

Survey of Corporate Records Practices 2006

Survey Overview

Several years have passed since the Arthur Andersen case and since Elliot Spitzer introduced us to how pervasive the problems of records management are and the damage that can be caused by over-retention and poor enforcement of corporate records policies. In the last few years, we have seen the introduction of Sarbanes-Oxley, FACTA and countless state requirements for managing and destroying records. But unfortunately, even after all of this, not much has changed.

Billions of dollars are spent annually to automate the management and retention of corporate records, when over half the records are simply not needed.

Companies are convinced that they need to keep even more records for even longer periods of time, when the facts point decisively in the other direction.

Consequently, companies are incurring huge electronic discovery invoices as a cost of doing business. Correcting their record naming and retention standards, and then applying those standards will yield deep volume reductions and slash the risks and costs of discovery comparatively.

Jordan Lawrence conducted a survey of several hundred corporate attorneys. Their feedback uncovered company problems including over-retention of records, poor record naming standards, general dissatisfaction with policies and the inability to enforce policies. These records management problems parallel the information and insights provided by operations and IT management that we recently gathered.

In this Survey Report, we introduce the legal requirements and critical knowledge for corporate records management compliance. This is followed by the specific Jordan Lawrence services that help solve some of the primary problems, or provide your company with the information needed to make better decisions about solutions that may be needed to meet organizational objectives in a timely, legally defensible and cost-effective manner.

We then cover some general solutions to the more common issues and then lay out some of the findings uncovered by the survey respondents.

About Jordan Lawrence

Jordan Lawrence is a specialty consulting firm, whose sole focus is helping organizations assess, develop and enforce corporate records policies and programs.

Since 1987, Jordan Lawrence has enabled companies to improve their levels of corporate protection by laying the foundation, setting the standards and developing the controls for strict compliance with the corporate records program. Recommendations made by Jordan Lawrence are objective, unbiased and focused on resolving a company's specific records issues.

Requirements of Corporate Records Management

There are five basic requirements for corporate records management programs which will lead to mitigated risks, reduced costs and improved access to records.

Retain records long enough to meet retention requirements.

Records must be maintained long enough to meet regulatory and “valid” business requirements. In most industries, only about 60 percent of record types must be retained under regulatory requirements; the rest need to default to accepted industry standards and operational needs.

Be able to locate records quickly and effectively when needed.

Companies need to be able to quickly locate records, regardless of physical location or media, to cut routine research costs and legal production costs.

Ensure that you can protect records when needed for examination or litigation.

Companies must be able to enact precise, immediate and documented hold orders on records subject to investigation, litigation or audit. This requires a broad knowledge base of the record types the company holds across all media, ownership, location (including which media) and if they still exist. Without this up-to-date information, it is difficult to manage hold orders to the degree now expected by the courts.

Destroy records immediately and non-selectively when retention needs are met.

Most organizations vastly over-retain records across all media. Our experience is that once companies enforce their policies, they experience a 40 percent to 70 percent immediate disposal of legacy records. Over-retention is of critical concern for these reasons:

- Legal adversaries know how to effectively use obsolete records against their targets.
- Each unnecessary record represents a potential unnecessary production cost.
- Each unnecessary record represents a potential smoking gun in litigation.
- Each unnecessary record complicates media migration, content management and other decision costs, volumes and complexities unnecessarily.

We believe that over-retention is a dangerous practice that requires immediate identification and a fore-front clean-up solution. This practice is certainly at the heart of most discovery problems, systems-implementation failures and unmerited legal settlements.

Appropriately tag your records according to the new, non-retention requirements.

In addition to retaining records long enough, companies must comply with new obligations unrelated to retention. These requirements include categories such as:

- Rapid discovery obligations implied by Sarbanes-Oxley, SEC actions and similar measures.
- Privacy obligations under HIPAA and FACTA.
- Secure destruction obligations that necessitate ensuring records are properly, completely and irreversibly destroyed when retention obligations have been met.
- Routine or commodity litigation that covers the most common litigation types within a company and the most common record types needed to support such matters.

