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InfoPAK[SM]

# Executing Your Records Retention Policy and Schedule

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This InfoPAK℠ details the best practices for executing a Records Retention Policy and Schedule.  It includes developing records and information management processes, addressing electronic records through a data placement strategy, creating employee behavior change management and training programs and dealing with older, legacy documents. It also discusses offsite records storage and evolving your records program into a broader and more useful Information Governance program. This InfoPAK is a sequel to the 2017 ACC InfoPAK developed by Contoural: "Creating Modern, Compliant and Easier-to-execute Records Retention Schedules."

The information in this InfoPAK should not be construed as legal advice or legal opinion on specific facts, and should not be considered representative of the views of Contoural, Inc., of ACC or any of its lawyers or members. This InfoPAK is not intended as a definitive statement on the subject it covers, but rather to serve as a resource providing practical information to the reader.

This material was developed by Contoural, Inc. Contoural, Inc. is the sponsor of the Information Governance Network and a sponsor of the Legal Operations Network Records Management and Information Governance Foundational Toolkit. For more information about the author, visit their website at www.contoural.com or see the "About the Company" section of this document.

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# Contents

# I.     Challenges of Executing a Records Retention Schedule

Records Management execution is a source of frustration for many companies. They find it difficult to consistently apply retention, and especially deletion, to their documents and data as prescribed by their records policy and schedule. Instead, this information continues to accumulate, driving up risks and costs. Organizations often become keenly aware of the lack of records retention compliance during eDiscovery or while trying to implement a privacy program. Moreover, records retention execution seemingly pits the legal team against employees and business units who often want to adopt a "save everything forever" approach. Perhaps it's time to rethink how organizations execute records management.

## A.     Traditional, Paper-Centric Records Practices Don't Work for Electronic Information

Traditionally, records retention programs were designed for the retention and disposition of "official" paper records. Executing a records program came down to sorting the right paper into record storage boxes, and (sometimes) destroying those boxes once their retention period expired. Yet, as companies move into the digital age, their records management practices do not keep pace. This paper-centric thinking still lives on in many programs:

- Programs continue to have an emphasis on paper records management, to the exclusion of the majority of records that are created or received in electronic media

- Records retention is a largely manual process

- Very few employees actually follow their records retention policy and schedule, and in some cases are not even aware that they actually exist.

These older programs, especially in the era of electronic information, not only fail to drive compliance, but actually hinder it. Worse, the lack of a viable program drives up both offsite paper and electronic storage requirements, increases risks and costs during litigation, and hampers privacy. A more modern and effective approach is needed.

## B.     Simply Having a Policy Does Not Make Your Program Compliant

In records management, it is tempting for in-house counsel to focus on its area of expertise – creating the "most legally compliant" policy. Sometimes, legal departments segment records programs into policy development and policy execution as separate and exclusive tasks. While they are willing to own policy development, they fall short on policy execution. However, this hands-off or deflected policy approach can come back to haunt the legal group. Often IT or

business units don't take ownership of policy execution, information accumulates everywhere increasing costs and risks and lowering compliance.

Having a policy in and of itself does not compliance make. Regulators and courts judge compliance on how well a policy is executed. They ask: What did the organization say it was going to do (in its written policy)? What are the processes, training, and controls used to execute the policy? Were the follow-up and audit procedures properly followed? And, did the policy achieve its intended results? Policy creation, therefore, should have a constant eye on execution. If an organization cannot execute what is stated in its policy, the policy should be redesigned to do so. This effectiveness assessment "gut check" should serve as a guide throughout the process.

While courts and regulators do recognize that records management is an inherently imperfect process, they expect reasonable, good faith efforts. Create a policy with clear objectives. Execute the policy with processes, technology, and training. Demonstrate the compliance of the policy with through metrics and audits. Show that a plan has been developed and is being executed. Audit the results and remediate any shortfalls. Not perfect? That's okay. No one expects it to be perfect. Start with good and keep moving forward.
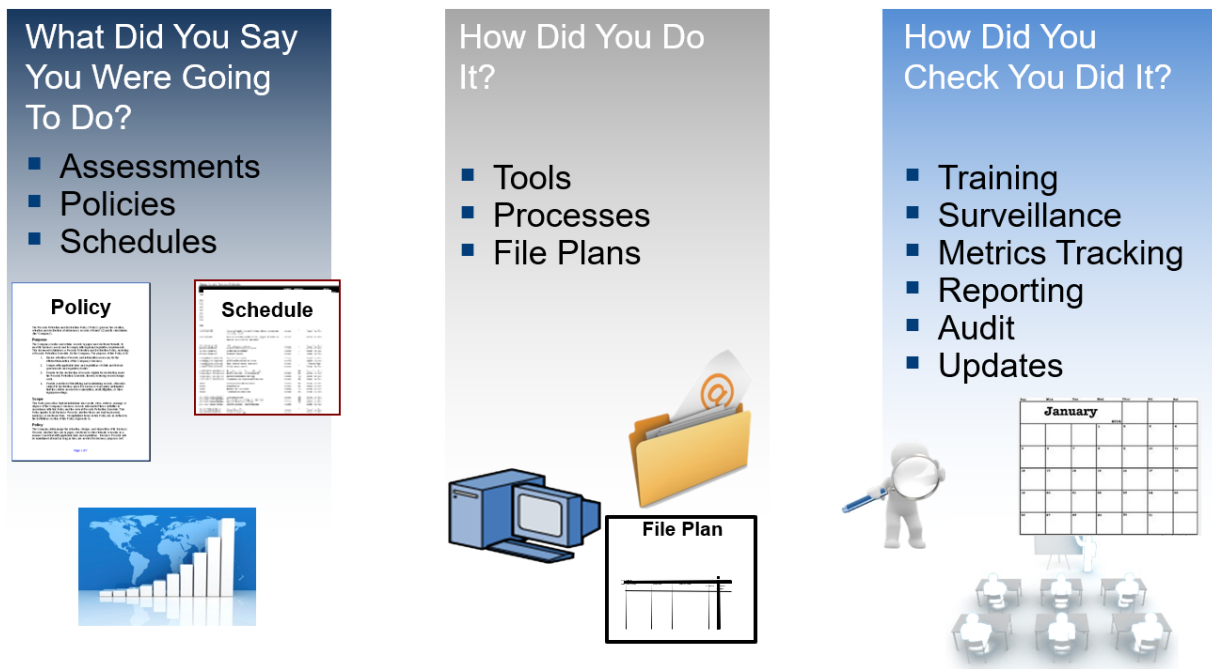


Figure 1. Courts and Regulators judge program compliance not on the policy but rather how faithfully the policy has been executed.

## C.    The Risks of Employee Self-Declaration

One approach to records management compliance is through employee self-certification. Employees are expected to acknowledge their compliance with the records policy, for example, by clicking a link sent in a monthly email, and those who fail to acknowledge it face disciplinary action. While Contoural likes the apparent simplicity and ease of this approach, its assessments of records program compliance have shown this type of self-certification does not actually work. Employees tend to follow the process initially, but soon fall behind declaring and retaining their

records. They still click the link claiming compliance, thinking to themselves they will catch up classifying all their records or otherwise complying with the policy. They fall farther and farther behind. The acknowledgments of compliance continue but they are not matched with actions. This can become a major issue during a regulatory inquiry or any litigation.

