Records and Information Management and Retention

Association of Corporate Counsel Nonprofit Organizations Committee

Legal Quick Hit
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3 pm ET

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“Why Should I Care about Records and Information Management?”

Records and Information Management (“RIM”) is a tool to manage the ***costs*** of storage of records and maintenance of electronic information, and the ***risks*** associated with either (a) not having records that are legally required to be retained, or (b) maintaining records that could have been destroyed or deleted pursuant to a RIM Policy.

Benefits of a Comprehensive RIM Policy:

1. A robust RIM Policy ensures that records that are needed for business purposes are organized and retained.

1. How much is your organization spending on storage of hard copy records? What is the cost of maintaining servers or back-up tapes for electronic information that you no longer need? A RIM Policy permits a company to discard unnecessary records and reduce storage costs.

Benefits of a Comprehensive RIM Policy:

3. A RIM Policy ensures that treatment and retention of records and electronic information are consistent throughout the company.

1. A RIM Policy shields the company against claims of spoliation, bad faith, or obstruction of justice when records are demanded in litigation or in a government investigation.

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Benefits of a Comprehensive RIM Policy:

5. A RIM Policy lowers production costs when records have to be produced.
1. A RIM Policy can have a positive return on investment by streamlining and rationalizing work flow.

Risks of Operating Without a RIM Policy or Ignoring Your RIM Policy

Risks include:

- Retaining documents unnecessarily
- Heightened liability in civil litigation
- Diminished credibility in government investigations
- Fines and Sanctions for failure to retain documents when necessary

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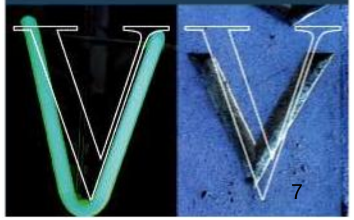
What is a Document Management Policy?

Let’s call it a “Records and Electronic Information Management (RIM) Policy”

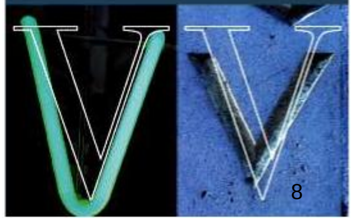
- A RIM Policy consists of a record management program that:
  - Defines company records;
  - Provides how long specific types of records should be maintained;
  - Gives instructions for managing, storing, and disposing of certain records;
  - Establishes “litigation hold” procedures; and
  - Establishes procedures for ensuring compliance with the Policy.



Schedule of Records
Example: Employee Records

Sources of federal law related to employee records:

- Fair Labor Standards Act of 1938 (FLSA)
- Equal Pay Act
- Employee Retirement Income Security Act of 1974 (ERISA)
  – Summary plans, reports on benefit plans
- Title VII of the Civil Rights Act of 1964
- Americans With Disabilities Act (ADA)
- Age Discrimination in Employment Act of 1967 (ADEA)
- Occupational Safety and Health Act of 1970 (OSHA)
  – Log and summary of occupational injuries and illnesses
- Family and Medical Leave Act of 1993 (FMLA)



When RIM Policies Go Wrong

The Consequences of Destroying Too Much or Too Little:

Administrative Sanctions

Civil Sanctions

Criminal Sanctions

When Document Destruction Goes Criminal:
United States v. Arthur Andersen

Arthur Andersen charged under 18 U.S.C. Sec. 1512(b)(2)(B) “Corrupt Persuader” theory in a federal criminal case.

Core allegation was the destruction of documents sought by SEC and DOJ.

Does Your Organization Receive Government Grants or Contracts?

Agency Audits

False Claims Act - Whistleblowers

Agency Investigations

Alteration or Destruction of Records 18 U.S.C. Sec.1519

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.. . or in relation to or contemplation of any such matter or case. . . [shall be guilty of a crime].

Consequences of *Not* Destroying Documents Pursuant to Policy

RIM Policies are risk management tools. Once a policy is in place, a firm should make every effort to comply with the Policy.

In some instances, litigants have increased liability by failure to destroy documents as called for by the RIM Policy.

