

Records Management Perspectives: Understanding legal requirements

Issue 1, 2014

The power of memory

www.crownrms.com



WHETHER PAPER OR DIGITAL, CORPORATE RECORDS ARE ON THE RISE



Records management is at the center of everyday processes for businesses, non-profit organizations and government departments. They all create, receive and maintain a steady stream of records. And every day, the stream is growing stronger, faster, broader.

The growing tide of records—often born digital, but printed to paper, then passed around for processing, signing, storing and final disposal—frequently seems more than any organization can manage.

These days, most records are digital throughout their life. Yet in the digital age, paper records still dominate for legal and regulatory requirements – whether for genuine reasons or the habits of business culture.

When paper and digital records are not destroyed as part of an ongoing records management program, the flood of records grows ever deeper and potentially dangerous.

Managing this flood of structured information takes a lot of organizational effort – defining processes and developing and deploying systems, ultimately in staff time.

Finding an intelligent approach to records management

Instead of asking what may be possible, or desirable, or looking for a perfect solution, organizations can make progress by taking a more pragmatic approach to records management.

How often have you heard the phrase: “We need to create and keep that record for legal reasons”? It’s almost a mantra when dealing with records, yet it is at best ambiguous. Your organization could save a lot of effort if it answered these challenges first:

- What are the regulations and laws that apply to our records?
- Where and how can we find these regulations and laws?
- How can we manage our records to comply with these regulations and laws?

Addressing such questions, this issue of Records Management Perspectives proposes a practical approach – highlighting what people managing records can actually expect to do, day to day, to meet regulatory requirements, and stem the tide of information growing out of control.

START BY DOCUMENTING THE PROCESSES

ISO 15489-1:2001 Information and documentation – Records management – Part 1 defines records as “information created, received, and maintained as evidence and information by an organization or person, in pursuance of legal obligations or in the transaction of business.”

Creation, reception and maintenance are the keywords. You must ensure you complete those records management tasks within the regulations and laws in the country where the records are being used, so they may be used as evidence of decisions made and actions taken – in that particular country, at a particular time, for a particular reason.

Follow these steps and a court or regulatory authority is very likely to accept your records as evidence of decisions made and actions taken.

Process 1.

Records must be created and received ensuring their integrity – i.e. they must remain authentic, true and accurate. What was done to this record, who did it and when are all facts that must always be captured and easily traced to the specific record.

Process 2.

Your employees must know your organization’s policies, processes, and rules, and the systems used for record-keeping. They must be trained in how to manage records, and an accurate account of who attended and when the training was held must also be kept. The training should be ongoing and repetitive.

Process 3.

Records must be created, received and maintained in the format that is allowed by law or regulation. When records are transformed from one format to another, who performed each step in the process, how it was verified and when it was done must be documented. Frequently, the documentation needs to be traced back to each record that was transformed.

Process 4.

Records must be maintained for retention periods based on legal and regulatory, fiscal, operational and historical requirements. For “legal, regulatory and fiscal” requirements you should rely on laws, statutes, regulations and precedents for guidance on how long to retain records. “Operational” requirements are based on internal processes and standards. “Historical” requirements demand careful consideration by archivists, historians and other stakeholders, and are based on an assessment of what the organization should preserve about its history. Be aware that in some countries private and public records must be transferred to national archives.

Process 5.

The processes used to determine the retention periods must be documented, and there must be a clear link between the defined retention period and record keeping practices at the organization.

Process 6.

There must be a defined process that your staff understand and follow to interrupt planned disposal. This “disposal suspension” or “disposal hold” is frequently based on a court order from a judge based on investigations, legal proceedings and other events. It is more often a requirement in countries with common law traditions.

Process 7.

The records disposal event must totally destroy the records, making it impossible to retrieve or reconstruct them.

Process 8.

Each disposal event must be thoroughly documented. The what, who, how and when for each record must be captured and retained. Being able to confirm record disposal can become an important part of regulatory and legal compliance. (Knowing when to stop looking for a record because it was destroyed saves a lot of time too.)

DON'T GET CAUGHT OUT BY MISINFORMATION

Before you determine your policies and processes, it's worth reading this list of some of the common misconceptions about regulatory and legal record keeping requirements.

