

Legal Basics

Legal Issues that Effect a Records and Information Management Program

**INFORMATION
REQUIREMENTS
CLEARINGHOUSE**

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Source of Law

- Statutes
- Regulations
- Rules / Opinions
- Case Law
- “Custom and Practice”

Basic Legal Principles

- **Applicable Laws: All laws that affect an organization or an organization's activities**
- **For applicable laws:**
 - **Knowledge assumed**
 - **Compliance required**
 - **Punishment can result from failure to comply**

United States Versus International Legal Perspectives

- **United States**
 - 20,000+ recordkeeping laws
 - Due Process: Cannot punish until provide notice of what conduct required
 - Litigation drives records management
- **Other Countries (non-English Speaking)**
 - Litigation not a major issue
 - Very few laws on recordkeeping

Legal Issues Affecting Records Management

- What records to keep
- How long to keep records
- What form allowed for records
- How to destroy records
- Other procedures affecting records

Legal Duties for Records

- **Duty to create records accurately**
- **Duty to maintain required records**
- **Duty to destroy records according to legal principles**
- **Duty to provide records when required in litigation or government investigation**
- **Duty to comply with other procedures**

Legal Requirements for a Records Management Programs

- **Government: Laws often require program**
- **Private Sector**
 - **Laws do not require program**
 - **Laws require compliance with recordkeeping provisions**
 - **Program probably only means of full compliance**
 - **Sarbanes-Oxley for financial records?**

“Recorded Information” Versus “Records”

- **Recorded Information:**
 - All recorded information created or received by organization
 - Includes drafts, duplicates, backups, advertising, junk email, etc.
- **Records**
 - Final version of “recorded information” that reflects business or position of organization

What are Records: Legal Definition

***Records:* . . . letters, words, sounds or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, chemical or electronic recording, or other form of data compilation.**

- Rule 1001(a), *Uniform Rules of Evidence*

Records: Definition

- **ARMA International**

Recorded information, regardless of medium or characteristics, made or received by an organization that is evidence of its operations, and has value requiring its retention for a specific period of time.

- **AIIM**

Information preserved by any technique in any medium, now known, or later developed, that can be recognized by ordinary human sensory capabilities either directly or with the aid of technology.

Record: Definition

- **National Archives and Records Administration (NARA)**

Documentary materials or information, regardless of physical media or characteristics, made or received by an office in connection with the transaction of official business and preserved by that office as evidence of the organization's functions, policies, decisions, procedures, operations, or other activities of that office or because of the value of data in the record.

Record: Skupsky Definition

- ***Record.*** The result of recording or preserving information on any media with the intent to preserve information that reflects the position or official business of an organization.
- **Record = *Official Record***

Importance of Official Record

- **Adds credibility to record**
- **Distinguishes record from drafts, incomplete work or junk**
- **Indicates information relied upon by organization**

Situation Determines What is a Record

- **Litigation / Government Investigation:** Any recorded information in existence
 - Drafts, notes, email, deleted electronic records
- **Records Management:** Any definition that complies with the law and does not obviously connote “evil intent”
 - Preservation of required records
 - Excludes drafts, notes, junk, etc.

Who Owns the Records?

- The Organization
- Not
 - Department
 - Individual
 - Information Systems
 - Records Management

Who Is Responsible for the Organization's Records?

- **Corporation: Corporate Secretary**
- **Government: Agency Director**
- **Other: Business Owner**
- **Records Manager?**

Legal Goals of a Records and Information Management Program

- **Regulation**
 - Identify laws affecting organization
 - Records required by law
 - Records demonstrate compliance
- **Audit**
 - Records support position
 - Records can be found

Legal Goals of a Records and Information Management Program

- **Litigation Protection**
 - Records can be found
 - Records are trustworthy evidence
 - Records protected
 - Absence of records does not raise suspicion
 - Holds prevent obstruction of justice

Legal Impact of Poor Recordkeeping System

- **Loss of Rights**
 - Records required
 - Right status shown by records
- **Fines / Penalties**
 - Records required
 - Records show compliance
- **Adverse Litigation Results / Presumptions**

Andersen Obstruction of Justice Conviction

- Andersen had a reasonable retention program
 - Identified records to be retained in audit files with appropriate retention – 6 years
 - Retention only for “essential information to support our conclusions”
 - Permitted destruction of drafts, notes, and other non-final documents when no longer need or after engagement complete
 - No destruction if threatened litigation

Arthur Andersen Obstruction of Justice Conviction

- **Problem:**
 - Andersen under investigation regarding Enron audit
 - Andersen lawyer reminded company to destroy records under the policy – looked suspicious
 - Andersen destroyed records while litigation / government investigation in progress

Sarbanes-Oxley Act of 2002

- Response to Andersen
- Response to corporate accounting abuses
- Goal:
 - Improve accuracy of financial reporting
 - Restore confidence in the stock market

Sarbanes-Oxley Key Provisions

- Establishes federal oversight of public accounting firms auditing public companies.
- Requires CEO and CFO to personally certify the accuracy of financial statements
- Provides penalties, up to 20 years:
 - *Knowingly* altering, destroying, mutilating, concealing, covering up, making false entry in any record
 - *With the intent* to interfere with any government investigation or proper administration of any matter.