Management of Electronic Records

- Adopt RIM Policy that addresses Electronically Stored Information ("ESI")
- ESI is no different than hard copy records, except in terms of format and how it is stored
- Promote centralized data management
- Establish sensible backup procedures (for instance, system disaster recovery backup tapes are NOT an appropriate means for record retention)
- Know your IT platform

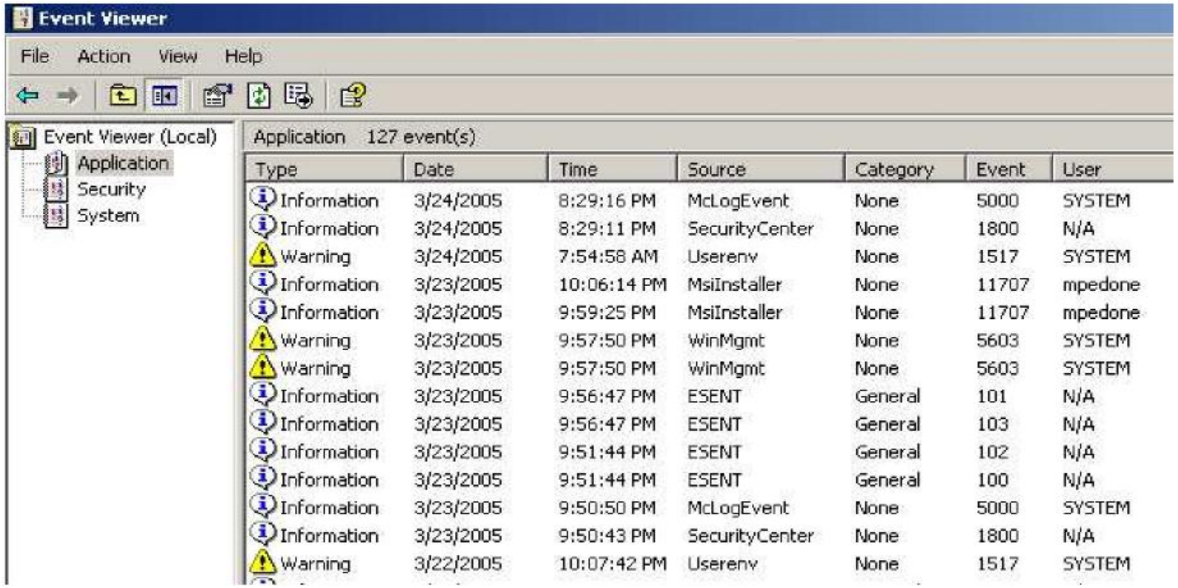
Human-generated Records

- Word processing documents, spreadsheets
- Database files
- Electronic mail messages
- Organizer items (calendar entries, etc.)
- Text messages
- Metadata
- Application-specific data, e.g.:
  - Accounting journal entries
  - Shipping records, etc.

...these are just examples

Device-generated Records

- Less obvious to the “non-techie”
- Most common form is a log
  - Activity
  - Error



Application 127 event(s)

Type	Date	Time	Source	Category	Event	User
Information	3/24/2005	8:29:16 PM	McLogEvent	None	5000	SYSTEM
Information	3/24/2005	8:29:11 PM	SecurityCenter	None	1800	N/A
Warning	3/24/2005	7:54:58 AM	Userenv	None	1517	SYSTEM
Information	3/23/2005	10:06:14 PM	MsiInstaller	None	11707	mpedone
Information	3/23/2005	9:59:25 PM	MsiInstaller	None	11707	mpedone
Warning	3/23/2005	9:57:50 PM	WinMgmt	None	5603	SYSTEM
Warning	3/23/2005	9:57:50 PM	WinMgmt	None	5603	SYSTEM
Information	3/23/2005	9:56:47 PM	ESENT	General	101	N/A
Information	3/23/2005	9:56:47 PM	ESENT	General	103	N/A
Information	3/23/2005	9:51:44 PM	ESENT	General	102	N/A
Information	3/23/2005	9:51:44 PM	ESENT	General	100	N/A
Information	3/23/2005	9:50:50 PM	McLogEvent	None	5000	SYSTEM
Information	3/23/2005	9:50:43 PM	SecurityCenter	None	1800	N/A
Warning	3/22/2005	10:07:42 PM	Userenv	None	1517	SYSTEM

New Types of Electronic Records

- Are new technologies creating new “records”?
- Yes – consider:
    - Instant messaging
    - Cell phone text / image messages
    - Blogs
    - Wikis
    - Corporate virtual worlds
    - Web page – including superseded versions
- *Are you storing records in the Cloud?*

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Record-Keeping During Litigation:

Duty to Preserve attaches when organization has reasonable basis to believe that organization records relate to threatened litigation or investigation.

