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Making the Records Retention Decision – Advanced Subjects

by Donald S. Skupsky, JD, CRM, FAI

Thank you, Andre, and thank you participants for joining us today. This is our third webinar this year and we are hoping to have one more before the end of the year. At that webinar we'll be opening the phones to questions and answers. As Andre previously mentioned we'll be happy to accept questions at any time. In fact, in today's session a couple of the participants who have registered actually sent along questions and I did incorporate some of the responses privately in emails as well as in today's presentation.

Away we go. As Andre indicated, this presentation will be available online if you missed some things or I'm talking too fast and you can't keep up with me with your notes. Let's move forward.

The topics I want to cover today are related to the main topic which is looking at the whole issue of records retention and looking at it from a more advanced issue of how we make the retention decision.

First issue was something that I started in the April 2015 webinar, and you'll be able to download that from our website, looking at how to structure the records retention schedule. I have a few more comments to make on that but I won't go into the detail I did back in April. Then I want to look at determining the scope of our legal research. What are regulated activities, how you think about those, the relevant jurisdictions? There is an issue that comes up very frequently on competing and conflicting laws where individuals working on legal research identify a variety of different laws from different jurisdictions with different retention periods and they're sometimes unsure how to deal with them.

We'll also look at the retention periods, the types, the abbreviations, [00:02:00] and I'll actually go through a review of records retention arithmetic. I do go through this type of review with each of my new clients but for some it's a little unusual. It is a form of arithmetic that I must frankly say that I invented with a set of rules. It is available through one of our publications, Record Retention Procedures.

Retention values, what are the different values of retention we're looking at and how do they differ and how do we integrate all of them. Then, finally, the last two topics will be determining the legal retention. We'll look at legal requirements, considerations, their differences, and factors to consider. Then user retention, which is a mystery to many of us of how we determine how long users need the records and how to approach that entire subject.

Let's start with structuring the retention schedule which, like I said, was a topic I addressed back in the April webinar. At that time we talked about the small buckets, these granularly retention buckets, more detail, more descriptions. There is a new trend towards bigger buckets where there are fewer descriptions of records, more consolidated record categories, larger and fewer and that seems to be a trend. My solution to the problem

is the right number of buckets, neither small nor big, but what is the right number of buckets to accomplish your goals.

At that time I threw up my bucket chart showing the small buckets. There could be 200 to 300 record series for example. As I said, they're more granular, bigger buckets, there are a few of them [00:04:00] therefore we have to consolidate descriptions of records together. Then the right number of buckets could be, for example, accounting could have 20 or 25 and Human Resources 30 to 40 and individuals then could have 10 to 15 or whatever is appropriate for their need.

Therefore, the source of the buckets, the original place where it's taken from which is your full records retention schedule, doesn't matter how many categories there are as long as individuals have access to the right number of categories that they need to do their job. Obviously when you look at these numbers, it's much smaller than 100 that a lot of organizations are shooting for the entire retention schedule.

Why does the record series structure matter in this process? One of the keys, and I didn't describe this in April, but I'll bring it into today's discussion because it's particularly relevant, is the right number of record series match properly to the relevant legal research. Let me explain that a little bit further. If you have very large broad record series that means you're covering a variety of record topics and a variety of areas of legal compliance.

One of the best examples will be personnel files. We have seen some organizations saying, "Let's create one category in our retention schedule for personnel issues and we'll include in that description benefits, personnel transactions, personnel actions, health and safety. Everything related to the individual we'll keep for a set retention period."

It may be that that retention period is appropriate, but when you look at the legal research that [00:06:00] ultimately will be linked to that record series, you will see vary diverse subjects that have nothing to do with each other. Therefore, to create such a large record series, you're going to have to consolidate legal research on personnel action, statutes of limitation related to personnel discrimination for example, as well as health and safety, as well as benefits, and a variety of other issues that were never meant to be considered together.

It is our recommendation that the right number of record series will also match the relevant legal research in a very organized way so if the research changes it only affects the records that are covered in that areas of legal research and not other types of matters. I think that's an important consideration in determining how many record series you have and how you structure it.

The right type of record series and the right number of record series improves the implementation user access. Of course if you have too few, users can't find the categories they're looking for and if you have too many, it relates to inconsistency. That's why I go back to the slide I previously presented. We need to set up systems with the right number of retention categories or record series per individual.