Impact of Sarbanes-Oxley Act

- **CEO's, CFO's, officers personally liable**
- **Concern whether record system adequate to support financial statement**
- **Concern whether records destruction can be viewed as a violation**

Sarbanes-Oxley Recordkeeping Requirements

- **Public Auditors**
 - Confirm accuracy of corporate financial statements
 - 7-year retention for audit reports and audit workpapers
- **Corporation**
 - Maintain audit / accounting complaints
 - Manage outside auditors
 - Section 404: For annual audit
 - Establish internal accounting controls
 - Demonstrate controls works

Sarbanes-Oxley Practical Operation

- **Public auditors confirm accuracy of financial system and reporting**
 - **Traditional audit**
 - **Review corporate controls**
- **Except for public auditors, corporation has no long-term retention for SEC**
- **SEC may not ever directly review corporate controls or Sarbanes-Oxley compliance**

Record Values Affecting Records Retention

- Operational / User
- Legal
 - Legal Requirements:
What you must do!
 - Legal Considerations:
What you may want to do!
- Historical

Why Develop A Records Retention Program?

- **Cost savings**
- **Information management**
- **Legal protection**
 - **Compliance with laws — records exist for legally-required periods**
 - **Litigation, government investigation and audit**

Laws Affecting Records Retention Periods

- No legal requirements
- Requirements to keep records with no legal retention periods
- Requirements to keep records for specific periods
- Statutes of Limitations / Limitations of Action
- Limitations of Assessment

Why Punish Party for Failure to Find Records?

This court will not shift the financial burden of discovery onto the discovering party . . . where the costliness of the discovery procedure involved is entirely a product of the defendant's self-serving scheme over which the plaintiff had no control.

- *Koslowski v. Sears, Roebuck & Co.*

Formula for Legally-Sufficient Destruction of Records

- **Records retention program systematically developed**
- **Legal / Audit holds applied to records**
- **Records systematically and consistently destroyed under the records retention program**
- **Documentation maintained of program development, records destruction and audit**

Courts Issued Sanctions for Records Retention Practices

- No documentation of program
- No person responsible for program
- Retention periods did not comply with legally-mandated retention periods
- Records destroyed while litigation in progress
- Records destroyed in bad faith or under suspicious circumstances

Legal / Audit Holds

- Identify records / documents subject to pending or imminent litigation, government investigation and audit.
- Place “holds” to prevent destruction (even under Retention Schedule)
- Manage “holds” – creation, update, removal
- Permit destruction when “holds” removed

Approval of Destruction

- **Authorization of Destruction**
 - Not required / Not recommended
 - Require specific approval
- **Notice of Destruction**
 - Provide listing of records for destruction
 - Requests exceptions
- **No Notice or Approval**
 - Recommended when hold system in place
 - Results is most consistent retention

Uniform Rules of Evidence

- **Hearsay:** A statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
- **Records:** . . . letters, words, sounds or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, chemical or electronic recording, or other form of data compilation.
- ***Data compilation*** = computer record

Uniform Rules of Evidence

Hearsay Exception - Rule 803(6)

- Records in any form admissible, if
 - Records of act or event
 - Made at or near time of event
 - By or from person with knowledge
 - Kept in the course of regularly conducted business activity
 - Testimony provided showing compliance by custodian or other qualified person
- Unless information or method of preparation lack *trustworthiness*

Uniform Laws for Records Technology

- **1949:**
 - **Uniform Photographic Copies of Business and Public Records as Evidence Act**
- **1974:**
 - **Uniform Rules of Evidence**
- **1999:**
 - **Uniform Electronic Transactions Act (UETA) / E-Sign**

Uniform Photographic Copies of Business and Public Records as Evidence Act (UPA)

- Organization (public or private) creates records
- Originals kept in the regular course of business
- Duplicates kept in the regular course of business

Uniform Photographic Copies of Business and Public Records as Evidence Act (UPA)

- Duplicates produced by
 - photographic, photostatic, microfilm, microcard, miniature photographic, or
 - other process which
 - accurately reproduces the original, OR
 - forms a durable medium for reproducing the original

Uniform Photographic Copies of Business and Public Records as Evidence Act (UPA)

- Originals may be destroyed in the regular course of business, unless
 - Originals required by law
 - Originals held in a custodial or fiduciary capacity
- When satisfactorily identified duplicates admissible in evidence as the originals
 - Judicial proceedings
 - Administrative proceedings

