

A Practical Approach

Ten-step framework for effective policy management and in-house eDiscovery

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The volume of electronically stored information (“ESI”) is exploding. Most organizations are saving essentially all of their information, duplicating it, poorly managing it, failing to leverage it, and then they get slammed when the subpoena is served.

The Federal Rules of Civil Procedure, as revised effective December 1, 2006 to address eDiscovery (the “Rules”), have increased the obligations for organizations to find information, preserve it and to be able to validate their information management processes. Indeed, the costs and risks of eDiscovery can be so great, that it is driving organizations to do what they should have been doing all along—classify and get some policy management control over their information, and to put in place strategies and tools for more efficient in-house collection.

Traditional methods of records management involving the review of each “document” and the comparison of it against a long manual of retention periods to determine its policy cannot be the only

strategy applied to electronic information. There’s simply too much content and it is too dynamic. It is not uncommon for a large organization to manage

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millions of new e-mails, IMs, and other files *every day*. The loss of productivity that would occur if each employee had to sift through this mountain of content is unacceptable and, in fact, it doesn’t happen. With all the risk, complexity, and competing priorities, for many organizations, it is hard to even know where to begin.

Below is a ten-step framework to help organizations get started “bridging the gap” between legal and IT, and establishing repeatable processes for records management and practical policies and tools for in-house eDiscovery.

Getting started with a practical methodology

1. Act cross-functionally.

The costs and risks of e-Discovery and electronic records retention cut across functional lines. Three primary constituencies—legal/compliance/RM (collectively “Legal”), IT, and the lines of business—are trying to address essentially the same problems associated with the unmanaged explosion of information, each from their own perspectives. Legal wants processes and tools that ensure discoverable information can be produced and preserved efficiently for eDiscovery, and that policies can be applied and enforced, including for the defensible disposition of content when it no longer has value. However, Legal doesn’t always understand technology and how the information is really managed. IT wants to improve efficiencies and lower the costs of information management, but, typically, IT wants Legal to set policy, as IT may not fully understand the legal requirements that the technology must address. Line-of-business employees want information, unlimited storage, improved productivity, and they don’t want to be bothered with cumbersome compliance activities. These three constituencies may look at the world in different ways, but the common goal is better information management. Therefore, it is important for companies to establish a small cross-functional team representing these constituencies to foster communication and drive decision-making by taking a risk-adjusted approach and establishing priorities.

2. Manage risks. Don’t seek perfection.

The “perfect” retention policy is too complex, time-consuming, and costly to implement. A better approach is to honestly assess your organization’s key gaps, establish priorities based on where the most risk is being incurred and the most money is being wasted, and start with a realistic plan to close those gaps.

3. Assess the impact on employees.

It is important to understand the impact any proposed retention policy, process, or technology will have on employees. If a new policy requires employees to change the way they do their jobs, they will often try to find a way around it, especially if it does not deliver business efficiency. Don’t cause good employees to do dysfunctional things. As you assess alternatives, recognize that changing employee behavior is difficult, so the potential benefits of any compliance initiative should be weighed against the costs and impacts of enforcing the changes.

4. Understand information assets from the top down.

A critical early step to gaining more proactive eDiscovery and electronic records retention capabilities is an inventory or “source map” to understand the types of information your organization creates and where it resides. Rather than trying to understand every document type, focus on the most significant workflows and the applications that support them. Often, IT has already documented some of this with application lists and systems inventories. This top-down approach will help you get a grasp of the information assets in your organization and is valuable in helping identify and focusing on priority content.

5. Stick to priorities. Don’t boil the ocean.

Once you have conducted diligence from the top down, focus on priority sources of content, meaning the content that has the greatest business value and content that causes the most pain because of the costs to manage it and the risks associated with having to discover it. Information that is part of critical workflows, subject to specific statutory obligations like Sarbanes, HIPPA, etc., or that is difficult to manage (particularly unstructured content and e-mail) is often at the top of the list.