A number of the vendors do not offer this. In fact, I don't know of one who will allow an individual to customize the selection of record series to apply an electronic document management system to correspond to either their normal usage or the areas in which they are dealing in their part of the business. For example, somebody who works in engineering is not in accounting so they don't normally deal with the accounting record series. If they need it, they can access [00:08:00] it, but for the most part they're concerned about the

engineering or the manufacturing record series and those are the ones they should see when they have an electronic record and they need to assign it a document retention schedule.

The right record series ensures the records are included in the program and full legal compliance. If you don't records listed in your retention schedule, users may think that certain records are not covered by the retention schedule and will not know that there's a certain period of time they have to keep the records.

One of the key issues, and I put this is a little inconsistent with the other points but it's all related, is right now IT has a primary goal and it wants fewer and simpler categories. It's trying to simplify the electronic records program, they're trying to implement it quickly, and they have this problem. They have to include retention. IT is not expert in records retention and therefore they want anything that will go in there and fewer categories seem to be easy for them. This is a trend I would recommend you fight against. You want the right number of categories in there and not just the smallest, not just the easiest. Sometimes it's better to do something that's a little bit harder than to do something that's just easy.

Okay, so let's move on. When we're determining the scope of the legal research, we need to look at regulated activities. What are regulated activities? Generally everybody is regulated in the tax area. Some of you would say, "Well, only if you're for profit." Well, actually nonprofit organizations are regulated by tax law because they have to 1) conform with certain requirements of the tax law because they're [00:10:00] a non for profit or nonprofit organization and number 2) they have to confirm that they are not a taxable entity. They have record keeping requirements.

Everybody has employment requirements, related health and safety, personal actions, antidiscrimination, et cetera, et cetera. We'll have categories that apply to everybody across the board, regardless of what industry you're in.

Then we start getting into industry specific areas, so foreign financial services, or power petroleum manufacturing, or any one of a hundred different industry specific areas will have additional legal requirements that apply to us because of the nature of our activities. That's pretty clear. I do add this collateral industry activities because even though all of us are effected by some of the general requirements for tax employment, once you get into special industries, there could be additional industry specific tax requirements or employment requirements.

For example, if you're in shipping, shipping may have specific requirements related to employees, if you're a dockyard worker or whatever. Same is true in tax. If you're a petroleum company you may have windfall profit tax that a normal company of course would not have. This is true in environment. If you have a smokestack in your manufacturing site, and of course if you're a power plant you give off air pollution that a normal white collar business in a downtown area wouldn't have. There are additional issues that come into play in the general requirements areas that would be unique to a specific industry.

The key [00:12:00] is you follow the laws for regulated activity only if they apply to your specific activities. I know this should be pretty obvious so if you're not in petroleum, please do not follow petroleum legal requirements for your records. The same is true for financial services. If you're not in financial services, you do not care what the regulations for a financial institution.

We have seen so many organizations and individuals, for example, who have looked for a requirement for general ledgers and they've done a huge search, perhaps even on Lexis and WestLaw. They found nothing

except perhaps in the area of power plants regulated by the Federal Energy Regulatory Commission. There they actually remunerate a requirement for general ledgers and, having found nothing else under general tax law, they said, "Oh, we have something here under FERC. Let's apply it." Please do not do that. If you are not in a particular regulated activity the laws of that area do not apply to you.

Relevant jurisdictions. Another way we cut and dice and figure out what laws apply to us is by jurisdiction. If we have offices and employees in certain locations, so if you have offices in three states in the United States, you are regulated by those three states as well as for US Federal. Now, you may not be regulated in all areas, but you'll be regulated at least for employment issues, tax issues, and things like that. [00:14:00]

If you have employees in different places, of course you'll be regulated based upon where the employees are located. The same is true on taxes. You will pay taxes where you are doing business in those jurisdictions. Manufacturing and production facilities, wherever those facilities do exist, you are subject to those regulations.

Remember that if you have let's say three offices in three states, but you also have a manufacturing facility let's say in Texas, you are subject to the environment requirements for your smokestack in Texas and US Federal, but in the other three states where you have employees, you don't care about the environmental requirements for smokestacks because you do not have a manufacturing site there. If you have storage facilities in certain locations, you will have requirements to pay taxes, you might have employees there. You just need to look where you have property, where you have people.

