Legal Aspects of Records Management
www.archives.nysed.gov

Objectives

• Understand legal requirements for RM
• Learn about laws and relevant court cases
• Understand how legal discovery works
• Know consequences of not keeping records

Agenda

• The legal importance of a records program
• The laws and the consequences
• Legal discovery, including e-discovery
• Practical steps going forward
Note

- We are not lawyers
- Though we interpret law all the time
- We do not provide legal advice
- Talk to your counsel for legal interpretation

How Laws Affect a Records Management Program

LEGAL & BUSINESS REASONS

 Legal Framework

- Local, state & federal laws govern RM
  - Regardless of format
- Understand & comply with applicable laws
  - RM program must support and sustain laws
- Know consequences of non-compliance
  - Goal: reduce your risk exposure
RM Legal Objectives

- Meet requirements imposed by law
- Fulfill FOIL requests
- Fulfill legal discovery requests
- Meet government’s business needs

Meet Legal Requirements

- Records Management program must
  - Comply with mandated laws
  - Demonstrate intent to comply
- Ensures accountability
  - Government’s accountability
  - Government employee’s accountability

FOIL and Discovery Requests

- Meet Freedom of Information Law requests
  - Timely retrieval of relevant records
  - Including electronic records
- Comply with discovery requests
  - Retrieval & preservation of applicable records
  - E-discovery now wide ranging & challenging
Meet Business Requirements

• Support government business operations
• Records support government services
• Records required to perform daily work
• Protect essential business records
• Help preserve those records
• Part of business continuity & disaster recovery

If Records Not Managed Well

• Stiff financial penalties
• Criminal penalties
• Inability to perform required work
• Added expenses for legal discovery
• Loss of public trust and support

What about you?

What are specific legal effects government has suffered from not properly managing records?
THE LAWS
Which ones do you have to be concerned about?

Intents of Records Laws
• Define “record”
• Identify records custodians
• Ensure authenticity
• Protect confidentiality
• Meet retention periods
• Show intent
• Demonstrate integrity

Which Laws Apply to Me?
• Local
• State
• Federal
Local Laws

- Laws enacted by your local government
- Can be laws focused on records
- Can be laws that indirectly affect RM
- Different from government to government

State Laws

- Arts and Cultural Affairs Law
- NYS Freedom of Information Law
- Electronic Signatures and Records Law
- Personal Privacy Protection Law (for state)

Arts & Cultural Affairs Law, Art 57-A
http://www.archives.ny.gov/a/records/nyc_laws_art57a.shtml

- AKA Local Government Records Law
  - Defines “local government” and “record”
  - Requires RM program and RMO
  - Establishes LGRAC, grants, regional program
  - Requires Archives’ authority to destroy records
  - Permits reproduction of records and disposition of originals
Part 185, 8NYCRR
http://www.archives.nyed.gov/a/records/mr_laws_reg185.shtml

- Regulations of the Commissioner of Education
  (for Local Governments)
  - Provides details to support the law
  - Defines duties of RMOs and LGRAC
  - Establishes rules for retention schedules
  - Defines reprographics and e-records
  - Governs storage of LG records off site
  - Further defines LGRMIF grants

§ 185.6 Special approvals for disposition of records

- For Local Governments
  (a) Records not listed on a records schedule
  (b) Records damaged by disasters
  (c) Disposition of records predating 1910
  (d) Disposition of employee records

Arts & Cultural Affairs Law, § 57.05
http://www.archives.nyed.gov/a/records/mr_laws_aaca5705.shtml

- For State Agencies
  - Defines “record”
  - Establishes State Archives
  - Defines the Archives as the state’s repository
  - Formalizes establishment of Records Center
  - Requires Archives’ authority to destroy records
  - Gives Archives authority to develop regulation
Part 188, 8NYCRR
http://www.archives.nysed.gov/a/records/mr_laws_reg188.shtml

• Regulations of the Commissioner of Education (for State Agencies)
  • Defines “state agency”
  • Provides details to support the law
  • Requires RM program and RMO
  • Defines duties of Archives and RMO

Part 188, continued

• Establishes rules for retention scheduling
  • Including records damaged by disasters
• Establishes rules for State Records Center
• Defines requirements for
  • Imaging and microfilming
  • Electronic records
• Describes transfer of archival records to Archives

