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What Lurks Within

Destroy legacy data or it can come back to haunt your company

Anne Kershaw | [All Articles](#)

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Legacy data (backup tapes, file shares, PSTs, and other storage media) when kept indefinitely has no value or purpose. But it can create expensive havoc and costs that can be avoided if the data is properly managed, and destroyed when business and legal retention requirements expire.

Even ignoring electronic data discovery costs, the cumulative infrastructure and operational costs of hoarding data and data media are enormous. Many organizations have hundreds of thousands of unneeded tapes and terabytes of electronic files that have not been looked at in years, incurring significant backup, maintenance and storage costs.

Photographer: Fredrik Brodén

Business executives and lawyers worry that the data might contain information that is subject to a legal hold or be relevant to some existing or future litigation — and that its destruction could be second-guessed by adversaries and courts, resulting in spoliation sanctions. So it's not surprising that so many are reluctant to say "throw it out."

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Yet saving everything is not an insurance policy — any comfort derived is illusory. In fact, keeping everything to avoid being sanctioned actually increases risks.

For example, regarding whether or not a company is obligated to keep certain records: if the

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organization has them, they likely must be disclosed if potentially relevant under F.R.Civ.P. 26(a) [general disclosures] and 26(b)(2)(B) [not reasonably accessible information] and potentially produced under F.R. Civ.P. 34 or 45.

Additionally, lawyers who know of documents preserved for one case that are relevant in another have a duty under F.R.Civ.P. 26(g) to disclose the existence of those records.

Here are steps you can take to bite the bullet.

1. *Confirm existing data, and information management and discovery response programs.* The first step is to confirm that the organization has a records and information management program and a repeatable process for responding to litigation and/or investigation discovery needs. Confirm that these programs and processes are audited and actually carried out, i.e., that they exist in practice, not just on paper or in some word processing file.

This does not mean completely reinventing the wheel for retention and legal holds, just a common-sense look at whether it appears to be working reasonably well.

2. *Inventory legacy data sources.* The next step is to make a simple list or inventory your legacy data sources. For data that is not in file shares or email, create or obtain a basic list of your organization's legacy data sources that are not under retention schedules or subject to litigation hold, such as hard drives, servers, tapes, removable media devices, etc. These may be sitting on shelves, in closets and storage rooms in the IT department, and elsewhere in the organization. For file shares and email, the initial process involves identifying inactive file folders and email, e.g., file shares that haven't been accessed in a given period of time, such as five years.

3. *Take reasonable efforts to establish provenance.* Having inventoried your legacy information, take reasonable steps to document why the data was saved, where it came from (if known), and the likelihood that it is a duplicate.

4. *Schedule or destroy.* All of the inventoried data sources should be either placed on retention schedules or legal holds as appropriate, or destroyed if no longer needed. If no business reason exists for keeping the data and it is not subject to any known records retention or legal hold requirement — or if it is duplicative of documents preserved elsewhere — it can and should be destroyed. The touchstone of the whole process is reasonableness. It does not involve a document-by-document review of all potential records preservation obligations.

5. *Disposition opinion.* An opinion letter from a properly qualified and insured outside expert — verifying the reasonableness of the organization's programs and processes and making disposition recommendations — is often the ticket to being able to start destruction. The disposition opinion helps the organization's business, legal, and records management professionals move forward comfortably with documentation of legal compliance. It also can help leaders achieve consensus about the destruction decisions, because if any adversary or judge questions the appropriateness of the disposition, the organization can point to its reliance on the opinion of the expert.

6. *Follow-up.* Having gone this far, confirm that the authorized destruction actually takes place. Remember the saying, "there are no free lunches." People don't think twice about what they are keeping if it's free and doesn't get in their way, yet often think twice if keeping it has a cost associated.

One way to obtain the cooperation of whatever business unit wants to keep data against advice is to make that unit the "owner" of the data — and be thereafter responsible for maintaining it and for the costs of reviewing and producing it if it is ever swept into discovery.

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Current Holds. The process of examining legal holds, identifying legacy data, and interviewing employees about the hold process and the provenance of legacy data may uncover situations where extraordinary volumes of data are being held for just one or two cases. In fact, a few cases may account for the lion's share of data being preserved.

It may be worthwhile to review those case files to confirm what the company is actually obligated to keep, e.g., a monthly backup may suffice in lieu of 30 daily backups; targeted preservation of a few custodians' emails may suffice instead of keeping all emails for the entire company.

In addition, with respect to situations containing overly broad preservation requirements, judicial intervention should be sought. Judges are becoming increasingly sensitive to issues associated with over-preservation and litigants are being encouraged to raise over-preservation issues with the courts.

Closed Case Files. A party is obligated to produce information that is in its "possession, custody, or control" — that includes information kept by outside counsel or e-discovery hosting providers. The preservation review process should include an audit of outside counsel and any relevant vendors regarding the status of case-related discovery that is no longer needed. Similarly, case settlement agreements should provide for the confirmed destruction of all discovery produced to the parties.

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