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An Ounce of Prevention
Is Worth a Pound of Cure

MNACC

June 10th, 2008

- Understand the “true” causes of records management issues;
 - ▶ Privacy
 - ▶ Compliance
 - ▶ E-discovery
- Learn how counsel can;
 - ▶ Strategically shape what discovery looks like
 - ▶ Avoid production related sanctions
 - ▶ Minimize risk of privacy breach
 - ▶ Successfully change culture around records management
 - ▶ Implement an effective records management process

“Data Breaches Hit Record In 2007more than 79 million records reported compromised in the United States”

The Associated Press, December 30, 2007

“The Plaintiff’s Bar is starting to recognize that e-discovery is a powerful litigation weapon, especially when suing companies with large IT systems and voluminous ESI storage”

Top Trends in E-Discovery Noted at ILTA Conference by Ralph E. Losey

“Six Qualcomm attorneys were issued sanctions for mishandling evidence in a patent case against Broadcom”

The Wall Street Journal, January 8, 2008

“Records management is the only area of corporate governance where compliance and execution is routinely left to the discretion of employees”

Brad Jordan
ACC Annual Conference 2003

“The reality of electronic discovery is that the responding party will fail, partly due to the near absence of prudent electronic records management.”

The Plaintiff’s Practical Guide To E-Discovery
by Craig Ball

“**Actual**” records management practice is seldom consistent with corporate records policy

- 40% of business representatives are not aware of their company’s corporate records policy
 - ▶ 39% think the policy only applies to paper documents
- 62% of business representatives are unaware/don’t have established disposal processes when records become eligible for disposition
- 39% of business representatives that work with PII do not identify this information as being sensitive or requiring special attention

Why? - Vague and Conflicting Policy

Email Retention Policy

Created by: IS Department

Date in effect: Immediately

Scope: Defines policy regarding retention of electronic mail.

Applicable to: All Company employees

Detailed description: Employees must check email communications regularly, retain only those communications that remain appropriate for current business needs, and delete all others after sending or reading.

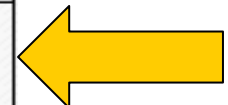
Long-term storage of email should be kept to a minimum.

No documents are to be saved on the C drive (local hard drive).

Consequences of violation: Space may be limited for saving emails.

Schedules That Are Not Actionable

RECORDS	RETENTION PERIOD
Hired:	
• Attendance Records	7 years after termination of employee
• Bonuses <ul style="list-style-type: none"> ○ Personnel Action Notice (PAN) 	7 years after termination of employee
• Change of Status Records <ul style="list-style-type: none"> ○ Personnel Status Change Form ○ PAN 	7 years after termination of employee
• CLERC Reports (re: module completion, usage, etc.)	7 years after termination of employee
• Code of Conduct Acknowledgement	7 years after termination of employee
• Collective Bargaining Agreements	Permanent
• Compensation Surveys	7 years
• Disability Records and Family and Medical Leave Records <ul style="list-style-type: none"> ○ Request for Leave 	3 years after termination of employee
• Disciplinary Records <ul style="list-style-type: none"> ○ Performance Counseling ○ Written or Verbal Warning 	7 years after termination of employee
• Drug Screen Authorizations	7 years after termination of employee
• Education Records	7 years after termination of employee
• Employee Evaluations <ul style="list-style-type: none"> ○ Performance Review ○ Performance Assessments 	7 years after termination of employee
• Employee Manuals <ul style="list-style-type: none"> ○ Employee Handbook ○ Policy and Procedure Manual 	Permanent
• Employer Information Report EEO-1	Most recent report for each reporting unit must be retained at each such unit or at company or divisional headquarters



Personnel Files Terminated

- Same record can be found in 8 different departments

Employee Relations

Loss Prevention – Risk Management

HR Administration

Payroll

HR Recruiting

Store Operations – District

Inventory Control

Store Operations – Region

- 14 versions in multiple media

- ▶ Paper

- ▶ Email

- ▶ Electronic

- 79% do not have established disposal practices

612 unique record types = 6,427 total profiles
(across all depts. and media)

Email	946 record profiles on this media - 611 contain sensitive information
Employee-Controlled Electronic	1,444 record profiles on this media - 888 contain sensitive information
Images	395 record profiles on this media - 269 contain sensitive information
IT-Controlled Electronic	1,039 record profiles on this media - 608 contain sensitive information
Paper	2,603 record profiles on this media - 1,712 contain sensitive information

Data Breaches No Surprise



“A lot of (privacy) breaches are due to inadequate information handling, such as laptop computers with Social Security numbers on them that are lost, human error, and something completely avoidable, as opposed to a hacker breaking into your system.”

