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## Best Practices for Defining and Establishing Effective Archive Retention Policies

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*Jennifer Kehoe Esq.*



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## **Introduction**

The use of technology as a means of business communication has increased exponentially in recent years. Electronically stored information (ESI) has become a major source of business records, and any organization that uses ESI—from email to word processing to instant messaging—must manage those records. With that responsibility come two basic issues: what to retain, and how long to retain it. How can organizations avoid retaining everything indefinitely, yet be confident that they are keeping all the records they need for a reasonable and legally defensible period?

When establishing archive retention periods, organizations must consider their legal obligations and business requirements. Next, they must establish official policies for retention. Finally, they must follow those policies—and in so doing, they would be well advised to consider the use of tools to help with the tasks of archiving, retention, and discovery.

## **I. The many reasons for record retention**

Any organization that may be subject to litigation must fully understand its particular record retention needs.

Many businesses are subject to well-publicized government or industry regulations that require certain types of records to be retained for specific periods of time—but that is not the only reason for thorough, consistent retention. In addition, every organization has a legal obligation to produce all relevant information should that organization be party to a lawsuit or to a regulatory or governmental investigation. Finally, every organization has its own business concerns that demand retention and discovery of information in order to continue day-to-day operation. Accordingly, every organization should have tools in place that will allow it to preserve and retain information.

## **Legal and regulatory obligations**

Organizations have always been obligated to produce information during a lawsuit. However, those obligations have become both more exacting and more extensive as they relate to electronically stored information with the implementation of the 2006 amendments to the Federal Rules of Civil Procedure. The increasing use of ESI in companies of all sizes has created not only more formats for information, but more information itself. Organizations need to prepare, implement, and enforce policies that support electronic discovery, but they also need to have

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the means to hold and retain information immediately. The amendments to the Federal Rules acknowledge the changing information world, and include a number of changes that address ESI, its storage, its preservation, and its production.

What the amended Federal Rules mean for organizations across the board is that courts expect all parties involved in a litigation to have procedures and tools in place to preserve any information relevant to the litigation as soon as that litigation becomes “reasonably foreseeable.”<sup>1</sup> Businesses and their counsel both need to be familiar with all the business’s ESI systems, all of its retention policies, and all of the means by which information is captured. In order to comply with these retention requirements, organizations must have the means to do so well before the need arises.

Beyond the Federal Rules, governmental agencies and regulatory bodies (the U.S. Securities and Exchange Commission [SEC] and Food and Drug Administration [FDA], for example) and industry regulations (such as Sarbanes-Oxley and HIPAA) establish specific minimum retention periods for certain information. In addition to such federal requirements, states may impose additional obligations.

In order to comply with all of these requirements, an organization must develop and adopt a records and information management (RIM) policy as well as a retention schedule. A RIM policy clarifies—among other things—the types and categories of information that the organization generates, where and how that information is maintained, and the personnel who are responsible for maintaining it. A retention schedule identifies how long each type of information is stored and when and how each type is destroyed. Development of these policies and schedules, however, can take a long time. Accordingly, the organization should not wait until its retention policy is fully developed and in place before it puts the necessary preservation tools in place.

Organizations that do not preserve information long enough to meet their litigation obligations (or other regulatory or governmental obligations) may face severe sanctions as a result.<sup>2</sup> Legal liability for failure to retain or produce information hinges on the reasonableness and defensibility of the organization’s policies. If information was prematurely destroyed—no matter whether the destruction occurred because the organization did not have a policy, because it had a policy with “unreasonable” retention periods, or because it did not have tools in place to retain information—that destruction could be the basis for legal sanctions. Accordingly, organizations need to establish clear, recorded, and defensible retention policies that demonstrate the organization’s attempt to meet its own business needs as well as its legal and regulatory

<sup>1</sup> See *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004).

<sup>2</sup> See, e.g., *Coleman v. Morgan Stanley*, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005), *further opinion* 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005) (court ordered sanctions for failure to produce requested ESI, eventually resulting in an award against Morgan Stanley of over \$1.7, later overturned on appeal).

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obligations. Moreover, these policies need to include schedules that demonstrate appropriate retention periods for the various categories of information.

Conversely, retaining information for too long (or indefinitely) creates a different risk: that of being compelled to produce information that could defensibly have been destroyed. A business is not required to retain all the information that it has ever generated—and it is permissible for that business, after a reasonable period of time, to dispose of even those records whose retention is required. If the organization retains all of its information with no maximum retention period or disposal policy, an endless pool of data is created that must all be searched and produced in the event of litigation or regulatory action. A well-planned retention policy, addressing both minimum and maximum retention times, limits the information pool to what is both timely and potentially relevant. No organization wants or needs to search through all of its past records when the majority of that information is irrelevant.

### **Business considerations**

In addition to the mandated retention requirements, every business has specific needs to retain and have access to its own information. Therefore, while legal and regulatory requirements provide a starting point for establishing retention periods, each business needs to identify whether it needs to retain any other types of information (defined by subject matter or by communication method) for specific periods of time. In the case of email, for example, these distinctions could include different retention periods for different departments, or for different projects, or for different levels of management.

