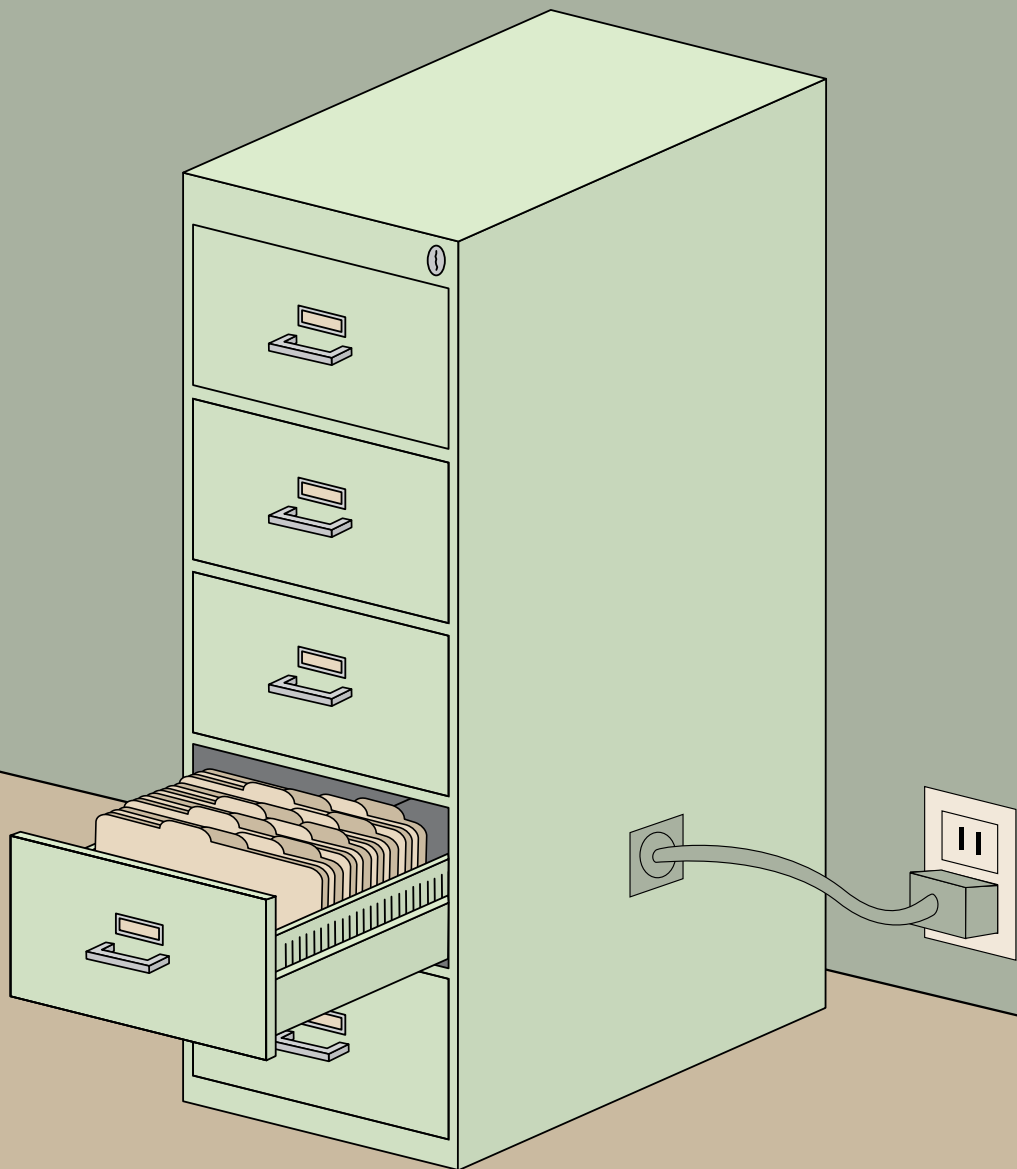


Can Your Records Management Programs Handle Ediscovery?

