

The Small Office Solutions Newsletter



Ronald L. Herold, Ph.D.

Local and Wide Area Networks
e-Commerce and Custom Applications
e-mail and WEB Presence

3612 Hummer Road, Annandale, VA 22003
Tel: (703) 573-2222 Fax: (703) 573-2263
E-mail: ronsolve@rrr.org Web: www.rrr.org

July 21, 2008

In This Issue

- **Litigation Strategy**
- **Email Retention and the Law**
- **Failed Retention Approaches**
- **Backup is not Archive**
- **You Don't have to save Everything**
- **You already have a Email Retention Policy**
- **A Generic Email Retention Policy**
- **Is your company Litigation and Regulatory Ready?**
- **XP lives on**
- **Stopping XP SP3 from downloading**
- **Adobe 9 – don't**
- **Adobe Edits**

Litigation Strategy

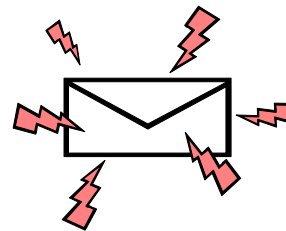


As heard on the Internet, 'A major law firm is planning to sue. They send the defendant a letter to the lowest level official in that company stating their intentions. 120 days later the law firm files the law suit and requests E-Discovery of all emails generated related to their initial letter. Since emails get routinely deleted and backups get routinely rotated, these emails no longer exists or can't be found. When the defendant can't respond to the request – the

law firm requests a summary judgment in their favor based upon destruction of evidence.'

The defendant needs an email retention policy and a means to achieve that policy.

Email Retention and the Law



[Disclaimer: Seek legal counsel for a more full and accurate understanding of what follows and how it effects your organization. What follows is intended for and written from the perspective of Information Technology and is not intended to provide legal counsel.]

When various firms such as Enron crashed and burned – the federal government initiated a law charging destruction of documents/evidence. Sarbanes-Oxley is one law that requires record retention. Subsequent to that law, other state and local laws have been enacted as well as amendments (January 2006) to the Federal Rules for Civil Procedures (FRCP). FRPC changes include:

- Full and Accurate Disclosure (Rule 26,34)
 1. Defines "Electronically Stored Information"

2. Requires early conference between parties in the E-Discovery process.
- Establishes Standards around “Legal Holds” (Rule 37)
 1. Prevents loss of information involved in litigation
 2. Begins when “Party is under a duty to preserve information because of a pending or reasonably anticipated litigation”
 - Specifies Production Formats (Rule 34)
 - Limits Fishing Expeditions (Rule 26)

What does all this mean? It means that organizations need to:

- establish and execute a policy for retaining electronic data (email being the most elusive – but documents are also included)
- make sure the data is retained
- be able to retrieve the data.

Failed Retention Approaches

One method of retention (and its being done, today) is to print every email and save it for some period of time – say 90 days. Sounds like it should work – except when the law suit hits – you then have to keep every email until the legal action is adjudicated – and end up with warehouses full of emails. Oh – and by the way – what is your retrieval mechanism when you need a specific email?

Another method is to mandate that all email is kept on the server and automatically retained and deleted from the server using its policies. . When the “employee of the year” had a laptop problem and turned in his machine to tech support – a .pst file was found – which is contrary to company policy. He had to be terminated – or the email retention policy would have been ruled void.

Backup is not Archive

A backup is not an archive. This may seem like a play on semantics – but consider how you might try to recover all the emails pertinent to a specific legal inquiry from a backup? Now consider an organized and indexed method of archiving. The effort would be much different. Clearly, saving every message into a big bucket might be the easiest way to comply with your company’s retention policy – but it would clearly be the biggest nightmare if you ever had to retrieve a message.

You Don’t have to save Everything



Most organizations (depends upon the nature of your business) are not required to save every email or every document during their normal course of business. What makes the most sense is to establish a retention policy consistent with business practices.

For example, meeting announcements are transitory in nature and probably need little retention. Project emails and data where there is a long term liability for the project’s success should probably be kept for the full duration of your liability – but then promptly destroyed.

Other types of data and communication have different business retention times. I am not aware of any law that requires any specific retention times during the normal operation of your business.

However, once it is evident that you are expecting a legal entanglement – the entire process changes and so do the requirements.

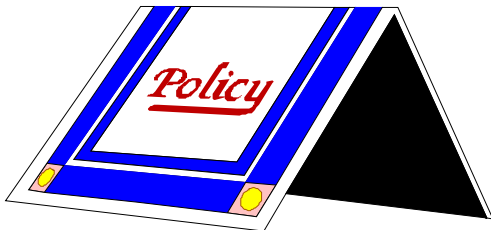
You already have a Email Retention Policy

You probably don't realize it – but you already have an email retention policy even if you don't have an official written policy in place. Don't believe me? Go ask any employee what their email retention policy is? It will exist and it will be different for each employee. Unwritten, unauthorized and undocumented – a multitude of policies none-the-less exist and are in full action.

You can try to influence your employee's email retention policies. If you limit your email store space – employees make local email stores. If you make you email store unlimited - your employees save everything.

You can define a corporate-wide email retention policy or use the defacto policies established and implemented by your employees that are now in practice.

A Generic Email Retention Policy



When creating a records retention policy for your company's email, you need to take several things into consideration.