6. Use specialized resources when appropriate.

Specialized, experienced consulting resources can often provide the objectivity needed to accurately assess priorities as well as help bridge the communication gap between Legal and IT. Make sure to use consultants who understand both the compliance and IT sides of the equation and who can deliver practical solutions.

7. Establish simple, reasonable, and repeatable policies.

Companies with complex paper-focused retention schedules should consider dramatically reducing the number of retention periods to apply to electronic content. One approach is to apply an initial classification to information to get it into general categories of importance—high, medium, and low. For most organizations, the greatest volumes of content are in the low-value category. The strategy there should be to get that content into a “big bucket,” not spend a lot of effort classifying it, and set a reasonable policy that the organization will, in fact, enforce. (Organizations often aspire to perfect policies, but then in reality don’t enforce them. For many, a good strategy is to set the retention policies longer, but then actually enforce them. In other words, set practical risk-adjusted policies that are somewhere between the extremes of “save everything” and “delete immediately.”) With respect to the lower volumes of high-value content, greater effort can be applied to establish more granular “little bucket” policies. The goal is to have a set of policies that are actually enforced, including so that information is deleted in an assured and defensible way at the end of the chosen retention period.

With respect to eDiscovery, the key is to manage the largest risk; namely, the risk of being held responsible for deleting information in a bad faith effort to destroy evidence. (This is known as spoliation.) Because it is impossible to completely avoid the risk of inadvertent destruction of information, there is a need to have a good process in place, so that good faith can later be established. By following repeatable cross-functional business processes for electronic records retention and eDiscovery, an organization can not only drive efficiency, but also reduce risk in the event of a dispute because the company can demonstrate that its processes are reasonable, consistent, and not intended to hinder the legal process.

8. Evaluate technology alternatives using IT and legal ROIs.

The costs and risks of eDiscovery can be dramatic, with the average cost of a case being in excess of \$1 million. In a reactive model, companies wildly over-preserve content and then pay third parties to collect huge volumes of information by media type, such as by mirroring drives and collecting content from backup tapes. The more information collected, preserved, and sent to outside attorneys for review, the greater the cost to the organization. However, the vast inefficiencies of the existing model creates the opportunity for a compelling business case justification and return on investment (“ROI”) for investments in better processes and proactive information management and in-house data collections. For the IT team, the ROI is largely driven by more efficient information management from de-duplication, tiered storage, archive, and content management solutions. The legal ROI results from the automation of in-house information collections (allowing for the automated in-house collection of less content), and the enforcement of retention and deletion policies.

9. Implement an enterprise ILM strategy

An information lifecycle management (ILM) strategy is designed to manage information based on its changing value over time. By following the principles of ILM, companies are able to use the same IT infrastructure that provides for proactive information management to also make the eDiscovery process far more efficient. Information that sits on the proper tier of storage, in a managed repository, and that is de-duplicated is far easier to discover than unmanaged information. ILM technologies like federated search allow a company to conduct automated, focused and efficient data collections and avoid a costly “save everything” approach.

10. Continuous improvement

Conduct regular reviews, audits, training, and cross-functional oversight to refine processes, and apply technology improvements when they make sense.

Methodology and ILM applied in digestible pieces will help reduce legal risks and costs

The challenges and complexities of electronic records management and eDiscovery compliance can seem massive, but with cross-functional communication, prioritization, risk management, repeatable processes, and an enterprise ILM strategy broken into digestible pieces, organizations can tackle the core issue of proactive information management and reduce costs and risks.

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and domain-specific consulting and professional services expertise to help organizations meet electronic records management and eDiscovery compliance challenges at their core—with proactive information management and in-house eDiscovery. EMC's products, services, and solutions have been proven to help companies of all sizes manage, use, protect, and share their information assets more efficiently, cost-effectively, and in a compliant manner.



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