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# Keeping the Skeletons in Your Closet: Creating and Managing an Effective Records Management Program



**Kathleen Pakenham**  
Partner

**Kathleen Pakenham**  
*White & Case*

Once a back office function, records management has risen to a CEO-level issue. In the wake of accounting scandals and the passage of the Sarbanes-Oxley Act of 2002, companies have focused their attention and their dollars on revising or creating records management programs.<sup>1</sup> Often, these programs center on when a company may destroy records. One office supply company reports seventy percent growth during a single year in sales of paper shredders to commercial customers.<sup>2</sup>

A records management program serves many purposes in addition to keeping a company off the front page of the newspaper in the latest corporate scandal. A program should allow a company to keep the records it needs, such as personnel records, insurance policies, deeds and bank records, and to efficiently locate those records when needed. The program also should assist the company with compliance with regulatory retention requirements. A broad spectrum of rules and regulations impose records retention requirements in areas ranging from human resources, accounting, tax, banking, privacy, securities, and the environment, to list just a few. A program that is well implemented and followed

will allow a company to more efficiently respond to requests for information, whether in the form of a governmental investigation into accounting practices or civil litigation in an employment dispute. Finally, a records management program can reduce costs for paper and electronic records storage by allowing the company periodically to destroy records that are no longer needed.

This article highlights some important considerations in implementing a records management program that not only purges unnecessary records, but also retains records necessary for compliance and effective business management in a way that mitigates risk.

## Record Creation Policies and Procedures

An often neglected but crucial part of creating an effective records management program is developing record *creation* policies and procedures. A record creation policy should consider what types of records employees should be creating as part of those duties and the form in which those records should be made. The purpose of a records creation program is

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two fold: first, to ensure that the company is creating the kinds of records it needs to function and manage its risk and second, to make certain that records are created in a way that is most efficient. Such a policy also should address issues such as appropriate distribution of information (whether copies of documents or e-mail cc's), labeling communications as privileged where appropriate, and storage of sensitive information. A records creation policy can be drafted in conjunction with a company's computer usage policy to prohibit profanity, use of company e-mail for personal purposes and the like.<sup>3</sup> In addition, in the course of developing a record creation policy, company will develop an index of the types of documents it creates, which will form the basis for the records maintenance and destructions portions of the records management program.

### Need what you keep and keep what you need

The first step in designing any records retention program involves a company determining what records it creates and maintains and whether it is required to or should retain those records. This is not a one-size-fits-all solution. One of the simplest and most effective ways to accomplish this is for each business unit to break down its records into categories and then, in coordination with business unit management, legal, IT, and the employees who create and use the records, to determine how the records are used in operation. Counsel can advise the company on any legal requirements for retaining those records. Armed with that advice, the company can then determine the appropriate retention period for each category, which may be the same as or longer than legally required retention periods. Using this information, a records retention schedule can be prepared showing the categories of documents to be maintained and the period for which they must be kept.

Considering the number of laws and regulations that must be considered (federal, state, local, administrative and international), it is imperative that the retention schedule be reviewed and revised periodically. Most commentators recommend

reviewing the schedule at least every two to three years. For companies in heavily regulated industries, more frequent reviews are advisable.

### Coordinate with other policies and procedures

Most large companies have a multitude of policies and procedures. Before rolling out a records management program, it is wise to review existing policies and procedures to determine whether there is any overlap. If any other company policies deal with records management issues (common suspects include IT, tax, accounting and human resources) they should not conflict with the records management program and should expressly refer employees to the company-wide records management program.

### Write for your audience

When preparing a records management program, a company should be mindful of the various audiences for which it is writing. Primarily, a records management program is for the use of company employees at all levels of the company. To increase the likelihood that an employee will read, understand and follow the program, the program must be written in terms that all employees can comprehend and execute. This means avoiding jargon and legalese and using the terms employees commonly use to refer to company records.

A records management program also is written for other audiences as well—regulators, litigants and judges—and must take their views into account. Regulators, like the Securities Exchange Commission, often ask for copies of records retention programs during routine examinations. For example, the Internal Revenue Service commonly asks for a company's records retention policy during an audit. Regulators ask for records retention policies in order to confirm that certain records are required to be maintained under the policy, and to determine whether records the agency might expect the company to have were destroyed in accordance with the policy. When writing for regulators, therefore, the policy should

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acknowledge certain regulatory requirements and describe how those rules should be followed. As an example, a records maintenance program manual for an accounting firm might say something like:

SEC rules require that we retain for seven years records relevant to the audits or reviews of issuers' and registered investment companies' financial statements. This includes records like workpapers and other documents that form the basis of the audit or review, and memoranda, correspondence, communications, other documents, and records (including electronic records), which are created, sent or received in connection with the audit or review, and contain conclusions, opinions, analyses, or financial data related to the audit or review. We read this rule broadly to encompass most documents we create or receive in connection with such audits or reviews. Accordingly, all such documents shall be maintained as follows [insert description].

Such language affirmatively acknowledges the agency's rules and sets forth the company's policy to comply with those rules.

