HUSCH BLACKWELL

May 2010

E-MAIL RETENTION

Peter Sloan

Clients often ask "how long do we need to keep our e-mail?" The accurate answer is "it depends," because e-mail is a medium, not a content type. But if we focus on the content of e-mail, the purpose of that content, and the surrounding circumstances, the e-mail retention dilemma can be resolved.

OVERVIEW

One determines how long to retain documented information in the ordinary course of business by considering the information's content type (such as contracts, audit work papers, or I-9 documentation) rather than the medium of the information (such as paper, digital data, or micrographics). While selecting the right media for official records storage is important, it is the nature of the information content that drives how long the documented information should be retained for legal compliance or business purposes.

And so, the problem with answering what appears to be a perfectly sensible question — "how long must we keep our e-mail?" — is that e-mail is a medium, not a content type. By analogy, an e-mail is akin to information on a piece of paper. Just as there is no single correct response to the question of how long to keep all paper documents, there is no satisfactory answer to a question seeking a uniform retention period for all company e-mail.

A review of over 50,000 records retention legal requirements and legal considerations found in the published statutes and regulations of the United States federal system and the fifty states confirms that there are virtually no laws that require all e-mail to be retained for a particular period of time in the ordinary course of business. Only rare exceptions exist, such as the requirement that national securities exchange members, brokers, and dealers retain all sent and received "communications [i.e.,

e-mail]... relating to its business as such..." for three years, and for the first two years in a readily accessible place. 17 C.F.R. 240.17a-4(b)(4). While a plethora of retention requirements apply to a wide range of information that might be found in e-mail, there generally is no blanket retention requirement for all company e-mail or other forms of e-communication.

But the e-mail retention dilemma can be resolved once we focus upon the content of the e-mail, the purpose of that content, and the surrounding circumstances. In other words, we can answer the e-mail retention question by dividing it into four questions:

- In the ordinary course of business, how long should weretain record-quality e-mail?
- In the ordinary course of business, how long should we keep e-mail that is not a record?
- How long should we keep back-up of e-mail?
- How long should we preserve e-mail that is relevant to litigation or other proceedings?

RECORD-QUALITY E-MAIL

Companies should have a records management policy that defines what is a record, such as "documented information, regardless of media, regarding the business operations of the company that should be retained for legal compliance or business needs." The company's records retention schedule should identify categories or types of records, with suitable descriptions and examples, and with ordinary course of business retention periods that satisfy legal requirements and business needs.

Only a subset of sent or received e-mail at the company will meet the policy definition and fall within the retention schedule's record types. E-mail and attachments that do should be retained as records for as long as indicated under the company's records retention schedule, as appropriate for the particular record type.

The problem is that most e-mail applications are well designed for efficient and collaborative communication, but not for records

management, and certainly not for applying records retention periods to the various e-mails and attachments. As a result, record-quality e-mail and attachments should be moved, either literally or figuratively, out of the e-mail application and into records management.

Five strategies exist to accomplish this result in the ordinary course of business:

1. **Print and Store with Associated Hardcopy Records**
   Printing record-quality e-mail and ttachments to paper allows the e-mail and attachment content to be retained in compliance with the retention schedule's various record type retention periods. However, one loses the associated metadata and the access ease and communication efficiency provided by computer applications handling digital information.

2. **Structured Storage Created By The E-Mail User**
   In this strategy, the employee e-mail user moves record-quality e-mail and attachments into an electronic file folder structure created by the individual user. If done well, record-quality e-mail and attachments are separated and segregated by retention schedule record type, facilitating the application of appropriate retention periods, but maintaining the advantages provided by keeping the content in digital format. A shortcoming of this approach is that different employees will create different structured storage frameworks, resulting in inconsistency across the enterprise.

3. **Structured Storage Created By The Company**
   Here, the departmental function or the company itself creates the framework of structured storage options, aligning them with the company records retention schedule. While this strategy requires more planning than strategy 2 above, it promises greater consistency, making it practicable

for the company to obtain more consistent application of the retention schedule to record-quality e-mail and attachments.