Here is the expanded rule. A little complex sentence but I'll go through each of the parts. You follow the laws in a jurisdiction, so in a particular state, if you're in Canada, it's a particular province, only if you have activities in that jurisdiction, you are doing things, you have offices, you're conducting business, you're doing something in that jurisdiction or you have a physical presence there, as I said, you have offices you have a manufacturing site, and the laws apply to your activities.

For example, if you are selling products in the state of Maine [00:16:00], you may be subject to issues like statutes of limitation. There may be other contract provisions that may or may not be tax implications. You have to review all of that and make a determination whether that's true or not. However, if you have no manufacturing site, no facility, no actual presence that's polluting the air in Maine, you do not follow the laws in Maine for environmental purposes. It's important to make these distinctions. You want to be broad enough in your legal research but you do not want to be too broad and include provisions that are irrelevant for your organization

Competing and conflicting laws. The rule is you must comply with all the laws that apply to you. That probably should be a plural on the word laws. Every law that applies to you needs to be considered in developing your retention schedule. Thus, if two or more laws affect your records, you must comply with all of them. Therefore, those who have said, "We will look for the longest law and show that on a retention schedule," how do you know you are complying with all of them? You do not know if you are complying with all laws until you identify all the relevant laws that apply to you and your organization. Therefore, it is necessary to do comprehensive legal research. Then you sort it all out and form legal conclusions.

Again, it's not a question of finding the controlling law, the longest law, it's a requirement to find all the laws in order to [00:18:00] determine all the laws that affect the retention decisions in your organization. This is the only way that you can ensure legal compliance.

Now, as we look at the retention periods, there are a variety of different types. We define one of the simplest type as creation type retention period. An example I've given on this slide is six years. It's from the time of creation. How long do you keep the records? Six years. However, when does that six year period start? Technically it starts from the actual time the record was created. If the record was created on March 1, you keep it six years. However, as a general rule we will probably keep the records until the end of the fiscal or calendar year, depending on what system you're going on. This is particularly true for accounting.

In the accounting world it is irrelevant that you paid a bill on March 1 and have a record of that transaction until you come to December 31, assuming you're on a calendar year, and determine what the amount of gross income and expenses and thus what you're taxable income is for your organization. Therefore, none of the records/transactions should be considered until December 31. I will repeat that. The records should be considered as though they were created on December 31, and then you count the six years, especially in accounting.

It's true in other areas since you will never destroy a record six years after it was originally created. It's too much overhead, too difficult. It can be [00:20:00] done, by the way, in electronic document management systems but rarely are we willing to allow the system to automatically destroy documents exactly six years after the record was initially created.

Now we have event type retention. Example would be active plus six. While the event is in progress plus a period of time like we have for contracts, employment, and things like that. I must say that a lot of people will try to add clarification in the retention event. I personally prefer to just use ACT or active to indicate that they're some sort of event. Most events are very clear on their face. If a contract is kept active plus six, what is the active period? Of course while the contract is active plus six more years. If employment records are kept active plus six, what is the active period? Of course, while the employees are active.

Occasionally there is some twist in the period we're looking at. For example, if it's a government contract, the active period will be until final payment but that's because of a particular law in the Federal Acquisition Regulations.

Indefinite, I-N-D. It's some long period that we cannot yet determine that is at least as long as our longest requirement and review this periodically. In the hazardous exposure area there are requirements to keep certain records active plus 40 years. That's a pretty long time. However, [00:22:00] we will generally recommend an indefinite retention related to hazardous material and hazardous exposure because people have found in litigation that even active plus 40 may not be long enough because litigation can begin, for example, in those cases related to asbestos, many, many years into the future. Not just when the person retires. Not just 40 years later, but whenever the disease manifests itself and they can trace it back to the source. Indefinite is a long period of time but there may be legal requirements. We got to keep it at least as long as those legal requirements.

We also use a retention period called max. Max three for example means you don't have to keep the records but if you do, you can't keep it longer than three years. It would be a maximum of three. This type of retention cannot be used if there are any legal requirements and we'll see how that plays out in just a little bit.

