to reasonably anticipated future litigation or investigation.



Overview

Why retain Records?

- Special attention due to federal, state, or local laws *
 - Knowledge value to the organization
 - Comply with litigation related imperatives which do or may require access to records **
- With over 20,000 federal and state statutory and regulatory retention requirements at the general business level, it is critical to supplement the company's internal knowledge with detailed legal research". Fulbright & Jaworski LLP – Legal Update – May 31, 2005 edition
 - Examples: IRS, SEC, OSHA, FDA, DOL, DHS,
- **The obligation to preserve electronic data and documents requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data.



Overview

The Cohasset Associates Survey

- 1/3 of respondents rate their RM program as marginal or fair
- Nearly 1/2 of respondents do not have any formal email retention program
- 53% of respondents indicate that electronic records are not included in their organization's record holds
- Nearly all respondents believe the *current process* for managing electronic records will impact litigation



Overview

Things Can Go Wrong

- Broccoli v. Echostar Communications Corp., 229 F.R.D. 506 (D. Md. 2005) – plaintiff's motion for sanctions granted. Email deletion policy
- E*Trade Secs. LLC v. Deutsche Bank AG, 230 F.R.D. 582 (D. Minn. 2005) – adverse inference sanctions for preservation failures
- Coleman (Parent) Holdings v. Morgan Stanley



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Organizations *should have* RIM policies and procedures

- **Essential** to organizational well being and efficiency
- **Reasonableness** is essential

Willard v Caterpillar, Inc. “good faith disposal pursuant to a bona fide consistent and reasonable document retention policy could justify a failure to produce document in discovery.

- **Need not mandate retention of all** information and records

Zubulake v UBS Warburg “Must a corporation, recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, ‘no’. Such a rule would cripple large corporations.... “



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RIM policies and procedures should be realistic, practical, and tailored to the circumstances of the organization.

- There is **no universal standard**
- Must **blend the needs** of operations, IT, regulatory, and legal
- Must address **legal retention** and destruction requirements
 - With over 20,000 federal and state statutory and regulatory retention requirements at the general business level, it is critical to supplement the company's internal knowledge with detailed legal research". Fulbright & Jaworski LLP – Legal Update – May 31, 2005 edition
 - Examples: IRS, SEC, OSHA, FDA, DOL, DHS,
 - SOX – Section 802 and 1102 – fines and / or imprisonment for destroying or concealing documents or other evidence with the intent to impair their availability



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RIM policies and procedures should be realistic, practical, and tailored to the circumstances of the organization.

- Operational and strategic **value** of information and records should be assessed.
- Disaster recovery plans are **not a substitute** for RIM policy and procedure.



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An organization need not retain all electronic information ever generated or received.

- Document destruction is a **typical and acceptable** part of the RIM process
- Systematic deletion of electronic information is **not** synonymous with evidence spoliation



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An organization need not retain all electronic information ever generated or received.

- Absent a legal requirement to the contrary,
 - organizations may **routinely delete** certain recorded communications
 - organizations may **recycle or destroy hardware** or media that contain data retained for purposes of disaster recover
 - organizations **may** delete residual, shadowed, or deleted data.
 - organizations are **not required** to preserve metadata



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RIM policy should include *procedures* that address lifecycle of information and records

RIM policies

- Must be put into *practice*
- Should be *documented*
- Should *define roles and responsibilities*
Zubulake, Keir v UnumProvident, GTFM v Walmart – failure to communicate lead to loss of information
- Should guide employees regarding *how to identify* and maintain information subject to RIM policy. IE: what about draft documents?



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RIM policy should include *procedures* that address lifecycle of information and records

RIM policies

- May define separately the roles of *content and technology custodians* for RIM
- Should consider the *impact of technology* on creation, retention, and destruction. Consider accessible and inaccessible data and pending changes to FRCP
- Should recognize the importance of *employee education*
- Should include conducting periodic *compliance reviews*



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RIM policy should include *procedures* that address lifecycle of information and records

RIM policies

- Should be integrated into policy regarding *use of property* and information
- Should be *revised* as needed



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RIM policy *must mandate* suspension of ordinary destruction practices

RIM policies

- Must recognize that suspension of normal destruction procedures may be necessary
- Should anticipate what will **trigger** suspension
- Should identify **persons authorized** to issue suspension
- Should recognize and may **describe suspension process**
- Should **tailor legal hold** to the circumstances

Danis v USN Communications, Inc. "The scope of what is necessary to preserve will vary widely between and even within organizations depending on the nature of the claims and the information at issue".



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RIM policy *must mandate* suspension of ordinary destruction practices

RIM policies

- Must recognize **effective communication** as essential
- May call for **documenting steps** to implement legal hold.
- May absolve an organization of the **actions of an individual** acting outside the scope of legal hold.
- Should recognize **legal hold as an exception** and return to normal procedures when legal hold is lifted.



Litigation Hold

When Does Litigation Hold Begin

How is Litigation Hold Implemented

How is Content Preserved

When can Litigation Hold be Relieved



Litigation Hold

When does Litigation Hold Begin

- Statutory or Regulatory Obligations
- Statutes of Limitation
- Duty Arising from Potential or Threatened Litigation
- Duty Created by Preservation Letter from Opposing Counsel
- Duty Created by Service of Complaint



Litigation Hold

When does Litigation Hold Begin

- Statutory or Regulatory Obligations
- Statutes of Limitation
- Duty Arising from Potential or Threatened Litigation
- Duty Created by Preservation Letter from Opposing Counsel
- Duty Created by Service of Complaint
 - Preservation letters or other written notice
 - Pre-litigation discussions, demands, and agreements
 - Facts, circumstances, comments – reasonable foreseeability and institutional notice.



Litigation Hold

How is Litigation Hold Implemented



Litigation Hold

How is Content Preserved



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Litigation Hold

When can Litigation Hold be Relieved



Important Resources

The Sedona Guidelines
for Managing Information and Records in the Electronic
Age

www.thesedonaconference.org

ARMA International

<http://www.arma.org/erecords/index.cfm>

