


Records Retention & Defensible Disposition

Golden Gate ARMA Chapter

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Discussion Outline

- Defensible disposition elements
- The challenge
- The approach
- The benefits
- Question & answer

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What is a Defensible Disposition Program?




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Defensible Disposition Includes...

- Policy statement
- Retention schedules
 - Record categories organized by business function
 - Triggering event
 - Retention period
 - Legal group
- Legal research matrix
- Strategies to dispose of legacy materials

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Policy Content: Table of Contents Example

<p>Section 1: Statement of Purpose _____</p> <p>Section 2: Definitions _____</p> <p>Records _____</p> <p>Convenience Materials _____</p> <p>Official Files _____</p> <p>Client Files _____</p> <p>Firm Administrative Files _____</p> <p>Retention Schedules _____</p> <p>Preservation Holds _____</p> <p>Section 3: Governance and Accountability _____</p> <p>Policy Acknowledgement and Compliance Reviews _____</p> <p>Specific Responsibilities _____</p> <p>General Counsel _____</p> <p>Director of Records Management _____</p> <p>Records Management Department _____</p> <p>Information Technology Department _____</p> <p>Office Administrators _____</p> <p>Practice Group Leaders and Department Heads _____</p> <p>Matter Billing Partner _____</p> <p>Section 4: Ownership of Records and Information _____</p> <p>Client Records and Information _____</p> <p>Client Property _____</p> <p>Client Originals _____</p> <p>Litigation Support _____</p> <p>Firm Property _____</p>	<p>Third-Party Property _____</p> <p>Administrative Records _____</p> <p>Records Labeled "Personal" _____</p> <p>Section 5: Official Records and Information Repositories _____</p> <p>Records Management System (RMS) _____</p> <p>Document Management System (DMS) _____</p> <p>Network FileShares _____</p> <p>Email _____</p> <p>Offsite Storage _____</p> <p>Non-Firm Devices _____</p> <p>Computer System Backups _____</p> <p>Section 6: Confidentiality and Security of Records and Information _____</p> <p>Precedent _____</p> <p>Section 7: Transfer of Records to/from the Firm _____</p> <p>Acceptance of Records _____</p> <p>Release of Records _____</p> <p>Release or Transfer of Client Files _____</p> <p>Lawyers and Staff Leaving the Firm _____</p> <div style="border: 2px solid red; padding: 5px;"> <p>Section 8: Disposition of Records and Information _____</p> <p>Notice to Client _____</p> <p>Disposition Approval Process _____</p> <p>Suspension of Records Destruction _____</p> <p>Acceptable Methods for Records Destruction _____</p> <p>Documentation of Destruction Activity _____</p> </div>
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Retention Schedule Example

HBR CONSULTING **Records Retention Schedule**
4/13/2015

Accounting & Finance				
Record Category Name:	Record Category Description:	Trigger Event:	Retention Period:	Legal Group Authority:
Accounts Payable	Invoices for goods and services purchased by the Firm and supporting reconciliations. Includes authorization for payment and documentation that payment was made, expenses requiring special approval, employee expense reimbursement, 1099s, etc.	End of Calendar Year	7 Years	Tax
Accounts Receivable	Documentation of funds receivable including notated pro formas and documents that support billing to clients, honorariums, refunds, employee personal charges, and reconciliations. Includes bad debt write-offs.	End of Calendar Year	7 Years	Tax
Audits - Financial	Documents summarizing the results of audits performed by an outside person or organization.	End of Calendar Year	15 Years	Tax
Bank Account Management	Documents related to the managing of the Firm's bank accounts. Includes opening, closing, and access and authorization documents.	Date of Closure	7 Years	Tax
Bank Reconciliations	Documents supporting the tracking of Firm funds held in Firm bank accounts.	End of Calendar Year	7 Years	Tax
Budgets - Firm-wide	Spreadsheets, work papers, and final approved documents showing planned income and expenses. Used to project expenses and income for the Firm.	End of Calendar Year	7 Years	Tax
Client Billing	Billing statements issued to clients for services rendered. Also includes billing rate schedules, client rate agreements, billing guidelines, and e-billing requirements.	End of Calendar Year	7 Years	Tax