BY DANA R. BAUGHNS AND JOHN HOROSCHAK



The long recession, exponential growth in electronic data, and the expansion of court cases on what corporations and their in-house counsel must do, have forced in-house counsel to improve the management of the litigation ediscovery phase in an extremely cost-conscious manner. Once something that outside counsel worried about, and something in-house counsel only worried about when there was an active litigation matter, in-house counsel now face increased judicial scrutiny related to ediscovery. Various court rulings have taken their aim at in-house counsel, and many local court rulings promulgated across the country show that the excessive burden of ediscovery and reasonable accessibility to data have been overstated. As a result, many corporations have elected to take control of their ediscovery process. Rather than relying on their law firms and vendors to handle these requirements, many corporations are integrating ediscovery into their corporate governance, risk and compliance strategies in 2011.

Corporations now have key legal professionals investing time, energy and money into the development of corporate-wide ediscovery strategies focused on the “left side” of the electronic discovery reference model (EDRM), to cut costs and ensure defensibility. These strategies include creating or enhancing records management programs, and investing in technology to bring ediscovery in line with other business processes to decrease overall risk, reduce costs related to litigation support and fulfill regulatory compliance mandates.

The “left side” of the EDRM includes information management, identification, collection and preservation. This article will focus on relevant areas of information management and identification. As defined by the EDRM, information management includes records management, compliance and IT infrastructure. This correlates to Early Case Assessment and ediscovery. According to the EDRM, identification includes identifying potential sources of relevant information, developing the identification strategy and plan, establishing the identification team, and identifying and certifying potentially relevant ediscovery sources.

Information management — records management

Records management is the first step in an overall approach to mitigating risk to a corporation, containing the costs related to ediscovery and meeting regulatory compliance requirements. It has become critically important for corporations to implement and maintain effective records management programs. While many businesses understand the necessity of a records management program to assist in complying with ediscovery mandates, very few businesses have a grasp on what steps to take to begin the process of developing a formalized corporate-wide records management program.

Maryland-based Allegis Group, Inc., is a large, privately held staffing company. Including all of its affiliate company locations and its corporate headquarters in Hanover, Md., Allegis Group, Inc., has more than 300 offices worldwide. Allegis Group’s global footprint includes providing recruiting, staffing and human capital business services in the United States, Canada, Mexico, Puerto Rico, Europe, Middle East and Asia markets.

The task of revamping its current record retention policy to create a comprehensive records management



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program for Allegis Group and its affiliate companies was intimidating. Like many other businesses, the company struggled with developing a more comprehensive and consistent process of determining how to identify the record footprint of its affiliate companies. Given the cross-section of departments in several affiliate companies, the task of determining what, where, why, when and how records are created, stored and destroyed was daunting.

But fear not; the task is not insurmountable. In fact, if you are still intently reading this article — this section in particular — congratulations, you have already taken the first step in the right direction. The guiding precept, should you continue on this mission, is to understand the record footprint of your business and to develop a management program for it.

An effective records management program will generally consist of three components: records management policy, a corresponding records retention schedule and a records index. Understanding the necessity of these three components — detailed in the 10 steps below — will make it increasingly easier to navigate the process of creating a records management program.

- **Appreciate the challenge and assemble a team:** As with most corporate-wide projects, you must first assemble a team of able-bodied, although probably secretly unwilling, people to drag through the process with you. Your team should at least consist of representatives from the legal, information technology (IT), human resources and the accounting departments. Appreciate the challenge of having executives and IT professionals joined for a common purpose, when their respective philosophy regarding record management is divergent. Most executives prefer to save every email for ready reference, while most IT professionals prefer to focus on creating space on the network by eliminating nonessential or dated emails. Notwithstanding these differing viewpoints, representation and input from the above-mentioned business units will assist with understanding the record footprint of your organization and increase the success of your records management program.
- **Set deadlines:** Set a deadline to complete the project. Most sizable corporations will need at least a year to properly implement a records management program.
- **Define “records:”** Be sure everyone on your team understands how records are defined, because every record created may not necessarily be within the purview of the records management program. In this context, records are generally defined as information captured to meet business, operational, legal and regulatory requirements of the company, and may be

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in electronic (e.g., text, images, calendar files, databases, spreadsheets, audio files, animation, websites, computer programs, malware, social media, etc.), hardcopy or other forms (e.g., legacy microfilm).