Beyond the issue of information retention is the question of storage space. If an organization is required to retain all email messages for a specific length of time, for example, then individual user inboxes are not optimal storage containers. The organization needs to ensure that individual user boxes are used only for communication and short-term storage, not as the primary means for official record retention.

### **Accessibility**

Retention can be achieved by a variety of means, including backup tapes. Functional retention, however, requires that the information be accessible, searchable, and retrievable when needed. Because an email archive is a comprehensive repository that includes indexing, the archived information can be retrieved easily and thoroughly without the time and expense of backup tape

restoration. System-wide archiving permits classification of information, automated search and retrieval, and elimination of duplicates. Most archiving programs permit flexibility in retention, and allow for multiple classifications and retention periods in the event that some archived information needs to be stored for longer or shorter times than the standard retention period.

## **II. Best practices for establishing retention periods**

As stated above, identifying the information that must be retained is only one step in establishing an effective archive system. The business must then identify minimum and maximum retention times for the information as well as determine whether all the retained information will be kept for the same period of time. This retention schedule may be a part of a larger records and information management policy, or it may be a separate policy. The following are the basic steps that an organization should take to create a successful archiving retention schedule.

### **Step 1. Collect the personnel**

In order to create appropriate retention periods, the organization needs to gather its personnel who have knowledge of the organization's business needs, its regulatory and legal obligations, and its email and information use. Although not all of these people may need to be involved at every step of the process, initial contact with each will ensure that the resulting retention periods reflect the needs and abilities of all users and of the business as a whole. The goal of developing a records and information management policy is to create a legally defensible policy that also addresses the everyday business needs of the organization—all in a way that is accessible and understandable to all members of the organization. Although developing a policy can entail an involved and extensive process, the policy itself (along with the retention schedule) should be straightforward and in plain, precise language. Wide representation can help accomplish these goals.

- **Department representatives.** Some businesses may require input from a representative of every department in order to ensure that the needs of all departments are considered. However, in many cases, it will be possible to ensure that the needs of the entire organization are made clear without such extensive involvement. The most important thing is to ensure that the email and information use and culture of each area is communicated.

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- **IT representatives.** One or more people from IT who are familiar with both the capabilities of the archiving system and the information archived (or to be archived) should be included in the early planning stages.
- **Legal representatives.** Legal personnel who have knowledge of the regulatory and other requirements that govern the organization's records should provide input both early on and as the retention schedule is finalized.

## Step 2. Collect the information

Once the personnel have been collected, the information at issue needs to be identified. If the organization has an existing policy regarding records and information management or a policy that identifies the information being archived, then that is the place to start. All the information that is going to be archived needs to have a retention period assigned to it and must be included in a retention schedule. If the organization plans to begin archiving immediately (see step 4), the initial retention period may be "indefinite" while the retention policy and schedule are being put into place.

## Step 3. Begin at the beginning: legal and regulatory requirements

Once the information and the people familiar with it have been brought together, the next task is to determine the actual retention periods, beginning with regulatory and other legally established minimum periods. Organizations that are not yet using archiving, however, may wish to begin archiving immediately, with an indefinite retention period until specific retention periods are established (see step 4).

- **Identify all categories covered.** Categorize the information subject to regulations and identify the required minimum retention period for each category.
- **Compare category minimums.** After establishing what the various retention periods are, consider whether it makes sense to use the same minimum retention period for all regulated information, for consistency. This may not be practical in all situations, and automated archiving systems can diminish any concerns about maintaining separate retention periods for similar information.

### **Step 4. Employ the tools**

Organizations need to establish specific retention policies with specific retention periods. In many cases, however, it is not practical for an organization to wait until these policies and time periods are in place before beginning to take advantage of archiving. If the organization is already using archiving, it may wish to simply continue with their existing archiving practices while creating specific policies and schedules for the future. If the organization has not yet begun to use an archiving program, it should consider the benefits of imposing an indefinite archive policy immediately, as an interim measure, while its permanent policies are being developed.

The most significant benefit of interim archiving is that it allows the organization to meet legal preservation obligations, regardless of whether a complete retention policy is in place. Litigation today requires that a company be immediately able to begin preserving and retaining information (also known as instituting a legal hold) as soon as it reasonably anticipates litigation or governmental action. Failure to place such an immediate hold on documents and electronically stored information can result in charges of spoliation of evidence and severe sanctions, including fines and default judgments. Archiving provides a company with the immediate ability to preserve information—for later review and decision by its legal department—and decreases the chances of inadvertent destruction while a hold is in place. Email is retained for 12 months, which allows e-discovery and preservation of any data that may be responsive, even in the absence of the complete, defined retention policy that is the ultimate goal. Interim archiving has additional benefits as well:

- Interim archiving gives IT an opportunity to understand the technology, fine-tune the deployment, and provide feedback to the team that is defining the permanent retention policy and procedures.
- IT can begin to estimate the amount of storage required to retain email, which can be useful for the policy team's planning.
- When the organization is ready to implement its permanent policy, data that has already been archived can be reviewed in accordance with the new policy and disposed of as appropriate.



