

Legal Issues in Records Management

For Public Entities

John Montaña
The PelliGroup



Who are we talking about?

- Public agencies
- Quasi-public entities
- Regulated entities such as public utilities



Are they different from private organizations such as corporations?

- In some ways yes
- In some ways no



How are they the same as private entities?

- They are subject to many of the same regulatory regimes and other considerations
 - Environmental
 - Labor
 - Safety
 - Audit
 - Litigation



How are they different?

- Records with very long life spans
- Different or additional enabling statutes and regulatory regimes
- Open records laws
- Sunshine laws
- Political issues and influences
- The obligation of public service and accountability
- Public contracts requirements
- Often limited resources
- Archival and historical responsibilities

Most core records management issues are the same

- technology management
- Conceptual tools
- policies and procedures
- retention schedules
- workflows
- People issues
- organizational culture
- change management
- training and education
- justifications
- operational efficiency
- cost savings
- risk management

Regulatory Regimes



Records management is a heavily regulated area:

- OSHA
- EEOC
- EPA
- DoT
- DoL
- DoE
- IRS
- Etc., etc.
- State analogues of the above



In addition, state agencies and public utilities may also have:

- FERC
- State utilities regulators
- State records or archives agencies
- Specialized legislation and regulation
- Legislative oversight and budgeting



Other Standards and Authority

- NARUC (National Association of Regulatory Utility Commissioners)
- ANSI (American National Standards Institute)
- AIIM (Association for Information and Imaging Management)
- ARMA (Association of Records Managers and Administrators)



Jurisdictional and preemption issues:

- Potential concurrent state and federal jurisdiction
- Potential concurrent jurisdiction by different agencies
- Different regulatory regimes for different business processes
- Cross-border issues of regulation



Issues with statutory and regulatory language

- Vague or outdated statutory language
- Poor match between records contemplated by law and those actually found
- No or few implementing regulations when the statute calls for them
- Unreasonable retention requirements
- Verbatim state adoption of federal requirements
 - What if federal requirements change?



The Bottom Line – Legal Requirements Usually Require Interpretation



Electronic records

- The equivalent of paper records for virtually all purposes
- Fully discoverable in litigation



E-mail

- For virtually all purposes, e-mail is considered a “written” record
- Government e-mail is a public record
- E-mail is generally subject to open records laws and freedom of information laws



Electronic Signatures in Global and National Commerce Act

- Sec 101 - A broad authorization of electronic records and electronic contracts
- Sec. 102 - Explicitly preempts state and federal law not consistent with its terms
- Sec. 104 - Limits the ability of government to restrict technologies or their use
- A very limited number of exceptions – sec. 102 (b), sec. 103



Privacy

- Two levels of regulation
 - State
 - Federal
- Many individual sources of law
 - Constitutions
 - Statutes
 - Regulations
 - Court Decisions

The Constitution

- No right of privacy stated
- Implied only for limited purposes
- Only against government action

Freedom of Information Act

- Most records open to public
- Enumerated exceptions
 - law enforcement investigations
 - national security
 - trade secrets
 - personal information
 - etc. etc.



State Records

- most states have open records laws
- all records open with exceptions
 - exceptions will vary by state. Examples:
 - patient records at public institutions
 - letters of reference concerning employment
 - letters in personnel files which are opinion
 - law enforcement records concerning confidential sources or methods



Public Records Generally

- Few exceptions
- Exceptions limited
- Little discretion allowed



Privately Held Records

- no generalized right of privacy
- no constitutional protections
- privacy protections granted by statute



Statutes Governing Privately Held Records Cover Narrow Situations:

- rental of videos
- library records
- educational records (sort of)
- electronic communications
- hotel room conversations
- bank records (e.g., Graham-Leach)
- medical records (e.g., HIPAA)