Duty to Preserve

- A legal obligation to preserve evidence occurs upon notice that litigation might occur. *Renda Marine v. United States*, 58 Fed. Cl. 57 (Fed. Cl. 2003).

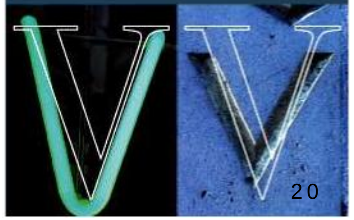
- **At the latest, the duty to preserve arises when the complaint is served.** Counsel has a duty to advise client of pending litigation and the need to preserve potentially relevant documents.

- Most companies are aware of the potential for litigation before it starts, e.g., demand letter, preservation letter, threat to sue.

Suspending the Destruction Schedule

- Suspend your document destruction schedule for all relevant documents as soon as you anticipate:
  - Civil litigation
  - A criminal or regulatory investigation

- Notify individual employees of litigation that relates to them, and instruct them to preserve whatever information they have that relates to the case.



Remember to Include Electronic Records in Your Legal Hold

- Remember to suspend the destruction of electronic records, especially records generated or maintained by witnesses and custodians.

- Remember automatic purge programs that destroy e-documents.

Initiate...

- Archiving of electronic documents once litigation begins.

- Contact with outside technological and legal consultants who are experienced in electronic discovery.

Steps for Implementing a Robust and Effective RIM Policy

1. Create a records management committee made up of senior management and attorneys or with attorney counsel.

1. Inventory the types of company records by department. The company may wish to use a Record Inventory questionnaire, or in some cases, work with an outside consultant.

Steps for Implementing a Robust and Effective RIM Policy

3. Develop an inventory form addressing:
   - Title/description/category of record;
   - Content;
   - Employees responsible for maintaining the record;
   - Location;
   - Recommended retention period;
   - Purpose of retention; and
   - Whether the record is an original or a copy.

Steps for Implementing a Robust and Effective RIM Policy

4. Collaborate with an attorney with experience in records management policies and procedures to draft a RIM Policy for committee review and approval.

1. Have senior management review and approve the Policy.

Steps for Implementing a Robust and Effective RIM Policy

6. Formally adopt the Policy: Does this need a Board resolution, or can it be adopted by management as part of internal controls?

1. Distribute the Policy to managers throughout the company.

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Steps for Implementing a Robust and Effective RIM Policy

8. Train employees and managers to implement the Policy.
1. Make “process changes” (storage, off-site storage, IT procedures, draft and approve document management documents) to implement the Policy.
1. Consider whether records management software that works concurrently with the organization’s RIM Policy is appropriate for your organization.

Training

Emphasize the Cost Savings

Emphasize the Management of Risk

Emphasize Cleaning the Work Space

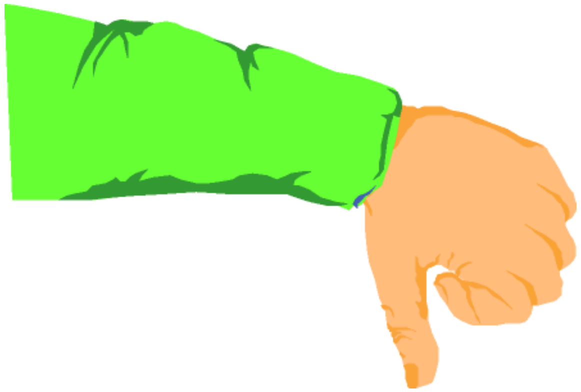
“Make it Fun”

Training

If all else fails ...

Threaten them with Disciplinary Action

for Non-Compliance.



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“Information governance” is now a key component in corporate compliance and ethics programs

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