## D.    Companies Need to Adopt Modern Approach to Execution

As information management has transitioned from paper-based to digital, records management execution also needs to be updated to a more modern approach. The key to solving these challenges is taking a step back and rethinking how such programs can and should be executed.

| Traditional Paper-centric Approach | Modern Records Management and Information Governance Program |
| --- | --- |
| Media-specific approach that addresses mainly paper | Content-specific approach capable of addressing paper and especially electronic content |
| Detailed Records Retention Schedules with hundreds of categories | Compliant yet "Bigger Bucket" retention categories for easier classification |
| Each employee has their own personal store of his or her own documents. | Valuable information is shared across groups and departments |
| Documents classified for retention periods | Documents classified for a broader information governance framework including retention, data security, privacy, and collaboration |
| Many records printed out on paper as the official copy | Most documents managed in electronic format |
| Information stored in difficult to access locations, such as offsite storage | Employees and departments have easy access to their documents and data |
| Employees self-verify compliance | Regular system audits ensure policy defensibility |

Table 1. Transitioning from a paper-centric records program to a modern, digital and paper-based program.

Upgrading records management programs involves creating processes and applying technology that more easily capture and classify records and documents. There is much less emphasis on manual processes, and more emphasis on identifying records and high value information.

# II.    Getting Started

Before launching any new records retention program, three key program elements should be addressed: (1) ensure an updated and modern records retention schedule is in place; (2) engage the appropriate group of stakeholders; and (3) establish at the beginning of the program who will fund what parts.

## A.    Start with an Updated, Modern Records Retention Policy

*Note: This section summarizes important attributes of a modern schedule. A detailed overview of this is presented in ACC's companion InfoPAK: "Creating a Modern, Compliant and Easier-to-execute Records Retention Schedule."*

Updating the retention schedule to be modern, compliant and easier to execute is often one of the first steps companies take to modernize their program. But, what makes a records retention schedule modern? How is a schedule properly crafted so it works better in today's information environment? Through creating, updating and executing hundreds of records retention schedules over the years, several common attributes have been identified:

*Compliance*. Does the established retention policy and schedule follow all the rules? Immature retention policies and schedules do not consider the rules, do not provide the legal basis for retention periods and do not mandate disposition of expired information. As a schedule matures, it should address general legal and regulatory requirements, as well as any industry-specific regulations. For global companies, the most mature schedules include country-specific retention requirements. This is an elemental requirement of any schedule.

*Comprehensiveness*. Does the established schedule represent all the records in the organization? Companies often try to take short-cuts by copying from industry templates or sample schedules that purport to include all records a company in that industry should have. These "out of the box" schedules will typically describe around 80% of a company's records. They omit, however, the 20% of records that may be atypical for an individual company. Effective schedules are comprehensive and capture all – both typical and uncommon – record types.

*Media*. Does the schedule address all media formats where records might exist? The oldest (and often the least mature) schedules concentrate on only paper or a subset of the media present in the organization. Today, many records – some exclusively – exist in newer media such as email, files and even social media. Also, do not overlook physical items that might qualify as records: lab specimens at life science companies, or even shoe design samples at shoe manufacturers, are often considered record types. A more mature schedule includes all media types and will help change the mindset that a comprehensive schedule only applies to paper records.

*Clarity*. An effective policy and schedule clearly define "What is a Record?" and "What is not a Record?" Likewise, they detail for employees what records must be kept, and what should be destroyed. A policy and schedule should be both informative and clear: they should define non-

records and provide examples, while avoiding esoteric acronyms and incomplete definitions.

*Consensus*. An effective schedule should represent a consensus across the organization of what information should be saved and for how long, and what information can be deleted and when. Often, a records initiative is driven by one group within the company. For example, Legal or Compliance might be spearheading the entire project and thus, make little effort to engage other departments. This results in rogue business units who either refuse to follow the schedule or push back on its requirements. Compliance efforts are often seen as "Legal poking its nose in our business" or "encroaching on our territory" and therefore are unwelcome.

*Usability*. The most practical schedules provide a "right-sized" approach: just enough information - not too little, not too much. They use a format that is easy to read and is organized in a way that all employees can follow. A usable schedule follows a "Big Bucket" approach, with a small number of record categories; rather than a "Small Bucket" approach, with hundreds or even thousands of record line items. Additionally, a usable schedule should be concise – it doesn't list every single record or example for a particular record category.

*Integration*. A mature retention policy and schedule should be integrated into an overall Information Governance program, which includes data classification, privacy, information security, collaboration and litigation readiness. A well-designed schedule should be a useful tool in all these functions. The data classification and privacy components of the company's Information Governance program should leverage the schedule to understand what types of records exist, and if they contain confidential information, privacy or intellectual property that needs to be protected.

*Defensibility*. Retention policies and schedules must be defensible, in the event they must ever be defended in court or to regulators. Defensibility also means ensuring employees are in compliance and are actually following the policy. If there is a provision in the policy that employees cannot follow, it should be rewritten to enable compliance.

*Maintenance*. A schedule is a living, breathing document that must be periodically reviewed and updated- as new record types are created, old record types become obsolete, and legal citations change - not to mention new recordkeeping regulations that come into play. Schedules should be updated every 12 to 18 months.

Effort put into creating a better schedule with these attributes will pay off many times over during execution.

## B.    Engage Other Groups When Executing

The second key element to executing an effective program is ensuring that the right stakeholders are engaged. While the pain of poorly managed information can be particularly acute for in-house counsel, the temptation to execute these initiatives alone should be avoided. The most effective programs are composed of legal, IT, risk, compliance, security, privacy, records management and business experts. No one person or group has the expertise to address all the functional aspects of records management execution (even the records group), and collectively, a well-established team will be better positioned to get the job done.

This raises a natural question: how to get other groups to participate in records management

execution? The fear is that no other groups see this as their problem and getting participation will be difficult. Interestingly, there are huge non-legal "wins" for a well-functioning records program. The key to building participation is targeting and messaging those wins to the other stakeholders. Table 2 provides a list of relevant messages.

| Stakeholder | Sample Win and Messaging |
|---|---|
| Legal | Compliance with corporate retention and destruction policies not only for paper but also email and other electronic documents. |
| Litigation | Significantly reduced eDiscovery risks and costs; narrower legal holds; early case assessment. |
| Privacy | Compliance with EU Data Protection and US privacy requirements; easier implementation of cross border controls; easier implementation of EU "Right to Be Forgotten" requirements |
| Compliance | Better compliance and monitoring of corporate compliance requirements including FCPA; easier investigations |
| Records Management | Control, management and disposition of paper as well as electronic information |
| Risk Management | Better overall controls and reporting for IG-related risks |
| IP Management | Better collaboration among knowledge workers; easier identification and support for IP development |
| IT | Reduced data storage costs; better use of existing technologies; better and more useful IT services |
| Data Governance | Better protection of privacy; higher data quality; avoid "polluting" data lakes |
| Information Security | Easier identification of corporate confidential, as well as other sensitive information; reduced risk of data breaches |
| Facilities | Decrease in the amount of paper records storage |
| Audit | Better investigation processes; reduced risk of IP breach |

| HR | Improved collaboration among employees; better management and control against hostile workplace claims |
|---|---|
| Finance | Potentially large cost savings across multiple groups; better compliance with SOX and other regulatory requirements |
| Business Units | Increased employee productivity; better use and reuse of information; mitigated impact of employee turnover |
| Individual Employees | Saving an average of 2 to 3 hours per week, per employee, searching for information |

Table 2. Messages to engage other stakeholders to participate in records management program execution.

Perhaps the biggest "win" will derive from better employee productivity and enhanced collaboration. Employees can search and locate what they need to improve their job performance by reducing the time they spend in personal information management (saving and searching for email, files, and other information). In addition, when a project is finished, an employee leaves, or a group is disbanded, information that may otherwise be isolated on desktops or in personal repositories can still be leveraged for future business value.

