

CORALLING ELECTRONIC INFORMATION

DOES YOUR COMPANY NEED A RANCHER?

The spread of mobile computing devices in the corporate world is expanding yet again what can be considered as a record. How does a company go about rounding up and managing that data?

Almost every day, new technology that allows us to create, receive and store an exploding amount of information hits the marketplace. It makes life more convenient, business easier and work far more mobile. But now this proliferation is also creating a major headache for the people who have to manage a company's records. More employees are working outside the traditional office, using new technologies to create records beyond the company's immediate grasp. A personal data assistant like the Palm Pilot makes it possible to send or receive a fax without ever going near the office. E-mail messages can be forwarded out of the company's secure server, automatically, to an employee's pager being carried down a street anywhere in the world. Voice mail messages can be "broadcast" to thousands of phone lines, inside or outside of the company building, with the touch of a button. E-mails can be parsed and scattered to millions.

Whether it is a new technology, a new feature or a new use of an old technology, the fact remains that the by-product of all such innovations is that some information or a record will end up in a place that makes it tough for companies to manage. Whether it is the technologist or records manager, what is clear is that it is increasingly difficult to bring e-information and e-records stored in various electronic forms within the control of the company.

Confounding the problem is that most companies declare that they manage all information and records in a media-independent way. In other words, information is managed by its content and not by the computer system that created it or the media on which it is retained. However, despite the declaration, many companies recycle storage tapes containing vast quantities of e-records without regard to content, rendering the records unusable. Companies purge the contents of entire computer systems or upgrade systems, making older records irretrievable without the old software and hardware. Of course, there is a whole new breed of e-record that may never get to the company from its hand-held computer in the field. If these same records were in paper form they would likely have been retained in accordance with records management policies. Because they are in electronic form, companies feel that they do not need to apply their own retention policies. So why is this a problem?

Businesses that fail to rein in information assets face four potential problems:

- 1) Difficulty running day-to-day business operations without knowing specifics about past communications and transactions;
- 2) Failure to have controls in place for e-record creation, retention and reproduction erodes record trustworthiness by allowing them to be created or altered by anyone, at any time;
- 3) Protecting company interests in the context of disputes, lawsuits, audits or investigations is more challenging without records and complete files; and
- 4) Failure to follow the company's own records policies undermines the legitimacy of the Records Management program and may be a liability.

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Loath to be accused of stating the obvious, it is necessary to retain certain records, whether they are accounting records, employees' files, customers contact lists, invoices and bills. That does not mean that everything has to be retained. Rather there needs to be some methodology regarding what to retain, for how long, what to dispose of and when to dispose of it. In addition to the law requiring that certain records be retained and for specific periods, trying to conduct business without records is untenable. For corporations that have to answer to their shareholders and Board of Directors, failing to retain records is unthinkable.

Along with this craze for new data gadgets, has been greater legal recognition of e-records as equal to their paper counterparts. In fact, the federal E-Sign law makes clear that e-records cannot be denied their legal effect. With greater legal recognition and parity with paper records comes the corresponding responsibility to manage e-records in a methodical and systematic way. The law also makes clear that any potentially relevant "data compilation" no matter what its form, is discoverable and may be subject to various legal requirements to be retained. For example, in one case the court sanctioned a party for failing to preserve complex electronic telephone call routing information that MAY have been relevant in the penalty phase of a lawsuit.

Newer laws even refer to the output of computing technologies as records. For example, one federal law makes clear that voice mail can be a record. However, few companies methodically retain voice mail records primarily because voice mail systems do not make for easy retention. However, courts do not appear to care about the difficulty a company may face when managing its e-records especially when the company has a choice on what technology to use in the first place. In fact, courts have admonished parties to lawsuits who seek to hide behind the complexity of the technology they use to create, transmit and store records for their failure to retain or produce them. There are cases where courts have required that information contained on various types of handheld and mini computers be produced. Further, there are numerous cases where courts have compelled the production of e-mail, voice mail, chat database discussions, and other similar data compilations.