Identity Theft Resource Center

Fewer than 20% of identity theft involves the internet...prevalent non-technical methods were mail theft and dumpster diving.

DOJ Study October 2007

- 27 % of companies lack a formal process for managing litigation holds
- 82% of companies have differing back-up processes across locations
- 52% of business areas with paper records containing sensitive information do not have secure destruction processes

Disparate I.T. Processes



	Corporate	MI	Canada	DL	CO	FL	CA	MO	GA
Policy restricts storing email outside messaging environment	No	No	No	Don't Know	Yes	Don't Know	Yes	No	No
# Email servers	4	1	1	1	1	3	1	1	3
Current size of email server (GB)	80 GB	46 GB	16 GB	21 GB	43 GB	300 GB	120 GB	273 GB	78 GB
Size of email server last year (GB)	70 GB	40 GB	10 GB	19 GB	33 GB	250 GB	120 GB	N/P	67 GB
Total email archive tapes	20	10	20	12	96	12	27	320	13
# archive tapes > than 24 months	20	0	1	0	72	0	0	192	0

- Can't overlook the “human factor”
- Over 60% of companies policies do not adequately address email (management, retention, and deletion)
- Business people report saving email
 - ▶ 46% :: report saving on local hard drives
 - ▶ 39% :: report saving on shared drives
 - ▶ 16% :: report forwarding to personal email accounts
- Over 90% of email being retained is not needed

Most information maintained by a company is at best redundant, and most likely outdated or counterproductive

- The amount of over-retention is staggering
 - ▶ Paper records :: 50% to 80%
 - ▶ Email :: 80 % to 90%
 - ▶ Other electronic records and information :: 80% or more
- The same record is usually found in at least three media
- Less than 5% of records are ever needed at all

Unenforced Policy = Discovery Challenges



- High collection and review costs
 - ▶ \$2,500 per GB national average
 - ▶ Subjective decisions
 - ▶ High error rates
- “Litigation inside litigation”
 - ▶ Lack of policy enforcement becomes part of the Plaintiffs strategy
- Lead’s to sanctions

During the Qualcomm trial
witness testifies about emails
not produced during discovery

Court issued Order To
Show Cause...

*“...why shouldn't sanctions be
imposed against any and all
attorneys who signed discovery
responses, pleadings and pre-trial
motions!”*

Over 1.2 million documents had been produced

Counsel discovers witness has email not produced

- *38 months old when patent infringement was initiated*
- *Welcoming email to the avc_ce mailing list*

Another 300,000 pages, belonging to 21 other employees were found and produced

Tough Sanctions. Important Questions.



Broadcom's sanction motion was granted (in part).

Six of Qualcomm's outside attorneys were referred to the State Bar of California for investigation.

Six outside and five inside attorneys were ordered to develop and comprehensive case review and "hold" management review.

Could you determine what documents are responsive to a discovery?

Do you know where to look for them?

Do you know who to contact to ensure responsive records are identified and protected?

Is your legal "hold" process done consistently?

Are you at risk?

- If the court grants a discovery motion and the losing party fails to comply with the order, the court may impose sanctions against the party.
- There is no requirement under this rule that the failure be **willful** or **reckless** – sanctions may be imposed even for **negligent** failures to provide discovery.

What Can Counsel Do?

- Throw out traditional records management notions
- Define where you want to be and then work backwards
 - ▶ What risks are you trying to mitigate?
 - ▶ What events do you want to impact?
- Identify and involve other stakeholders
- Develop the foundation
 - ▶ What are the “records” of your company?
 - ▶ Who has them?
 - ▶ Why do they have them?
 - ▶ Where are they?
 - ▶ What about everything else?

Start with Subject Matter Experts

- Understand the corporate infrastructure and processes in relationship to policy, regulatory compliance and preservation
 - ▶ Email
 - ▶ Back-up processes
 - ▶ Mobile computing
- Understand specific tax and compliance requirements
- Collect the necessary information to prepare for meet and confer conference

What You Need To Know



Email software, servers, mailboxes.

Voicemail software, servers, related storage.