## C.     The Budget Question – Who Should Pay?

Sometimes upgrading records management capabilities does require expenditures on technology, outside services, personnel and other areas. One significant roadblock to address early is which group will (and should) fund these efforts. The debate often goes around and around: IT thinks Legal should pay because Legal will benefit from the content management solution. Legal thinks IT should pay because technology is involved. Or is it the business units' responsibility? One of the risks in engaging a number of stakeholders in this discussion (and understanding their needs) is that it also creates conflicting expectations about who should pay. There have been situations where an archiving system, for example, would have saved a company literally millions of dollars, but the project was stalled due to arguments over who would fund it. The greatest risk is that no one initiates these discussions for fear that speaking up first will somehow tag them as project funders.

Experience has shown that it is best to get these issues out on the table early. Clearly, records management execution does cost money, but it also can save even more. Often when the committee highlights the risks of not having a program, senior management will fund or start funding these programs through other sources. Some organizations have been successful in attaching these initiatives to risks that have been pointed out by the board of director's audit committee. Sometimes a negotiation results in legal paying for the policy and IT paying for the technology components. When discussed, what appears to be a budgetary road block can bring a number of creative funding solutions to light.

These discussions should also include a detailed list of cost savings. An effective records program

reduces costs and risks of eDiscovery, the cost of storage (both online and on-premises) and also reduces risks and potential fines for compliance. Perhaps most significant, it can save employees hours per week in managing information. These savings are material, can be measured, and should be included in the discussion of who pays.

# D.    Determine the Right Records Program Maturity for Your Organization

| | Current Records Maturity vs. Recommended Maturity | | | | | Risk | Cost Savings |
|---|---|---|---|---|---|---|---|
| | No Capability | Limited Capability | Basic Level | Full Capability | Fully Optimized | | |
| | 🤸 | 🚲 | 🛺 | 🚗 | 🏎 | | |
| Records Policy | | | | ● | | High | Medium |
| Automated Records Governance | | | | ● | | Mimi | Medium |
| Records Processes and Procedures | | | ● | | | Minimal | Large |
| Records Communications, Training and Audit | | | | ● | | High | Medium |
| Defensible Disposition | | | | ● | | Low | Large |

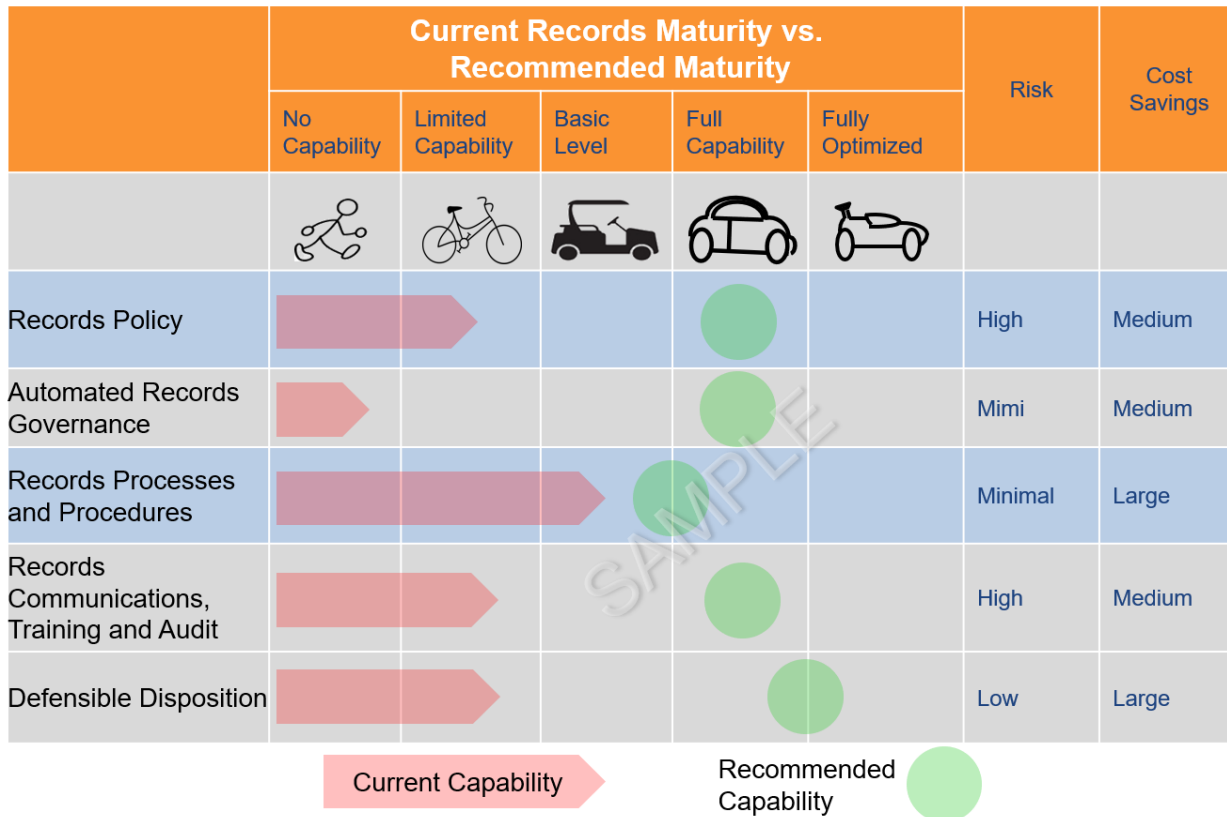Current Capability          Recommended Capability

Figure 2. Sports car, sedan or golf cart? Different organizations require different levels of maturity. Target the right level of records management maturity for your organization.

Records Management requirements vary widely across industries and even across similar companies. Different industries face different records compliance requirements, as well as the amount of records created. Size and geographical distribution also vary widely. Organizations should consciously target the appropriate level of maturity for their records program. A few organizations need a sophisticated and more expensive "sports car" level of program maturity; however, more organizations would be better off with a lower level "sedan" or even "golf cart" level program. The appropriate maturity is based on a combination of factors, including compliance requirements, litigation profile, industry practices, company size, culture and budgetary constraints. It is better to have a well-executed, albeit simpler approach than a more complex, difficult, and expensive "sports car" target that spends more time in the repair shop than being driven. Senior managers know this to be the case and savvy records professionals know that targeting the right level of maturity is key. Make a conscious choice based on these factors. When justifying a program, be sure to explain the choice and the rationale behind it.

## E.    Divide Your Execution into Phases

There is a tendency to simply start with a small component of records execution without worrying about bigger picture details. But even small initiatives run across – and may conflict with – other program elements. Organizations wanting to dispose of files and other unwanted unstructured data, for example, may start with an electronic data deletion project. However, before this can be done the records retention schedule may need to be updated. Then someone realizes that the legal hold process should be addressed so information under legal hold is not deleted. Just getting started can be difficult! Avoid creating one single, large project and getting stuck. Rather, take a big picture view and develop a roadmap that divides projects into smaller, more manageable pieces.

As the strategy is being developed, consider the timeline in which these projects can be completed. The timeline should factor in competing initiatives, funding, and the speed at which the organization can absorb change. Some smaller programs can be executed in a quarter or two. Larger and more complex organizations often have records program timelines that may span a number of years. Perhaps, most importantly, each project or small group of projects should offer an organizational "win" in which the enterprise witnesses the benefits of these types of programs. Having wins early and then throughout the process will help build momentum and buy-in, as opposed to experiencing only one win at the end of a series of long projects.

It should be noted that many organizations fear that the day they formally adopt their records retention policy and schedule they are under an obligation to fully execute it. This is neither realistic nor practical. Records retention and Information Governance programs are best rolled out in phases. After updating their policies, organizations may first address email, then files, then offsite records, for example. This "divide and conquer" approach is more doable and leverages experience from one medium (email, for example) into the next (attacking file shares). Nor is there an expectation from courts and regulators that policies be fully implemented on Day One. It's fair to point out "here's our policy and here's our roadmap". Regulators and courts want to, not only see the plan, but that it is being executed in a reasonable timeframe.  Typically, they want to see ongoing activity quarter after quarter.