Seven years for everything

True for some records, but never true for every record. Contrary to popular belief, even the U.S.A. Internal Revenue Service doesn't require seven years' retention for all tax-related records.

The organization must retain the paper copy

Most countries accept born-digital records and scanned records, if produced within the appropriate regulations and laws for format and process. Processes used to create and secure the born-digital or scanned records should always be documented.

Signatures must be original

Many countries accept born-digital e-signatures when produced within the appropriate regulations and laws. Courts in many countries may accept photocopies or scanned images of signed documents as evidence. (Check the rules in each country in which you're operating.)

Digital, electronic, or scanned format records may never replace paper records

Born-digital and scanned records are accepted in many countries when produced within the appropriate regulations and laws for format and process.

"Keep everything" is the law

That is never true.

Records must stay in the office

Some records may need to remain in the office, although it is seldom very many. Conversely, some countries require off-site storage of records to meet defined standards and processes. Processes for off-site storage of records should always be documented.

No outsider can look at the organization's records

Courts in both civil and common law systems can force an organization or individual to give up records as evidence.

These are personal records, not business records

If the record is about the business, then it is not personal. Taking a record home does not make that record personal.

That is only for the United States, not here in my country

A court in the United States may require records kept abroad to be offered up or produced to comply with a document discovery request.

"Keep everything just in case we need it" is our policy

It is not feasible for space, cost and management reasons to keep all records even when they are digital records. Defining "all records" is too difficult. In all likelihood such a policy would not survive the first month, and the organization will need to explain why "all records" were not kept.

All of our records are protected by privilege

Privilege is a common law concept that protects communication between a lawyer and a client during a legal proceeding. Privilege never protects all the records of an organization all of the time.



KNOW YOUR LOCAL LAWS



It helps to understand the legal system where the records are being created, received and maintained.

In theory there are either civil law or common law legal systems. Most countries have evolved their own legal systems, often combining aspects of both civil law and common law, along with cultural, religious and social legal systems. They will inevitably have differing perceptions of what is appropriate and acceptable for record-keeping.

For a primer on the legal system of specific countries, see: www.en.wikipedia.org/wiki/Legal_systems

Civil law-influenced legal systems are the most prevalent

Civil law is based on codified laws made by legislative bodies. It is prescriptive and defines what needs to be done to comply with the law. Under a civil law system, it is normally easier to find explicit regulations and laws on record-keeping requirements.

Civil law systems seldom, if ever, have ‘discovery requests’ for evidence, but civil law judges can request evidence be produced. Although a past case decision may influence a civil law court, its weight is not as great as under the common law system.

Common law legal systems are found in about one-third of the world, normally in those countries with some prior connection to the United Kingdom

Common law’s main difference from civil law is the use of precedents – meaning what came before – and much of the common law is based on decisions from previous cases.

Countries using common law enact statutes by legislative bodies, which guide and set some boundaries for judges and juries.

Under a common law system, it is rather more difficult to find explicit regulations and laws on record-keeping requirements. Any laws and regulations found are open to interpretation during a legal case and may be subject to precedent from other cases. Most notorious in the United States, but possible in all common law system countries, are ‘discovery requests’ for evidence. Often termed ‘fishing expeditions’ they can be extremely onerous on record-keeping systems, processes and departments.

Pluralistic and religious legal systems do exist and may influence either civil or common law legal systems.

Culturally accepted norms on what is legal for record-keeping and what is not, frequently influence what people perceive to be the best process for records management. These norms should not be ignored when managing records.

DEVELOP A RECORD-KEEPING BRIEF



Your records manager will need a clear understanding of the regulations and laws that apply to your organization's records. The ISO definition is clear that records are kept as evidence.

Any record may therefore be used in a legal proceeding. Statute of limitation and periods of prescription are generally the maximum period of time that you may need to consider when retaining a record. And the records manager should have a good understanding of these areas of record-keeping laws:

- Statute of Limitations under Common Law
 - Look in the rules of evidence and the civil, commercial, labor and tax code, and the precedents for cases that may relate to your industry or area of operation.
- Periods of Prescription under Civil Law
 - Look in civil, commercial, labor and tax code.
- Contracts
 - Look also in particular at proof of an accepted and agreed-upon contract, e-signatures, and scanned images of contracts.
- Financial, accounting and taxation regulations and laws.
- Format of records, acceptance of paper, electronic, digital, scanned images and the transfer of records from one format to another.
- Formation and closure of a business entity or non-profit entity (whichever is applicable to you).
- Leasing and selling of property laws.
- Manufacturing regulations (when applicable to the organization).
- Personnel, employment, pension and insurance-related law.
- Privacy and access to information
 - This refers to information held on employees and organizational activities by current and former employees and external regulatory or law-enforcement authorities.

