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NIXON PEABODY
ATTORNEYS AT LAW

Joint Workshop for Corporate Counsel and IT Executives

Considerations for Bringing New Systems Online, Retiring Old Ones, and Expiring Their Data

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The Retention and Preservation Community

Agenda

- **The Conundrum**
- **The Legal Point of View:**
 - What's Required
 - Practical Issues
 - During Active Litigation
 - What's Desired
- **The Operational Point of View:**
 - The Opportunity
 - There is Only One Day One
 - Collaborating with IT and the Business

The Conundrum

- **If you have data, it may be subject to holds and discovery**
 - There is always litigation in large companies – no such thing as “day 1” in litigation department!
- **Once data builds up, it's difficult to know what you've got ... so you keep everything to make sure you're covered**
- **If volume of data and volume of litigation are high, it's more likely that the ball will get dropped somewhere between legal and IT!**
 - Data will get overlooked, deleted, or retired at the wrong time

Recent Case in Point: NTL Securities

Time, volume, and diversity worsen the odds of success:

- Litigation lasted 5 years, relatively few custodians but dispersed data sources
- 2 holds issued early in the case
- No reminders issued over several years
- Data management outsourced to IBM
- IBM never notified, data got over-written
- Systems got decommissioned with no preservation action, data was lost
- Systems got transferred to new entities with no preservation action, data was lost
- Sanctions, adverse inference, and costs awarded

SCOPE



NOTICES



MONITORING

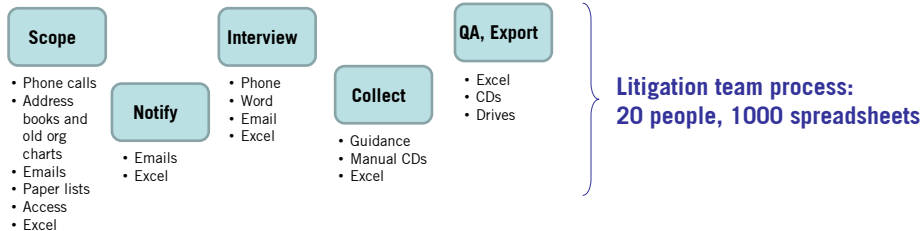


COLLECTIONS

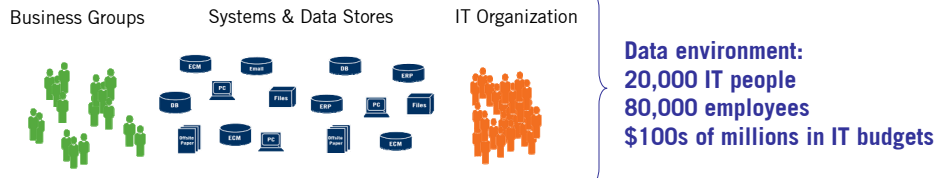
What's Required

- **Judge Peck in NTL: “You are, by now, aware of Zubulake”**
- **Identify and preserve *all* potentially relevant data when litigation is reasonably anticipated**
 - In your custody or control
 - Employee data, increasingly data they take home
 - Data managed through outsourced services
 - Records and non-records alike
- **Disclose these sources of data to your adversary** (in many jurisdictions)
- **Describe related retention practices and protocols**
- **Notify the people with custody or control of this data of their duty to preserve it**
- **Monitor compliance over the course of litigation**
- **Collect the data in a forensically sound manner when necessary**
- **Document your process to demonstrate its integrity**

The Practical Challenges



Paper Chase to Figure Out Who, What, Where?



What's Not Required

- Keeping all data ever created is not required for “compliance”!
- Why not?
 - Retention laws dictate regulatory or statutory retention periods
 - Almost always longer than business need for data
 - Vast majority of data loses business utility very quickly
 - Storage is not free and IT staff is not cheap
 - Data volume growing at 57% a year; growth rate outpaces any price decline
 - Complexity increasing constantly with volume and diversity of data
 - Saving everything actually undermines your ability to effectively preserve data for litigation
 - Privacy and security harder to manage if continuous accumulation
 - Arguably less defensible- everything is in scope so the more you keep and the longer you keep it, the higher the risk

During Active Litigation

- **Consider automating legal holds process to improve scoping, transparency, communications consistency and record keeping**
- **Ensure that IT staff with stewardship of systems and data stores are aware of ongoing holds**
 - Be clear about overlapping holds (especially when one is released)
 - Reminders are critical – they don't think about litigation every day
- **Partner with senior IT and business executives so they understand the requirements**
 - Preserve as directed by litigation (trumps retention schedule)
 - Retain and dispose per approved retention schedule
- **Institute check point processes for system and data migration that pre-determine any over-riding preservation obligations**
 - Delay migration until counsel has assessed situation
 - Evaluate costs and risks, communicate with adversary

The Operational Point of View

Lower cost, efficiency are goals shared by all stakeholders:

- | | |
|--------------|--|
| Legal | <ol style="list-style-type: none"> 1. Distinguish what to retain and what to dispose 2. Recover and produce (less) information in litigation |
| IT | <ol style="list-style-type: none"> 1. Know what to move to cheap storage, what to dispose 2. Under constant pressure to optimize operation |
| Ops | <ol style="list-style-type: none"> 1. Avoid financing unnecessary data infrastructure 2. Avoid unnecessary litigation costs and risks |