Uniform Rules of Evidence Authentication and Identification - Rule 901

- **Foundation: Evidence sufficient to support a finding that the matter in question is what its proponents claim**
- **Example: Rule 901(b)(9)**
 - **Evidence describing a process or system used to produce the result, and**
 - **Showing that the process or system produced an accurate result**

System Components for Compliance with Rule 901

- **Components**
 - **Procedures**
 - **Training**
 - **Audit**
- **Documentation**

Uniform Rules of Evidence

Original - Rule 1001(c)

- Writing and recording itself
- Counterpart intended to have the same effect as the original
- Computer printout or other output
 - Readable by sight
 - Shown to reflect the data accurately

Uniform Rules of Evidence: Duplicates - Rule 1001(d)

- Counterpart produced from same impression or same matrix as the original,
- By means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or
- *By other equivalent techniques which accurately reproduces the original.*

Uniform Rules of Evidence: Originals Versus Duplicates

- Originals *not* required
 - Originals lost or destroyed, without bad faith
- Duplicates admissible to the same extent as originals, unless
 - Genuine question raised as to the authenticity or the continuing effectiveness of the originals, or
 - It would be unfair to admit the duplicates in place of the originals

Retention of Original Records After Imaging

- Original records required by law
- Records with intrinsic value: stock certificates, bonds, cash, negotiable instruments
- Documents for which the original signature or handwriting may be significant -- e.g., wills
- Notes, mortgages, and debt instruments that will be stamped “paid” and returned to owner

Uniform Electronic Transactions Act (UETA: 1999)

- **Adopted as Uniform Law by over 45 states**
- **Similar to “E-Sign” – Electronic records law adopted by U.S. Federal Government.**

UETA: Applicability

- Does not require electronic record or signature
- Applies to parties who “agree to conduct transactions by electronic means
 - Prior agreement
 - Previous conduct – e.g., exchange of e-mail forming contracts

UETA: Conclusions

- **Just because Record, signature or contract is electronic**
 - **Cannot be denied legal effect**
 - **Cannot be excluded from evidence**
- **If law requires Record/Signature, electronic record meets requirements**

UETA: Retention

- **Retain electronic record for required period**
- **Maintenance of electronic record for required period meets requirements to retain record**
- **Note: “Retention of record” does NOT include information whose sole purpose is to enable record to be sent, communicated or received.**

Arbitration Case Example: Improper Destruction of Records

- **Facts**
 - **Computer records destroyed while litigation in progress**
 - **Required search of e-mail not performed**
 - **Plaintiff claimed unable to prove case without missing information**
 - **Defendant claimed request too costly and burdensome**

Filing Systems: The Court Cases

To allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purpose of the discovery rules.

- *Koslowski v. Sears, Roebuck & Co.*

Arbitration Case Example: Continued

- **Court Decision**
 - **Large fine for failure to search**
 - **Requirement to conduct computer search regardless of cost**
 - **Presumption on merit:**
 - **Plaintiff: some evidence of claims**
 - **Defendant: cannot defend**
- **Result: Defendant forced to settle under unfavorable terms**

Legal Problems With Electronic Records

- Records supporting claims difficult to find
- Records supporting claims incomplete
- Records destroyed without a Record Retention Program
- Inconsistent destruction
- Cost / liabilities for long retention
- Records lack trustworthiness

Records Retention Strategy for Electronic Records

- Establish organization-wide
 - Rules of retention: 6, ACT+6, IND
 - Implementation procedures
 - Control
- Link retention rules to classification
- Develop retention / classification “tools”
- Apply to ALL electronic recordkeeping systems

Problem With E-mail

- Replacement for telephone or face-to-face conversation
- Authors believe their E-mail is private
- Authors don't believe they are making "records"
 - E-mail is a "tool" to communicate
 - Authors don't go through a formal process to create E-mail

Problem With E-mail

- E-mail language not to the same standard as formal letter or memo
 - Loose language
 - Incomplete thoughts
- Authors/recipients “selectively” destroy E-mail records
- E-mail subject to litigation as an “admission”
- Restrictions of E-mail reduce efficiency

Skupsky Recommendations for E-Mail

- E-Mail should be defined as “non-record material” – “recorded material”
- E-Mail should self-destruct in 30 days
- Procedures to convert selected E-Mail to “records”
 - Assign record series code plus retention period **and** store in electronic filing system, or
 - Print and store in paper file

Electronic Records - Backup Strategy

- **Problem: Cannot destroy records with different retention periods from backup tapes**
- **Distinguish “backups” from Off-Line storage**
 - **Backup: Disaster recovery / vital records**
 - **Off-Line Storage: Long-term, low access information**

Conclusion

- Upper management now very interested in records management
- A records retention program ensures records were destroyed properly, with *good intent*
- A records management program ensures that required records can be found
- Climate right to implement effective records management