# III.    Three Methods of Executing Records Retention

While there are a variety of methods for executing a records retention schedule, they generally fall into three categories: manual processes, data placement, and "true" auto-classification. Immature programs tend to depend heavily on manual processes. More mature programs better leverage both new and existing technology via a more automated data placement strategy. Most programs have some combination of manual processes and data placement.
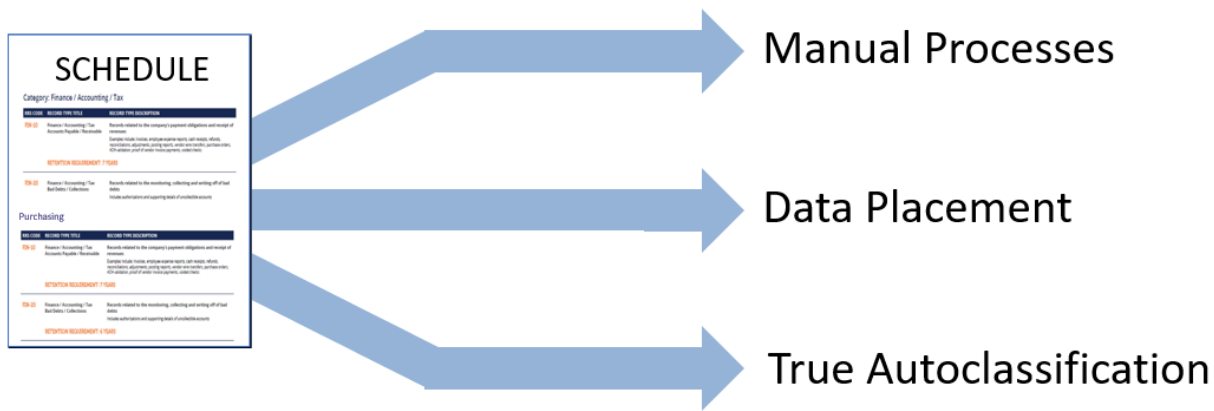
Figure 3. Three methods of executing records retention.

## A.    Manual Processes for Records Retention

The traditional approach for records classification and management is a series of manual processes in which employees sort through all documents and tag, classify, and store appropriate records. This may include looking up the retention period for any given record and then going through appropriate steps for providing metadata about the record. Common manual records retention and disposition processes include the following:

**Manual Processes for Electronic Records**

- Employees create personal filing structure on personal drive and filing documents

- Department creates informal file structure on departmental drive to file shared documents

- Individuals create personal folders on departmental drive, outside of departmental records

- If the company uses a content management system or archiving, individuals upload documents to the system – typically without any metadata or retention requirements – filing structure often loosely agreed upon by department

- Ad hoc deletion of information from personal drive, departmental drive

- Ad hoc deletion of email

- IT sends notice to department to "clean up your department drive" to free up space

- Department conducts yearly manual clean-up of shared areas (network drive, SharePoint, etc.)

- Exercise to go into file shares and delete anything older than XX Years

**Manual Processes for Paper Records**

- Paper clean-up day/week

- Ad hoc paper clean-up by employees

- Routine boxing of paper records for offsite storage older than XX Years

The problem with manual processes is that they bump up against the "five second rule." The average employee sends and receives 167 emails and more than 25 files each day. We find that employees will spend at most five seconds manually classifying a single document, and even that short period of time works out to more than an hour per week per employee to classify information. If the manual records classification and management process takes longer, even well-meaning employees will soon start blowing off the process. Manual classification worked better in a world of paper, but the sheer volume of the electronic documents that employees touch each day has led many companies to adopt an easier data placement strategy.

# B. Data Placement Strategy

A data placement strategy combines both policy with technology to make records and document classification both faster and easier. First, a number of records and document repositories are made available to employees. These could be a content management system such as OpenText, a cloud-based offering such as Microsoft's Office 365 or even a contract management application. Most organizations use a variety of repositories to hold different types of documents. Second, each repository is configured with appropriate folders to hold different record types for various departments. This folder hierarchy is called a taxonomy. Next, each folder in each repository is configured with retention rules, matching the requirements of the retention schedule. Most systems can be programmed such that when a user places a file, for example, in one of these folders, the system will retain it for a specified period (five years, for example) and then, assuming no legal holds are in place, it will automatically delete the record upon expiration of its retention period. This configuration is not limited solely to retention. The user can program the system to automatically tag each record or document for its proper data security classification, access controls, and collaboration features.

Across the enterprise there may be multiple repositories, and within each repository there may be many folders. Here's the trick, though: Users should not see every repository and every single folder – that's too complicated. Rather, these systems have the capability of showing any given user the three or four places their records and documents live. When finally set up, users only need to put their information in the right place, and these pre-configured systems will enforce all the rules.

If this sounds complicated, that's because it is. Determining which files and emails go in which repositories, and mapping the retention schedule and other policies against the folders can be quite complex. The overall goal of this approach is to move the complexity away from the user and move it into the system. It is much better that a few members of the execution team get a headache setting this up, thus making it faster, easier to execute, and simpler for everyone else.

- Easy "put it someplace" paradigm
- Few choices of locations
- Five-second rule
- Enables productivity

Please select a repository

Working Docs

Finance Records

Reference

Contracts

Figure 4. Data Placement Strategy from an employee's perspective. Record and document retention for employees should be fast, intuitive and easy.

A data placement strategy works because it's simple, fast, and easy enough that employees are much more likely to follow it. Another advantage is that it kills multiple compliance birds with a single stone; electronic repositories can be programmed not only to tag documents for retention periods but also data security classification, collaboration, access controls, and even legal holds. It moves the complexity of these compliance requirements away from individual employees and instead configures it into the system.

## C.    True Autoclassification

A third method for enforcing a records retention schedule is true autoclassification. Today, computers can be taught through an iterative process to recognize a document type by its content, and automatically classify it according to its instructions. This type of autoclassification is most often used in eDiscovery through a technology-assisted review to sort relevant documents from non-relevant ones. Theoretically, the same technology can be used to sort records from non-records. The holy grail of records management is to have a technology that automatically classifies all records in all electronic media with no user involvement.

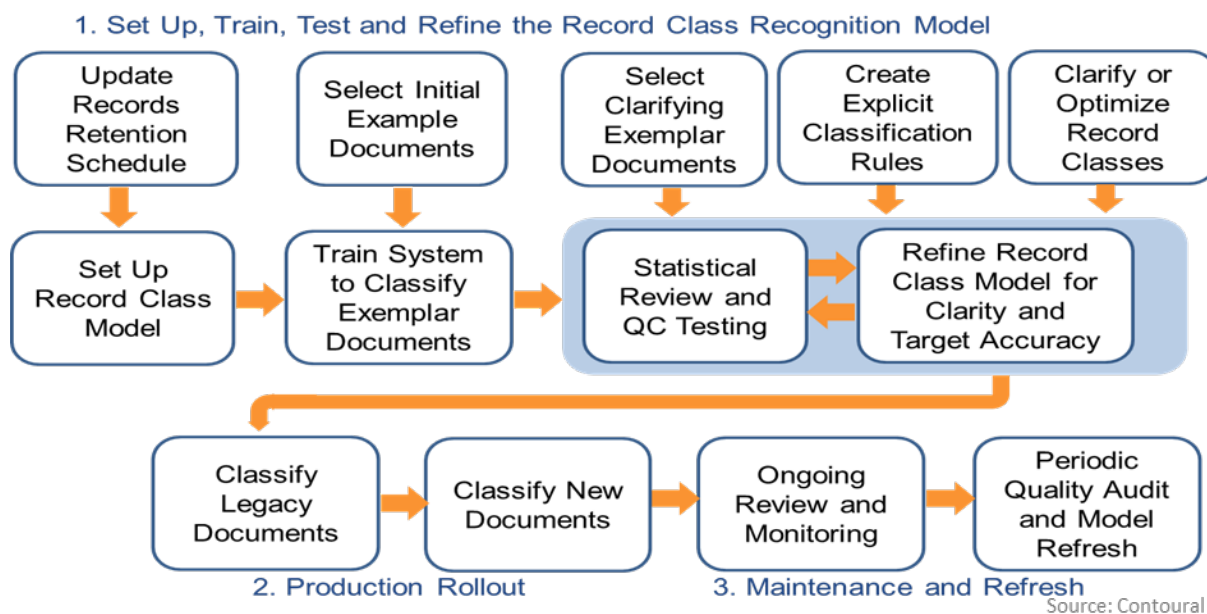**1. Set Up, Train, Test and Refine the Record Class Recognition Model**

Figure 5. Training process for a single record type. This process would have to be repeated for each record type, potentially hundreds or thousands of times.

