

Take Charge! - Improving Your Document Management Skills



NARPM CONFERENCE
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Why is document Management Important?

To Control the Creation and Growth of Records

- Despite decades of using various non-paper storage media, the amount of paper in our offices continues to escalate.

To Improve Efficiency and Productivity

- Time spent searching for missing or misfiled records is non-productive..

To Minimize Litigation Risks

- A consistently applied records management program can reduce the liabilities associated with document disposal by providing for their systematic, routine disposal in the normal course of business.

To Reduce Operating Costs

- It costs \$22 less per linear foot of records to store inactive records in the Federal Records Center versus in the office. Usually, in an office that doesn't have a records program, 30-50% of the files could be stored off-site. **In EPA, we average 25 feet of paper per person. In a 30 person office that could mean a savings of \$7,000 annually.**

To Preserve the Corporate Memory

- An organization's files contain its institutional memory...

To Safeguard Vital Information ...

Why is document Management Important?

Litigation/FOIA...

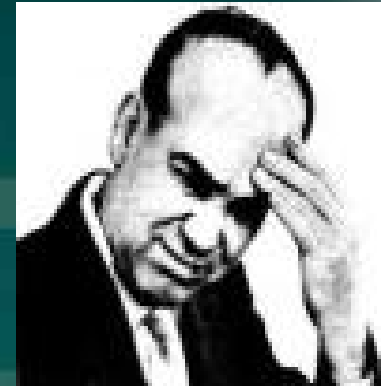
- 100's of cases in litigation
- FOIA requests (in FY '06 EPA received nearly 12k FOIA Requests)
- Duties to provide info. to Congress, general public, etc.
- Records Management = huge problem but a low priority until there's a problem...

GE v EPA - Litigation



Perspective...

- Frustrating & time-consuming process (true for most litigation)
- Huge drain on resources
- Req'd a lot of instruction, coordination, participation
- Diverted us from our mission
- Timing: In litigation (& FOIA) timing = a problem – court/regulatory deadlines – *beyond your control*



Lessons Learned

Attorneys files...



- Attys tend to keep more doc's & records than RPMs
- Attys able to withhold more (atty/client or work product privileges)

Litigation – Privileges

What can I withhold?

Privileges:

Less can be withheld than you think

- A few basic privileges:

- Attorney/Client, Attorney Work Product, Deliberative Process (DP), etc.

- DP cannot be used as often as we think

- RA has to sign off, then HQ AA has to sign off

- The ‘Settlement Privilege’ is not really a recognized privilege although if you are engaged in an ADR process the doc’s exchanged in the negotiation may be protected. (Settlement Privilege & the Alternative Dispute Resolution Act of 1996).

Keep in mind...

– even if marked “privileged” it is not always protected.

- inadvertent production → released by accident

- inconsistency among regions caused problems in GE case

- DOJ does not want to battle on every doc.

* personal/field notebooks can be discoverable

→ ? : *Would I want a PRP to see that?*

FOIA - *what can I withhold?*

Records must be released unless they fall into one or more of the **9 exemption categories**.

The **most common exemptions** that apply to requests received by EPA:

Exemption 4 - Trade Secrets, Commercial or Financial Information (**CBI**);

Exemption 5 - Privileged Inter- & Intra-Agency Memoranda

- has been construed to exempt only the documents normally privileged in the civil discovery context.

Exemption 7 – Records/Info. Compiled for **Law Enforcement Purposes**.

Waiver:

- Did I waive the privilege by giving it to an outside party or by inadvertent disclosure?

- The Courts have adopted various views on inadvertent disclosure, ranging from completely permissive to completely merciless.

Getting Organized

Is it a Record? - Records v. Non-Records

Records include:

all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency ... & preserved or appropriate for preservation by that agency... as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Gov't...

Nonrecords include:

- *Extra copies* of doc's preserved only for convenience or reference; information copies of correspondence, directives & other documents on which no administrative or mission-related action is recorded or taken.
- **Working Papers & Drafts:** Doc's such as rough notes, calculations, or preliminary drafts which are assembled or created & used to prepare or analyze other doc's & which meet **all** of the following criteria:
 - (1) **NOT circulated** or made available to employees, other than the creator, for official purposes such as approval, comment, action, recommendation, follow up, or to communicate w/ Agency staff about Agency business;
 - (2) **Do NOT contain unique information**, such as substantive annotations or comments that adds to a proper understanding of the Agency's formulation & execution of basic policies, decisions, actions, or responsibilities;
 - (3) **NOT** needed for purposes of adequate & proper documentation of the decisionmaking process; &
 - (4) **NOT** described elsewhere under an Agency-wide or EPA organization-specific requirement to retain the doc's for a specific period of time.

Nonrecords may be recycled.

Getting Organized

Specific types of documents...

1- Working papers/drafts/markups:

Drafts w/ comments & markups, once superseded, may be recycled unless the originator/employee providing such comments determines that the info. contained therein is **substantive, or is unique info. which adds to a proper understanding** of the formulation & execution of basic policies, decisions, actions...or is needed to **document the decision making process**.

