



## MANAGING BUSINESS INFORMATION: The Opportunities Presented by Regulatory Requirements and the New E-Discovery Rules

Keeping on top of regulatory obligations and being mindful of litigation can overwhelm business owners and managers who would rather focus on opportunities for business growth. While it may seem counterintuitive, the new accountability standards, such as Sarbanes Oxley and the Health Insurance Portability and Accountability Act (HIPAA), as well as the intrusions presented by the new federal electronic discovery rules, present opportunities to set goals and obtain a business advantage.

Implementation of an information management plan geared to the needs of the specific business entity can reduce operating and storage costs, as well as streamline the process for making informed decisions. By organizing and managing existing data and the creation of future data, a company can avoid the consequences of new regulatory schemes and electronic discovery processes while operating more efficiently. In the long term, this strategy can save the company money and assist in making better decisions based on reliable and accessible information.

### ORGANIZE AND CREATE ACCESS TO VITAL INFORMATION

There is no single model as to how a company should manage its information; each program is as unique as the business' needs and its owner's ambitions. The focus should be on business operations, not outside standards. The program should be reasonable and flexible and should not rely on rigid principles. By making policy-level decisions as to what information is vital to a company, both to its internal workings and in response to external demands, a business has the opportunity to evaluate its ability to leverage and to set goals for its future use and improvement. The key to realizing a business advantage is to exploit the impetus of the requirement into an opportunity to gain insight into internal operations, identify problems, evaluate priorities, and target specific accomplishments.

#### Direct and Indirect Legal Requirements

A well-planned data management program assists a company in its defense from outward threats in the increasingly regulated and litigious atmosphere in which business operates. It supports

compliance with a multitude of direct legal requirements, such as the OSHA requirement placed on employers to retain documents regarding employee exposure to hazardous materials for decades-long periods or the six-year requirement for holding ERISA Form 5500. To evaluate its direct legal obligations, a company can rely on legal counsel or turn to software applications available to assist in identifying the regulatory requirements of specific industries or it can review a number of publications available on the subject, including those found in the ARMA (Association of Records Managers and Administrators) International bookstore online at [www.arma.org](http://www.arma.org).

A well-functioning program takes into account indirect legal requirements faced by the business, such as quality control information that a company would maintain to defend itself in product defect litigation or documentation supporting product-development in the event of patent or copyright infringement claims. The point is that the program be tailored to the business so that the company has convenient access to the information it needs to defend itself should it be the subject of investigation or discovery.

#### Information of Value

Similarly, a well-planned program maintains information that has value to the company, such as licenses, titles, or formation documents, and makes it accessible to employees. In an age where employees are more transitory than ever, an information management program preserves corporate history and memory. Without such a program, employees are often hard-pressed to locate important documentation or determine events from the past that impact current decision making. Further, by "decluttering" the data pool and ridding the company of information that is not useful, important information is easier to find, operating and storage costs are reduced, and the growth of data is better controlled.

#### Accessibility

Retaining data in a manner that is consistent with the operations of the business is critical to its future use and value. Simply put, what good is the information if you cannot find it?

- Proper organization protects the integrity and availability of business-critical information; thus, leveraging information capital and providing an opportunity to make better decisions. It improves efficiency and productivity.
- Automated tools are available to assist in organizing and retrieving data. There are a number of electronic archive systems and “best practices” guides available on the market to assist in organizing electronic data.
- Organization includes protection during events of crisis through the use of contingency plans, e.g., by arranging a separate location for the storage of vital information, a company has a place to turn in the event of disaster. Offsite storage of inventory lists needed for insurance submissions and accounts receivable data to resume cash flow could be the difference between a company’s survival or demise should unfortunate events occur. The lessons learned from the Hurricane Katrina disaster should be embraced by every responsible company.

## AVOIDING THE PITFALLS

The creation of an effective program requires a mental shift from the idea of a traditional document retention policy to the dynamic and consistent employment of data. The crux of a traditional document retention policy is often a schedule for the disposal of documents, including the occasional computer file. Such programs frequently fail because they are not kept up to date with current legal obligations and business practices. Moreover, with over 70% of information maintained by business today in the form of electronic data, much of the information kept by business is ignored, which is particularly unfortunate because technology has presented greater opportunities to use, access and control electronic data.

Further, traditional document retention policies have a tendency to be ignored because they are not fully automated and typically are not audited by management to ensure enforcement. Key to avoiding legal ramifications from the manner in which data is maintained or destroyed is the routine and systematic administration of the data management

program. The program must be clearly defined and carried out so as not to appear to have been haphazardly implemented or otherwise suggest that inaccessible information is the result of efforts to impede the fact-finding process.

The successful program is one in which the objectives of legal counsel and IT work in concert. Together they ensure that data is maintained in such a way that it can be properly designated a business record and that it is systematically destroyed once that business record is no longer of value.

- The inadvertent destruction of data through technological ignorance or neglect must be avoided.
- The destruction of data must cease once the business suspects a “possible claim,” i.e., suspension must be made before a lawsuit is filed to avoid facing serious legal sanctions. To avoid any negative inferences, both the enforcement of the data management program and its suspension should also be well documented to establish that the business’ conduct has been reasonable and consistent.
- Moreover, data set aside for destruction must be disposed of in a manner that respects privacy obligations legally imposed, e.g., it is not available for scrutiny beyond those authorized with access and it is not simply thrown in the garbage where it can be discovered by others.
- Disposal also takes into account the technological considerations as to how electronic data is fully expunged, i.e., whether recoverable legacy data is available or whether electronic data has been written over and the legacy data eliminated.

By staying on top of useful information, business has the opportunity to use its data for growth and avoid getting bogged down by an information glut. Employees are less likely to be overwhelmed in responding to regulatory requirements or otherwise protecting the company from external demands. Management can then turn its focus from conforming to outside demands to instigating opportunities for business growth.

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