While we believe this approach holds great promise and will drive records management in the future, these technologies are not quite ready. The typical corporation may have thousands of record types across multiple media. Records classification can be a couple of magnitudes more complex than the discovery associated with a single legal matter. Furthermore, the case law supporting record types by true autoclassification – without human involvement - is lacking.

There is one area, however, where autoclassification is being used successfully today. It can do a pretty good job identifying certain types of specific information, such as Personally Identifiable Information (PII) and Protected Health Information (PHI) for privacy or searching through a series of contracts looking for a particular term. While these true autoclassification systems are not quite ready for identifying all record types, they can do an adequate job of identifying non-record, low-value information that should be deleted. Sometimes cleaning up the *r*edundant, *o*bsolete or *t*rivial data (called ROT) can go a long way to reducing costs and risks.

## D.    Creating Records Management Processes and Procedures

Although most records should be classified and managed through routine manual processes or preferably data placement, companies will still need to set up a series of additional processes and procedures to capture, classify, manage and dispose of records and information that may be created or received outside of these every day processes. Table 3 lists typical records management processes.

| Process | Description |
| --- | --- |
| **Departing Employee Records Management Procedures** | Provides guidance for dealing with the work-related records of departing or transferred employees, to ensure that the department/function does not lose any knowledge of the departing individual, or that potentially important documents are not abandoned, deleted or otherwise lost as a result of the departure. |
| **Email/Voicemail Management Guidelines** | Recognizing that both email and voicemail can be discoverable documents in litigation or regulatory matters, these guidelines inform users on best practices for drafting, securing, and disposing of these messages. |
| **Procedures for Managing Records during Merger, Acquisition or Divestiture** | When a company merges with or acquires another company, or divests itself of a business unit, there are always records of that organization that must be considered and organized. These procedures provide guidance on how to manage company records that are either acquired with a new company or divested with a departing business. |
| **Paper Records Management Procedures** | Procedures on proper onsite management and storage of paper records, as well as procedures on how to organize, box, and send paper records to offsite storage, as well as retrieve those records when they are needed onsite. |
| **Records & Information Management Program Change Request** | Procedures for requesting revisions to, and then revising the Records Retention Policy, Records Retention Schedule, or other RIM processes and procedures. |
| **RIM Program Compliance Audit** | Procedures and audit checklists that enable a RIM organization to perform an audit each year of a business unit/department/function's compliance with company RIM policies and the Retention Schedule. Includes an audit plan, audit checklists, and remediation plan. These audits are |

| | |
|---|---|
| | important to demonstrate diligence to courts and regulators. |
| **Records Clean Up Day** | Procedures and communication plans for conducting periodic "Records Clean Up Days" within the company or individual departments/business units. |
| **Annual RIM Self-Assessment** | An assessment process administered each year to departments/ business units/functions, to determine the current state of their RIM maturity. |

Table 3. Typical records management processed and procedures for capturing and classifying records not managed through data placement.

Typically, the biggest risk with these types of processes is not lack of development, but instead that they were not applied consistently across the enterprise. This is particularly true for foreign subsidiaries, acquired entities, or applying governance and deletion to document and data sets preserved under legal holds under matters that have been adjudicated.

# IV.    Employee Behavior Change Management and Training

Once a company has its policies and processes, roadmap, tools, and technology in place, some may believe they are done. However, here is still a critical task remaining: employee behavior change management. Employees have developed habits over years and sometimes decades of storing email and files in their preferred locations such as file shares or offline email "PST" files (email that resides in a file and not on the email server) on their desktops. Often, as part of a revamped records program, they now need to store this information someplace else, typically a content management or archive system defined as part of the data placement process. Just sending an email telling employees to change typically does not work; nor does simply threatening them that they need to adapt to a new process. You can have the best policies and technologies, but if employees are not using them, all is for naught.

What *does* work is implementing a Behavior Change Management process. Change Management is a formal discipline that combines messaging, communication, training and auditing to get employees to follow a new process. When organizations effectively apply change management, even stodgy, disinterested or even recalcitrant business groups will get on board. Change Management has several different components including a message and communications strategy, training, pilot and rollout and audit.

# A.    Records Management Messaging and Communications Strategy

Core to a Change Management strategy is developing messaging that will resonate with employees. While legal and other groups may have the authority to mandate document retention and disposition, these programs are much more successful when they communicate the value of these programs to employees. Good records management not only drives compliance, but it also increases employee productivity and collaboration. In moving records from file shares and other unmanaged areas to better governed content management systems such as SharePoint, employees have better productivity tools at their disposal. Some "wins" for employees under these updated records program include:

- Have full search capability

- Keep documents organized the way you work

- Easier to share valuable content

- Ability to always locate the most current version

- Not worry about what data needs to be kept with automated disposition

- Use mobile device for certain types of information

- Valuable information is available and not lost in the clutter

- Have no worries if laptop crashes or mobile device is lost or stolen

Records management training and rollout should be based on these types of messages.
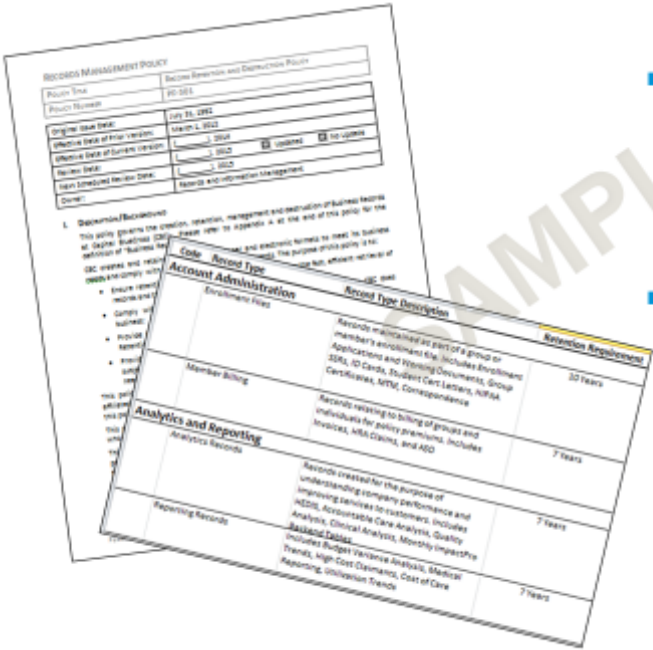
# B.    Records Management Training

Putting together an effective training program involves working with a communications and training group to understand what kind of communication plans have been successful in the past in the organization and understanding what kind of platforms are available for training. A good training plan lays out the resources and responsibilities for training. Does the organization have classrooms that can be utilized? What media should organizations use to deliver trainings? To ensure a successful change in behavior, it is key to understand the particular audiences that need to be addressed, what platforms are available to deliver the training and look at the messaging that needs to be developed.