A records manager's goal is to create a record-keeping brief for each country where the organization operates. If in any doubt, always ask in-house or outside counsel for advice on record-keeping requirements in your country.

You may wish to consider the following as a template letter to outside counsel when asking for help to create a record-keeping brief.

Points to remember:

1. Identify outside counsel for the country. Get a referral from in-house counsel whenever possible.
2. Ask for a quotation to do the work. Specify at least three drafts prior to approval of final version.
3. Agree on the price.
4. Review the first draft and return for amendment. Review the second draft and either approve or ask for a third draft. Three drafts are normally required.
5. Accept the final version and get a final version clearly indicated on each page with date approved and by whom.
6. Review every three to five years, with the same outside counsel if possible.

Template letter to counsel:

(XXX – the country, ZZZ – the outside counsel name, YYY – another country.)

Dear _____,

The Records Management department is conducting a review of records management laws and regulations in XXX, to create a record-keeping brief. I would like ZZZ to investigate the laws and regulations in XXX concerning the retention period and management of business records. This would cover any laws and regulations for specific record media, that is, paper, digital, microfilm and others, as well as the transfer of business records from one media to another, for instance, microfilm or image production from paper business records or the transfer from one digital format to another format.

It also covers rules and regulations for the retention of computer-generated, stored and manipulated information, for instance, computerized “books of account.” It includes the “rules of evidence” for both civil and criminal proceedings in a XXX court. It includes any regulations the Inland Revenue department or similar government taxation agency or bureau in XXX has published concerning tax record retention, format and submission requirements. It also includes any records related to employment, pensions, work visas or related issues for both citizens of XXX or expatriate employees.

Any regulations or guidelines on the protection of privacy and the control of records relating to the disclosure of personal data are of interest. Any regulations or guidelines on the transfer of records from XXX to another country are of interest. Any unique record management requirements for a foreign business entity operating in XXX are also of interest. Any unique records management requirements for the [describe industry, business operation, etc., here] are also of interest.

Apart from this letter, I will send you a record-keeping brief prepared by our outside counsel from YYY as an example.

Yours sincerely,

It is very unlikely that the first and second record-keeping brief drafts from outside counsel will answer all the questions on record-keeping for your organization. Each draft must be carefully read, discussed with others inside and outside the organization, questions prepared and presented to outside counsel and a subsequent draft prepared for further review and acceptance. Frequently, the information will require cross-checking and further research with local records management groups, external professional services firms, government agencies and always with other employees who use records in the organization.

It is not uncommon to clarify for outside counsel erroneous information given on length of retention, format of records, transfer of records from one format to another and so on. By the third draft, once the records manager has worked through the drafts and done some additional research and discussion within his/her organization, the final record-keeping brief is ready. This record-keeping brief is most useful when it is shared widely throughout the organization and referenced and summarized on records retention schedules. The record-keeping brief becomes the organizational memory for why records are being created, received and maintained to meet legal and regulatory requirements in that particular country.

The advice here is only intended as guidance. Crown Records Management can help any organization create and maintain a comprehensive records management program.



CROWN RECORDS MANAGEMENT COMPLETE INFORMATION MANAGEMENT SERVICES

Crown Records Management takes care of corporate information, printed or digital, throughout its entire lifecycle, from creation through to eventual long-term preservation or destruction.

The extent of our facilities enables us to offer a consistently high quality of service on a global basis.

The scope of our experience includes advising businesses of every kind on better information management.



This article was authored by Bill Proudfit on behalf of Crown Records Management.

Bill Proudfit has more than 25 years' experience in knowledge, records and information management.

For further information regarding this article or any other services provided by Crown Records Management, please email Philip Britton at pbritton@crowwww.com or visit www.crownrms.com.