

Good Housekeeping

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(What to clean up *before* litigation)

Litigators have a favourite expression: “Litigation is WAR”, but with electronic discovery, this expression should read “litigation is MAD”, for Mutually Assured Destruction. Even though the Supreme Court in the U.S. overturned the Andersen decision, the company is unlikely to return as a viable business. The Morgan Stanley case turned on poor preservation and handling of the documentary evidence, backup tapes in particular, resulting in multi-billion dollar awards. Even in Canada there are cases where the costs to recover (and review for relevance and privilege) information from backup tapes runs into the multiple hundreds of thousands of dollars.

What can CIO’s do now so their companies aren’t tied up in electronic discovery knots?

Here’s a top 10 list of Good Housekeeping chores:

1. Review electronic document retention policies in light of business and regulatory requirements. If your company does not currently have information management policies, initiate a project to develop, approve and maintain them. What are you keeping and what do you need to keep? Involve corporate counsel as well as your information management specialist in the analysis of the requirements so that you know the policies are sound and defensible.
2. Audit compliance with document retention policies. How do you know your policies are followed? If they aren’t followed, why not? Are there consequences for employees who don’t follow the policies? Depending on your perceived risk of litigation, you may wish to introduce a continuous monitoring program, led by your IM professional, in addition to engaging your internal auditor in systematic information management audits.
3. Manage email. According to a recent news item in Globe Technology, 70% of executives prefer email communication. It is true that most email messages are not substantive and can be deleted, but are the ones that constitute a record being kept? Does your staff know how to distinguish a business record from ephemera?
 - a. As a side issue, do you have standards for business language used in email? A number of corporations have got caught on very informal email that was at variance with official statements – the candour and frankness of email can be a gotcha in litigation. (“Do I have to spend my waning years [as an employee of AHP] signing checks for fat people who are a little afraid of some silly lung problem (PPH)?” Fen Phen litigation). Or Bill Gates musing about Netscape.
 - b. As another side issue, what happens to the email of employees who leave the corporation? Consider what might be the outcome if an employee who was “dismissed for cause” sues for wrongful dismissal – do you have a process to preserve the email that supports the dismissal?

4. Train employees in the management of electronic documents, including e-mail and provide advice. In most corporations management of electronic records is left to individual employees, in contrast to how paper was managed in the past, where secretaries and records officers managed the files for professional staff.
5. Manage backup tapes. As CIOs, you know that disaster/recovery systems aren't designed as an archive. How many generations of backups do you need in the event of a disaster? If you are keeping month end tapes, what is the business reason for doing so? What happens to them at the end? What happens to older backup tapes when you change technology, as you inevitably will?
6. Have a process for implementing a "litigation hold" in the event of a suit, an investigation, or reasonable expectation of one. Get corporate counsel to review and approve it. How do you communicate the "litigation hold" in your corporation and how do you ensure people understand what is expected of them? How do you document the process?
7. Have a "litigation hold" fire drill to test the process.
8. Design applications with built-in consideration of the needs for archive and destruction of information no longer required for business or regulatory purposes that are clearly aligned with approved IM policies. How do you de-commission older applications and what happens to the data in those systems?
9. If you outsource server, network and helpdesk support and maintenance, ensure the contract has provisions for implementing litigation holds, preservation processes and collection.
10. Control the leaky peripherals. Electronic documents leak out of the corporation through email, thumb drives, CDs and other devices. People work at home and store documents on their home computers. Several cases involving theft of trade secrets turn on this very special form of larceny.

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