The Cornerstones to Establishing a Records Policy

The next step after understanding the requirements of a corporate records program is learning how to meet them. First, establish a defensible program, which necessitates information gathering. A company that has successfully collected the information listed below can rapidly develop policy documentation.

Know *what* record types your company generates and retains.

Without knowing what record types are held, there is nothing to map retention requirements, records-related systems and maintenance against. In the same manner, if a company does not have this information captured, the records management program is not complete and will hinder a company's ability to meet their legal, regulatory or cost objectives.

Know *who* owns and controls each record type.

To ensure records can be produced, protected and destroyed as needed, companies must know who *owns* each record type. The *official owner* needs to be identified, as well as convenience users and *custodial* relationships, such as vendors who provide corporate benefits management, payroll processing or background checks.

Know *where* the records are located.

Records are often retained redundantly in multiple departments and media across the entire organization. Companies must know where records are located geographically, as well as on what media and on which applications. This information will help ensure that requirements and records practices are applied consistently across the organization, regardless of the systems or vendors used.

Know *when* records become obsolete and can be disposed.

Most records are only an asset of the organization for a relatively brief time. Once records have been retained long enough to meet a regulatory or valid business requirement, they start to become a liability and should be disposed of in a consistent manner. Determining the correct retention requirements goes beyond regulations. It includes a careful evaluation of business/risk decisions, tax needs, operational needs and the consideration of accepted industry standards.

What Record Types Are Maintained

Who Owns Or Controls Each Record Type

What Media Is Each Record Type Maintained On

Where Are Records Held

What Records Still Exist

Jordan Lawrence Solutions

Assessments for Records Initiatives

We provide an objective, third-party review of current and planned records initiatives that covers all, or at least a substantial cross section, of the company. This should be completed before undertaking development of a corporate records policy, developing a retention schedule or acquiring records-related software, systems or vendors.

Assessments can be general in nature or geared to a specific medium:

- Assessment for Email Initiatives
- Assessment for Document Imaging Initiatives
- Assessment for Content Management Initiatives

The cost savings and cost avoidance opportunities that exist are dramatic when adequate, unbiased information is available.

Volume Correction

Companies need to develop “enforceable” record naming and retention standards that can be applied directly to all current records holdings, including paper, electronic, email and digital images. “Right sizing” records holdings impacts every aspect of corporate records maintenance, production, legal and discovery costs, vendor preference and technology selection. Handled as a conversion effort and properly documented, most companies will see appropriate immediate volume reductions averaging 50 percent for all media.

Legal “Hold” Management

All organizations should implement centralized legal hold capabilities to cover all record types across all media. This will enable immediate, precise and verified hold orders that can be managed, tracked and explained in litigation, examination and other matters. With proposed changes in the Federal Rules of Civil Procedure, this is a significant issue for many organizations to resolve.

Regulatory Tagging

Compliance and regulatory officers, auditors and risk managers should consider their exposure beyond just non-retention matters. Requirements for rapid discovery, privacy, secure destruction and routine, “commodity” litigation matters can easily be collected and handled once broad knowledge of record types is gathered. Regulatory tagging against Sarbanes-Oxley, FACTA, Anti-Money Laundering, Gramm-Leach-Bliley, HIPAA and other requirements can help avert a records-related crisis in most corporations.

Jordan Lawrence Recommended Solutions

Standards for corporate records management now exist and are available for most industries. These include Corporate Records Policy documentation, Email Policy documentation and record naming and retention standards. Adapting these to any company and integrating program implementation throughout the organization can be completed in just a few months. Ongoing enforcement and continual refinement are now well-established disciplines and are being effectively deployed at hundreds of corporations worldwide. For companies with heavy regulatory and litigation burdens, records policies are probably more important than nearly any other corporate policy. Lacking enforcement can lead to severe legal problems, negative financial impacts and unwanted publicity. Make sure the company's tactical solutions meet and allow for an enforced records policy.

