Records Management
Electronic Records and Electronic Discovery

Office of the Secretary of the Commonwealth
Division of Public Records
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www.sec.state.ma.us/pre/predix.htm
Agenda

- Records Management
- Records Custodians
- Records Retention
- Electronic Discovery (E-Discovery)
- Records Management Plan
- Acknowledgments
Records Management
What is a Record?

The statutory definition of “public records” includes “all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee” of any Massachusetts governmental entity. G. L. c. 4, § 7(26)
Records Management
E-Mails are Public Records

- Electronic mail communications (e-mail) made and received by government employees are public records.
- The retention period for e-mail is based on the CONTENT of the e-mail.
- The Public Records Law analyzes the CONTENT of a record, not the form.
Records Management

Purposes/Benefits

- Proper record management
  - Allows ease of access to information for the duration of the retention period of a given record
  - Promotes good will with the general public seeking access to records
Records Custodian Definitions

- A records custodian is defined as a "person having routine access to or control of public records."
  950 C.M.R. 32.06
- Records custodians must take proper care of public records
- EVERY agency should annually submit a Records Liaison Officer Form (RCB-4)
Records Custodian Responsibilities

Records custodians must be aware of:

- The records the agency makes or receives
- The people who make or receive such records
- The retention periods for agency records
- The format in which the records reside
- The location of agency records
- The accessibility of agency records
Records Custodian
High Ranking Officer

- Records custodians must have authority to direct personnel who control or hold records.
- An agency records custodian should be a high ranking officer who can manage the increased responsibilities related to records management.
Records Custodian
New Responsibilities

- Stringent new federal E-Discovery rules require agencies to produce all paper and electronic records
- If an agency is directly or indirectly involved in litigation, it may be subject to a litigation hold to preserve all records in their control
A litigation hold may require retrieval of electronic records

No destruction of records may take place once litigation hold is in place, even if retention period is passed

A litigation hold requires coordination between legal, IT and agency staff
Record Retention
Statewide Schedule

- Records custodians must retain records for the retention period as outlined in the Statewide Records Retention Schedule
- Some agencies have specialized schedules
- Retention requirements apply to all records, regardless of form
- Agencies must retain records in an accessible format for the retention period of the record
Record Retention
Statewide Schedule

- Examples
  - Massachusetts Highway Department
    - Section C-10, Page 80-84
  - Massachusetts Registry of Motor Vehicles
    - Section J-5, Page 137-139
  - Public Records Requests
    - Section B2, Page 62

- Requests for revision or update to retention schedules must be made to the RCB
Record Retention
Retention Periods for E-Mail

- The retention period is based upon the content of the e-mail
- For example
  - Massachusetts Highway Department correspondence related to consultant selection is seven (7) years, whether in paper or e-mail form Statewide Retention Schedule, C-10(1)
Record Retention

Records Storage

- Agencies must request written approval from the RCB to:
  - Destroy records
  - Store records at the State Records Center
  - Transfer ownership of records to the State Archives

- Agencies should seek approval from the RCB prior to employing third party storage
  - Massachusetts Highway Department uses offsite storage
Record Retention
E-Mail

- E-mail messages made or received by government employees are public records.
- For retention purposes, e-mail users must evaluate the content of the message.
- Agencies must establish **written policies** for e-mail systems capable of displaying and preserving the contextual data (metadata).
- Agencies must ensure that all personnel who will be handling e-mail are **trained** to ensure compliance.
Record Retention
Administrative Use

- Certain records may be discarded after use
  - Threaded emails
    - Retain final version
  - Reminder and courtesy correspondence
    - Meeting reminders
    - Confirmation correspondence
  - Certain draft versions

- Refer to Statewide Retention Schedule

- Retention period is determined by content
E-Discovery Overview

- Under state and federal rules, all agency records may be subject to disclosure as part of a lawsuit.
- Agencies are required to provide access to all records, regardless of form.
E-Discovery
Electronic Stored Information (ESI)

**Examples**
- System output
- System data
- Office documents
  - Microsoft Word, Excel, PowerPoint, Outlook, etc.
- Photographs
- Maps
- Video
E-Discovery
ESI Storage

- E-mail and attachments
- Web pages
- Removable storage media
  - Disk
  - Tape
  - Drive
  - Flash
E-Discovery
Special Data Considerations

- Embedded data (draft language, editorial comments, tracked changes data)
- Metadata (data about the history, tracking or management of an electronic file)
- End user search tools such as Google Desktop
- Deleted data that may be retrievable
E-Discovery
Irretrievable ESI

- If a court orders ESI to be produced, agencies may be required to rely on:
  - ITD to provide backup tapes for ITC-hosted applications or MassMail
  - *Agency Chief Information Officer (CIO)* for backup tape
  - *Agency LAN team* to help sort through local MassMail archive
  - *Computer forensic consultants*
E-Discovery
Location of ESI