The Bottom Line

- There's no general rule
- Read the governing law – there may be more than one



Litigation



Representative Costs

- Per terabyte:
 - \$.5 to \$1 Million to find
 - \$.5 to \$1 million to process

BEFORE human review



Representative Costs

**70% of the cost of a lawsuit is
document review**



Response

- Amendments to Federal Rules of Civil Procedure
- The Sedona Guidelines



The Federal Rules

- Conceptual reform – recognition of:
 - Data volumes
 - Difficulty of searching some data sets
 - Costs and difficulties of isolating or freezing data sets
 - Inherently transient nature of some data



The Federal Rules

- Actual Changes:
 - Pre-trial conferences on electronic discovery
 - A requirement that a data map be provided to the other party



The Sedona Guidelines Managing Electronic Information

- Not official, but:
 - Very, very prestigious and learned think tank
 - Very persuasive authority
 - General tenor is the same as the federal rules



The Sedona Guidelines Procedures

- Organizations should have reasonable procedures
- Procedures can be tailored to the organization, but --
- Procedures should address full information life-cycle
- Procedures should address litigation hold



The Sedona Guidelines Retention

- You don't have to preserve all e-data
- You don't have to preserve shadow, residual or deleted data
- You don't have to preserve metadata



Where Does This Leave Us?

- With an Opportunity:
- You have:
 - two opportunities to confer on electronic data issues
 - two opportunities to set expectations
 - two opportunities to manage the issue



What To Do?

- Negotiate:
 - The parties must confer in good faith prior to meeting the judge
 - That's an opportunity to assert reasonable objections to unreasonable demands



What to Do?

- Educate:
 - If the parties can't come to agreement, the judge decides
 - The parties will be offering different spins to the judge
 - The judge has to be educated on the realities of electronic discovery



Where to Start:

- Educate yourself – know the issues, problems, costs
- Come prepared – the pre-trial conferences are where things get decided



Before the Conferences

- Find your own internal experts
- Confer with them
- Know your own capabilities – don't over-promise
- Learn how to explain technical concepts in non-technical terms



Remember:

- Litigation is hardball – the other side may not agree with your theories of reasonable
- The side that wins is the one that convinces the judge it is right
- The judge may start out with little familiarity with technical computer issues



What Not To Do:

- Don't overstate your case
- Don't try to jerk the other side or the judge around
- Don't assume the judge is uninformed, non-technical or stupid
- Don't over-promise results



Remember:

- There are no hard and fast rules
- You must convince the judge you are:
 - Correct in your assertions
 - Reasonable in your practices
 - Reasonable in the positions you are arguing



A Few Practical Issues



What's a Record? What's Discoverable?

- Maybe lots of things you don't think about:
 - e-mail
 - instant messaging
 - voice messages



Issues with indexing

- In order to find a record, you must be able to accurately identify it
- Indexing is the key to identifying records for disposition
- Many repositories are poorly indexed, or not indexed at all
- Keyword searching is only partially effective
- Repositories may require substantial indexing or other identification activities



Issues with electronic records repositories

- Poor indexing
- Uncontrolled backup processes



Litigation Holds!!!

- Merely broadcasting a litigation hold is inadequate
- There **MUST** be follow-up and supervision!
- **DO NOT** attempt to play games!



Some Cases of Interest



Qualcomm Inc. v. Broadcom Corp.

05cv1958-B (S.D. Cal.)

- Qualcomm hid knowledge of 46,000 relevant e-mails
- Lawyers danced around them in questions
- Results:
 - Qualcomm ordered to pay 8.5 million in Broadcom attorney fees
 - Six lawyers referred for disciplinary action



McGuire v. Acufex Microsurgical, Inc.

175 F.R.D. 149 (D. Mass. 1997)

- Do you have to keep draft documents?
- No!



Plainly, [employers] can call for drafts from their staff, before the final product, edit those drafts, and then discard them where, as here, the editing concerned obvious errors made by someone other than the accused harasser. To hold otherwise would be to create a new set of affirmative obligations for employers, unheard of in the law -- to preserve all drafts of internal memos, perhaps even to record everything no matter how central to the investigation, or gratuitous.