What do the abbreviations look like? Well, we use six. We don't use six years. It's the same as six years. When I say blank years, blank means years. If you just see six, it's years. Retention should normally be done in years. Years ago some people tried doing it in months because we had a few retention periods for 25 months for

example in the financial services area. Do not do that. Retention should be in years, much easier to deal with. Occasionally we might have to do something in months. It may be, for example, tapes of certain areas of our [00:24:00] facility might be kept a matter of 30 days and, of course if there's an incident we'll know about it.

Active is the active period. As I said before, the event normally should not be described in the abbreviation. We can add a separate event if you need a prosy type event and most events are absolutely obvious what they are.

Superseded can sometimes be used. Maximum I mentioned. Indefinite. Permanent should never be used in a retention schedule. No records are permanent. You may put down permanent believing you're going to keep it forever, but I assure you that you will destroy it at one time or they will be destroyed by act of God, a mistake, a mistake in intervention. Something will happen that leads to destruction of records. If you're goal is permanent, you probably cannot afford because you will have to take some affirmative action like the national Archives does to protect the original documents, for example, our Declaration of Independence.

What is then records retention arithmetic? We have two different retention periods, one of six, one of seven. Records retention arithmetic says we take the longer of the two, seven years, so we pick the longest number of the two. I suggest we not mess around with CY, or current year. It just gums up the work. Some people have made current year one, but if you have a requirement current year plus one, and you say the retention is two, it really gives a false impression. Really, the records will be kept until the end of the current year, so the retention still is only one.

Periods such as an event type retention of active plus one, with a numerical type creation retention, [00:26:00] you take pieces of both to get a retention of active plus six. You take the longest event, in this case there is no event part to it, so the longest is the ACT and you take the longest number, in this case is six compared to one. That gives us an active plus six retention.

Periods such as active plus one, active plus three, we just take the longest of each part. In this case, the three was still the longest number and was one of the numbers we considered, but you take the longest of the events and you will take the longest of the numbers.

Now, some people go against my recommendation and start defining the events. Then you need to set a priority for the events. If active is a possible event and term, T-E-R-M for termination is a possible event, what if there are two provisions, one says active plus one and the other says termination plus six, what is the final abbreviation? You need to establish it. That's another reason why I don't like to use other abbreviations for events other than ACT or active.

Then what we have a retention of active plus six and indefinite? We always pick indefinite. Why? Indefinite is the longest retention period. There's no such thing as indefinite plus three. That's like saying infinite plus three. There is nothing longer than indefinite as it stands.

Maximum of three we talked about. You can have a six year retention requirement but in our [inaudible 00:27:48] of records retention arithmetic this is not allowed. Therefore, you cannot have a maximum of three with a six year legal requirement, for example, and a [00:28:00] maximum of three user retention. This is going to have to be three because the two just are totally inconsistent and therefore there needs to be some basic rules that you follow.

Okay, let's get into retention values. There are three basic values that we look at, legal, user, or operational and historical. There are others. If you look in the various textbooks, they'll list them all but it all comes down to those three.

Audit is a legal issue for example. Then under legal we have two factors, legal requirements and legal considerations. Both important, but they are to be dealt with separately. For retention purposes we pick the longest retention using records retention arithmetic. We could assign values for legal, user, and historical and then the total retention would be the longest of all of those using, again, the rules of record retention arithmetic.

Let's look at the parts and then we'll put it back together. What are legal requirements? Legal requirements are laws you must follow or you'll be subject to fines, penalties, losses of rights, or other bad things. Those are the types of requirements we typically see that are objective and mathematical. They're keep records six years. Keep records four years. They're pretty straight forward. They state a specific period of time for keeping the records. If you fail to keep the records for those periods of time you can be subject to all sorts of problems. Therefore, we recommend you don't do that. You will follow the longest of the legal requirements that applies to you. That's why I made it such an important issue [00:30:00] early on, only follow the legal requirements that apply to you. You don't care about legal requirements that don't apply to you. You select the longest of the legal requirements.

Now, there's one exception to that and I'll give you an actual real world example for I-9s. I-9s actually have two different retention requirements. One is active plus one. You keep the I-9s while the employee is active plus one year. And there is a requirement that you keep the I-9s for at least three years. What retention meets both those needs? If the person is in effect in your employ longer than three years, then three years would be met by the active plus one, but we can't sit there and figure out how long employees are employed whether it's three years or one year or ten years or whatever. So the normal decision is to use the rules of records retention arithmetic and come to a conclusion that active plus three incorporates both these requirements in it. It's slightly longer in some cases but that is the best way of managing it and that's the actual retention we come up with for I-9s.