4. Electronic Content Management Systems

Today most ECM systems (Electronic Content Management), EDMS (Electronic Document Management Systems), and ERMS (Electronic Records Management Systems) are compatible with e-mail and attachments. While this strategy requires significant expense, planning, and implementation, it offers the best of both worlds. Properly trained e-mail users can move record-quality e-mail and attachments with relative ease out of the e-mail application and into an effective records management structure. At the same time, the content remains in digital format, it enjoys greater protection and security, and should also be highly accessible and easily used. Also, if the company chooses to install an e-mail archive application, it will likely feature or integrate well with these digital content management tools.

5. Artificial Intelligence

As technology capabilities increase in sophistication, it is becoming possible for some robust tools to automatically identify record-quality e-mail and attachments and classify them to respective record types, with associated retention periods under the company's records retention schedule. This strategy requires significant and ongoing expense. And because such systems seek to replace the judgment of individual users with the operation of technology tools, thorough strategic planning and implementation are crucial.

Regardless of the strategy selected, the objective remains the same — to separate the "wheat" of record-quality e-mail from the remaining "chaff," segregating e-mail records from the rules applicable to other e-mail and instead applying records management and records retention periods.

Note that the above issue is not solved by e-mail archive solutions. Archive systems do provide several benefits, such as reliable capture of e-mail content and enhanced search capabilities. But archive systems require rules for categorizing e-mail based on recordworthiness and corresponding retention periods. The archive must still be "told" how long various types of e-mail content are to be retained, and thus an archive is not a magic bullet solution to e-mail retention.

It is crucial that the company devise and implement effective training, communication, and reinforcement of expectations for the handling of record-quality e-mail and attachments. Because these e-mail records are business assets, their proper retention and management also should be added to the purview of company compliance assessment.

NON-RECORD EMAIL

Once the company has devised an effective strategy to segregate and properly handle record-quality e-mail and attachments, it will be left with a large volume of electronic messages and attachments that, in the ordinary course of business, need not be retained to meet legal requirements or business needs. Because there is no compliance requirement or lasting business value for keeping nonrecord e-mail and attachments, in the ordinary course of business such e mail should be disposed of relatively promptly.

Why should this be so, considering that it seems to cost relatively little to store even significant volumes of nonrecord e-mail? In reality, storage costs are more significant than one might imagine, due to the tremendous volume of non-record e-mail that can accumulate. Most CIOs and IT application managers will report that e-mail represents by far the fastest growing data type by volume at their company, resulting in additional network storage costs and challenges in accomplishing back-up within the available time window each night. Further, some e-mail

systems, such as Microsoft Exchange, may begin to behave erratically when individual e-mail boxes become too large. Yet the cost of e-mail storage is dwarfed by the cost of e-mail retention, both in lost productivity in locating specific e-mail in the ordinary course, and even more dramatically in later arising litigation, when the expense of locating wheat among the chaff truly skyrockets.

In short, a company properly committed to compliant retention of record-quality e-mail should be equally focused upon proper and timely disposal of non-record e-mail in the ordinary course of business.

So how is this accomplished? Consider the following strategies for the non-record e-mail that remains in the e-mail application:

1. **Establish and Enforce Limits on E-Mail Account Volumes**
   Many companies establish such limits with one hand, but with the other hand freely create exceptions, or simply fail to enforce the limits. If this is your strategy for non-record, ordinary course of business e-mail and attachments, enforce the limits, so that exceptions are truly exceptional.

2. **Apply Time Limits to E-Mail Accounts**
   Most e-mail applications allow for time-based notifications, reporting, or purging of selected e-mail application folders, such as the mailbox, sent items, and deleted items. As you explore the capabilities of your e-mail application, you must also consider company culture and the needs of the employee users. While too long of a period (measured by years) will likely fail to yield the desired reduction in non-record e-mail volume, too short of a period (measured by days or weeks) will likely result in "pack rat" behavior by individual users, motivating them to evade the rules by moving nonrecord e-mail out of the controlled environment.

