

# FOLEY EXECUTIVE BRIEFING SERIES



## Corporate Records: What to Keep and What to Toss

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## Need for a Policy

- Ubiquitous Electronic Records Makes Data Policy Essential
  - Litigation Nightmares – *Homesource*
  - Cost Shifting - *Zubulake*
  - Legal Malpractice - *Qualcomm*
  - Ethical Violations by both in-house and outside counsel?



## Need for a Policy

- “Philosophies” of Data Retention
  - “I can’t throw it out; someday it may help us!”
  - “Storage is cheap, and time is money. Let’s deal with this when we have to.”
  - *U.S. v. Microsoft* - 3 million e-mails, and Bill Gates can’t recall any of them!
  - No “right” answer; but policy-based destruction is preferred.



# Principles of Good RRP

- Collect and Keep Only What You Truly Need
  - What information do you collect?
    - Types of data
    - Types of data subjects
  - Where does it come from?
    - Provided
    - Captured
    - Purchased
    - Created
    - Domestic v International
  - Why do you collect it?
  - Why do you keep it?



## Principles of Good RRP

- If you don't have it, you:
  - Can't misuse it
  - Don't need to store and protect it
  - Don't need to send out change notices
  - Don't need to find and produce it
  - Don't need to destroy it



# Principles of a Good RRP

- Compliance with Law
  - Maintain records that demonstrate compliance with substantive law
  - Retain records concerning company's legal obligations for the period of time the obligation remains; but no longer
  - Keep records for as long as statute of limitations; but no longer



# Principles of a Good RRP

- Destroy Data Pursuant to Set Policy
  - Destruction should occur on a regular basis
  - Destruction should be based on business reasons
    - Real business needs come first
    - Cost
    - Administrative efficiency
    - Disaster recovery



## Principles of a Good RRP

- Destruction Stops Immediately Once a Claim is “Likely”
  - Failing negotiations
  - Government inquiry
  - Demand Letter, Notice of Claim, or Cease & Desist
  - Service of Process
  - Voluntary cooperation with Government





# Principles of a Good RRP

- Maintain Privacy and Security During Retention and Disposal
  - Confidentiality
  - Integrity
  - Accessibility



## Establishing a RRP

- Firm-Wide Records and Data Audit
  - RRP Team from all departments
  - Include GC, HR, IT, Accounting, Compliance
  - In large firm, consider retention of RRP counsel and consultants



## Establishing a RRP

- Data Map – Identify Company Systems for Data Creation & Retention
  - Inventory all hardware, including PCs, voicemail, fax, email, PDAs, servers, etc.
  - Remember home computers, faxes, etc.
  - Consider deep and dead storage, including off-site storage
  - Consider variety of media, including paper, magnetic, optical, film, fiche, etc.

*more . . .*



## Establishing a RRP

- Data Map - Assess Company Systems for Data Creation & Retention
  - SMS/text messaging; IM; company blogs; company and personal storage websites
  - Don't forget third-parties who may be creating, receiving, processing, or retaining your data



## Establishing a RRP

- Determine Legal Requirements and Compliance Issues
  - Audit all legal obligations and requirements applicable to Firm's business
    - HR obligations are often largest number,
    - In certain industries (e.g. securities, pharmaceuticals, environmental, etc.) other regulations may outnumber
  - Calculate applicable statutes of limitation



## Establishing a RRP

- Determine Legal Requirements and Compliance Issues - more
  - Remember that US may not be only governing law – e.g., consider EU
    - Data that is valuable to a data subject may not be destroyed without her consent
    - Data retention policies must be disclosed
    - Data may only be collected for the purpose originally identified and disclosed



## Establishing a RRP

- Develop Centralized Records Inventory System
  - Create uniform file system for all departments?
  - Dewey Decimal System
  - How to handle dynamic data: databases, spreadsheets, etc.?
- Know where your records are!