Now, we possible can create other exceptions. For those looking at international issues, for example in the tax area, the United States tax requirements would lead to a conclusion that you keep the records no longer than six. Six is the typical period we recommend. We know in other countries, and I just happen to remember Switzerland, they have a ten year requirement for their tax [00:32:00] records. The question then is do you follow the longest of the requirements or do you make exceptions. In the United States we'll keep the records for six years. In Switzerland we'll keep it ten. That's my normal recommendation in the international arena.

Within the United States or within Canada, I would normally recommend you pick the longest of the requirements. It's theoretically possible to make distinctions in legal requirements between states or jurisdictions. I just find it is best applied in the international arena.

Legal considerations. These are laws that may influence retention but are not legal requirements. For example, we have areas like a limitation of action. Many people call it statutes of limitations, same thing. In the great state of Louisiana they call it prescription. It's the period of time to sue. Period to time you can sue somebody, period of time they may sue you. It's an important issue to consider, but it's not a legal requirement. You do not have to keep the records for the period of time of the statute of limitations. We're going to talk more about that.

There is a requirement sometimes to keep records but there's period stated. We have written on this extensively. We have White Paper if you would like to request that from Andre. Basically that would establish a three year period if the law of the state, for example, requires you to keep records but does not state how long. This is also true for United States Federal Regulations based upon two different reasons a little too complicated to cover in today's webinar but we'll be happy to send you the White [00:34:00] Paper. It is almost universally accepted now that this principle is in fact correct. There are in fact eight states in the United States that confirm this for laws of those states. If the records of the state there's no requirement stated, you may safely destroy those records after three years.

We also see as legal considerations actions that will never occur. For example, tax evasion. No responsible organization will be [inaudible 00:34:38] in tax evasion. You'll be complying with the law. You'll be doing what you need to do. Therefore, the fact that IRS or Revenue Department can audit you forever in case of tax evasion is irrelevant. The fact that you could be audited forever doesn't mean you keep the records forever. You just make sure you do not get engaged in tax evasion. I know that sounds a little silly or trite, but this has concerned a lot of people over the years. They see such provisions and say, "Well, we better keep our records just in case." Well, don't do this thing, don't evade your taxes and avoid paying and avoid filing, and you won't have anything to worry about.

Legal considerations are subjective. If you remember, legal requirements were objective. You select a reasonable period, often less than the requirements period but there could be occasions where it is longer.

Now let's talk about some of these issues. As I mentioned, people use the words statute of limitations, the limitation of action interchangeably. It covers all types of legal actions, contracts, [00:36:00] personal injuries, property damage, a variety of different things. States the period of time you can sue or be sued and it creates a limit on the period of time you will have to deal with these issues. After some period of time you no longer have to deal with it.

If they do not establish legal or retention requirements, then don't treat them as requirements. I've seen so many organization say, "We will follow the statute of limitations and duh, duh, duh, duh, duh." That is not a requirement and please don't do that. Legal actions will occur generally before the longer statute of limitations period.

Let's talk about contracts for example. It's a great example. Now, the longest statute of limitations for written contracts is 15 years. There's actually a couple of little provisions that could drive this to 20 but practically that's 15 years and thank you, great state of Ohio, for the 15 years. Some come in at 10 but most are 6 years or less. A lot of people are concerned we might be sued in Ohio 15 years after the breach of the contract.

The reality is nobody is going to wait 14 years, 364 days and then sue you. The normal start of litigation is a year or two or three after within year two or three of the breach of the contract or it will never occur. Either you will sue somebody because they wronged you or they will try to sue you believing you wronged them. They want their money, they want the problem resolved, they have no interest in waiting this period of time, nor are the courts particularly interested.

By the way, if somebody sues you 15 years from now, they of course will have all [00:38:00] the documents they need to sue and you of course can subpoena it all in your preparation. There is no need to keep the records according to the statute of limitations period. Instead you'll keep it for some reasonable period.

Here's some reasonable periods for legal consideration. For tax audit, most jurisdictions in the United States and the United States Federal IRS says the same thing, that they must audit you within three years after you file your tax return or they will be forever barred. Some people will treat that as a minimum legal consideration of three years, others will treat that as four counting the year of filing. We don't whether it's going to be the first quarter of the year or it's going to be later in the year with extensions so let's count that as one, plus the three as the minimum legal considerations period for purposes of our retention schedule.

