

A COMPLIANT INFORMATION MANAGEMENT PROGRAM: THE BEST GIFT OF ALL

An E-DOC Magazine Legal Expert Column by Randolph Kahn, ESQ.

2002 HAS BEEN A TOUGH YEAR for corporate executives across the country, so maybe in the spirit of holiday giving, it's time that we all pitched in to get them the perfect gift. What is the perfect gift for the busy executive who has images of their colleagues being led away in handcuffs, dancing in his or her head?

The perfect gift for your corporate management this year is peace of mind? Peace of mind is a gift that records and information management professionals have to give by developing and implementing a Compliant Information Management Program. A program that passes muster with the most stringent requirements of regulators, lawmakers, adversaries in litigation, and outside auditors. What we learned this past year is that policies are of little value if employees don't understand and follow them. However, many companies don't even have the policies and directives they need in the first place. We also learned that companies that fail to manage their information and records get fined millions of dollars, cease to exist in extreme cases, and executives get criminally prosecuted for which they may do prison time.

Maybe you are fortunate, and when you assured your panicked executives that you had them covered on Sarbanes-Oxley, you didn't have to think twice. Records can't be destroyed like they were at Andersen because you have a solid Legal Hold mechanism in place that ensures that paper and e-records are preserved at the first sign of legal trouble and the process is taught and routinely audited. You have retention rules for all type of electronic records and you apply the same rules to the myriad of databases that you do to paper records. Employees are trained, understand, and accept their responsibilities. The email system is not purged without first making sure email records are retained. Life is good.

During the reflective moments during this holiday season maybe we all need to take a second look at what we are doing to protect our organizations.

When companies are prosecuted in the Federal courts for wrongdoing, such as destruction of records, the sentences handed out by the court are based in part on the seven key considerations listed below. Therefore, many corporate compliance departments build their programs to include these 7 elements:

- Policies and procedures
- High level support and leadership
- Proper delegation of responsibility--improper delegation of responsibility to employees who should not have responsibility is a problem
- Communication and education
- Making reasonable steps to achieve compliance through monitoring and auditing

- Consistency in enforcement
- Mechanisms to correct problems or respond to breaches in policy

Companies who take the Sarbanes-Oxley law seriously should consider incorporating these elements into their Information Management Program. Doing so can help to minimize the chance that malfeasance will occur in the first place, and can also reduce the severity of punishment for wrongdoing when it does occur.

So what does applying these compliance principles to your Information Management Program look like in practice? By answering the following questions, you can begin to answer that question yourself.

- 1) **Policies and Procedures.** Does your company have a comprehensive Business Information or Records Management Manual that tells employees what a record is, how to manage it, retain it, transmit it, store it, dispose it, and so on? Still some work to do? Does your company have rules that deal with drafts, ownership of records, duplicates, transitory email message, email records, retention of back-up tapes, application of retention rules to computer-based information. More work still?
- 2) **High-level support and leadership.** Does management support, fund, and make sure that all employees take information management seriously? When was the last time a senior executive spoke about or signed onto a memo on a records management topic? If he/she hasn't lately, then does program really have the support it needs?
- 3) **Proper delegation of responsibility.** Do all employees understand to whom they can go to for clarification on Information Management issues? Is there competent and trained staff throughout the entire company with responsibility for Records? Has the responsibility for generating interest in the records management program fallen on the records manager? Does the executive team actually believe that the Division Presidents will listen and take direction from the Records Manager?
- 4) **Communication and Education.** Do you have an up-to-date RM training program? Does it reflect the latest changes to critical policies and to the technology environment in the office? Do your employees understand what they are required to do? When is the last time training was conducted?
- 5) **Monitoring and Auditing.** Does your company conduct regular internal or external audits of your Information Management Program? Do you have any way to measure employee compliance with the Program? Do you cooperate with IT to gather metrics about employee use of email archives and other management tools?
- 6) **Consistency in Enforcement.** Do you have a written policy for dealing with breaches of important policies? Would your HR records demonstrate that such breaches have been dealt with in a consistent manner?
- 7) **Problem Correction.** Is there a process in place to deal with either failures with the program or a way to correct problems should one become known? Is there a process for employees to bring problems to your attention?

These seven principles can be an invaluable measuring stick for your Information Management Program. Use them to help you focus on what is important, what is working, and what is broken. They will help you understand what the courts, regulators, and auditor want before the first sign of trouble.

Peace of mind doesn't come easy, but a Compliant Information Management Program will go a long way to help both you and your company's management find some this holiday season, and well into the future.

Happy Holidays!