## Establishing a RRP

- Consider Separate Email & Voicemail Policies
  - Email is often most dangerous, most highly prized in litigation
  - Searching and recovery of email often extraordinarily costly
  - Voicemail is even worse
  - Huge volumes of undeleted email often choke system resources
  - Quick, automatic deletion to be preferred (but check legal/regulatory obligations)





## Establishing a RRP

- Draft Workable Policies That Conform with Business Needs
  - RRP Team drafts policies and time-frames consistent with good RRP principles
    - Buy-in from all departments
  - Circulate time-frames -- and be prepared for shouting!
  - See examples in materials
  - Incorporate policies into business processes



## Establishing a RRP

- Establish Procedure for Immediate Suspension of RRP When Litigation is Threatened
  - Centralize claim receipt procedure: HR, GC or Compliance Dept.
  - Pre-drafted memos and emails to stop destruction (see handout)
  - Work closely with IT on procedure for stopping destruction of back-up tapes, email servers, etc.
  - Establish testing procedure
  - Include procedure for restarting RRP after claim is resolved



## What Not To Do...

**RadioShack sued for violating ID theft law - Apr. 2, 2007 - Windows Internet Explorer**

http://money.cnn.com/2007/04/02/news/companies/radio\_shack.reut/index.htm?postversion=2007040217

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RadioShack sued for violating ID theft law - Apr. 2, 2007

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### RadioShack charged with violating ID theft law

**Electronics retailer allegedly tossed customers' addresses, credit-card numbers in a trash bin at one of its stores in Texas.**

April 2 2007: 5:03 PM EDT

ATLANTA (Reuters) -- RadioShack Corp. was sued Monday by the Texas Attorney General's office, which charged that the electronics retailer exposed consumers to potential identity theft by dumping data such as addresses and credit-card numbers in a trash bin behind one of its stores.

The civil suit, filed in San Patricio County, Texas, accuses the company of violating the state's 2005 Identity Theft Enforcement and Protection Act, which requires businesses to protect consumer records that contain sensitive information.

RadioShack, based in Fort Worth, Texas, did not immediately return phone calls seeking comment.

[Thwart ID thieves](#)

According to the complaint, which was posted on the state attorney general's Web site, "thousands" of records containing customer names, addresses, telephone numbers and other data were found in a trash can in an alley behind a RadioShack store located in Portland, Texas, in March 2007.

RadioShack "failed to safeguard the information by shredding, erasing or other means, to make it unreadable or undecipherable

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# Enforce, Enforce, Enforce!

- Enforcement (the “hard part”)
  - Both management and in house counsel must be vigilant
  - ACCA hosted seminars  
(e.g. Best Practices Forum for Enforced Records Management)
  - Various vendors  
(Computer Forensics Consultants; Accutrac; Documentum; EMC2; File Net; File Surf; Manage; ARMS Records Management)



# Enforce, Enforce, Enforce!

- Name RRP Representative Within Each Business Unit
  - Invest RRP Rep with Executive's authority
  - Teach from the Top: Apply RRP to Executive Office
  - Invest in Training



# Enforce, Enforce, Enforce!

- Audit Compliance with RRP from Inception
  - Use RRP Team to Assist with Audit
  - Consider Retaining Consultants if Necessary
  - Test Systems for Stopping, Restarting RRP
  - Test security



# Enforce, Enforce, Enforce!

- Effectiveness of Policy is Key
  - Ineffective Policy may be Worse than No Policy
    - *Murphy Oil v. Fluor Daniel*: Failure to follow email destruction policy leads to order of production of backup tape; “if Fluor had followed this policy, the email issue would be moot.”
    - *Zubulake*: Parties are now “on notice;” cost-shifting will not take place if policy is not followed.
    - Spoliation – the new buzzword!



## Practical Tips

- Involve IT at Every Level
  - IT often believes in saving data; needs to learn about losing it as well.
  - IT should help devise ways to automate proper retention, retrieval, and disposal.