2- Personal papers

Defined as "...documentary materials...of a private or nonpublic character that **do not relate to or have any effect upon the conduct of agency business.**"

3 generally accepted classes of personal papers:

- 1) Materials **accumulated before joining gov't service** that are not used subsequently in the transaction of gov't business;
- 2) Materials **relating solely to an individual's private affairs** (outside business pursuits, prof. affiliations, or private political associations that do not relate to agency business);
- 3) **Diaries, journals, or other personal notes** that are **not prepared or used for, or circulated or communicated** in the course, of transacting Gov't business.

3- Transitory documents

Documents of **short-term interest which have no documentary or evidential value.**

3 of the most common types of transitory files:

- 1) **Routine requests** for information or publications and copies of replies that require no administrative action, no policy decision, and no special compilation or research.
- 2) **Letters of transmittal** that do not add information to the transmitted materials.
- 3) **Quasi-official notices** that do not serve as the basis for official actions.

4- Duplicate copies: Exact duplicates may be recycled.

5- Concurrence copies: Kept in the site file in the division of the generator

Getting Organized

General document issues...

Ongoing tension between needing to purge/clean-out files while not disposing of 'agency records'

- We need to maintain decent hard copy & electronic files
- **Consistently maintaining** your files (electronic & hard copy) *will pay off !*
- Organizing doc's up-front at the time of creation saves time in the long run
- **Mark/segregate confidential files** at the time of creation

Getting Organized

suggestions...

Don't write on originals, doc's for Administrative Records or or Records Center

- *Comments: Would I want a PRP to see that?*

Establish your own file management plan

- *e.g. After end of fiscal year --> clean-out e-mail, drafts, file, archive old files.*

- *A regional or at least divisional plan would be best*

- *Who will be the keeper of the Records?*

Consider sending reports/drafts/data to records center → easier for FOIA request or when we're in discovery

And as for E-mail...



E-MAIL MANAGEMENT

ENTERPRISE CONTENT MANAGEMENT SYSTEM (ECMS)

- EPA's New System for E-mail Records Management.
- On-line Nationwide Training Coming.
- Summer Implementation.
- Will alleviate questions about how long to retain e-mails.
- Will have searching capability.

E-MAIL MANAGEMENT

ECMS DECISION PROCESS

- Is e-mail is an agency record?
- Are you creator or sender?
- Do you need to take action?
- Does e-mail explain, justify, document decision?
- If **yes**, file in ECMS.

E-MAIL MANAGEMENT

ECMS DECISION PROCESS

- Once retained in ECMS, e-mail can be deleted from Lotus Notes.
- Once retained in ECMS, retention periods governed by EPA's various Records Schedules.

E-MAIL MANAGEMENT



- Establish consistent procedures for e-mail dissemination.
- When sending an e-mail, be judicious on recipient list. Remember sender & recipient can be record holders.
- E-mail records are subject to Discovery & FOIA requests.

E-MAIL MANAGEMENT

- E-mails can be particularly crucial for high profile sites.
- When sending e-mails, be aware of content. E-mail may eventually be exposed for discovery.
- File e-mails in site folders for ease in access during relevant Discovery or FOIA requests.

E-MAIL MANAGEMENT

- If unsure about e-mail as agency records, don't delete.
- E-mail records can be in electronic or print format.
- If e-mail not a record, delete.
- Issues arise about server capacity.

SITE TRANSITION PROCESS

- Who is responsible for site transitioning process?
 - Former RPM/Attorney?
 - New RPM/Attorney?
 - Management?



SITE TRANSITION PROCESS QUESTIONS

- Conduct exit interview?
- Discuss personal management styles?
What works for you?
- Identify concerned parties, *i.e.*,
contractors, PRPs, etc.?

SITE TRANSITION PROCESS QUESTIONS

- Identify site stage, *i.e.*, PA/SI, RI/FS, RD/RA, etc.?
- Identify funding requirements?
- What does management expect?

SITE TRANSITION PROCESS

- Where are the working files?
- Are files clearly labeled?
- What about confidential files?
- Current issues?

E-Discovery Rules:

What is it & how will it impact database issues related to litigation?

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NARPM 2007



FRCP Rule Amendment

- Amendments to the FRCP took effect on December 1, 2006
- The amendments address Electronic Discovery (E-discovery)
- The amendments apply to all cases filed after December 1, 2006 & for pending cases, to the extent that it is just and practicable.

FRCP Rule Amendment

- Important term to keep in mind:
Electronically Stored Information (ESI)
- ESI is not defined but a commenter described it as, “information created, manipulated, communicated, stored and best utilized in digital form, requiring the use of computer hardware and software.”

FRCP Rule Amendment

- Changes to Rule 26
- Initial disclosure must include a description by category and location of ESI
- Parties must confer early (first two to three months of a case) on the form of production and privilege issues.
- What does it mean for us?
- Attorneys must understand (learn from user of ESI) technical matters such as: computer systems, where data is stored, what software was used to create the ESI and policies and practice of ESI retention and backup.