Records Where NYSA Does Not Control Retention

• Court records
  • Judiciary Law, Article 4, §89.1 (Appellate)
• Records of district attorneys
  • Judiciary Law, Article 4, §89.2
• Canceled obligations
  • Local Finance Law, Article 2, Section 63.10
Special LG Records Issues

- Birth, Death, and Marriage Records
- Under jurisdiction of DOH
- Municipal Court Records
  (N.Y. Uniform Justice Code §2019-a)
  - State records in the care of a town or village
  - Filed with municipal clerk when municipal justice leaves office
  - Jurisdiction of Office of Court Administration
- Deeds of Gift & Deposit Agreements

Freedom of Information Law

www.dos.state.ny.us/oog/index.shtml

- Defines terms of access to public records
- Appointment of Records Access Officer
- Requires keeping a subject matter list
- Request must reasonably describe records
- Sets deadlines for responding to requests
- Denial of access must be in writing

FOIL Non-Compliance Risks

- Fees imposed if denial is unreasonable
- E-records can’t be created to impair access
- E-records structure must allow segregation
New York State ESRA
www.its.ny.gov/policy/esra/esra.htm
• Electronic Signatures and Records Act
  • Govt can create, receive, and retain e-records
  • Covers private sector and individuals also
  • Electronic signatures are legally binding
  • Generally not required to use e-signatures
  • Makes NYS ITS the Electronic Facilitator

Exceptions to ESRA
• Certain documents excluded from ESRA
  • Wills and trusts
  • Do not resuscitate orders
  • Powers of attorney
  • Health care proxies
• Recent amendments to ESRA
  • Allows donation of anatomical gifts
  • Allows e-recording of deeds and mortgages

New York State PPPL
www.dos.ny.gov/coog/pppl.html
• Personal Privacy Protection Law
  • Applies only to state agencies
  • Requires collection of only needed data
  • Requires good RM practices
  • Allows people to access or correct their info
  • Regulates disclosure of such records
  • Exempts the State Archives for its archives
Civil Practice Laws & Rules
http://codes.lp.findlaw.com/nycode/CVP

- Code of civil practice & associated court rules
- Many rules cover statutes of limitation
  - Used by Archives to establish retention periods
- Best evidence rule (Rule 4539)
  - Permits use of copies in court when copies were prepared in regular course of business
  - Use of copies permitted even if originals exist

Specific Rules within CPLR

- Rule 4518
  - Original records, even e-records, are admissible if made in the regular course of business
- Rule 4521
  - Defines how public officials can indicate the lack or non-existence of a particular record
- Rule 4540
  - Defines how public officials authenticate copies of public records
  - Others cover admissibility of certain records

Federal Laws

- Federal Rules of Civil Procedures
- Health Information Portability and Accountability Act
- Family Educational Rights and Privacy Act
- USA Patriot Act
- eSign
Federal Rules of Civil Procedure (FRCP)
• Discovery rules for subpoenas & litigation
• Govern conduct of civil procedures in federal district courts
• Describe scenarios when records disposition can occur
• Severe penalties for non-compliance or premature destruction

E-Discovery Revisions in FRCP
• E-records discoverable
• E-records usable as evidence
• Must be produced within 30 days
• Requestor may specify form of production
• Third parties may be subpoenaed
  • Such as cloud storage service providers

HIPAA
www.hhs.gov/ocr/privacy/hipaa/understanding/summary/
• Health Information Portability and Accountability Act
  • Standards to protect patient records
  • Provides patients’ right to access health records
  • Guarantees security and privacy for certain classes of health information
  • Now allows disclosure of health information
    • 50 years after person’s death
### PHI

- Protected Health Information (PHI)
- Part of HIPAA
- Information used to identify an individual
  - Patient name, phone number, email address, SSN, health plan number, identifying characteristics, and more
- Requires higher protections than other information

### HIPAA Still Applies

- Even if not providing health care services
- If help administer health plan to employees
  - Must ensure health plans comply with rules
  - Flexible Spending Accounts (FSAs) offered
- Fire departments providing ambulance or emergency medical services
- School districts maintaining health records on students
- Penalties
  - $100 to $50,000 or more per violation