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Legal Requirements Matrix Example

HBR CONSULTING **Legal Requirements Matrix: Firm Administrative Records**
4/13/2015

Legal Group Jurisdiction	Description	Citation	Records Affected	Retention Requirement	
Tax	Federal	Information and Returns	26 U.S.C.A. § 6104 (a)	Inspection of applications for tax exemption or notice of status by certain exempt organizations and certain trusts	No retention specified
		Information and Returns	26 U.S.C.A. § 6104 (b)	Inspection of annual information returns	No retention specified
		Information and Returns	26 U.S.C.A. § 6104 (d)	Public inspection of certain annual returns, reports, applications for exemption, and notices of status	3 year limitation on the inspection of certain returns
		Limitations on Assessments	26 U.S.C.A. § 6501 (a)	Assessments and collection records	3 years from tax filing
		Limitations on Assessments	26 U.S.C.A. § 6501 (c)(8)	Assessment on certain foreign transactions	3 years after date on which Secretary is furnished information required to be reported
		Limitations on Assessments	26 U.S.C.A. § 6501 (e)(1)(A)	Civil action on omission from gross income of an amount properly includible therein which is 25% of amount of gross income stated in return	6 years after return is filed
		Limitations on Collections	26 U.S.C.A. § 6502 (a)(1)	Books of account	10 years from assessment
		Limitations on Credit or Refund	26 U.S.C.A. § 6511 (a)	Credit or Refund	3 years from date tax return filed or 2 years from date tax paid (whichever is latest)
		Limitations on Credit or Refund	26 U.S.C.A. § 6511 (d)(1)	Claims re bad debts and worthless securities	7 years from filing return
		Limitations on Credit or Refund	26 U.S.C.A. § 6511 (d)(2)	Claims re net operating loss or capital loss carrybacks	3 years from filing return for taxable year of loss resulting in carryback
		Limitations on Credit or Refund	26 U.S.C.A. § 6511 (d)(3)	Claims re foreign tax credit	10 years from filing return

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The Challenge

- Information is not managed in a manner that allows for disposition leading to:
 - Escalating costs of storage for data, information and records (e.g., materials) in hardcopy and electronic formats
 - Increasing legal exposure and discovery costs resulting from over-retaining
- Information stores continue to expand; Gartner says 40%+ per year
- Conducting a comprehensive, document-level inventory and disposition is neither reasonable nor practical

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Ideal State: Disposition of Controlled Records, Data, and Information

Subject to Retention Policy	Classified	Meets Retention	Approved For Disposition	No Legal Hold
<ul style="list-style-type: none">RecordsInformationDataDocumentsEmailBackup mediaStructured dataUnstructured dataNetwork share and hard drives	<ul style="list-style-type: none">Classification category appliedOther characterization appliedConvenience vs. official materials	<ul style="list-style-type: none">RegulatoryStatutoryOperationalRetention periods have been satisfied	<ul style="list-style-type: none">Eligible records identifiedDepartment reviewTax reviewLegal reviewRM review	<ul style="list-style-type: none">No litigation holdNo tax auditNo regulatory investigation


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Approach to the Problem

- Develop or enhance RM policies and retention schedules
- Implement the policies on new materials going forward; STOP contributing to the problem
 - Classification
 - Identification of official custodian
 - Official repositories
- Develop a Defensible Disposition Strategy for how best to deal with disposing of legacy backfile materials

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Legal Perspective: Why is this Okay?

- “Document retention policies, which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business.”
- “It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.” See Arthur Andersen LLP v. United States, 544 U.S. 696 (2005)
- Courts typically look at four issues when examining the conduct of an individual or organization with respect to document retention and disposition
 - Good faith effort
 - Reasonableness
 - No duty to preserve documents at the time of the disposition
 - Consistency of disposition practice

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Legal Perspective: Why is this Okay (Con't)?