Courts are similarly unlikely to be persuaded by the argument that the company actively manages their records located inside a company facility but does not even attempt to corral the e-records created by numerous mini-computing and communications devices provided to employees by the company to use outside the office. This is particularly significant because more employees are working outside the traditional office setting and they use an increasing herd of decentralized technologies to perform much of their work. Therefore, the e-record may forever remain outside the control of the company.

The new E-SIGN law, like other laws, still requires that records be trustworthy and authentic to be legally acceptable evidence no matter their form. To the extent that a record has been out of the company's control and could have been altered, changed, or even fabricated, at any time, the record and the system that created it may be subject to attack as lacking trustworthiness.

How will the company, reliant on computers for most business processes, ensure it has everything it needs? How will all the e-records be managed according to content? How will the company overcome the lack of a technology panacea to ensure that the company is complying with its own policies and making good evidence of its e-records?

THE SOLUTION

Unfortunately, there is not some "Killer APP" solution to these problems. Rather, at least part of the solution is an old-fashioned one. Tell employees what to do, train them on doing it correctly and

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then make sure they are doing it by auditing their conduct. Develop policies that are consistent in the treatment of e-records and make sense with the technology used by the company. Provide procedures that specifically help the company “corral the records out on the range.”

Unless employees are instructed at the policy level that the voice mail system, for example, as a communication tool is to be used for administrative messages only, then it undoubtedly will be used to communicate a business “record” that should be retained in better long-term storage medium. Providing broad policy directives on what to do and how to do it serves two objectives. First, records and information that may be needed have a better chance of being retained and retrieved for future use in some more manageable medium. Second, providing a policy that works, given the company’s technology and is consistent with other records policies provides a defensible position to company actions. Individuals may not get it right all the time, but at least the company sought to do the right thing in the first place.

At the procedural level, additional guidance can be provided. Using the voice mail example, if an occasional voice mail rises to the level of a record that should be retained, the recipient may be directed to transcribe the message with all the transmission data (the sender, date, time and a list of recipients etc.) and store the paper record in a folder with all other records. Once the employees know what the voice mail system should be used for, how to retain an occasional record that is transmitted by voice mail, then the company can have greater confidence in purging the contents of the system to make room for new messages without fear that they are violating their own policy or destroying records. After all, the e-mail system, voice mail system, PDA, pagers etc. are mere technologies. If you are managing records and not technology, there should be little downside from managing a system’s functionality by periodically purging its contents in the “ordinary course of business.”

Similarly, employees can be instructed that all company records in paper and electronic form, no matter where they are located, (including laptops, PDAs, pagers, discussion databases, group e-mail accounts or external e-mail accounts) are company property and need to be retained in the company records management system. The employee should be instructed on when and how often they should provide copies of records to the company and whether it should be done in a paper or electronic form.

For each new technology, there may be a need to devise a policy and a specific set of rules that provide direction for employees. By going through this exercise, the company will determine the best business use of the technology, how the contents of the system can be retained if necessary and how such records can be most effectively managed. Do chat database discussions need to be retained? If not, how will the company convey that employees should limit their use to informal business dialogue and make this directive consistent with other record policies? Are employees’ e-calendars records? Should the company automatically retain a copy of e-mail forwarded to employees in remote locations? What system can be implemented to collect needed e-mail without keeping everything forever? How will the company train employees that records, no matter what their form or their location are the “corporate memory” and may need to be preserved to advance and protect company interests?

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CONCLUSION

Today, keeping a company's records within its control may require something like a "data rancher" whose job it is to bring e-records back within the company's system. That may also require the application of innovative solutions and pragmatic policies. While policies do not ensure that everyone will get it right every time, what is clear is that without specific directives, needed information will most assuredly never find its way back to the company. Controlling e-mail, voice mail, PDAs, chat databases, garnering hand held computer records, and generally providing company controls to make good evidence needs to be addressed. Every day that goes by is another missed opportunity to harness and manage the company information assets no matter where they are found or in what form they are retained.

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