### FERPA

- Family Educational Rights and Privacy Act
  - Protects confidentiality of student records
  - Provides parents and students the right to inspect, review, and correct information
  - Schools need written permission to release
  - Schools may disclose directory information
  - Schools must annually notify parents of rights
USA Patriot Act
www.justice.gov/archive/ll/highlights.htm
• Provides Justice Dept expanded access to
  • Telephone and email communications
  • “Business Records” (Section 215)
• Allows more electronic surveillance
• Requires immediate compliance

eSign Act
Electronic Signatures in Global & National Commerce Act
• Allows digital signing of contracts
• Similar to ESRA, but across state lines
• Records must remain accessible for required retention period
• Records must be accurately reproduced

eSign Limitations
• Does not apply to
  • Wills, trusts, adoptions, divorce decrees
  • Certain areas of Uniform Commercial Code
  • Court orders and notices
  • Court briefs and pleadings
  • Notices of default, foreclosure, or eviction
  • Transportation of hazardous materials docs
Case Law

- Law developed through courts
  - Legal precedents based on court decisions
  - Also referred to as common law
  - Distinguished from statutes
  - Legal principles developed in case law

Case Law Example
US District Court, District of Columbia, 1993

- Armstrong v. Executive Office of President
  - Electronic rendition of paper record is record
  - Electronic rendition is not just a copy
  - Paper version may not reflect all information contained in electronic rendition
  - Metadata is part of the record

Case Law Example
Supreme Court of Arizona, 2009

- Lake v. City of Phoenix
  - Hidden metadata is part of public record
  - Printed copy of record deemed not suitable
  - Embedded information within e-records reveals more information and must be provided
Case Law Example
Court of Appeals of Washington (State), Division 1, 2009
• Mechling v. City of Monroe, Wash.
  • Emails from public officials’ personal email accounts are not automatically exempt from disclosure under public records laws
  • If any portion of a record qualifies as a public record, then the entire record is a public record
  • Although exempted information can be redacted

LEGAL DISCOVERY

Discovery Defined
• Pre-trial phase of a lawsuit
• Opposing party can obtain evidence
• Critical to understand because
  • High risk
  • High cost
  • Extremely time-consuming
Key Steps in E-Discovery

1. Identification
   - Locate relevant records and information
   - Identify potential custodians and repositories
   - Potentially disclosable for a legal proceeding
   - Inventories and retention schedules may help
   - Inside or outside of your facilities

2. Collection and preservation
   - Place hold on data
   - Ensure records protected against tampering and destruction
   - Suspend records disposition
   - Gather, copy, and preserve
     - Hardcopy records (paper and microfilm)
     - Electronic records
       - Digital docs, voicemail, scanned images, email
       - ECMS, application servers, backup tapes

3. Processing (review and analysis)

4. Production and presentation
Collection Risks

- Collecting too much
  - AKA over-inclusiveness
  - Lawyers charge per hour to review files
  - Risk of sharing confidential information
- Not finding everything
  - AKA under-inclusiveness
  - Sanctions for noncompliance
  - Missing key records for either party

Processing

- Review and analysis of collected data
- Need people, skills, and technology
- Need special software for large volumes
  - De-duplication of files (eliminate copies)
  - Pre-processing applications that filter
    - By owner, date range, file type, and size

Production and Presentation

- Determine what needs redacting
- Determine presentation format
  - Difficult to review native files
  - Consider plaintext, PDF, HTML, XML, along with native version
  - Include metadata and header information (such as routing info in an email)
- Transfer to removable media
Cost of E-discovery Identification and Collection I

- Rowe Entertainment v. William Morris Agency
  - $9.75 million to restore emails from 200 tapes
  - Plus hundreds of thousands of dollars to review 250,000 email messages

Cost of E-discovery Identification and Collection I (2)

- Murphy Oil v. Fluor Daniel
  - $6.2 million to restore, review & print emails from 93 backup tapes, and six months of staff time
  - Failed to follow own policy of recycling backup tapes after 45 days, so forced to review all tapes

Costs of E-discovery Processing and Review

- Internal review = $2K per gigabyte
- Legal review: $32K per gigabyte
- Inability to produce records
  - Legal sanctions
  - Costly fines
  - Unfavorable rulings
Demonstrate Good Faith