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The pros and cons associated with various retention options should also be taken into consideration. For example:

- **Journaling.** Pros include having a full, complete picture of all email and relatively low maintenance. Cons include retention of more information than necessary, and less ease of use than some other options.
- **User-driven archiving.** Pros include flexibility and the ability to tailor retention to particular needs. Cons include lack of consistency across the organization and increased reliance on individual users.
- **Automated archiving.** Pros include the ability to select a particular driver (such as date, size, content, time, or user) for email retention and organization, as well as minimal user effort. Cons include lack of flexibility and potential for over-retention.

### Step 5. Address the organization's business needs

Once the organization has addressed any legally required categories, it may designate additional retention periods on the basis of its business needs and on its perception of the potential for litigation. In most cases, the organization's legitimate business basis for setting forth retention periods will also be sufficient to establish a defensible basis if the organization's preservation practices are challenged in court.

- **Consider the business requirements.** This is a vague step when it is considered in a vacuum, but in practice it is easier to achieve. In determining these requirements, the organization should consider:
  - How often access to the information is likely to be needed on a regular basis
  - The extent to which the information is either superseded by or included in later versions
  - The extent to which the information is distributed outside the organization, such as to customers
  - The potential for future litigation or other adversarial action related to the content
  - The purpose of the information, both in its creation and in its distribution
  - The information's intended use and distribution, as well as its actual use in practice

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- **Identify sufficiency of required periods.** For each category with a regulated minimum retention period, the organization must determine whether that period is also sufficient to meet its business purposes for the information. If not, the regulatory minimum may need to be increased.
- **Remaining categories.** For the categories of information that have no required minimum retention periods, the organization must determine what the business needs are for the information—and set the retention periods accordingly.

### Step 6. Spell it out: create a written retention schedule

The newly established retention periods need to be recorded, both for distribution to users and as part of the legal defensibility record. The schedule does not need to be elaborate, but it should include specifics about the various categories and associated retention periods. In the course of creating a written schedule, the organizations should keep the following considerations in mind:

- **Maximum retention periods.** A minimum retention period is important, but is only half of the policy. A maximum retention period needs to be set as well, in order to avoid over-retention. This can be addressed either by including a specific maximum retention period for each category, or by including a general clause stating that upon the expiration of the minimum retention period, the information shall no longer be retained. This maximum retention period should also address the disposal of any currently retained information, including information archived under an interim “infinite” retention period.
- **Distributing the information.** Having established archival retention periods in place ensures that information will be retained appropriately, but information concerning those periods needs to be distributed to all users, both to communicate policy and to address the storage habits of individual users. Especially in cases where individual employees use a variety of different email programs or where it is common for users to archive email messages in .PST or .NSF files or on removable media, the schedule needs to make clear that this is not “retention” for purposes of the organization.

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A simplified sample retention schedule is below. Obviously the specifics, including type of information and retention periods, will differ for every organization. However, as the sample demonstrates, a retention schedule does not need to be extraordinarily complex or cumbersome in order to be effective.

## Sample simplified records retention schedule

ID	Master Category Title	Retention Time	Category Description/Examples
1	Accounting/Finance	15 years	General Books & Records, Capital Assets/Obligations, Payroll, Information Systems, Accounts Payable/Receivable
2	Legal & Compliance	10 years	General Contracts, Non-Disclosure Agreements, Claims, Negotiations, Permits, Registrations, Corporate Reporting, Corporate Reporting—Selection, Audits/Reviews—External/Regulatory, Audits/Reviews—Internal, Programs, Programs—Prevention, Detection and Investigation, Inpatriates, Policies and Procedures
3	Real Property	20 years	Improvements to Real Property, Abstracts, Title, Insurance
4	Governance—Board/General	Permanent/Indefinite	Corporate Records, Board Actions/Investor/Shareholder Records—Communications, Voting and Proxy Records
5	Human Resources	7 years	Benefits Plans, Benefits—Contributions, Benefits Provided, Elections, Pension Summary Records, Personnel Files/Records, Selection, Resumes, Immigration, Training and Development
6	Intellectual Property	10 years	Patents, Trademarks, Copyrights
7	Public Relations	5 years	Press Releases, Product Related Notices
8	Sales/Mark./Adv.	6 years	Adv. & Promotional Documents, Brochures, Product Information
9	R&D	12 years	Drawings and Specifications, Lab Notebooks, Project Files
10	Insurance	11 years	Policies, etc.
11	Tax Reporting	50 years	Income Tax Returns
12	Engineering & Man.	15 years	Test Specs and Results, Product Specs, Quality Documents, Service Manuals

### III. Conclusion

Simply moving information into an archive does not constitute effective information management.

In order to gain the highest benefit from archiving, all of the information that goes into the archive system must be categorized, and a retention period must be set for each category.

Well-established retention periods used in conjunction with the automation and ease of use of an effective archiving system create a streamlined, customized, and uncomplicated means of achieving information preservation.

## About Symantec

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Symantec Corporation  
World Headquarters

20330 Stevens Creek Boulevard  
Cupertino, CA 95014 USA  
+1 (408) 517 8000  
1 (800) 721 3934  
[www.symantec.com](http://www.symantec.com)

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