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THE SARBANES-OXLEY ACT DIDN'T INVENT PENALTIES FOR DESTRUCTION OF EVIDENCE, BUT IT DID PERFECT THEM

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THE SARBANES-OXLEY ACT OF 2002 was passed in the wake of seemingly endless financial scandals involving a number of public companies. The law is a new tool for the SEC to regulate publicly traded companies and protect the investing public from the actions of unscrupulous executives and accountants. Many careers, companies, and billions of dollars later, it is heartening that many in the information management community are asking about the impact of the Sarbanes-Oxley. So what does the law mean, what are the implications for your company, and what can be done to insulate your company from becoming the next headline? However, before we answer those questions, let's briefly look at the law itself.

Sarbanes-Oxley legislates acceptable conduct for public companies and their executives and public accountants (accountants responsible for auditing public companies). The law establishes the Public Company Accounting Oversight Board, a soon-to-be-formed entity that will be responsible for developing rules regarding public accounting and company accountability. While the law addresses certain recordkeeping issues, it does so largely from the public accountants' perspective. However, there are still direct actions related to Sarbanes-Oxley that your company can take today.

The reason that the new law probably got your attention in the first place is the following section:

" . . . whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies or makes a false entry in any record, document or tangible object with 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 any case filed under title 11 or in relation to, or contemplation of any such matter of case, shall be fined under this title, imprisoned not more than 20 years, or both.

If you do anything to make records covered by the law unavailable, then you can be imprisoned for up to 20 years and fined as well. It's not the first law to impose prison time for "obstruction of justice," but it sure gets my attention.

The law requires public accountants to retain "work papers" for seven years. However, even if that requirement applies to the outside accounting firms, in the face of the directive, the public company itself should review its retention policies to determine if internal recordkeeping rules are consistent with what the accountants will be required to do.

The law requires public accounting firms to report on companies' internal controls and procedures for maintaining certain records. Also, the "signing officers" (company executives signing SEC filings) are "responsible for establishing and maintaining internal controls." Therefore, it may be useful to assess, and if necessary bolster, your records management auditing and compliance

programs, at least with respect to the "affected" records - especially since you know that your outside auditors may be doing the same.

Directors, officers, and stockholders controlling 10% or more of the public company are now required to make known any ownership changes on the company website within two days of the relevant transaction. Clearly this implies that such companies will need to retain trustworthy records demonstrating the timing and content of the required Web-based disclosures.

The Public Accounting Oversight Board has been given authority to compel the production of records or require the continued retention of a public accounting firm's records, even beyond what the law otherwise requires. There may be disastrous consequences for public companies that fail to produce paper or electronic documents, records, or any tangible evidence. Experience has taught me that the "production mechanism" is much less expensive and painful to implement it before the subpoena is received.

So here are the practical takeaways:

- Never destroy anything that is potentially relevant (even if it is not subject to Sarbanes-Oxley) if you know that a lawsuit, investigation, or audit is about to be or has been filed. §
- Don't alter or make anything "unavailable." Purposefully disposing of proprietary software needed to access records might be considered "concealing," and allowing employees to encrypt records and "lose" the decryption key could be considered "covering up." Simply stated, the law is broader than "shredding." §
- Once the company is in "trouble" it's too late to do any "house cleaning" even if company policy otherwise allows the records to be disposed. §
- Audit your records program to see if the company has what it takes to protect its interests. Unless and until you know what's broken, you won't know what to fix. Experience performing compliance audits on RM programs for clients has shown that they can be conducted expeditiously with substantial benefits. If the program is deficient, you can correct it before a lawsuit exposes the holes. §
- As previous addressed, every company that gets sued or is subject to audits or investigations needs a procedure to ensure that records, documents, and other evidence is preserved. You might call it a "Legal Hold," a "Preservation Order," or a "Records Hold Order," but just make sure it is in writing, is taught to all company personnel, and is followed. Having a policy and not following it may be as bad, or even worse, than not having one at all.

Written policies make a difference for two reasons. One, they guide employees in doing the right thing. Second, they are a "record" of the company's position and manifest its desire to do the right thing, which will not be lost on the regulators. Rules may not work in every instance, but they can help. How sympathetic would the SEC or IRS be if today they learned that records were "mistakenly" destroyed because the company under investigation failed to have policy telling employees what and how to preserve needed records. Accidental destruction will happen, but failure to have a policy to prevent such destruction may be deemed inherently unreasonable and may be reason enough for a regulator or court to make an example out of you and your company. Applying risk management principals proactively in this business climate seems prudent.