- An important consideration by courts
  - Can minimize potential sanctions and fines
- A strong RM program is a good start
  - Strong foundation to build upon
  - Periodic and consistently applied enforcement

Case Law Example
Supreme Court of Washington, Div. 1, 2008

- O’Neill v. City of Shoreline
  - Home computer may be inspected
  - Case involved emails sent and received from council member’s home computer and personal email
  - City must inspect personal computer to determine if records are on it
  - Must provide records regardless of format or if on personal or home computer
  - City must provide email metadata as well

Case Law Example
United States District Court, E.D. Virginia, 2006

- Samsung v. Rambus
  - Informal instructions insufficient for legal holds
  - Instructing employees to “look for things to keep” is not enough if litigation expected
  - Reasonably should have anticipated litigation
  - Must suspend routine destruction policy to ensure relevant records are preserved
Case Law Example
Supreme Court of Wisconsin, 1965
• Youmans v. Owens
  • Any records created within one's authority as a public official constitute public records
  • Personal social media accounts may be public records
  • Even if the official claims these were created in a private role

Redefinition of Legal Hold
• Stopping scheduled records destruction because of pending or expected
  • Litigation
  • Governmental investigation
  • Audit
  • Special organizational requirements

Case Law
US District Court for Southern District of New York, 2003
• Zubulake v. UBS Warburg
  • Start hold as litigation is reasonably expected
  • Identify sources of info to ensure preservation
  • Evaluate internal compliance with records retention and storage practices
  • Save active files and ensure backup data is safely stored
  • Monitor compliance with hold, re-issuing hold to ensure new employees know about it
If Potential for Litigation...

- Halt record destruction process
- As soon as aware of litigation possibility
- Contact senior officials and legal counsel
- Limit discussion to appropriate parties

Steps to a Legal Hold

1. Identify potential records custodians
2. Compose a hold notice
3. Distribute the hold notice to custodians
4. Maintain and update the notice
5. Maintain an audit trail
6. Repeat as necessary

What Would You Do?

- How would you manage legal holds in your organization?
- How soon could you identify the records?
- Who would be in charge of what job?
PRACTICAL STEPS MOVING FORWARD

What’s Needed

• Executive support
• Knowing your records and their location
• Documented policies and procedures
• Conducting awareness training

Executive Support

• Emphasizes the impact of non-compliance
• Helps departments support RM program
• Promotes integration with RM
• Supports better adherence to RM
Know What You Have

- Inventory records
- Hardcopy and electronic
- Organize records
  - Separate records from non-records
  - Facilitate access and retrieval
- Dispose obsolete records
  - Apply records schedules on time
- Protect and secure records
  - Security, preservation, and disaster protection

Policies and Procedures

- Policies
  - Broad rules to be followed
- Procedures
  - Specific actions or means to achieve outcomes
- These demonstrate good faith
  - Can minimize potential negative legal impact
  - But only if you also follow them

Awareness and Training

- Written policies are no good if not followed
- Ensure awareness of policies by all staff
- Provide polices and procedures training
- Reinforce periodically
Success Factors I

- Classify records at creation
  - Identify
    - Retention periods
    - Security levels
  - Failure to do so
    - Increases storage, retrieval time, and costs
    - Increases impact of broad records requests

Success Factors II

- RM must be involved in IT decisions
  - Significant role in planning IT systems
    - For discovery
    - For retention, disposition, and preservation
    - For access
  - Must partner with IT staff

Success Factors III

- Change Management
  - Help department staff adapt to change
  - Facilitate changes in work processes
  - Integrate RM in new processes and systems
Any other success factors?

What else would help?

FINAL WORDS OF ADVICE

Solid RM Programs Lead To

- Risk avoidance
- Reduced cost of FOIL compliance
- Reduced cost of legal discovery
- Less disruption of operations
- Increase staff efficiency
- Long-term cost savings
Not Following Legal Requirements

- Reduces government transparency
- Undermines public trust
- Reduces support
- Attracts undue attention
- Restricts ability to operate effectively
- Degrades ability to operate efficiently

Act Today

- Challenges increase as e-records grow
- If you don’t know what you have
  - You don’t understand your risks
  - You don’t know what could happen
- This is merely good records management

The Legal Aspects of Records Management

Thank You!

For more information
www.archives.nysed.gov