

Office of the Secretary of State

Vermont State Archives and Records Administration

Records and Information Management Update

Summer 2011

When Information Meets Litigation

Records management (also known as Records and Information Management or "RIM") is defined in 3 V.S.A. § 117(a)(1) as the "identification and management of public records to assure their authenticity and accessibility from creation to ultimate disposition." RIM uses a combination of policies, procedures, and tools to align an agency's records and information to its business functions and needs. To do this, focus is placed on the life cycle of the records or data. The records life cycle is comprised of three general phases, all of which are interrelated: (1) creation or receipt; (2) maintenance and use; and (3) disposition.

Litigation, or the prospect of litigation, introduces a new dynamic to records management: an immediate need to know, find, and prevent the destruction of all potentially relevant recorded information. This obligation is not only triggered by the actual commencement of litigation, but also arises when litigation is reasonably anticipated. While there is no precise test to establish when an agency should "reasonably anticipate" litigation, a well-respected organization known as the Sedona Conference has explained that "Reasonable anticipation of litigation arises when an organization is on notice of a credible threat it will become involved in litigation or anticipates taking action to initiate litigation."

Agency records management programs can facilitate the agency's response to ongoing or anticipated litigation. Records management makes it more likely that that there is documentation of: (a) what records have been created or received; (b) where records are located and how they are maintained; and (c) if the records have already been destroyed pursuant to a disposition order or record schedule. The value of these, especially the last, should not be underestimated, as it will reduce the amount of time spent looking for records that may no longer exist! As a result, once litigation is anticipated or underway, the obligation to preserve records and produce vast amounts of recorded information in short periods of time, part of the "discovery" process, is less daunting.

Records that may be relevant to ongoing or anticipated litigation should not be destroyed. Period. Even when retention requirements have been met and destruction is authorized by a record schedule or disposition order, agencies should take steps to prevent the destruction of records. If an agency waits until the commencement of litigation in order to prevent records from being destroyed, it may lose information that a court later finds should have been preserved. In blatant situations, this has been called "spoliation" of evidence and strict penalties may be imposed as a result. Therefore there is the potential for legal cases to be won or lost over how well an agency manages its records.

To effectively preserve potentially relevant recorded information, a "legal hold" should be implemented in response to litigation. Legal holds suspend the application of retention policies until ongoing or anticipated litigation is resolved, after which time the hold can be released and routine records management practices, including retention, can be resumed. The legal hold should encompass all potentially relevant recorded information regardless of form and format. Large portions of modern government records are created or maintained in electronic form, sometimes by complex systems maintained by information technology units rather than individual users. These electronic records and associated backups are particularly susceptible to instantaneous deletion or modification and should not be overlooked when it comes to implementing a hold.

Litigation may arrive with little warning, so do not wait until it commences to better prepare your agency and staff. Legal or retention holds are not limited to litigation. Ongoing or pending investigations, claims, negotiations, audits, and other extenuating circumstances may require the suspension of retention policies as well. Why not be ready?! Records officers and liaisons, legal counsel, IT staff members, and business/ program managers should collaborate to establish or update their agency's records management program. With a program in place, they can take swift and effective action when litigation is anticipated or underway. Potentially relevant recorded information will be identified, located, and preserved, and a legal hold will be effectively implemented.

2011 Open House Dates

Open houses are held at VSARA twice a month. At these events we provide informal, basic training in records management and using the State Records Center, and give our users the opportunity to tour our facilities and meet our staff. We encourage new records officers and liaisons, or anyone who has never been to VSARA, to attend! We tailor our open houses to meet the needs of attendees, so call or email today to schedule a visit!

Tuesday Morning Sessions

(9:30 - 11:00 am) July 5

August 2

September 6

Thursday Afternoon Sessions

(1:30 - 3:00 pm)

June 23

July 28 August 2k

Email us at rim@sec.state.vt.us or call Rachel Muse at 828-2397 if you'd like to attend.

A Request Can Freeze Routine Destruction

On April 29, 2011, the Vermont Supreme Court issued a decision in the case of *Price* v. Town of Fairlee in which a 4 to 1 majority of the Court concluded that ballots and tally sheets held by a Town past statutorily mandated sealed retention requirements become open to public inspection upon request. The Town had taken the position that the records, initially required by law to be kept in sealed containers, were exempt from inspection even if the Town maintained them beyond the time mandated in statute, and that it could destroy them (without making them available in response to a specific request) at any time after the retention time had run. The Court's decision hinged on the often-reiterated principle that all doubts are resolved in favor of access to information. The case underscores the idea that records that might have been legitimately destroyed prior to or in the absence of a request take on a different status once a specific request relating to those records has come in.

General Records Schedules: What's New

As VSARA makes more General Records Schedules (GRS) available, more and more agencies are adopting them for use. GRS are a fantastic way to get started on developing a records management program for your agency: they establish minimum retention requirements for a wide variety of records, are flexible and easy to adapt to your needs, and more are underway. At this time, 17 agencies and departments have notified VSARA that they're using GRS, and we're seeing that number grow all the time. Learn more about using GRS on our website.

Our latest compilation of GRS now available for use. These schedules are designed for use by public utilities, and cover records related to managing ratepayer records, and the operational and policy making records of telecommunications providers. This set of GRS will be expanded in the future to cover a wider range of public utilities and the records they create. **GRS for Public Utilities**

Encore Sessions of "Got Records? Now What?" For those of you who were unable to attend our March sessions of the course

"Got Records? Now What?" at the Summit, we are pleased to announce two more dates: July 20, 9:00-12:00, and November 2, 12:30-3:30. The first half of this workshop introduces concepts of records and information

management, including best practices, tools, and resources currently available. The second half of the session helps attendees understand the statutes surrounding public records in Vermont, be able to respond efficiently to public records requests and understand exemptions and how to apply them.



In the US, it's estimated that server

farms, which house Internet, business and telecommunications systems and store the bulk of our data, consume close to 3 percent of our national power supply.

Shelley Podolny, "The Digital Pileup" New York Times, March 12, 2011

Register for the courses through the Summit.

DigitalPreservationEurope, a multi-disciplinary group that seeks to find

A Records Management Cartoon Break!

solutions to preserve at-risk digital data, have developed a series of cartoons to illustrate the challenges associated with preserving data digitally. Watch Team Digital Preservation prevent nuclear disaster through the forces of good records and information management! <u>Digital Preservation and Nuclear Disaster: An Animation</u>

Reminder: Authorizations Expiring **Be Aware:** June 30th will mark the date when current authorizations to

access records at the State Records Center will no longer be valid. If you've authorized individuals who are not records officers or liaisons to have ongoing access records stored in the State Records Center using the VSARA-003 form, those individuals will need to be reauthorized for the upcoming fiscal year (July 1, 2010 - June 30, 2011).

Questions or Comments? Email us at rim@sec.state.vt.us.

Tel: (802) 828-3700 • Fax: (802) 828-3710

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1078 US RTE 2, Middlesex ● Montpelier, VT 05633-7701

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