- **Draft a policy:** Draft a policy that addresses the purpose, scope, roles and responsibilities, retention standards, and record destruction processes of your records management program for US-based operations, as well as foreign operations, which are becoming the focus of many plaintiffs due to differing legal standards. Include policies that address: data management when an employee leaves the company; back-up tapes, recycling PCs, servers, user hard drives, failed hard drives and legacy data systems; off-site company storage facilities and third-party storage; new technologies such as digital voice mail stores, portable devices and cell phones, including instant messaging, voice mails and attachments; and whether employees can store files on removable media (floppies, CD-ROMs, DVDs, zip and thumb drives).
- **Create a schedule:** Create a records retention schedule listing applicable broad categories of records and their legally recommended and/or required retention periods.
- **Create a record index:** Create a record index to assist with identifying what records are created, retained and destroyed in each substantive business unit or department. The index should include a value classification for each record. Is the nature of the record legal, operational, financial or historical? The index should also identify the record custodian and how each record is maintained. For example, is the record format electronic, paper or both?
- **Evaluate record index:** Evaluate the record index to determine if your business needs require a longer retention period for certain records.
- **Finalize:** Formalize your records management policy, records retention schedule and each respective records index.
- **Change management:** Develop applicable change management processes, training to accompany the records management program and an auditing process.
- **Launch and revisit regularly:** Launch the records management program, monitor the progress and revisit the records management program every six months to ensure compliance. Add new policies and procedures, include any newly developed technology for managing the program, and add new team members from specific business units to ensure the records management program endures and remains up-to-date for the corporation in perpetuity.

Identification — data mapping

Part and parcel in having a record management program is identifying and understanding your company's records footprint.

Once a corporation has defined the information it needs to meet business, operational, legal and regulatory requirements, managing this information effectively when litigation is reasonably anticipated may feel overwhelming, and the costs related to managing the data can be significant.

According to the EDRM, data can be contained on many types of servers (file servers, collaboration servers, email servers) and many interrelated data management systems (document management systems, financial systems, disaster recovery and backup systems). Servers hold not only general company data, but also user-specific data (home directories or departmental shared directories) that encompasses a myriad of devices that users employ to utilize that data, including desktop computers, photocopiers, calendars, Instant Messaging (IM), text, cell phones, smart phones and memory cards. Additionally, corporations must plan for inactive data archives contained on various media, such as hard drives, servers, recycle bins, tape backups, flash drives, CD-ROMs and DVDs. All of this is further complicated by the fact that legacy data, potentially across all these categories, may exist from previous company systems within the relevant time period, as well as the fact that the necessary hardware, software or technical expertise to access such legacy data may no longer exist within the target company.

Taking proper steps to identify potentially responsive data is the first step in managing and reducing risk, litigation preparedness and ediscovery. The process by which a corporation indexes their data and information is known as data mapping.

A project that may take three to 12 months, data mapping in a broad sense is the process of understanding and documenting a directory of a corporation's data by category, location and custodian, including how and in what format the data is stored, how it is accessed, and the associated records retention policies and procedures associated with the data as outlined in the corporation's records management program.

Data mapping is a requirement as set forth in the Federal Rules of Civil Procedure (FRCP). Specifically, Rule 26(a)(1)(A) directly states the need for a data map by specifying that parties must provide each other with "a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, and may use to support its claims or defenses."¹ Additionally, information must be provided on "each individual likely to have discoverable information."

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Several opinions have been written discussing the consequences of negligent and grossly negligent management of data during discovery. However, there is a paucity of case law specifically referencing ineffective, incomplete or completely lacking data mapping. If data mapping is not performed, or performed inadequately, the incomplete production may lead to court sanctions and possible negative inferences against the corporation and their counsel.

With advances in technology, many corporations are integrating automated data mapping applications, especially in large enterprise organizations, to decrease the workload, increase the accuracy of the data map and reduce costs when integrated with ediscovery solutions.