A limitation of action, how long you can be sued, six years is certainly the most likely period of time that you might be sued under some sort of matter. Therefore, for purposes of liability where we are involved in litigation the active plus six comes up for the litigation files.

Contract, active plus six. I said the vast majority of statutes of limitation are six years or less, but most lawsuits would start considerably less than that. By the way, there are very few requirements on contracts. There are requirements for federal contracts which is final payment plus three years but we don't see that in the private sector. I can sign a contract with you, throw it away tomorrow, I've committed no actionable problem. However, [00:40:00] if I don't have a copy of the contract, I don't know what my obligations are and I certainly don't know what your obligations are. It would be very difficult for me to enforce my rights so I will keep it for a period of time as a legal consideration because it makes sense to do that.

There are a couple of oddball items like hazardous material manifests of indefinite. Now there is a three year requirement for hazardous material. You have hazardous material. Let's say you give it to a shipping company to move it to a hazardous waste site, there's a manifest of what was given to them, there's a requirement to keep that for three years. However, as a legal consideration we normally recommend indefinite because the risk is too high if you don't have the records.

If, for example, that shipping company drives out of your driveway, goes down the country road and dumps the material in the woods, you of course will be held responsible but without those manifests there's no proof that you actually gave legal custody to somebody else and they should be responsible. Therefore, it has been important to establish this as a legal consideration of indefinite. Of course we have requirements to keep records and no period stated and we often just put in three as the legal consideration within our retention schedule for that purpose.

Determining user retention. The organization retention goal is to comply with the law and reasonable user needs. It is not the goal of the organization today to keep records for long periods of time just in case. This has been a real point of contention that it is extremely important that you be able to identify to users of your [00:42:00] organization that the goal is to make sure that they keep records for a reasonable period of time but not necessarily too long.

Never ask users how long to keep records. Why? Because they will generally give you the wrong answer. Now, why would they give you the wrong answer? There's a variety of reasons for that and let me just enumerate a few of those. Some users want long periods of time. In fact I jokingly talk about in some seminars a new retention abbreviation UIR. What does that mean? Well, we keep records in our organization until I retire. Well, it's not in the best interest of the organization to follow practices like that. Remember our goal, reasonable user needs. We want to make sure user have records to do their job but we will scrutinize the reasons because they always give us the wrong answer if we ask them.

Why would they give you the wrong answer of long periods? Because they're important so their records are important. Who is the most important person in your organization with the least important records? That is the CEO. The CEO activities does not involve creating anything. Managers create everything, the CEO just reviews it and approves it and the CEO gets copies of everything in his or her records. When the CEO, by the way, does other functions, yeah, they may have records that are important but pure CEO function records are not really important even though the person is important.

People keep it just in case. They don't want to be wrong. If you ask them how long to keep records and they give you an answer [00:44:00] they're thinking, "Gee, what if I'm wrong so let's give a longer period and it's therefore safe." Here is the strategy for dealing with user retention issues. The organization determines retention, not users. If you have not made that switch in your policy, please do that.

Departments, users do not determine retention. The records belong to the organization, the organization determines retention, not users. Therefore, what's the role of users? Users provide subject matter expertise to the organization's records retention decision. Okay? They don't make the decisions. They don't determine how long they need the records for user purposes.

They provide information and you, the organization, determine how long to keep the records. What do we ask the users? What information do we get from them in developing our retention schedules? Well, I like to ask some very simple questions. I know some of you have pretty elaborate forms you like to fill out. Please, if you fill them out fill them out in your office but don't fill it out while you're doing an interview with the users, you'll bore them to death.

If you just ask them these simple questions, you could have a very animated exciting discussion with them and find out a whole lot of information. Ask them what they do. Nobody asks them what they do, especially ... Whoa! Didn't want to do that ... especially their spouse. They come home, their spouse doesn't say, "What did you do at the office today?" because they've heard that already. Users of records and personnel in your organization love to talk about what they do to somebody who might be interested.

When you find out what [00:46:00] they do, you ask them to describe the steps they do to complete their activities. What do you? What steps do you take? How does that all proceed? Then ask them what records do you create or receive in doing all those activities. They'll be able to rattle off the top 10, the top 20 record series in their part of the organization without you ever stepping foot in their office or looking in any of their file cabinets.