Training can assume a variety of formats including classroom, webinars, and CBT (Computer-based Training) supplemented with training aids, guides, and a list of frequently asked questions (FAQs). Training content should reflect the overall messaging that will best resonate with employees.

| RESOURCE | RESPONSIBILITIES |
|---|---|
| Trainers | Provides in---person or online training to Executives or others, as necessary |
| Executive Sponsor (John Smith) | Present information on the Records Program implementation timelines at meetings of Executive Committee, Senior Leadership, and other required meeting |
| Core Project Team | Provide awareness building and consistent messaging to all Delivery Resources and Audience Segments |
| Business Unit Leaders / Department Leaders | Provide awareness building and overall project support to line-of-business employees and other general users |
| Records Coordinators | Provide assistance to employees throughout rollout and beyond; answer questions, build awareness |
| Intranet | System for delivering messaging to Executives and other targeted groups |
| iLearn | Provides Computer-Based Training (CBT) for Records Program |

Table 4. Sample Training Plan.

Figure 6. Sample Records Management Training

# C.    Roll-Out

A Pilot ensures that a company is ready to roll out the new process, procedure or technology to large groups or the entire enterprise, depending on the total size of the company, geographic distribution, and nature of the technology being deployed. Some changes to training materials, training, solution architecture, solution configuration (or even components), and backend support may occur based on the results of the two activities.

When implementing a new system for storing records, an organization should then plan and execute a Proof of Concept (POC) and Pilot testing periods. The POC is primarily a set of unit tests and some integrated tests, as needed, to show that the features and functionality of the technology solution are working and acceptable to the core team (typically IT and Legal/Compliance, and perhaps one business group). The Pilot testing period is primarily about the end user experience. It covers messaging, training, user productivity and behavior, online self-help tools, helpdesk support (both in IT and Legal), and the rollout process. This activity is designed to test the entire solution (policy, technology, and people), not just the technology itself. The Pilot should be long enough to ensure that the proposed approach works and is effective.

## D.    Audit

The regular examination of a user and system conformance and compliance to intended rules is important not only for ensuring that the approach is working but also for providing program defensibility in the event it is challenged. Results of ongoing audits drive regular re-examination and refresh of policies, processes, and procedures. Typical audit areas include:

- Records training

- Records compliance across various groups

- Proper classification of record types, ensuring correct retention period

- Defensible disposition processes

- Legal hold implementation

Any weaknesses identified during an audit should be remediated. Likewise, audits should be an ongoing process to ensure continued compliance.

# V.    Legacy Paper and Electronic Disposition

## A.    Defensible Disposition of Unneeded Files and Emails

The discussion thus far has focused on upgrading records management to save the right information for the right amount of time. While modern programs are good at saving the right information, they are even better at getting rid of expired records and low-value business information.
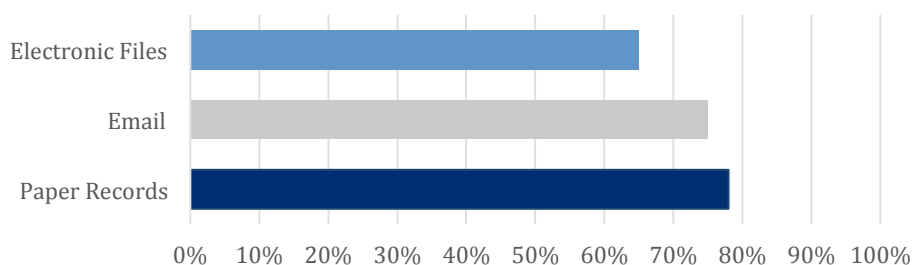
Figure 7. Disposition Targets. Average percentage of expired records and low-business-value information that can be deleted while maintaining compliance and retaining information still needed by the business.

Organizations should routinely delete unnecessary or expired information. Making disposition repeatable and consistent are the pillars of a defensible records program. We advise that companies struggling with defensible disposition start by forming a cross-functional team to examine current information management and legal response processes. Establish communication among the legal, records management and IT departments, as well as executives and end-users. Everyone must think beyond traditional processes to see the value of a defensible disposition program.

Identify the business's pain points so that you can explain – as specifically as possible – how defensible disposition and managed retention programs will yield measurable benefits. For example, consider "hard" cost savings, such as postponing storage expenditures, as well as "soft" cost savings, such as reducing the amount of time spent by employees searching for information or working through litigation holds. Having a cross-functional team in place will help you portray the program as a "win" for all stakeholders.

Leverage team resources to create an information types inventory (ITI). An ITI is a detailed and comprehensive list of all types of documents and information across the organization. It details not only record types but also privacy and other types of information, as well as what information resides in which repositories.

Covering the basics will force the team to grapple with estimating the value of the information that is held by the organization. Who needs it? Does it support ongoing operations? Are there outside rules and regulations that mandate its retention?

## B.    Cleaning Paper Record Storage

While much of the focus on Information Governance is on electronic information, many companies are still burdened with huge stores of legacy paper records. Over-retained records (and other non-record extraneous materials) result in higher cost beyond that charged by offsite storage vendors (which in itself can be extremely expensive). For example, paper records are also subject to discovery in the event of a lawsuit or request from regulators. These discovery costs can be costly but can be reduced by decreasing the amount of paper that must be searched and by scheduling regular remediation efforts that start with an accurate inventory of what is in storage.

Paper disposition often follows the same steps as disposition of electronic information: First, establish your policies to include an up-to-date records retention schedule and legal hold process. Next, identify the locations of paper records. Companies are often surprised where they find these boxes (or file cabinets, or file folders) being stored. Then, develop a repeatable, documented process for classifying these records. Everything outside of the retention policy and not under legal hold can go; inactive records that have not expired can be shipped to offsite storage. Again, put faith in your process. Paper records often have the advantage in that they are stored in a location this is not easily accessible by employees. Thus, paper records disposition often requires much less "buy in" from the employees and business units.

## C.    Why Electronic Defensible Disposition Programs Stall Out

The need to defensibly dispose of information is clear. Why is it so difficult for companies to

proceed with confidence? There are several common roadblocks:

*Fear of Spoliation* – One of the most common obstacles to defensible disposition is the concern that the disposal of business content could be misconstrued as spoliation in certain situations. A lack of consistency or confidence in legal hold processes may cause the legal department to suspend deletion activities.

*Uncertainty about Records Retention Requirements* – Even when a retention schedule is in place, it may be misunderstood or simply not followed. As a result, individuals may carelessly delete information that should be saved.

*Lack of Agreement on the Business Value of Records and Documents* – Some records retention schedules reflect only the minimum legal and regulatory retention requirements for records. But they may not take into account additional operational or business requirements for both record and non-record content, which may result in longer retention requirements than the legal or regulatory minimums.

*Employee Resistance* – Employee resistance is one of the biggest obstacles to implementing a defensible disposition program. In some cases, employees have little or no training or guidance on the rules and procedures for proper document classification. This can create a lack of confidence on behalf of the employee – "I might get in trouble if I misclassify this document and it turns out to be a business record."

*Not Knowing Where Information Resides* - By not having a complete inventory of where business content lives and what applications generate or consume it, information is effectively outside of the control of the organization. This makes it difficult if not impossible to apply consistent disposition policies.

Anticipating these pitfalls will greatly reduce the likelihood of disposition efforts stalling out.

# VI.    Addressing Offsite Records

Despite spending billions on office automation technology to facilitate the adoption of digital documents, organizations still create and store a large but decreasing amount of paper. Even with paper storage volumes decreasing, offsite paper storage costs continue to grow and vendors continue to see their revenues increase at nearly 10% per year with profits growing even faster. Successful in squeezing more fees out of less paper storage through complicated storage contracts, these companies are successful at extracting high fees from a declining market. Punitive removal fees make switching vendors difficult. Making matters worse, poor, error-prone billing practices and complex invoices that are difficult to reconcile with a contract also add to these increases. At a time when most companies expect to spend less on paper storage, they are often spending more.