First, the mistake most companies make when creating an email retention policy is not involving all areas of the company in the construction/review process. An email retention policy is not just a legal document, it will effect employee productivity company-wide. So, the first step is to create a policy group with representatives from all major areas of the company. It is important that you understand how employees use the email system. Do they create their own personal archives? How often do they reference old emails? Understanding these things will ensure you don't put in place

procedures that will adversely affect employee productivity.

Second, you need to understand what regulatory or legal factors you are subject to. Is your company in a heavily regulated industry that has existing data retention requirements? For example, banks and other financial institutions have data retention requirements under the Gramm-Leach-Bliley Act, brokers and traders have data retention requirements under the SEC and NASD regulations, hospitals and other medical institutions need to worry about regulations under HIPAA and all publicly traded companies in the U.S. have data retention requirements under Sarbanes-Oxley. These regulations all have retention requirements which include email. Legal considerations mainly revolve around your company's current legal status, i.e., are you in the midst of a court case which could include discovery of company email. It is always best to have an email retention policy in place before legal proceedings.

Third, you need to decide how you will enforce the email retention policy. Are you planning to put an automated email archiving system in place, or will you rely on manual procedures? If you will rely on manual procedures, you will need to include step-by-step email retention instructions that employees can follow and employee training to ensure the policy enforcement. In most cases, an automated email archiving system will ensure policy enforcement and raise employee productivity.

Also, you must communicate the new policy to the employees. Employee communication and training can lower your compliance and legal liability.

Lastly, a good email retention policy should have the following topics:

- Effective date
- Last change date and changes made
- Person or department responsible for the policy

- Scope/coverage
- Purpose of the policy
- Policy statement: This can include a company philosophy statement about the business/legal/regulatory reasons for records retention
- Definitions
- Responsibilities
- Procedures
- Other retention policy guidelines
- Duplicate copies/convenience copies
- Consequences if the policy is not followed
- Appendix A: Litigation hold/stop destruction policy including a backup procedure
-

Like any other important policy or procedure in your corporation (like your disaster recovery plan – which you have? Right?) an email retention policy is something that has to be designed to fit your organizations individual needs.

To provide some though into the process, the link at the end of this paragraph goes to the Texas Association of Counties and suggests some methods that they have considered for email retention. It's a good read and I would suggest it's worth the time.

http://www.county.org/resources/library/county_mag/county/194/5.html

Is your company Litigation and Regulatory Ready?



If you are – you have the following items in place

1. Up-to-Date Policy and Process
2. Policy Enforcement via Technology
3. Automated Collection, Retention and Deletion of Emails
4. Robust Litigation Hold process
5. Efficient E-Discovery process with rapid document production
6. Well Communicated policies to Employees

Legal Ramification of Archived Emails

A related but totally different topic regarding email is an employer's responsibility concerning the archived emails of the company's employees.

There always appear to be employees who will conduct personal business using employer's computers and bandwidth and storage – and then complain about the employer archiving their emails and retaining them and delivering them to a legal authority under subpoena.

The key element to support the employer in this action is that there is an email usage and archive policy **and** that this policy is actually implemented and enforced. Here is a good read on the topic:

http://www.iacis.org/iis/2003_iis/PDFfiles/HolmesCampbell.pdf

Let me know if you want help developing and implementing a policy to address this.

XP Lives On

New licenses for XP seem to still be available if you order machines from OEMs. That is – you can't buy XP in the store or on a mail order PC, but you can specify it from OEMs. My understanding is that this will continue through January 2009. Of course, Microsoft has changed its policies on this so many times – that it is impossible any longer to believe what is offered as gospel from Microsoft.

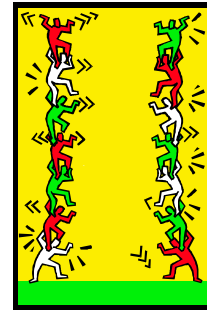
Stopping XP SP3 from Downloading

If you were the manufacturer of the Windows software product and made service packs for your software, would you have a program titled "Windows Service Pack Blocker Tool Kit"? I guess you would if you were Microsoft.

With this tool kit you can block XP SP3 from the Windows Update Service download for 12 months from its date of becoming widely available. I am not sure what date that is – and if Microsoft isn't going to change that date – but the link below will provide that feature and at least for the time being – stop the downloading of XP SP3.

<http://www.microsoft.com/downloads/details.aspx?FamilyId=D7C9A07A-5267-4BD6-87D0-E2A72099EDB7&displaylang=en>

Adobe 9 – don't



Here is a report from a customer of mine on Adobe 9.

"I had Adobe Reader 8 on my laptop. I made the mistake of upgrading to Adobe Reader 9.0. It was a disaster. If I opened ANY pdf file the computer hung. None of the usual tricks to alleviate this problem would work or get the computer to shut down and reboot in an orderly fashion. Power removal was the only solution.

I uninstalled Adobe Reader 9.0. I couldn't find a copy of Adobe Reader 8.0 to load – it is not available on the Adobe website. However, now IE opens my pdf files [which may be due to having the full Adobe Acrobat 7.0 installed on the laptop]. It is working fine. I do have Adobe Acrobat 7.0 on my laptop so I can edit pdf files, etc.

I have copies of Adobe Acrobat Reader 8 if you find you need to move backward. Please contact me.

Adobe Edits

I was playing with opening pdf files which were posted on the Internet from Adobe Acrobat. I find that most pdf files, even at sites like hp.com, still have the edits embedded in them and they can be revealed by turning on markup. It is easy to eliminate edits from a public pdf file but it appears that most companies don't know or bother.

If you need a hand with how to do this – let me know.