3. **Keep Non-Record E-Mail in the Network E-Mail Application**
   Sometimes a company's IT function "solves"

a problem with accumulating e-mail volume by individual users into PST or other archive files in network shares, local drives, or removable media. This strategy may relieve pressure on dedicated network e-mail storage, but it creates a host of other, thornier problems. In the ordinary course of business, e-mail volume continues to multiply, but now in locations outside of the ready control of the company's IT function. And if and when a preservation duty does arise due to pending or impending litigation, the company may now have a legal duty to locate and preserve some of the non-record e-mail and attachments that have been allowed to be blown to the four winds, resulting in extraordinary expense and business interruption.

Therefore, when selecting strategies such as 1 or 2 above to limit the volume of non-record e-mail, do so in a way that, to the greatest extent possible, keeps non-record e-mail and attachments within the e-mail application's control. Further, use technology, policies, training, and compliance activities to minimize uncontrolled dispersal of non-record quality e-mail and attachments.

Once again, an e-mail archive is not a ready-made solution. Without well-calibrated rules and compliant use, the archive will end up with a default retention period for all e-mail, which may be too short for various categories of record-quality e-mail, causing compliance problems, and almost certainly too long for non-record e-mail, exacerbating e-mail volume exposures for the company.

Training and Compliance
Just as effective training, communication of expectations, and compliance assessment are crucial regarding record-quality e-mail, they are equally important regarding proper handling of non-record e-mail and attachments. Once the right strategies are selected to manage the volume of non-record e-mail, the right combination of compliance elements should be deployed.

E-MAIL BACK-UP

With record-quality e-mail moved to records management, and non-record e-mail and attachments under control, there should not be a need for using back-up systems for archival e-mail storage purposes. Instead, the sole purpose for back-up of e-mail and attachments in the ordinary course of business is disaster recovery.

Find the person within the company's IT function who is responsible for disaster recovery restoration of e-mail, and ask him or her how many days — not months, not years, but days — of network e-mail back-up to disk or tape are truly needed to meet disaster recovery requirements. The answer will likely be anywhere from three days to one week, and the longest rotation period you will hear will likely not exceed 30 days. The point is that there is no disaster recovery purpose served by maintaining e-mail back-up for months or years. In the ordinary course of business, e-mail back-up should be kept no longer than is truly necessary for disaster recovery.

E-MAIL SUBJECT TO A PRESERVATION DUTY

When litigation, governmental investigation, or similar proceedings are pending or reasonably and clearly impending, a duty arises to preserve documents and data, including e-mail and attachments, that will be relevant to the matter.

Preservation duties may arise by statute, regulation, court or agency order, or simply based upon the circumstance of a pending or impending proceeding. Regardless, when the preservation duty arises, e-mail and attachments within its scope must be preserved until the preservation duty expires. This duty generally supersedes all ordinary course of business handling of the affected e-mail and attachments, regardless of whether they are record-quality or a non-record, and in some circumstances may even extend to back-up of e-mail and attachments. The company's legal department should have a well-planned legal hold notification system and preservation process that, taken together, will identify e-mail and attachments subject to the preservation duty, notify the affected users and data source custodians, and ensure that the preservation duty is met.

At the same time, companies that practice effective ordinary course of business management of e-mail will find that the job of satisfying the preservation duty is less onerous and expensive. It will be simpler to locate and preserve relevant e-mail, and it will be less likely that large volumes of non-record e-mail and unnecessary e-mail back-up will have accumulated. As a result, it will be far easier for the company to cost-effectively locate and preserve e-mail and attachments to which the preservation duty applies.

Contacts for Information Management:

Peter Sloan
Kansas City, MO
peter.sloan@huschblackwell.com
816.983.8150

Deborah Juhnke
Kansas City, MO
deborah.juhnke@@huschblackwell.com
816.983.8150

About Our Information Management Team

Husch Blackwell's Information Management Team helps clients with information retention, preservation, and compliant disposal. The team is part of the firm's Information Governance Group, which provides interdisciplinary expertise in Privacy, Data Security, and Information Management to help clients satisfy information compliance requirements and manage risk while maximizing information value.

About Our Firm

Husch Blackwell is an industry-focused, full-service litigation and business law firm with 16 offices across the U.S. and in London. We represent national and global leaders in major industries including energy and natural resources; financial services; food and agribusiness; healthcare, life sciences and education; real estate, development and construction; and technology, manufacturing and transportation.