- If you have acted in good faith and reasonably, courts will typically review actions in a more favorable light
- Recent cases include:
 - Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC. (2010 WL 184312 S.D.N.Y.)
 - Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598 (S.D. Tex. 2010)
 - Hynix Semiconductor Inc. v. Rambus Inc., 2009 WL 292205 (N.D. Cal. Feb. 3, 2009)

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What to do with all of this Information?

- Generally, an organization is under no legal obligation to retain every piece of information it generates in the course of its business (*Note: legal holds impose an obligation to preserve that may be broad and far reaching*)
- Vast amounts of legacy information (physical and electronic) do not readily lend themselves to precise classification against an organization's records retention schedule
- Characterization of the legacy information can be a less precise, yet defensible option upon which disposition decisions may be made
- Reasonableness, good faith, and documentation are key to successful initiatives

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The Approach: Defensible Disposition Process

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graph TD; A[1: Data Gathering] --> B[2: Analysis]; B --> C[3: Define Disposition Strategy]; C --> D[4: Characterization]; D --> E[5: Execution];
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1: Data Gathering

2: Analysis

3: Define Disposition Strategy

4: Characterization

5: Execution

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1: Data Gathering

- Review existing RM policy and processes
- Conduct stakeholder interviews (Legal, Tax, IT, Compliance, etc.) to define data points for characterization, business owner's use requirements
- Assess the organization's risk tolerance
- Identify the level of metadata available about legacy materials (both hardcopy and electronic)
- Identify the scope and content of the organization's structured and unstructured repositories (targeted/prioritized review)
- Access the tools available to collect information and metadata about the materials

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2: Analysis

- Review collected data against classification opportunities
 - Determine feasibility of bulk classification against schedule
 - Develop other characterization criteria
 - Apply risk tolerance thresholds
 - Determine disposition approach for electronic materials
 - Disposition from resident line-of-business applications (potentially both unstructured and structured repositories)
 - Consider treatment of the "application" as a record
- Develop business case
 - Storage savings
 - Discovery cost avoidance
 - Risk and exposure reductions
 - Potential soft ROI/efficiency gains (i.e., less time looking for materials)

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3: Define Disposition Strategy

- Document the process and secure related approvals
- Identify and allocate resources to support the effort (Legal, Tax, IT, RM, and business units)
- Socialize the defensible disposition program components with stakeholders
- Implement the disposition against candidate materials in accordance with the newly-defined disposition process

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4: Characterization

- Divide legacy backfile materials into groups for further due diligence
- Prioritize quick win opportunities
- Confirm that existing legal holds don't apply
- Develop characterization criteria based on the organization's defined risk tolerance, for example:
 1. Associate "created/modified by user metadata" to a business function; and
 2. Identify information older than the longest non-permanent retention period on the schedule for a business function; and
 3. Consider other characteristics such as date created, last accessed date, departed authors, etc.; or
 4. As otherwise reasonably informed by other department, industry, or specific circumstance.

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5: Execute

- Identify records eligible for disposition
 - Apply record categories from retention schedule
 - Apply other characterization attributes
- Secure approvals per the newly-defined disposition process
- Determine appropriate destruction method
- Prepare documentation for disposed materials
- Execute appropriate destruction method
- Update RM tracking systems as appropriate
- Attach destruction certificate with internal documentation

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Applicability – When to Initiate

- Strategically
 - As part of an informed information governance initiative designed to improve controls on the front end (risk based)
 - As part of a strategic sourcing initiative to manage centralized costs (e.g., characterize legacy back file collections)
 - In response to “lessons learned” from prior discovery experiences
- Tactically
 - Office relocations
 - Department/business unit consolidation
 - Merger/acquisition/divestiture
 - Consolidating an off-site storage facility
 - Implementing new RMS/DMS/Email archive technology

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Benefits – Building the Business Case

- Reduce the volume of records storage thereby decreasing direct storage costs for physical and electronic repositories
- Reduce the indirect cost of managing records through improved search and access
 - More agile information workers put the organization at a competitive advantage
 - Less re-work to re-create records that can't be found
 - Authoritative information can be reliably produced
- Reduce risk and exposure
 - Legal exposure
 - Potential risk
 - Cost avoidance

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Discussion – Q & A

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