- Recovery of ESI is a collaborative effort between:
  - Records custodian
  - Department employees
  - Contractors or other agents in custody of agency records
  - Agency IT staff

- E-Discovery records are by definition decentralized

- *Do not limit your inquiry to CIO*
  - Employees may be using personal e-mail addresses to conduct state business
  - Employees may have multiple copies of ESI
E-Discovery Preparation

- **Assemble a team**
  - Secretary or agency head
  - CFO - funding issues related to compliance
  - CIO - manager of IT and electronic systems
  - Key IT people (who will be agency’s Fed. R. Civ. P. 30(b)(6) witness?)
  - Records custodian
  - Legal counsel

- **Inventory records**
  - Identify hardware/software
  - Perform an application inventory
  - Review data backup and storage procedures and locations
  - Consider records stored off-site
    - Vendors
    - Employees’ home computers

- **Document results**
E-Discovery Preparation

- Review documents that may be relevant and useful in litigation
- Determine need for suspending deletion of records
  - Who should be notified?
  - How quickly can you capture the records of key players (what IT resources do you need)?
  - How quickly can you take a snapshot of email or other information?
E-Discovery Preparation

- Consider
  - Fourth Amendment implications
  - State and Federal wire tap statutes
  - Does agency have a recently signed copy of an Acceptable Use Policy for every IT user?

- Develop procedures notify appropriate personnel when a claim is raised
  - Legal counsel
  - IT personnel
E-Discovery
Common Abuses and Errors

- Failing to place litigation hold on destruction of records
- Failing to notify court of e-discovery problems
- Failing to provide accurate records
- Failing to fully respond to discovery requests
- Purposeful sluggishness in responding
- Fabricated evidence
E-Discovery
Ignorance of Technology

- “Ignorance of IT is simply no longer an acceptable cover for mistakes in most federal courts.”
  www.ralphlosey.wordpress.com/zubu-duty/

- The U.S. District Court in Tampa rejected the excuse of “computer illiteracy” in document production as “frankly ludicrous.”

- “Attorneys can no longer blame their knowledge gap on lack of guidance from the courts… E-discovery conduct has been sanctioned in all 12 federal jurisdictions.”
  www.abanet.org/lpm/lpt/articles/tch02052.html
ESI: Conclusion

- Move from paper to electronic discovery has decentralized discoverable material and the persons who control it.
- Control over access and knowledge often in hands of user.
- Start by developing an ESI map taking into account people, data, devices, and locations.
- Do not under any circumstances rely on your CIO and ITD alone to determine what discoverable ESI your agency’s employees and contractors may control.
Records Management Plan
Implementation

- Staff training
  - Alert staff to record retention obligations
  - Combine document retention training with business writing training
    - Employees should be aware that every email is potentially a public record
    - Contact the Secretary of the Commonwealth for training
  - Educate employees on discovery duties in litigation
  - Identify records custodian for each unit
Compliance review
- Have team in place (IT, legal counsel, management)
- Test un-recycled backup tapes to ensure they are recoverable
- Consider requiring managers to certify that the policy is being followed
- Annual review clean up days
  - Pizza, prizes etc., casual clothing
  - Reminders to review home computers, PDAs
- Add document retention compliance to exit interviews

Document compliance
Records Management Plan
Risks of Inaction

- Agency employees (staff, IT) may not be
  - Properly trained on the implication of the records they create
  - Aware that e-mails and other records may need to be retained, are a public record, or are discoverable in litigation
  - Aware that the Statewide Retention Schedule applies to e-mail and other electronic records, and permission must be obtained from the RCB prior to destruction
Resources

Secretary of the Commonwealth of Massachusetts: Records Management Unit
www.sec.state.ma.us/arc/arcrmu/rmuidx.htm

Sedona Conference: Publications
www.thesedonaconference.org/content/miscFiles/publications_html

Legal Technology: E-Discovery Road Map
www.law.com/jsp/legaltechnology/eDiscoveryRoadmap.jsp

SETEC Investigations: Checklist for Rule 16(c) Pretrial Conference for Computer-Based Discovery

Impact Forensics: Computer Forensics, Electronic Discovery, Expert Witness Firm
www.impactforensics.com

Metropolitan Corporate Counsel: Litigation Preparedness A Checklist For Corporate Counsel
www.metrocorpcounsel.com/current.php?artType=view&artMonth=July&artYear=2007&EntryNo=6901

ABA Law Practice Today: The E-discovery Missteps that Judges Love to Hate
www.abanet.org/lpm/lpt/articles/tch02052.html
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Questions?