Building and Implementing an Information Governance Program in a Changing Legal Landscape

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Hon. Andrew J. Peck
United States Magistrate Judge, U.S. District Court, Southern District of New York

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Polling the Audience
What is Information Governance?
Cross-Border Data Privacy Considerations
Introduction to Discovery
Applying the Law: Federal Rules of Civil Procedure and Recent Case Law
Practical Considerations for Building and Implementing an IG Program
Key Takeaways and Q&A
What is Information Governance?

- “The set of multi-disciplinary structures, policies, procedures, processes and controls implemented to manage information at an enterprise level, supporting an organization's immediate and future regulatory, legal, risk, environmental and operational requirements.” [1]

- “The activities and technologies that organizations employ to maximize the value of their information while minimizing associated risks and costs.” [2]

- Macro vs. micro approach to information governance

- Considerations: industry, size, culture, geography, corporate structure

Cross-Border Data Privacy Considerations

US Litigators and Investigators
Dealing with EU Data
Electronic Discovery Reference Model

Electronic Discovery Reference Model / © 2014 / v3.0 / edrm.net

Introduction to Discovery

The Problem: Over Preservation
The Average Microsoft Case

59,285,000 PAGES
PRESERVED

10,544,000 PAGES
COLLECTED & PROCESSED

350,000 PAGES
REVIEWED

87,500 PAGES
PRODUCED

88 PAGES
USED

Based on FY13 Data

Introduction to Discovery

- Primary obligations
- Civil litigation, regulatory inquiries, internal investigations
- Key risks, timelines, expectations
- Being proactive
- Scope and information sources
- Penalties for failure to comply
Rule 26: Duty to Disclose; General Provisions Governing Discovery

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.
Rule 37: Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
   (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
   (2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:
      (A) presume that the lost information was unfavorable to the party;
      (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
      (C) dismiss the action or enter a default judgment.
FRCP 37(e) Flow Chart

Rule 37(e)(1)

The Court may: Order measures no greater than necessary to cure the prejudice.

Rule 37(e)(2)

The Court may:
(A) Presume the information lost was unfavorable;
(B) Issue mandatory or permissive adverse inference instruction; or
(C) Enter dismissal or default.

1 Subject to proportionality considerations
2 If the Court elects not to apply 37(e)(1)
3 If the Court elects not to apply 37(e)(2)
Recent Case Law

- Common Themes
  - Redefined Scope of Discovery
  - Proportionality and Burden
  - “Reasonable Steps” vs. Negligence
  - “Intent to Deprive”
  - Inherent Authority
Program structure and effective partnerships with pre-existing organizations and initiatives

Prioritizing and defining measures for compliance

Senior management buy-in

Factors: industry, size, culture/history, risk tolerance, geography, corporate structure, visibility into data footprint

Purpose of IG Programs: Destruction? Migration? Enterprise Risk Management?

Common pitfalls

Building “reasonableness” into the program

Metrics and reporting