Record management programs also must be written to consider that they likely will be discoverable in the event of civil litigation. In the current legal climate, litigants view document productions with suspicion, often paying more attention to what has been left out of the production than to what has been produced. Moreover, a raft of case law illustrates that litigants will be quick to claim spoliation of evidence if it is determined that potentially discoverable materials have been destroyed. Sanctions for spoliation can range from monetary penalties to granting an opponent an adverse inference charge at trial<sup>4</sup> to a finding of default.<sup>5</sup> With that in mind, a record management program must be careful not to suggest that records should be destroyed (or that employees should avoid creating certain records) out of litigation concerns. The policy also should not suggest that certain categories of documents always exist if that is not in fact the case. For example, if the policy requires maintenance of certain management approvals, the policy should be careful not to imply that management approval is always required.

### Put someone in charge

It might seem obvious to put someone in charge of implementing and managing a program, but surprisingly this often is not done. Officially appointing someone as the head of the records management program serves several purposes. First, it demonstrates management's commitment to the program. To this end, the appointee should be someone in a management or legal function with authority to act. Second, a point person (or persons, depending on the size of the company)<sup>6</sup> provides a central source to answer questions about the policy, whether those questions are from employees, regulators or civil litigants. Third, a central source should provide consistent responses to inquiries, which will assist in uniform application of the program. Fourth, based on inquiries, the records program manager may be able to modify the program to avoid recurring questions and adapt the program to employee practices. Finally, over time the use of a central source should allow the company to gain institutional knowledge about how the program operates in practice and whether it is meeting the company's business and risk management needs.

### Provide access and instruction to employees

Therefore, it is imperative that employees are aware of and instructed on the records management program. There are several keys to improving implementation of the program. Simply handing out a manual to employees is not sufficient; a training program should be institutionalized. On roll out of a program, all employees with responsibility for creating and maintaining records should be trained, with periodic refresher courses and instruction for new employees. Training should cover the reasons for implementing the policy, underscore management's commitment to the program, and emphasize the need for compliance. Employees should be instructed on guidelines for creation, retention, labeling, storage and destruction of records and be provided with an opportunity to ask questions. In addition, employees should be educated on repercussions for themselves and the company for noncompliance. To prove compliance, the company should maintain

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attendance records demonstrating employee training. Finally, the company should provide employee access to the written program, for example, through a company-wide intranet. Any intranet site should include the written policies and procedures (including updates) as well as contact information for persons in charge of the program.

### Follow and audit compliance with the program

A policy, no matter how well prepared, that is not followed is not only useless but also is a litigation hazard. Arthur Andersen's record retention policy has never been criticized, but its compliance with its own policy led to the firm's indictment. In designing programs, I have found that it is best to involve the employees who will be following the program, especially those in information technology functions. This allows "real life" considerations to be integrated into the policy because employees will be able to tell the drafter whether a planned procedure can work in practice. A program that is not unduly onerous and that follows the regular flow of employees' work is more likely to be followed.

Periodic reminders to employees to label and file records also are useful in encouraging compliance. In addition, some companies declare annual "document retention holidays," during which employees take a day from their usual work to organize paper and electronic files. During these "holidays" someone from the legal department and/or the business unit record management coordinator are on hand to answer questions.

In today's environment it almost goes without saying that compliance with a records management program must be audited. Periodic audits allow the company to determine whether the program is working or needs to be modified. It also is an opportunity for management to remind employees of their obligations under the program and the importance of following the program. It is absolutely critical that all instances of noncompliance be addressed. Depending on the nature of the noncompliance, it may be dealt with through additional training, reprimand, suspension, termination, or other appropriate sanctions (including referral to law enforcement). Employees should

be informed periodically of any penalties related to noncompliance, as well as high profile cases related to corporate recordkeeping.

### Conclusion

A well thought out and implemented records management program serves many purposes. It can be a vehicle for management to emphasize its dedication to regulatory compliance as well as a means to ensure preservation of and ease of access to important business records. It can provide a safe harbor for destruction of records that have outlived their usefulness, and save money and precious storage space. A few simple considerations, such as the ones discussed above, will assist a company in creating a program that meets its business needs, while protecting itself in litigation and government investigations.

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*Kathleen Pakenham, a partner in our New York office, is an experienced litigator in matters involving complex questions of federal tax law and procedure. She also has extensive experience representing clients involved in all types of government and internal investigations, as well as related trial and appellate matters.*

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1. While records management programs commonly are referred to as "document retention policies," a modern program must account not only for paper documents (which now account for the minority of business records), but also electronic records such as emails and voicemails.
2. Greg Melville, *The Big Cleanup: Does your company follow the rules about e-mail deletion? Document storage? Paper shredding? Are you sure?*, *The Wall Street Journal* at R3 (March 29, 2004).
3. A note of caution here – a company should only institute a record creation policy if it will be enforced.
4. See, e.g., *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).
5. See, e.g., *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D. Fla. 1984).
6. Companies commonly appoint a committee comprised of one member of each business unit, headed by a member of the General Counsel's office. For ease of discussion I refer to a single point person.