How much lower cost? \$10s – \$100s of millions

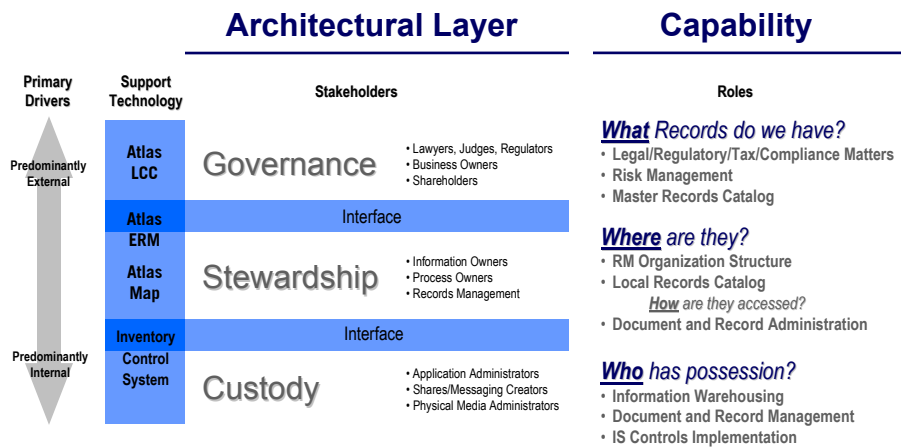
The Opportunity

- Keep only what you need to: Nothing more, nothing less
- Institute retention protocol before bringing new systems on line
- Develop working partnership between legal, IT and the business groups to drive economic benefits to each
- Big opportunity to end the data paralysis!

- **Try this test at home:**
Ask your CIO how much new data is generated each quarter and how much new storage is brought online.

Then ask how much is recycled or retired.

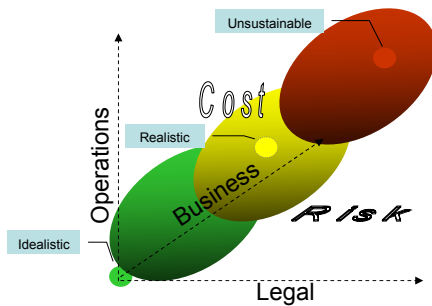
Framework Communication and Execution Architecture



Retention Framework

Three views combine to describe a record, its location, and its custody

- The Legal view defines Record Class, Code, Retention, and Jurisdiction
- The Business view identifies Ownership, Sensitivity, and Risk
- The Operational view provides Custody, and Logistics



Cost/Risk Determinants

1. **Legal determines risk:**
"What do we need to keep?"
2. **Operations determines cost:**
"How do we need to keep it?"
3. **Business determines the equilibrium:**
"Where do we focus our efforts?"

No Day Like "Day One"

- **Once the genie is out of the bottle, it's difficult to put back**
 - System reconfig is hard once system is operational
 - Holds may already be required
 - Once data is lumped together and piling up, it is difficult/expensive to segregate and dispose
- **Your company has MANY process controls for bringing new systems on line**
 - Add to mature process with retention/preservation check
 - Can system preserve information when needed?
 - Can system understand and apply retention schedules?
 - Can it do both??
 - Before go live, implement retention protocols per retention schedules
 - Data savings likely pays for any manual effort; some systems can even automate process for you
 - Leverage any new security and privacy protocols that are being instituted for leverage, common approach
- **In most large companies, a new systems come on line every week.**

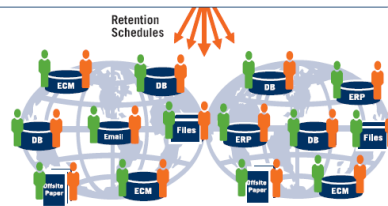
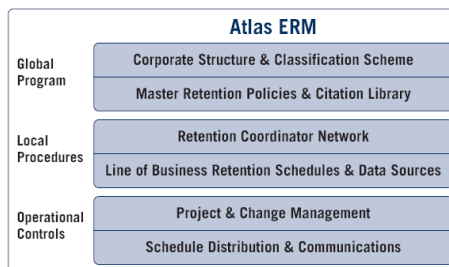
End of Life Considerations

- **Checkpoint with litigation prior to retiring systems**
- **Distinguish retiring a system from retiring its data**
 - May need to keep some portion of data for retention purposes – don't keep an encyclopedia if you need to keep a word!
- **Distinguish between ongoing retention (statutory) obligations and legal holds (litigation) obligations**
 - May not need the system, just the data and vice versa
 - Some file formats are easier to restore than antique systems, operating systems and environments – consider a system-neutral approach to retiring data (when no hold obligation)
- **Expect privacy and security concerns to accelerate process improvements on data disposal, synchronize both governance streams**

Common Reference Needed

- **Critical for diverse stakeholders to understand what to do**
 - Systematic approach to retention protocols and schedules
 - Provide a reliable “golden source” for all stakeholders
 - Connect the dots: Class/type of information to the business groups that have it, the systems that contain it, and people with related responsibilities
 - Sustainability crucial – tap into the people who already know what information exists and how it's managed!

Unified Retention Policy & Schedule Administration:
One System of Record for Retention



Summary

- 1. Forge good communications between legal and IT at the senior level**
 - Common economic interest exists – common vocabulary and dialogue needed
- 2. Institute robust procedures for holds communications to IT stewards**
- 3. Consider outsourced data as “in scope” in litigation**
- 4. Require preservation check point before systems are retired**
- 5. Institute retention protocols before new systems get turned on**
- 6. ... and do it with the Global Market in mind**

Think Global

- Thank you
- Questions?