When they've gone through what records they have and you've recorded all that information, ask them when have you needed the records after three years? OR if they give you a really good answer, explain to me after five years or six years or ten years. Or some of the answers will be so obvious that it's clear to you that they need a longer retention period. What you're doing in this step is bracketing the retention. You're not determining exactly, you're just finding, okay there seems to be some reasonable basis for keeping the records for three years or five years or six years and they gave a reasonable explanation so that sounds like a reasonable user period.

By the way, you might also ask them besides what if the records did not exist at that time after three or five years what would happen, and also kind of get them to talk about well, we're not talking about litigation or tax audit or those things. Those are legal. What other reasons would you have that you need the records after

three years or five years. We can start bracketing what the user retention is without asking them for the specific values.

If they give you a retention schedule that has their user retention in it, that's nice, [00:48:00] that's a starting point but don't be stuck with it. You still can propose reasonable retention periods. Send it back to them in the retention proposal and let them react to it. If they think you're wrong, let them explain why you're wrong. Otherwise, that will be the user period and previously we've identified the legal period.

How do we put this all together? We can look at four examples. Well, we have legal, user, and historical value. Six year legal, three year user, the total would be six. Another example. Active plus one is the legal, user is three, total is active plus three. Remember we take the longest of the event type retention and the longest of the numerical to establish our new retention.

Example three, same as we had before except now we introduce this record series has historical value. By the way, it's rare that an entire record series has a historical value. It's often selective records. Therefore, you need a very detailed historical records policy to indicate why you're doing selective retention within a record series and what they criteria are. Therefore, if you do apply historical value to a record, which in my experience rarely occurs to entire record series, but it could, the longest of course is indefinite. Then, just another example if there's no numerical that we still will put the three value out there.

Okay, so let me give you some final observations as we wrap up today's webinar. Number one, retention [00:50:00] is determined by a precise methodology, not because it feels good or just in case. There must be a reason why you do things. I've seen so many feel good retention schedules. I have seen so many legal departments who have approved a longer retention period once it's long enough to feel good because they know if they don't do it that way they're going to have to do the legal research. Well, I strongly recommend that either you do it or they do it or you ask us to do it or other competent sources to do the legal research. It needs to be there.

You need full legal research to ensure legal compliance. It's the only way you have surveyed all the laws in the jurisdictions where you have business activities, where you have employees. It's the only way you know that you are in full compliance if you've gotten your arms around the full scope of legal research that affects your records.

The structure of the record series determines the structure of the legal research. If you have very broad limited number of record series, you're going to have to jumble together laws that relate to various different regulated activities. There is no alternative to that. Therefore, that is, in my opinion, an incorrect approach because you will now, as I said before, the human resources area be forced to jumble together laws on personnel actions, benefits, health and safety perhaps, all together where those laws were designed to require retention for different very specific types of records. Those laws were not intended to apply retention in other areas that are not [00:52:00] covered by the law.

The organization controls the retention schedule, not individuals. You make the decision how the retention schedule is to be structured, what are they retention periods, especially what are the user periods, how the legal research is going to be organized, what the scope is. Of course, working with others, working with your users of records, working with your legal department to figure this all out.

Good retention methodology is defensible. I have now gone through this in litigation. We have seen how good retention schedules are attacked by the opponents and how good retention schedules, however, stand up to scrutiny. I was involved as an expert witness in one matter which never got to trial where the matter ended based upon my deposition as I was able to defend the retention schedule that we developed and the other party ultimately realized they were going to lose and dropped the case. Therefore, it is important you have a methodology, you follow it, you document it. I've talked in some of the other webinars in other slides of what are some of those factors.

From Information Requirements Clearinghouse we want to thank you for participating today. Reminder that the transcript and the full video, I'm sorry, audio with the video presentation of the slides will be available on our website in the next few weeks. Feel free to download that and share it with your friends. Please feel free to contact Andre Cabral, our Director of Marketing. Here's his phone number and email, for [00:54:00] additional information and questions.

Be on the alert for the announcement of our next webinar. We have not set the date, but at that time we will encourage you to provide us with some questions and answers in advance and we will be taking some questions and I will be hopefully providing answers live based upon the questions asked by the participants.

Thank you again and you all have a great day.