Upon reflection, I am not so convinced that Sarbanes-Oxley is as limited as it initially appeared. The law is about corporate accountability. The way that companies demonstrate their financial disclosure and "conduct" is in large part with records. The way that companies demonstrate compliance with laws and policy is also largely with company records. When companies fall from grace it is usually a record that proves to be damning. So while Sarbanes-Oxley may only tangentially impact your company, the fact remains that failing to manage records is risky business whether or not you are a public company or accounting firm, unless of course you long for a new country home upstate with cramped living quarters and a limited menu.

CARPE DIEM: RECORDS MANAGEMENT DOES NOT GET ANY SEXIER

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Listen up. I have a couple of really funny jokes.

Have you heard the one about the law department that refused to defend a lawsuit because they didn't have the budget for it?

What about this one? The company's new mantra this year is cut, cut, cut. So, management takes 20% out of the records management budget. However, IT has to suffer like everyone else - their budget only increases 20% this year.

So here you sit, trying to defend your budget and perhaps even justify your existence. You look long and hard, but nobody at the top really seems to believe that records management is that important. They seem to believe that an RM department of one is all that is needed. The only one that "gets it" is the newly hired young lawyer, but even she is not within shouting distance of the corner offices.

Sound familiar? Read on.

For over a year, nearly everyday, stories about records management have grabbed the headlines in major newspapers across the country.

A premier accounting firm withers away, clients flee, thousands lose jobs, and partners lose millions in value. All this because the company failed to have adequate records policies and teach them to employees. A few employees destroyed records to cover their tracks and the rest is history.

One of the world's largest phone companies files bankruptcy and, before the ink is dry on the court pleadings, the SEC does the unthinkable and imposes an \$800.00 an hour records babysitter to ensure that the company does not destroy or alter the records that may be needed during the ensuing investigation.

An executive from an international conglomerate allegedly seeks to alter shipping documents to make it look like the millions of dollars in art bought at company expense and sent to his personal residence was sent to a company facility instead. The executive is out of a job and being prosecuted.

In the face of all the records mismanagement and accounting scandals plaguing corporate America, a new federal law is passed increasing the penalties for anyone who "alters, destroys, mutilates, conceals, covers up, falsifies...any record..." to 20 years in prison and/or a fine.

In my dealings with information and records management professionals I hear a lot about their "sad" lot. While I am persuaded that it exists, I am not convinced that it has to be that way.

This is a unique time and you have an opportunity like never before. Records management has taken center stage as a corporate governance issue. The executives understand that failure to properly manage the company information assets can impact them and the company. You need to show them how you can help.

In fact, twice in the past year I have seen records managers present their case to senior management in this way, and win. Seize the day!

You need a plan. To help you jump start your plan of attack to put RM on the agenda consider the following:

- 1) If RM can't be sold as "risk mitigation or liability avoidance" (the "stick" approach) (which would be baffling given all the news of late) then the other option is making the company function "faster, better, cheaper," (the "carrot" approach) by better organization and thus access to records.
- 2) If you sell RM with the stick approach then you need a champion from legal, tax, or audit who is senior enough to make the point and carry the ball. Not surprising, I was recently asked by a Records Manager to make the case to the CFO and it worked.
- 3) If you sell information management with the carrot approach, then you will likely need a senior business executive or IT champion. In any event you can't do it alone.
- 4) You can also approach the "lack of funding and recognition" issues from both perspectives, just know your audience and what will move them.
- 5) Expand your belief about what is an information or records management task. Perhaps the company needs record creation rules that deal with the kind of electronic record kept as evidence of business activities. Perhaps you can develop an e-records indexing regime to promote retrieval to better service customers. Perhaps you can work with IT on meta data standards that ensure the company e-records are considered "good" evidence.
- 6) Maybe, its time to work with legal to help determine the records implications of the new Sarbanes-Oxley "Accountability Act."
- 7) IT needs records management policies, whether they know it or not. Without retention rules applied to e-records, anytime IT purges the contents of a system their actions can be called into question. In the context of a lawsuit, investigation or audit they can be accused of "destroying" records (even if their actions are innocent) in anticipation of a lawsuit for which there may be huge consequences.
- 8) We know that the volumes of e-stuff is growing at an alarming rate and that keeping everything forever is untenable. You can help "clean house" in a legally sound way. IT needs you, now find a way to help them.

- 9) Email, as the fastest growing employee-used technology needs real information management discipline ASAP. There are lots of important email records that may be forever "lost" in an employee's PC and that no one else knows about, let alone can find. Policy and rules that you can deliver will make a difference.
- 10) 10. Equally troubling, what if the email administrator purges all the contents of the system without regard to the value of any given message. "Throwing the baby out with the bath water" does not make sense given that most email today is used to do real business.

You're surrounded by carrots and sticks. Grab them and either share a tasty snack, or smack someone (just figuratively). Find the right champion. Carpe Diem! Today is the day for RM.

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