## A.    Top Three Reasons Offsite Storage Costs Are Increasing

*Shift to Ancillary Fees* – While in many cases the average monthly storage fee per box is decreasing to support revenues, vendors have shifted to ancillary administrative fees. Similar to how airlines now make much of their profit on baggage and other extra fees, the record storage companies have followed the same game plan. For example, every time a vendor touches a box for inventory, retrieval, or destruction there are multiple fees and usage transactions. These fees are often deeply hidden in contract language, and while at first glance may appear somewhat immaterial, in reality, they can comprise the bulk of a monthly bill. Today the actual amount spent on offsite record storage can represent as little as 20% of total fees. The other 80% represent a variety of other charges.

*Vendor-favored Billing Inaccuracies* – Obsolete billing systems have created an unforeseen windfall for vendors. Reviews of customer invoices have uncovered steep billing error rates, with more than 50% of typical invoices containing errors, resulting in overcharges of up to 35%.

*Stranded Boxes* – Most organizations discover that 40% (or more) of their paper documents are either redundant, obsolete or trivial (in that those records need not be retained) or have been kept past their retention schedule date.  In short, companies pay offsite vendors millions of dollars per month for content that shouldn't have been stored in the first place.

## B.    Reducing Ongoing Storage Costs

For many, burdensome storage costs coupled with punitive box removal fees feel like an unavoidable tax. However, increasingly, organizations are taking a step back and developing strategies both for recovering overbilling, and also reducing long-term record storage costs and volumes:

*Reducing Costs with Requirements-based Smart Contract Negotiations* – The contract and billing complexities put companies at a disadvantage when it comes to renegotiating contracts and, by extension, their actual costs. Examples of these are almost endless, but Table 5 lists some actual storage costs, billing related fees and management fees. Companies that understand exactly how much they spend on which areas are in a position to negotiate better contracts. This can result in savings ranging from 24% to 45%.

Table 5. Examples of ancillary fees found in contracts

| Storage Costs | Billing Fees | Management Fees |
|---|---|---|
| Box retrieval/access | Fuel surcharges | Online access |
| Box removal | Itemized invoice | Box inventory list management |
| Permanent box removal (e.g., if moving to a new facility or destroying old records) | Invoice by department | Onsite room use |
| Delivery | Price increases | |
| Box size variations applied to the above | Minimum fee | |
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| Delivery | Price increases | |
| Box size variations applied to the above | Minimum fee | |

***Recovering Over billings -*** Detecting invoice error can be a daunting task requiring specialized skills and, sometimes, even a legal background as contracts need to be matched to invoices, which are multi-page and contain itemized details. The business function reviewing invoices needs detailed knowledge of contract provisions to determine the accuracy of charges. Note that box management activity is billed in arrears and storage is billed in advance. Both are on the same invoice.

***Reducing Costs and Risks with Offsite Records Remediation –*** Ultimately, the biggest savings occur when records are destroyed in accordance with records management policies.

Over-retained records (and other non-record extraneous materials) result in higher costs beyond just those with the offsite vendors. An effective records remediation program can reduce those costs and risks. The key is making sure that the records are defensibly deleted using a formal program.  Paper is not going away any time soon which means that offsite paper storage will remain an ongoing expense. Smart companies will analyze their current contracts with offsite vendors in order to balance and reduce future costs. Many companies will find they have overpaid and have an opportunity to recover fees inappropriately billed. Expert advice from outside independent consultants can play a critical role both in identifying recoverable costs and in negotiating more favorable contracts.

# VII.     Upgrading Your Records Program to Information Governance

## A.     What Is Information Governance?

Information Governance is a formal discipline that takes previously disparate activities around records management, eDiscovery, privacy, security, defensible disposition and employee productivity into comprehensive activities that allow organizations to better manage, retain, secure, make available and dispose of information through cross-functional initiatives. It is becoming increasingly difficult to be effective in any one of these areas without taking an Information Governance bigger picture view. And, through successful execution of these types of projects companies are reducing costs, lowering risk in litigation, increasing compliance, and perhaps most importantly, making their employees more productive.

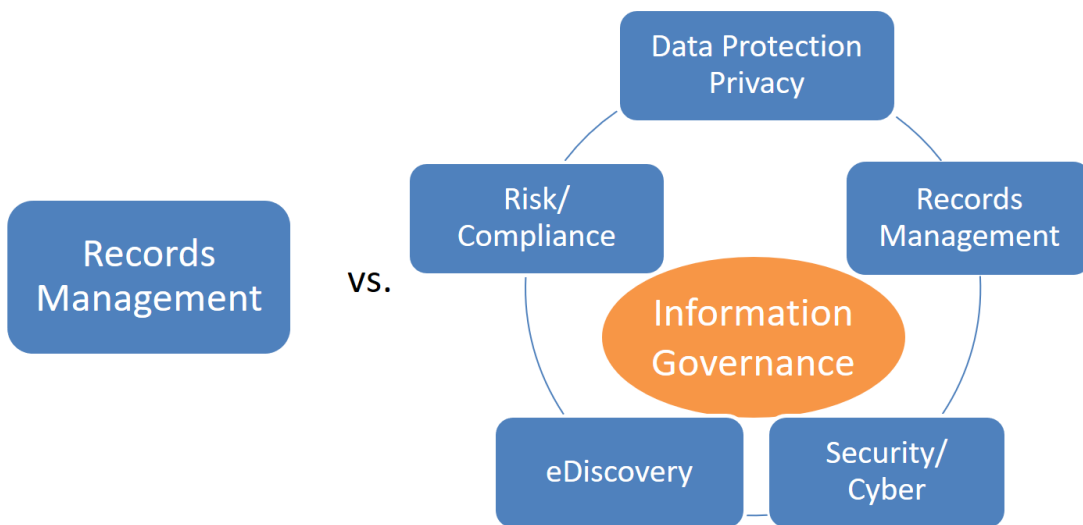## B.     Upgrading to Information Governance



Figure 8. Records Management Function vs. Information Governance Organization

Companies are both updating and modernizing their records management programs, and also combining them with previously siloed eDiscovery, privacy, and other complinace programs into a more comprehensive and easier-to-execute Information Governance program. Traditionally, these and other compliance programs have been approached in a silo-like fashion. However, companies increasingly are realizing the interconnections between these programs. For example, effective defensible disposition of unneeded data and documents driven by records management lowers risks and cost of eDiscovery. Effective privacy compliance requires identification and classification of records. A comprehensive Information Governance program seeks to consolidate and coordinate control of data and documents for retention, business use, access, and disposition.

# VIII.    Final Words

When most records were created and stored on paper, records management was a relatively straightforward process. Then the world changed and information switched from paper to electronic media. In-house counsel may ask themselves: how do we know we have it right? They start looking for the *perfect* policy, the *perfect* process, and the *perfect* tool. Organizations often think "We are not ready to start because we're not quite there yet." In the meantime, documents and data accumulate, requirements become stricter, and risks increase. Perfect becomes the enemy of "good enough." Records Management and Information Governance are inherently imperfect processes. Fortunately, the courts and regulators do not expect perfection. Rather, they expect reasonable good faith efforts. In your policies, declare what will be done. Execute those policies with processes, technology, and training. Demonstrate that policies are being complied with thorough metrics and audits. Show that a plan has been developed. Show that the plan is being executed. Audit the results and remediate any shortfalls. Not perfect? That is OK. No one expects it to be perfect. Start with good and just keep moving forward.