Data mapping is key for establishing a defensible position of compliance with various agency recordkeeping requirements.

Corporations are under significant financial constraints in terms of resources, and a data mapping project will likely require cost justification. In-house counsel will need to make this point so that the resources will be provided. The project will help in-house counsel develop a defensible discovery process for litigation matters and may save the organization significant money related to ediscovery costs. Depending on how much data can be eliminated before data collection, processing, reviewing and production, the savings may be considerable. The time to invest in a data mapping project is before a complex discovery order requires an organization to use outside counsel to manage the process. Costs increase when a corporation must locate relevant documents, emails (stored in multiple locations), paper files, phone records, and back-up tapes for several custodians, geographically dispersed within a short period of time. The discovery costs range from custodian data identification, collection, processing review and production. As the completion deadline becomes more difficult to meet, the opportunity to strategically evaluate the data before production to opposing counsel decreases. If data from the same custodians is required for a new case, and there is no underlying data map, collection process and data retention of the collected data, the costly process may need to be repeated.

Data collection practices are more defensible if they adhere to a standard, in-use policy that includes accurate data mapping. A standardized approach demonstrates to a court an accurate repeatable process less likely to miss important custodian information.

The process may also help with electronic data and paper document storage cost reduction efforts. When the data map is complete, data that is not subject to a litigation hold or regulatory record keeping requirements may be disposed in accordance with the document management policy. This reduces the liability of maintaining documents with potentially harmful content that may subject to a

future litigation hold, collection and production. Reducing the volume of data exposed to the ediscovery process could save an organization millions in collection, processing, document review and production.

Reduce time pressures of document production. The data can be reviewed before collection to gain a greater understanding of these risks before the discussion. Quick identification of potentially harmful search criteria can be an effective strategy tool during discovery negotiations.

Creating a data map is the first step in determining where your data resides.

What is a data map?

A data map is a chart or graph that helps a corporation determine at a glance where data is located, the data type, the media used to store the data, which departments the data supports, etc. On a more granular level, it identifies which groups of employees use what software and operating systems, where the data is stored long term, and if the data has a destruction date. Data mapping involves the following key steps:

1. defining the project scope,
2. identifying team members,
3. gathering data,
4. analyzing the data,
5. accounting for back-up tapes,
6. writing the data mapping document, and
7. reviewing and updating the finalized report.

Data mapping steps

Defining the project scope

Defining the project scope depends on the nature of your corporation's business and the tools your employees use. Some employees share information in a dialog form or bidirectional data flow, while others only receive information in a unidirectional data flow. This characteristic will impact how effective litigation holds are issued and custodian data is collected.

The complexity of how employees generate data should also be considered. Healthcare and pharmaceutical organizations may need to track many locations of every employee data from smart phones, hand written patient status reports, and lab research notebooks to the locations of archived emails. For retail or manufacturing businesses, locating employee data may be more straight-forward. Questions to consider are:

- What types of servers are used for which employee groups?
- Where are the servers located?
- What happens to the data of the server in the long term, i.e., is it destroyed or moved to a back-up system?



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Like the **cross-department involvement** required for the **records management program**, in-house counsel will also need to **involve people** from **key departments** in the **data mapping project**.

- What is the logic behind your current data storage process?
- How do you demonstrate a defensible internal organizational search for responsive data in litigation?
- Do archiving, storing methods and data locations vary by department within the organization?
- Do you use any hosted or cloud-based services?
 - Where is your data located?
 - How secure is this data? Is the organization Statements on Auditing Standards (SAS) 70 compliant?
 - Has the third party been thoroughly evaluated by your security and IT groups during your engagement process?
 - Has anyone from your organization visited the actual location where your data is stored? If so, are periodic inspections planned to ensure your data is secure years after the initial contract engagement?
- What is your current email archiving process? An entire article could be devoted to this question, but here are a few considerations:
 - How many places are emails stored?
 - Do you have an archiving policy? Is it enforced?
 - Do you allow employees to save emails and other data to PCs, laptops or other portable devices such as thumb drives?
 - Does the company use an email archive solution? With most archive solutions, as email and instant messages are sent and received, each message is bifurcated and copied into an archive before it reaches whatever instant messaging infrastructure is in place (Exchange, Notes, GroupWise, etc.). An archive has a broad impact on the corporate IT infrastructure.
 - Does the company use daily back-ups for email? Back-ups are a point-in-time snapshot of email data, and are not intended to provide a compliance solution of any sort, especially because of

ongoing deletion of messages by users. Companies relying on back-up media for records management purposes usually spend substantial money on forensic experts to recover email from back-ups.