## Practical Tips

- Establish clear accountability at all levels
  - Incorporate compliance into business plans
  - Incorporate compliance into individual performance and compensation reviews
  - Reward/penalize managers for business unit performance on completion, compliance and results
  - Assess discovery costs to business units



# Practical Tips

## ■ Train

- Educate staff on perils of e-communication
- Educate staff on how to manage their e-communication
- Educate staff on what to do with records when claims arise
- Eliminate local data retention to fullest possible extent



## Practical Tips

- Prevent email bloat
  - Segregate personal and business email
  - Delete all email promptly unless saved in a specific folder
  - Encourage Total Workday Control over email



## Practical Tips

- Identify privileged documents when generated or received
  - Set up automated tags for e-documents
  - Color-code paper documents



## Practical Tips

- Keep disaster recovery and records retention distinct
  - Backup tapes are for disaster recovery, not data preservation or retrieval
  - Recycle backup media as often as practical to eliminate them as costly discovery mechanisms
  - Be able to retrieve stored data that does not involve sequential backups
  - Plan for data retrieval and disposal from legacy systems when they are replaced



## Federal Rules

- Changes in FRCP (2006) Have Affected Data Retention Issues
- Federal Rules require early and proactive treatment of e-discovery
- State rules are changing; guidelines have been promulgated and new laws are being enacted
- Proposed new FRE 502 – may change the law on privilege



## Federal Rules

- Electronic data are different from paper
  - Dynamic vs. static system
  - Huge volumes of documents
  - Much information is stored in forms that are not “documents”
  - Serious risk of privilege waiver (but see proposed FRE 502)
  - Burden of searching legacy/backup systems



## Federal Rules

- Rule 26(b) and (f)
  - Early conference to address electronic discovery, including privilege issues
  - Early preservation orders are disfavored
  - New “two-tier” discovery process for electronic information
    - Identify and produce reasonably accessible electronic documents and information
    - Identify sources of information that are not reasonably accessible, but “a party need not provide discovery of electronically stored information from sources that ... [are] not reasonably accessible because of undue burden or cost.” (Rule 26(b)(2))
    - Codification of *Zubulake*’s 7 factors





## Federal Rules

- Rule 26(b)(5)(B) – New Approach to Assertion of Privilege
  - No automatic waiver
  - Establishes procedure for late assertion of privilege
  - Recognition that much privileged information may be hidden and cannot be searched in advance



## Federal Rules

- Rule 37(f) – Limitation on sanctions
  - Recognition of dynamic nature of electronic information
  - “Good faith” standard
  - “[C]ourt may not impose sanctions ... [if] information [is] lost as a result of the routine, good faith operation of an electronic information system.”



## Federal Rules

- Practical consequences
  - Work with active and to-be-acquired systems; legacy systems can wait
  - Litigation holds still essential, but fewer sanctions for inadvertent destruction
  - Huge, upfront searching costs may be reduced – maybe
  - But federal only for now; and worst sanctions have come in state cases.
  - Use counsel who are facile not just with the rules, but with the technology



# Practical Tips - Litigation

- Be Prepared for Litigation
  - Have a Plan
    - Know who will be involved in responding to systems assessments and responses to requests for electronically stored information
    - Have an up-to-date Data Map (system architecture and inventory)
    - Have considered and tested hold procedures



## Practical Tips - Litigation

- When litigation is threatened:
  - Circulate memos and emails regarding data preservation
  - Establish a privileged point of contact for questions
  - Make sure all destruction processes are stopped, or evaluated for their applicability to potentially material data by legally savvy personnel
  - Send letter to opposing party (through outside counsel) demanding preservation of evidence
  - Confer with e-discovery counsel to map the architecture, policies, and processes involved with your electronically stored and manually stored data and create a plan for retrieval, review, and production of relevant data



# When Litigation Comes

- Seek agreement with other side regarding:
  - Scope of discovery
  - Preservation and management of e-evidence
  - Sampling of records
  - Forms of production (e.g., print out, native format, etc.)
  - Cost sharing.
  - Initial disclosures and depositions regarding data and systems architecture, software, retention policies, and retrieval capabilities



## Conclusion

**A Data Retention Policy is No  
Longer a Matter of Choice**

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