Instant messaging software, servers.

Accounting system software.

All operating systems and application software on user desktops.

All operating systems and application software on user laptops.

Operating systems and application software on PDA's.

Remote access using Internet access to email and other systems.

Internet servers and related firewalls.

Business representatives have the knowledge of;

- ▶ What record types exist across the enterprise
- ▶ How they correlate to specific LOB / departments
- ▶ The media and the applications in which they reside
- ▶ Where redundancy occurs
- ▶ Storage locations
- ▶ What is the reference value and business requirement
- ▶ Location of personally identifiable and other sensitive information
- ▶ ***What is really going on***

Example - Discovery Road Map™

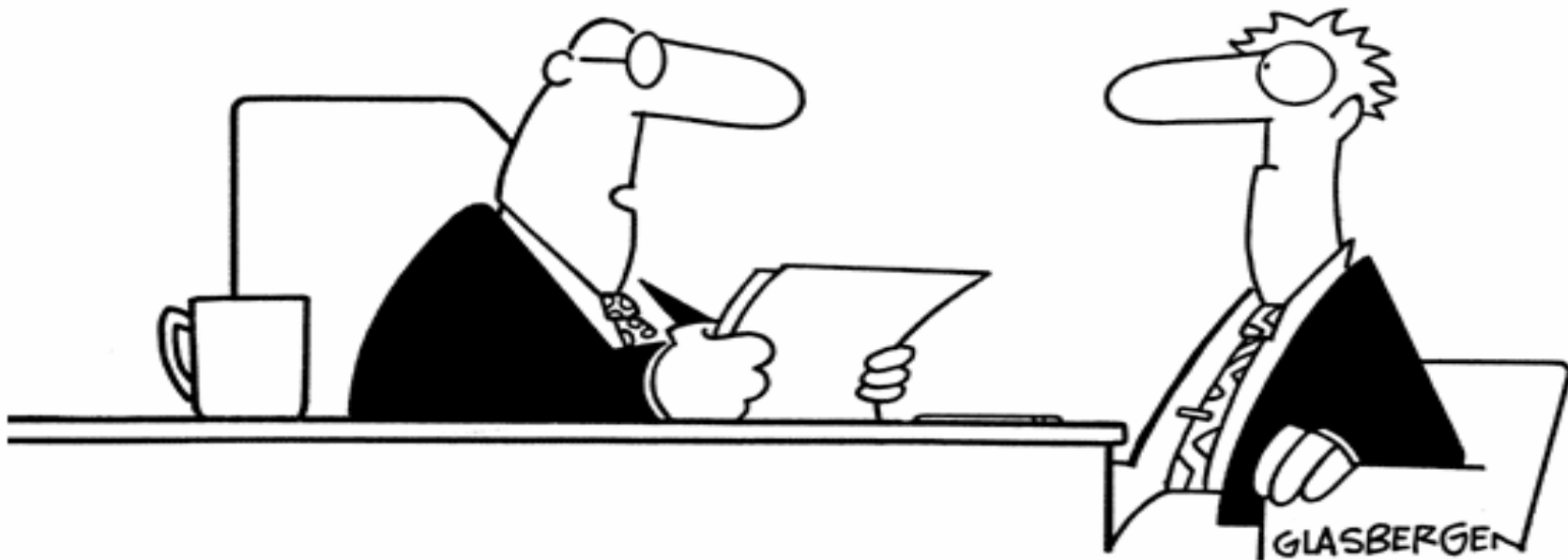


Area	Media Type	Official Version	Storage Locations	Application/System	Current Retention
Applicants - Not Hired					
<i>Employment applications, new employee input memos, position opening requisitions, copies of workman compensation, applications and copies for employment file.</i>					
Employee Relations	Email Systems	No	Laptop Hard Drive, Email Server, Thumb Drive	Outlook	Not Provided
Employee Relations	IT-Controlled Electronic	No	ERP	PeopleSoft	12
HR Recruiting	Email Systems	No	Email Server, Network Drive, Printed & Filed	Outlook	9999
Legal	Paper Records	No	Offsite Facility, Department File Cabinets	-	Not Provided
Store Operations- District	Email Records	Yes	Personal Email, Email Server Workstation Hard Drive	Outlook	36
Store Operations- District	Employee-Controlled Electronic	No	Laptop Hard Drive, Network Drive, Thumb Drive	System	Employee Discretion
Store Operations- District	IT-Controlled Electronic	Yes	ERP	PeopleSoft	Not Provided
Store Operations- District	Paper Records	Yes	Offsite Facility	-	24
Store Operations- Region	Employee-Controlled Electronic	Yes	CD/DVD, Laptop Hard Drive, Network Drive, Thumb Drive	Word	12

