

Defensible Deletion: Solving the Data Crisis

GETTING TO DEFENSIBLE DELETION

The gross accumulation of information with no exercise of defensible deletion has led Corporate America to a data crisis. Over-retention is responsible for a host of health issues for businesses, including non-compliance, unnecessary data storage costs, inefficiency and unnecessarily high cost of litigation and obligations for responding to government inquiries.

According to Transparency Market Research, the e-discovery industry, including software and service, is expected to grow to \$9.9 billion in the next three years. The fuel for this dangerous rise is the accumulation of nonessential, redundant and worthless information businesses hoard.

IT WILL HAPPEN TO YOU

It is not a question of if, but when a company will become the subject of either a government inquiry or litigation that requires them to produce records as part of document **discovery**.

Document discovery has historically been a challenge faced by large companies, but increased government oversight and a savvy plaintiff's bar are now making it an unfortunate reality for businesses of all sizes.

The first step in most government investigations and inquiries is a request for records. If the company is slow at producing the requested records or the records are incomplete, this may result in serious consequences and a more invasive investigation.

The plaintiff's bar knows that companies over-retain information. They have become extremely effective at leveraging this fact with the threat of an expensive document discovery process to extract a settlement. It's a safe bet for them that most companies have no consistent process for deleting information, nor defensible controls in place managing where employees store information. In many cases, the potential costs of a document discovery will exceed the dollar amount the company is willing to spend to settle the matter. So the sad reality is that many cases come down to simple economics – it's cheaper to settle than to fight.

IMPACT ON LITIGATION COSTS

Today, up to sixty cents¹ of every dollar spent on litigation will be spent on collecting records and paying counsel to review them, making document discovery the potentially largest component of litigation costs. Recently, four significant trends have emerged.

First, electronic data growth is growing in excess of 20% annually. The cost of litigation, **excluding judgments and settlements**, has risen at 9% annually².

¹ Rand Institute of Civil Justice, "Where the Money Goes", 2012

² Litigation Cost Survey of Major Companies Statement Submitted by Lawyers for Civil Justice Civil Justice Reform Group U.S. Chamber Institute for Legal Reform For Presentation to Committee on Rules of Practice and Procedure Judicial Conference of the United States 2010 Conference on Civil Litigation Duke Law School

Blame the cost of litigation on attorney bill rates? Hardly. Over the last decade, average attorney billable hourly rates have only risen by less than 5% per year³. And the cost per GB to collect and process data for review has dropped by 98% over this time.

DEFENSIBLE DELETION IS THE ANSWER

In document discovery, only one out of every one thousand documents collected and reviewed are relevant⁴, and for every 1,000 pages an average of 90% have no regulatory requirement or valid business requirement to be retained.

When companies appropriately and defensibly shrink the amount of information available for collection and review, they reduce the costs (and risks) of document discovery. The Supreme Court⁵ has spoken clearly on the legality and merits of disposing of records and information in the normal course of business. The courts recognize it is impossible for a company, no matter its size, to retain all the information created in the course of business.

Beyond the impact on litigation, defensible deletion provides other benefits. It makes finding critical information easier and more efficient, reduces the risk of a data breach and violations of privacy regulations and reduces storage costs.

THE DEFENSIBLE DELETION ROADBLOCK

There is overwhelming agreement from Chief Legal Officers, Chief Information Officers, litigators, analysts, jurists, bar associations and even technology and e-discovery experts about the need for and value of defensible deletion. Every company should systematically delete legacy and redundant information in the normal course of business.

Defensible deletion begins by recognizing the difference between true records and information. Valid business records – sometimes a form or single document but most often a logical collection of information – record business activities and transactions of an organization. Valid business records tend to have a defined value and **must** be retained to meet regulatory requirements or to support valid business needs. Some information, while not valid business records, may have reference value and should also be retained for some period of time. *But the majority of information created could and should be eliminated shortly after creation.*

In the end, businesses keep far too much, in far too many formats and places for a very long time, making themselves vulnerable to crushing document discovery when litigation or a regulatory investigation occurs.

³ National Law Journal

⁴ Litigation Cost Survey of Major Companies Statement Submitted by Lawyers for Civil Justice Civil Justice Reform Group U.S. Chamber Institute for Legal Reform For Presentation to Committee on Rules of Practice and Procedure Judicial Conference of the United States 2010 Conference on Civil Litigation Duke Law School

⁵ Arthur Andersen LLP v. United States

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Companies can break free of the data crisis problem and set standards, leverage proven processes and deploy defensible deletion. There are four steps they can follow:

1. **CREATE A RECORDS INVENTORY.** A comprehensive Records Inventory is the cornerstone of an effective records management or information governance initiative. It connects retention rules to where the information is maintained so defensible deletion becomes possible. An inventory of all record types used within the company – including the media and applications where each record type exists – must be developed. This inventory should identify which departments use and have access to records, where records are stored, the media used, how records are accessed, who they are shared with inside and outside the company, their reference value and the specific elements the records contain that make them personally identifiable or sensitive.
2. **MAKE THE RETENTION RULES ACTIONABLE.** The retention rules should include record type names and descriptions, retention periods that are clearly defined, a trigger event that starts the retention clock for each record type and the supporting logic behind each retention decision.
3. **LEVERAGE PEOPLE KNOWLEDGE.** Technology only goes so far; business people determine the ultimate success or failure of any records control program. A successful initiative involves business people in the development of the records inventory and in determining the operational value of information.
4. **LEVERAGE TECHNOLOGY.** With a comprehensive Records Inventory and actionable retention rules in place, companies can leverage technology to execute the defensible deletion of eligible records and information. Well-structured technology makes the process faster, more accurate and it makes it possible to automate the execution of policies going forward.

CONCLUSION

Every company will benefit from the appropriate and defensible deletion of legacy and redundant information. With appropriate retention rules and standards in place, compliance with regulations around retention and privacy is easier, data storage costs are reduced, efficiency improves and document discovery is substantially cheaper and less risky.

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