FRCP Rule Amendment

- Changes to Rule 26:
- Accessible vs. inaccessible ESI.
- Parties not required to produce if there is an undue burden or cost.
- But, in response to a motion to compel, the responding party must overcome the burden by a showing of inaccessibility.
- In turn, the requesting party may overcome the burden by a showing of good cause.
- What does it mean for us?
- The attorney must know the accessibility and inaccessibility of ESI at the initial meeting.
- This means that attorneys must also know the burden and cost of producing ESI.

FRCP Rule Amendment

- Changes to Rule 34
- Requesting party may specify the form of production of ESI.
- The responding party has an opportunity to object and propose an alternate form of production.
- What does it mean for us?
- Another example of why the attorney must understand the format of the ESI and the potential burden associated with production of the ESI in a particular format.

FRCP Rule Amendment

- Changes to Rule 37
- The rule provides for a qualified “safe harbor” for the loss of ESI that occurs during “routine good faith operation of an electronic information system.”
- “Good faith” however, requires affirmative action to prevent data losses when litigation is “reasonably anticipated.”
- What does it mean for us?
- This means that the attorney must be knowledgeable about routine purging of data.
- In cases where litigation is “reasonably anticipated,” the attorney must know what affirmative actions can be taken to prevent data loss.

What does the FRCP rule amendments mean for you?

- Follow record management guidelines
- If your case becomes involved in litigation or it could potentially become involved in litigation, **do not purge your records** (both electronic & hardcopy).
- **Contact your case attorney** to determine which records must be preserved.
- Spoilation of evidence (e.g. destruction of documents) can result in sanctions by the court

How is EPA addressing E-Discovery issues?

- Ultimate goal: Each AA-ship & region will document the routine practices for operating electronic information systems.
- The document will include information such as: description of the system, routine & automatic deletions & the reuse of disaster recovery backup systems.

How is EPA addressing E-Discovery issues?

- 2 surveys are being developed & refined to gather information about EPA's ESI.
 - Information Technology Survey
 - Where is information stored, how is it backed up, how is it managed?
 - EPA Major Database & Systems Survey
 - Identify databases most likely to be relevant to litigation by or against EPA.

How is EPA addressing E-Discovery issues?

- The E-Discovery team & DOJ will visit regions & HQ offices to gather information (via interviews & surveys)
- EPA & DOJ E-Discovery team members visited R3 in January.
- HQ began inventory of databases & completion of survey.

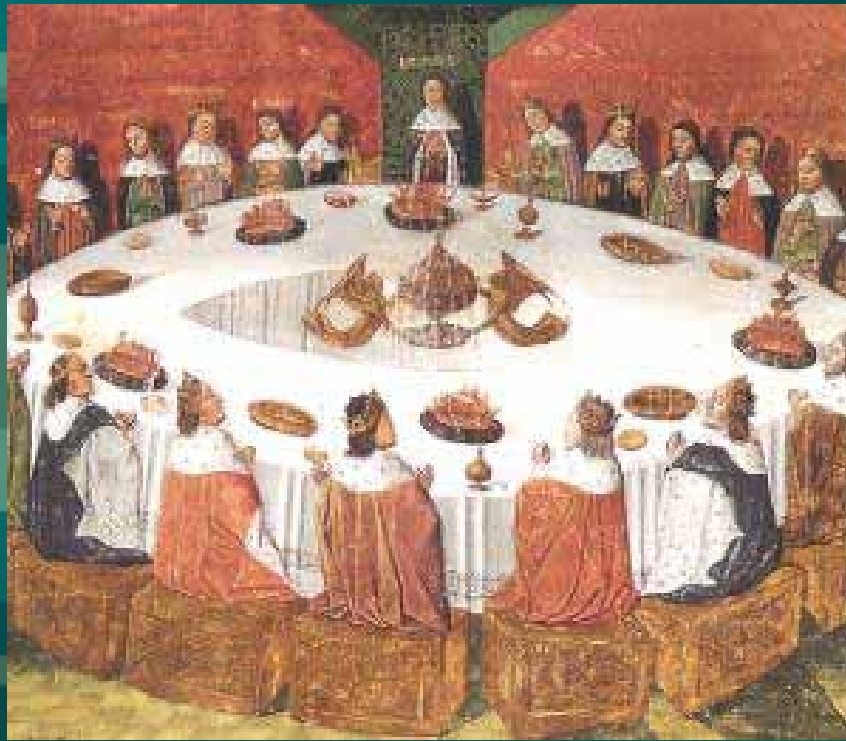
How is EPA addressing E-Discovery issues?

- Another important by-product of the FRCP rule amendments is the concept of “litigation hold” letters.
- These letters would be issued to ensure that the agency staff preserve ESI as a result of an actual or anticipated litigation.
- EPA & DOJ will need to work on “litigation hold” policy.

What to expect in the future

- Even after the surveys are complete & the ESI is documented, information on ESI must be updated on a periodic basis to maintain accurate & current information.

Roundtable Discussion with Dion & Friends



Comments? - Questions? - Issues?