- Necessary knowledge to prepare for 26 (f) conference
 - ▶ All document retention policies including electronic information, and email, backup procedures and policies
 - ▶ Key player groups / organization charts
 - ▶ Key records, applications and data types used by key players
 - ▶ Enterprise data and system maps
 - ▶ Overview of back-up processes
 - ▶ Overview of e-mail systems
 - ▶ Key player metrics for e-mail and unstructured data
 - ▶ Key data metrics for e-mail and unstructured data
- Who will be your expert witness (i.e. 30(b)(6)) on all your records retention practices?

The Privacy Challenge

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www.glasbergen.com



“We’re looking for someone who can help us crack down on identity theft. Fill out this application and don’t forget to include your Social Security number, date of birth, phone number, home address and mother’s maiden name.”

Storage Locations - Employee Relations

- Laptop
- Hardcopy - File Room
- Email
- Image - Network Drive

APPLICANTS - NOT HIRED

Employment applications, new employee input memos, position opening requisitions, copies of workman compensation applications and copies for employment file.

Employee Relations

HR Recruiting

Legal

Store Operations - District

Store Operations - Region

Yes	Personal information
-----	----------------------

Yes	Personal information
-----	----------------------

Yes	Personal information
-----	----------------------

No	Not Provided
----	--------------

No	Not Provided
----	--------------

Storage Locations - Store Operations

- Email
- Workstation
- Laptop
- Hardcopy - District Storage Facility
- Network Drive

Creating An Actionable Policy

- Reconcile the information collected from business representatives with business and regulatory requirements to create a practical retention schedule
 - ▶ define long term retention period
 - ▶ determine “official” version
 - ▶ eliminate creation of redundant versions
 - ▶ define retention of general information
- Create a policy that defines
 - ▶ ownership of the policy
 - ▶ responsibility of employees
 - ▶ consequences of non - compliance
 - ▶ audit process and frequency
- Anticipate unintended consequences

- Collaborate between Legal & IT
 - ▶ clearly articulate requirements definitions
 - ▶ ensure current infrastructure can meet the expectations of the policy
- Dispose of records & information you don't need
 - ▶ address any holds
 - ▶ document logic behind disposal
- Invest in technology when reasonable
 - ▶ cost vs. benefit
 - ▶ have realistic expectations

Bringing The People Along

- Tone at The Top!
- Do not create additional work for business representatives
- Training should
 - ▶ educate employees on expectations
 - ▶ document employee acknowledgement
 - ▶ identify support resources
 - ▶ be conducted annually
 - ▶ be part of the on-boarding process
- Establish and enforce appropriate consequences

- The true cause of records management issues;
 - ▶ Inconsistency
 - ▶ Over-retention of information
 - ▶ Lack of “effective” process
- What can counsel do
 - ▶ Start by assessing what you have, where, and why you need it
 - ▶ Create a Discovery Road-Map
 - ▶ Make policies and retention schedules actionable
 - ▶ Get rid of what you don’t need
 - ▶ Don’t overlook the “human factor”
 - ▶ Establish an effective litigation hold process
- Be proactive!
 - ▶ A consistent and comprehensive plan will provide *long-term* cost savings and reduce your headaches

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www.jlgroup.com

Privacy Rights ClearingHouse

www.privacyrights.org

ACC

www.acc.com

Maryland District Courts ESI Protocols

www.mdd.uscourts.gov/news/news/ESIProtocol.pdf

Tune into JL webcasts

www.jordanlawrence.com

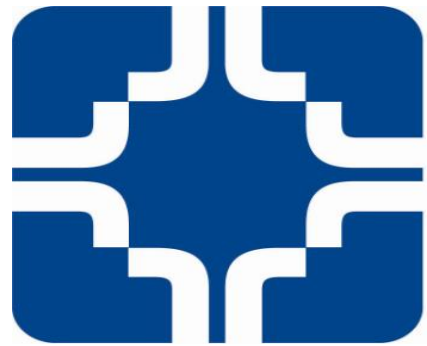
Thank You

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