



# TIP SHEET

an informational newsletter on intellectual property matters

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## Records Management for Electronic Discovery

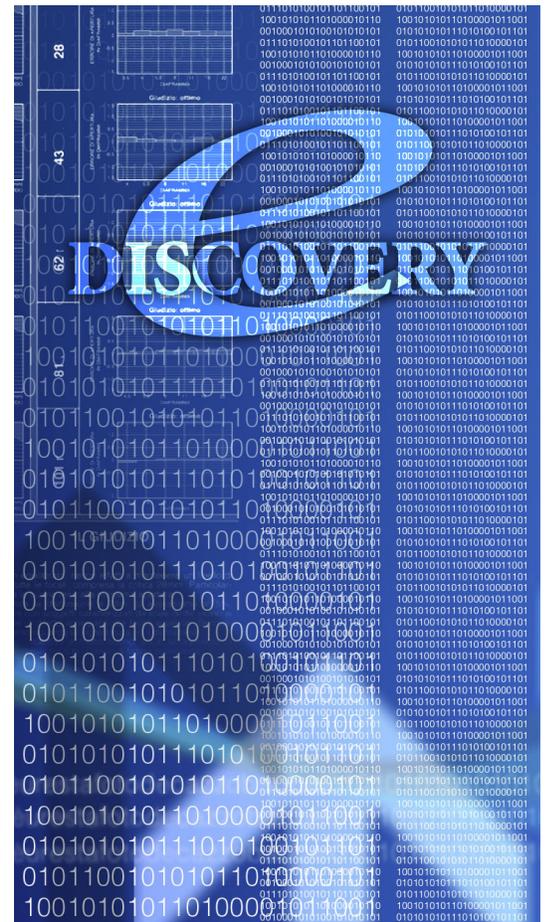


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Lawsuits increasingly involve electronic records. Businesses may be required to preserve electronic records by statute or regulation or when they relate to anticipated litigation. Beyond these restrictions, however, companies are generally free to keep or destroy information on a cost/benefit basis. This freedom provides a significant opportunity to manage risks and reduce costs through a records management program. Litigation expenses and risks associated with unmanaged record accumulation include increased costs to preserve and capture evidence, increased cost of attorney review of records for responsiveness and privilege, increased risk of sanctions for failure to preserve, locate and/or produce relevant records, and increased risk of bad litigation results due to “bad” records.

Shaping electronic business records with a records management program requires proper planning implemented through the natural long-term accumulation of information systems and records. For most companies, a combination of continuous destruction and structuring of information achieves the best results at the lowest cost. To initiate such a program, many companies will want to tackle smaller segments of records one at a time, with an early focus upon high risk/reward information such as communications (e-mail and messaging), collaboration, and project management systems.

As groundwork for efforts to destroy



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unnecessary data, companies must create a defensible legal hold process. Records should not be destroyed without such a process in place. A legal hold process should include a reporting chain for matters reasonably anticipated to result in litigation, a decision process for issuance of legal records hold, a control chain for identifying, preserving, and gathering electronic information, and a process for documenting hold actions. The process itself should be documented to help establish good faith should anything go wrong.

Data destruction should occur only through a legally defensible retention and destruction process. To implement such a process, it is important to understand the universe of data involved, so most management programs will involve at least some effort to inventory and analyze electronic data. The results of this effort can be used to develop retention and destruction policies and processes and help identify and purge unnecessary data. Once developed, these policies and processes can be documented to answer any challenge to record-keeping practices.

Information systems should be reviewed and refined to better structure, organize and control data. This should include an effort to consolidate data storage in repositories that are properly secured and duplicated and to refine backup and migration processes to avoid unnecessary duplication and dispersion of information. This category of activity includes cleanup activities such as destroying backup media and de-commissioning old hardware without violating legal preservation requirements.

Records issues are generally secondary to business operating goals, and a records management program is likely to succeed only if its users find it efficient and worthwhile. We have extensive experience and resources in this area and would welcome the opportunity to help you build an efficient and successful records management program.

*Drew Webb is a shareholder and the leader of McAfee & Taft's E-Discovery and Records & Information Management practice group. Drew advises clients on pre-litigation e-discovery planning and compliance and assists clients in developing comprehensive records management programs.*

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