Now, the Bad News . . .



Broccoli v. Echostar Communications Corp.
229 F.R.D. 506 (D. Md. 2005)

- What about that 14 day blanket retention period for e-mail?
- Not sanctionable – well, maybe
- “Under normal circumstances, such a policy may be a risky but arguably defensible business practice undeserving of sanctions.”



But . . .

“In short, the evidence of a regular policy at Echostar of "deep-sixing" nettlesome documents and records (and of management's efforts to avoid their creation in the first instance) is overwhelming. “



How Hard Do You Have to Look
for E-Records?



St. Andrews Park, Inc. v. Corps of Engineers
299 F.Supp.2d 1264 (S.D. Fla. 2003)

- FOIA request resulting in lawsuit
- What was searched?
 - Network server
 - E-mail accounts of identified personnel
 - “The district’s computer network”
 - Enough? – No.
 - “The Corps simply has not met its burden [of showing it conducted a reasonable search]”



Zubulake V. U.S.B. Warburg,
229 F.R.D. 422 (S.D.N.Y. 2005)

- Routine lawsuit, routine issues, but . . .
 - Poor supervision of discovery
 - Poor records management leading to poor discovery results
 - Issues dribbling out over time
 - Clever lawyers taking advantage of those issues



Records Management Issues:

- Backup tapes destroyed or unrecoverable in violation of a retention policy
- E-mails deleted from active system after notice of litigation
- Late discovery of e-mail in personal “archives”
- Failure of counsel to supervise discovery
- Failure of employees to comply with direction by counsel



The Result:

- Identification and turnover of relevant material two years late
- Absence of some relevant material
- A question as to what was missing
- An issue of spoliation



The Consequence:

- A conclusion that relevant material was missing
- An assumption of wrongful conduct
- An inference of bad faith
- An adverse inference instruction: “The material that was missing or made unavailable contained information unfavorable to the party responsible for it.”



In Re Texlon Corporation Securities Litigation 98CV2876 (N.D. Ohio July 2, 2004)

- The party in interest: PriceWaterhouse



Records Management Issues:

- Failure to produce relevant documents
- Failure to produce all *versions* of relevant documents
- Hard copies different from electronic copies
- Failure to protect data from alteration when litigation foreseeable



Coleman v. Morgan Stanley, 502003CA005045 (Fla. 15th Cir. Mar. 5, 2005)

- Backup tapes – lots of them, in several locations
- Incomplete production of e-mail, delays, more incomplete production
- Statements and certifications that production was complete when it was not
- Result: Adverse inference



Rambus, Inc. v. Infineon Tech. AG

220 F.R.D. 280 (E.D. Va. 2004)

- Retention policy adopted 2 years prior to commencement of litigation
- Office “shred days” 1 and 2 years prior to first actual dispute with known party
- Office cleanout concurrent with office move
- Goal was to make company “battle ready”
- No real evidence anything relevant was destroyed



Rambus, Inc. v. Infineon, cont.

- Court viewed retention program, shred days as a pretext to destroy relevant documents
- Court concluded that duty to preserve attached when list of potential opponents and potential causes of action was compiled



Samsung Electronics, Co., Ltd. v. Rambus, Inc.
2006 WL 2038417 (E.D. Va. July 18, 2006)

- Same facts, same court
- Why another case: Multiple parties asserting spoliation defense to avoid patent royalty issues
- Same result



Hynix Semiconductor, Inc. v. Rambus

2006 WL 565893 (N.D. Cal. Jan.5, 2005)

- Same facts, different court
- Result: no spoliation, no sanctions
- Court determined that the retention policy was not adopted in bad faith, and there was no showing of prejudice



Questions

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John Montaña
The PelliGroup, Inc.
jcmontana@pelligroup.com