- Does the company use storage optimization where archiving solutions extract mail items from production mailboxes, and replace them with stub messages from the email server, to reduce the storage burden on production mail servers?

Identifying team members

While in-house counsel will be administering litigation holds as described in the company's records management, they will need to "sign up" other team members in the company. Like the cross-department involvement required for the records management program, in-house counsel will also need to involve people from key departments in the data mapping project. IT should be able to help with hardware, software, server types and locations, and the various data formats used throughout your organization. Human resources may be able to assist with the organizational hierarchy and how information flows between different groups, and may also have a sensitivity to specific regulatory privacy concerns, i.e., Health Insurance Portability and Accountability (HIPAA) Act requirements. Business unit managers can also help identify systems they use that may contain relevant data and employees who may have relevant information.

Gathering data

To gather the data, in-house counsel will need to work with IT and each of the other team members. While not all data sources apply to every litigation hold and custodian, here are likely sources and media to consider when gathering data:

- Email — where is it stored?
 - Where does the number "15" come from? John Collins of the Ingersoll Firm suggests there are potentially 15 unique locations for email storage.
 - Servers, tapes and hard drives
- Servers and locations of all servers containing custodian or potential custodian data
- Smart phones, IM and voice data
- Third-party providers — data stored with a cloud-based provider
 - What steps have you taken to make sure you can get your data out of the cloud quickly; in a useable format?
 - Has someone in your organization vetted your cloud provider's security and ability to deliver your data to you when you need it?

An aerial photograph of a winding road through a green, hilly landscape. A vertical bar with seven colored segments (dark red, orange, teal, grey, light green, dark blue, and gold) is positioned over the road. The text "More straightforward solutions." is written in a white serif font to the right of the road.

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Revisiting the data map periodically (annually at a minimum) may help minimize the labor and potential cost of identifying and restoring antiquated data.

- Handwritten notes that may be reasonably anticipated in a discovery request
 - Research lab worker notebooks
 - Nurse patient records
 - R & D workers notes — electronic, voice or handwritten
- Laptops, personal computers and tablets
- Thumb drives, CDs, third-party clouds

Analyzing the data

To analyze the data, you will need to consider the following:

- Who are the employees creating the data?
- How long have they been with the organization?
- What departments do they work in?
- What software do they use?
- Do they create data stored in a cloud?
 - How do you access cloud data from a third party?
- Where is the data physically located?
 - Your offices, off shore, employees' basements, other?
- How does data from one potential custodian relate to other potential custodians?
- If you are required to produce data under a litigation discovery order, would you be able to successfully do so within typical discovery time constraints?

The following scenario illustrates the importance of this step:

The legal department or IT department has a document retention (destruction) policy that limits each employee's data storage space on the server. The well-intentioned employee stores propriety data on a laptop or PC to comply with the server space limit, and backs-up the data to a thumb drive to work at home, perhaps over a weekend. The employee downloads company

information, and stores it on a home PC with the family personal information and social media data. In this situation, data mapping and custodian data collection may have become more challenging and costly.

Back-up tapes

An analysis and understanding of the back-up tapes used by an organization is a rather unique subset of data mapping. While it is critical to obtain a list of all servers and individual hard drives that are backed up, who performed the back-up, and whether there was a change in the hardware or software used, it is also important to determine how back-ups are performed, how often they take place, where the back-up tapes are located, and whether the back-up process is a full copy or an incremental back-up. Additionally, the nature of back-up tapes must be appreciated.