# IX.    About Contoural, Inc.

Contoural is the largest independent provider of strategic Information Governance consulting services. Contoural works with more than 30 percent of the Fortune 500 and numerous mid-sized and small companies and provide services across the globe. Contoural is a subject matter expert in Information Governance, including traditional records and information management, litigation preparedness/regulatory inquiry, information privacy and the control of sensitive information, combining the understanding of business, legal and compliance objectives, along with operational and infrastructure thresholds, to develop and execute programs that are appropriately sized, practical and "real-world." Contoural is a sponsor of ACC's Information Governance Network, and a sponsor of the ACC Legal Operations Committee Records Management and Information Governance Toolkit.

As an independent services provider, Contoural sells no products, takes no referral fees from product vendors, nor provides any "reactive" eDiscovery, document review or document storage/warehousing services. This independence allows us to give our clients unbiased and impartial advice while serving as a trusted advisor.

Contoural services include:

- Assessment and Roadmap Development

- Records Retention Policy and Schedule Creation and Update

- Records Management Process and Procedure Development

- Data Security Classification

- Litigation Readiness

- Data Placement

- Technology Selection

- Taxonomy and File Plan Development

- Behavior Change Management and Training

- Legacy Document and Data Remediation

- Information Governance Organizational Development

- Offsite Record Storage Audit, Contract Negotiation and Cost Recovery

- California Consumer Privacy Act Program Development

- GDPR Program Development

With an average of 24 years of experience, Contoural consultants include former litigators, former in-house counsel, records managers, compliance experts, eDiscovery specialists, privacy professionals, technology experts, former CIOs, training and behavioral Change Management specialists, industry technology analysts, among others. Many hold JD degrees; most are members of ARMA International, IAPP or AIIM, and most have in-depth experience in one or more areas of technology that can help enhance, and potentially automate, the implementation of policies, retention schedules and processes for records management and litigation readiness. In addition, Contoural consultants remain active in the legal community, including the American Bar Association and various State Bar Associations.

# X.   About the Author

Mark Diamond, President, CEO and Founder, Contoural, Inc.

*Note: The content in this InfoPAK reflects the collective insight, experience, recommendations, advice, and wisdom of many Contoural consultants and other team members. While Mark is listed as the author, any credit for the quality of the content should be bestowed on this larger team. Any shortcomings belong exclusively to Mark.*

Mark Diamond is an industry thought leader in information governance, encompassing records and information management, litigation readiness, control of privacy and other sensitive information, defensible disposition, and employee collaboration and productivity. Mark is a frequent industry speaker, presenting at numerous Legal and IT industry conferences. Additionally, Mark delivers more than 50 onsite Information Governance seminars to internal corporate audiences each year.

Mark is the founder, President & CEO of Contoural, Inc. Previously, Mark was co-founder of Veritas' (OpenVision) Professional Services group, founder and General Manager, Worldwide Professional Services for Legato Systems, Vice President of Worldwide Professional Services at RightWorks, and he has worked as a management consultant. He also served as Chair of the Storage Networking Industry Association customer advisory board on data security. He sits on the board of advisors for high technology companies.

He has a Bachelor's degree in Computer Science from the University of California San Diego. Mark is former President of the UC San Diego Alumni Association, and served as a Trustee of the university's foundation.

Mark welcomes any questions and comments regarding this InfoPAK. He can be reached at [mdiamond@contoural.com](mailto:mdiamond@contoural.com) and for more information, on Contoural's site at [http://www.contoural.com/about-management_team.php](http://www.contoural.com/about-management_team.php).

# XI. Additional Resource

## A. ACC InfoPAKs

"Information Governance Primer for In-house Counsel," (2016), *available at* http://www.acc.com/legalresources/resource.cfm?show=1439795

"Creating a Modern, Compliant, and Easier-to-Execute Records Retention Schedule," (2017), *available at* https://www.acc.com/legalresources/resource.cfm?show=1479868

## B. ACC Docket Articles

Annie Drew and Mark Diamond, "Building a Business Case for Information Governance," *ACC Docket* 32, no. 8 (Oct. 2014): 26-40, *available at* http://www.acc.com/legalresources/resource.cfm?show=1377595

## C. ACC Legal Quick Hits

"Preventing Employees From Hoarding Documents," *Legal Quick Hit,* (2018), *available at* https://acc.inreachce.com/Details/Information/FAA4D598-2313-4693-B408-2E5C09CB94C3

"How to Hire, Train, Develop Objectives for, and Supervise a Records Management and Information Governance Team," *Legal Quick Hit,* (2017), *available at* http://webcasts.acc.com/detail.php?id=426069&go=1&_ga=2.84143321.1529715264.1513276418-432379149.1453311770

"How to Delete A Lot of Email and Files Quickly (and Defensibly)," *Legal Quick Hit,* (2016), *available at* http://webcasts.acc.com/detail.php?id=812093&go=1&_ga=2.83922137.1529715264.1513276418-432379149.1453311770

## D. ACC – Webcasts

"First Year Student Orientation: Launching or Updating Your Records Management Program," *Webcast,* (2017), *available at* http://webcasts.acc.com/detail.php?id=659596&go=1&_ga=2.84143321.1529715264.1513276418-432379149.1453311770

"Information Governance: Getting a Program Started," *Webcast,* (2017), *available at* http://webcasts.acc.com/detail.php?id=550935&go=1&_ga=2.84143321.1529715264.1513276418-432379149.1453311770

"Creating an Information Governance Project Plan," *Webcast,* (2016), *available at* http://webcasts.acc.com/detail.php?id=740113&go=1&_ga=2.83922137.1529715264.1513276418-432379149.1453311770

## E. ACC – Information Governance Network Resources

"Employee Behavior Change Management Programs for Information Governance," *Quick Counsel,* (2017), *available at* http://www.acc.com/legalresources/quickcounsel/employee-behavior-change-management.cfm

"Creating a Data Classification Standard," *Sample Form & Policy,* (2017), *available at* http://www.acc.com/legalresources/resource.cfm?show=1460255

"Data Map Design Strategies," *Sample Form &*

*Policy*, (2017), *available at* http://www.acc.com/legalresources/resource.cfm?show=1454429

"Data Map Population Strategies," *Sample Form & Policy,* (2017), *available at* http://www.acc.com/legalresources/resource.cfm?show=1454435

"Data Map Use Cases," *Sample Form & Policy,* (2017), *available at* http://www.acc.com/legalresources/resource.cfm?show=1454447

"Creating Discovery Response Processes," *Article*, (2017), *available at* http://www.acc.com/legalresources/resource.cfm?show=1454480

"Defining Effective Legal Hold Processes," *Article,* (2017), *available at* http://www.acc.com/legalresources/resource.cfm?show=1454486

## F.     Contoural Whitepapers

Reducing Your Offsite Storage Risk and Cost," *White Paper,* (2018), *available at* www.contoural.com

 "Defensible Disposition: Real-world Strategies for Actually Pushing the Delete Button" *White Paper,* (2014), *available at* http://www.contoural.com/whitepaper_summary.php?id=31

"Metrics Based Information Governance," *White Paper,* (2013), *available at* http://www.contoural.com/whitepaper_summary.php?id=28

"Stop Hoarding Electronic Documents," *White Paper,* (2012), *available at* http://www.contoural.com/whitepaper_summary.php?id=32

"Email Classification Strategies That Work," *White Paper,* (2012), *available at*

http://www.contoural.com/whitepaper_summary.php?id=29

"Seven Essential Storage Strategies," *White Paper*, (2015), *available at* http://www.contoural.com/whitepaper_summary.php?id=1

## G.     Other Articles

Mary Butler, "Panel: launching Information governance harder than Landing on the Moon," *The Journal of AHIMA*, (2015), *available at* http://journal.ahima.org/2015/05/18/panel-launching-information-governance-harder-than-landing-on-the-moon/