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How to Avoid the Information Management Dark Ages

Charles Ragan

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Have you ever put something important in a special place, and not been able to find it? Of course, we all have. Sometimes it may be because we have too much stuff; other times, because we have been too clever by half. But should American businesses in a highly competitive global economy permit or encourage such foibles? Not if they hope to stay up with the competition. The reality, however, is that most organizations struggle with information management -- keeping far more information than is useful, and paying too much to store and manage it.

First, a bit of context. Beginning in the 1970s, many organizations launched document retention (aka destruction) programs. These programs included a policy requiring disposition pursuant to a schedule, and usually led to the establishment of a small records retention team. Techniques of library science were applied, and detailed taxonomies or document classifications were developed to identify the kinds of information the organization generated. Legal and business process teams then analyzed how long a document should be held, i.e., measuring a document's useful or necessary lifecycle in years determined either by legal requirement or business need. All was well -- for about a decade.

By the late 1980s, the U.S. was no longer a commercial island. Strong economies had emerged in Europe and Asia, putting significant stress on basic U.S. industries (steel and autos, among others). The response was to "get lean," consolidate operations, trim staffs -- and records management was a significant casualty in the process. Contemporaneously, computers entered the mainstream of business operations. The internet arrived, road warriors proliferated. By early this century, more than 90 percent of all information was computer generated, and 70 percent of that data was never printed.

For whatever reasons -- lack of staff, failure to recognize the values of sound information management, economic downturns, failure to adapt to demands of new information generating technologies -- information management techniques and programs did not keep pace with the developments, not withstanding the U.S. Supreme Court's endorsement (*Arthur Andersen LLP v. United States*, 125 S. Ct. 2129 (2005)).

Legislators and regulators, however, continued to establish new document retention obligations. And then the courts started deciding electronic data discovery cases. Sanctions for failing to effect legal holds, or not finding all relevant information in a timely fashion, hit not only the legal advance sheets but also the front pages of mass media. These scary EDD stories provided renewed impetus for information managers, but also encouraged conservative lawyers to urge overbroad legal holds (halting desired disposition strategies set by records managers). The economic meltdown of 2008 next interrupted plans, and fiscal realities required to establish a traditional information management program for global organizations became challenging for many.

How so? Recall that a records disposition schedule is a function of both business needs and legal requirements. Legal requirements, in turn, depend on what a company does (the business footprint), and where it conducts that business or businesses (the jurisdictional footprint). To establish the appropriate retention schedule, many organization now commission research of the retention obligations applicable to its business and jurisdictional footprints.

For a company doing business only in the U.S. and only in a few states, the cost of implementing a schedule is usually manageable. Depending on whether original research is conducted, or an existing database is leveraged, that cost could range from \$10,000 to \$50,000. But for an organization doing business throughout the U.S., the researcher would assess which laws and regulations applied to the organization's business footprint in all 51 state and federal jurisdictions. As some existing databases contain more than 50,000 separate regulations, this can be a daunting and expensive proposition! For a truly international company (some do business in more than 150 countries), the cost of obtaining a schedule can run well into seven figures.

Establishing appropriate obligations is only the first step in the process. The organization may need to harmonize discrepancies between jurisdictions for similar classifications of information, and establish a plan to dispose of data after its useful life.

In paper document days, a disposition plan was straightforward: When the time for disposition came, the records manager could simply retrieve and destroy the appropriate boxes. The world of electronically stored information has substantially complicated that equation in at least two respects. First, ESI is not easily cabined. Individual employees maintain substantial volumes of data in email accounts, on personal computer hard drives, and on personally accessed network drives, among other containers. Second, while technology companies have labored literally for decades to automate the process of disposition, there is no silver bullet tool to date. Current technologies can automate parts of the disposition process, but still require a customization or learning process, whereby someone teaches the tool what disposition periods apply to the ESI in the particular organization.

Organizations also need to conduct training o manage behaviors to ensure that workers understand the principles underlying the records program and what steps they may have to take to comply with the retention schedule. This, too, can involve complexity, as a single department may find that its information is subject to 10 or more retention periods.

In short, successful information management in the electronic age requires a substantial village -- not just a records manager, or an IT tool. This is not to deny that there are substantial benefits, as recently chronicled by Christian Liipfert, in "[Making the Business Case for Information Governance](#)," in the October issue of *Law Technology News* magazine. There are, but the benefits are largely soft, and do not result in obvious hard-dollar benefits. While regulators may punish an organization for not keeping data for required periods, they will rarely fine an organization for keeping information *longer* than required. Establishing a program requires expenditures; not ensuring compliance with a program can result in even more costs if the organization allows stores of legacy and orphaned data to accumulate and be subject to future discovery requests and associated costs. (See "[What Lurks Within](#)," by Anne Kershaw, December 2011 *Law Technology News*.)

Absent a paradigm shift, many observers suggest that we run the risk of entering a digital dark age -- where there is simply too much information cascading constantly from various sources, making it difficult to retrieve, absorb, and retain valuable information in a timely fashion. The cost for an organization to produce and maintain the retention schedule that lies at the foundation of a sound records program is simply too expensive, and disproportionate to value.

At present, regulators have complete discretion in setting retention periods. One [analysis](#) of federal employment retention obligations, by Wallace Bonapart and Cornelia Gamiem, lists more than 20 different sets of regulations requiring retention of documents ranging from one to six years, some with additional event-based triggers. The rationales for the various choices are neither intuitive nor subject to review or correction.

This is neither necessary nor logical rule making -- Congress could and should make it simpler. Rule-makers should have no more than four choices: for example, three, seven, 10, or 30 years. This would simplify creation of schedules, reduce costs, and technology tools could more readily be "taught" to apply disposition schedules. Such a regime would meet the legitimate needs of regulators, and further the significant goals of intelligent information governance in contemporary business. Now, if only legislators could be persuaded to act collaboratively for the common good.

Charles Ragan is the principal of the Ragan Law Firm, and splits his time between San Francisco and Edina, Minn. Email: crr@craganlaw.com.



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