Since tapes record data based on chronology and not the file type or content, determining what is on the tape is not self-evident. The older the back-up tape, the more likely the software version or operating platform originally used when the tape was created is not readily available. It is not unusual for a large established organization to have 10,000+ tapes dating back 15 or more years. If you have back-up tapes from the 1990s, do you really want to know what is on them? Are thoughts of *Love Canal* or *Erin Brockovich* coming to mind?

As back-up tapes are used, a corporation should determine if back-up tapes should be restored based on the risk of discovering a possible liability. However, if the data on the back-up tape is NOT subject to a litigation hold, or there is not a duty to disclose the information on the tape, they may be destroyed or recycled in accordance to your current document retention/destruction policy. The other option is to do nothing with the back-up tapes unless a court orders their restoration, which may never occur.

Writing the data mapping document — major sections

Once the data has been mapped, in-house counsel will want to facilitate the writing of a formal data map, which should be updated from time to time. The following is a sample table of contents for a data map:

- Executive summary
- Master inventory
- Tier I
 - Granular level
 - Where can employees save email or other data (word documents, other file types)?
 - Server, smart phone, PC, laptop, flash/thumb drive
 - Where is the data stored after it is created?
 - Is your current email destruction policy enforced?

ACC Docket

- *Creating a Strong Foundation for Your Company's Records Management Practices* (Nov. 2007). This article explores how counsel can effectively manage large volumes of records. www.acc.com/docket/rmp_nov07
- *Corporate Chronicles: How to Do Records Management for Maximum Protection* (June 2005). This article lays out the steps you need to develop, maintain and enforce a records management program. www.acc.com/docket/rec-mgmt_jun05

InfoPAKSM

- *Records Management: Resolving the Eight Issues* (Sept. 2009). This InfoPAK describes the eight key records management issues that Jordan Lawrence's corporate clients have focused on in the past 12 months. www.acc.com/infopaks/rm-8issues_sep09

Quick References

- *Advanced Technology Solutions for Litigation* (Sept. 2010). Learn how advances in technology can solve the challenges facing corporations and counsel, and address the issues and burdens for legal, compliance and information governance. www.acc.com/quickcoun/atsfl_sep10

- *Successful Records Management Programs* (Aug. 2010). Learn how to create and keep a successful records management program with tips from this ACC QuickCounsel. www.acc.com/quickcoun/rmp_aug10
- *Hot Topics in Electronic Discovery* (July 2009). This reference provides the best practices for electronic discovery. www.acc.com/topics-edis_jul09

Education

- Join us at ACC's 2011 Annual Meeting, October 23-26 in Denver, for a variety of CLE/CPD sessions covering the use of ediscovery in your law department, including "Ediscovery — Top 7 Dos and Don'ts for In-house Counsel." Register today at <http://am.acc.com>.

ACC has more material on this subject on our website. Visit www.acc.com, where you can browse our resources by practice area or search by keyword.



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used in the organization. New versions of software, storage systems and locations are continually evolving, and potentially discoverable legacy data is often not converted to the newer version or platform. Revisiting the data map periodically (annually at a minimum) may help minimize the labor and potential cost of identifying and restoring antiquated data.

By focusing a corporation's resources on the "left side" of the EDRM, in-house counsel can cut cost and ensure defensibility in 2011. Creating defensible data solutions for their organizations, and saving significant time and reducing costs requires an in-house counsel to start with understanding a company's records footprint, and implementing an effective records management program.

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NOTE

- 1 FRCP 26(a)(1)(A) requires organizations to develop a data map.

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- What is your email destruction policy?
 - Where are emails currently stored?
 - What about paper copies of emails?
 - Server email removal?
- PC/laptop email archive and destruction policy
- Tape destruction or tape reuse?
- Tier II
 - Broader level — organization-wide understanding of where information is located and why it is stored this way
 - What is the retention schedule for each type of data?
 - What data needs to be kept indefinitely?
 - This is only about 8 percent of all data

Before finalizing the formal data map, it may make sense to have your outside counsel review.

Periodic evaluation

One of the major challenges that arises from the data mapping process is determining how to produce data from systems and/or software that is no longer being