Offsite Records Storage

Half of ACC members responding to this survey conveyed that offsite paper records are still used extensively in production orders and that accessing them is often difficult. Onsite paper records are used 88 percent of the time. The problem with accessibility is caused directly by employee discretion in categorizing (naming) records, which makes it difficult to discern which records to review and to identify who to contact for record protection and production. This also causes vast over-retention, which leads to unnecessary research obligations for records that should not even exist.

The remedy is to set record naming and retention standards, and then apply those standards to the inventories of records held.

We also recommend that all companies discontinue allowing storage vendors to have control of the "information about corporate records" (the inventory-control software or interface). This is an extremely risky practice and one that the storage vendor has no liability for, other than a small degree of financial exposure (typically less than a dollar per box affected). Check with your audit department if you have any questions about the importance of this vital FACTA, HIPAA and corporate liability issue.

Document Imaging

It is surprising how many companies digitally image paper records, but then retain the paper and do not apply retention standards to the digital images. We recommend that companies tag their "document codes" or "record type codes" used in indexing to appropriate retention standards, and then systematically apply those standards to the images, which entails disposing of the images once retention obligations have been met.

Paper copies should be retained only for a short period of time after imaging. Best practices suggest usually as long as it takes to verify images and indices are correct. However, if paper originals are "original instruments" or otherwise legally necessary original records, we recommend that they be stored in a protected environment or vault for the duration of their retention requirement.

We also recommend that legal "hold" management be integrated into any and all document imaging systems.

There are several companies we can recommend who will meet all the guidelines above.

Email Management

There is no doubt that email is the biggest concern to all management. Email is a problem for these reasons:

- Email is vastly over-retained, backed up and archived.
- People write foolish things in email messages.
- Companies seldom distinguish between email “records” and “non-essential communications.”
- Employees are given amazing levels of discretion in setting retention and destruction practices.
- Retention standards seldom exist and are even less often applied.

We recommend that companies first determine what “valid business records” are retained on email systems, which can be done quickly through an Assessment for Email Initiatives. Record naming and retention standards can be established and applied to email inventories, similar to handling other records on other media and systems.

We can recommend email management solutions that offer compliance, which works for email retention, disposal and even legal hold management.

Who Participated

Over 75 percent of respondents occupy senior legal positions and responsibilities within their organizations.

Rank	Position	Percentage
1	CLO / GC	40.4%
2	Associate GC	19.2%
3	Senior Attorney	6.9%
4	Deputy GC	5.0%
5	Division Counsel	4.6%

Nearly all respondents (over 91 percent) report multiple job responsibilities in their day-to-day work for their organizations.

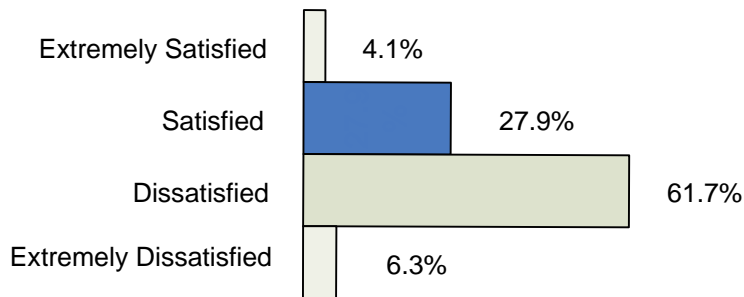
Rank	Responsibility	Percentage
1	Compliance	58.1%
2	General/Commercial Contracts	54.7%
3	Corporate Transactions	51.6%
4	Litigation	40.7%
5	Generalist	40.3%

Records Policy Insights

It might surprise executives that the people most concerned with the *effectiveness* of an existing records policy are not happy with what is in place or how useful it is in day-to-day practice. When asked about:

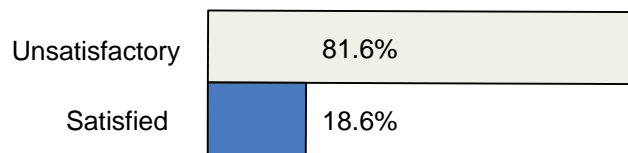
- **Their satisfaction with the current Corporate Records Policy...**

Respondents are very unhappy with their current corporate records policies



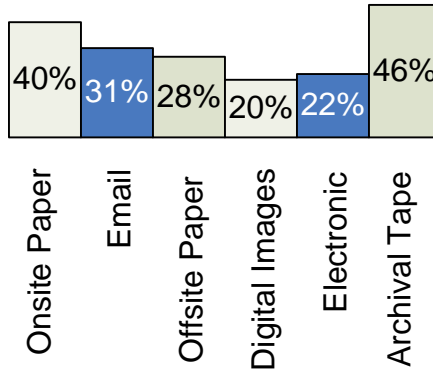
- **The completeness of their record naming standards across all media...**

The standardization of record types, in general, is inadequate for their businesses



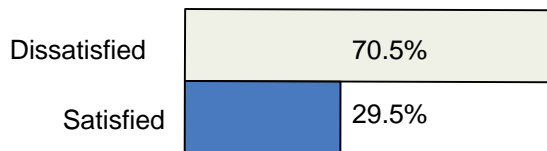
- **The routine disposal of records in accordance with approved retention standards...**

What percentage of the time do you believe that disposal of records happens in accordance with approved retention standards?



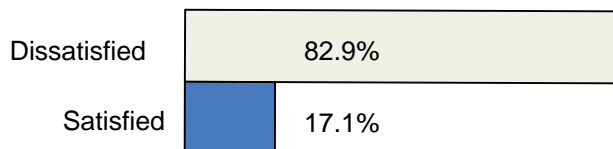
- **The completeness of their record naming standards for paper records (used heavily in litigation support)...**

The standardization of record types, for paper records, is inadequate for their businesses



- **The completeness of their record naming standards for email-based records (used heavily in litigation support)...**

The standardization of record types, for email records, is inadequate for their businesses



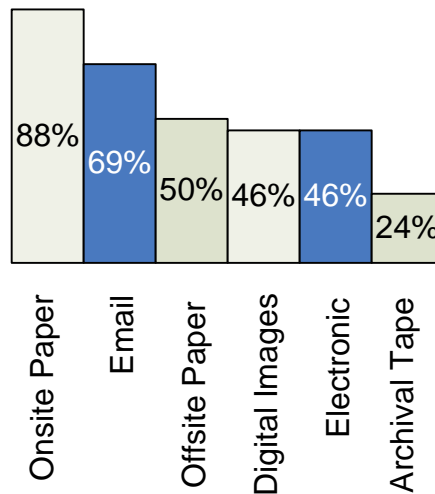
- 70.8 percent state that their records policy and practices do not create “auditable events” that can be tested and verified for compliance.
- 78.9 percent state their records policies are never audited.

Production and Discovery Issues

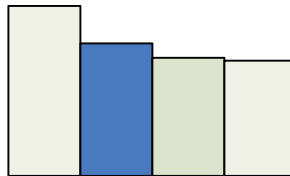
Companies must have the ability to identify records and owners of records in order to enact immediate, precise and verified legal hold orders when needed. The legal and financial ramifications are too serious to leave the hold process to chance. Despite the importance, few attorneys offer promising assessments of their companies’ current situations.

- Less than 50 percent have the ability to enact hold orders accurately. Consequently, companies revert to broad, cumbersome “blanket holds” to compensate for poor record naming, ownership and hold management capabilities.
- Less than 50 percent can efficiently identify specific *record types* subject to holds and target hold orders to the specific group of relevant records needed.
- Only 20 percent can efficiently identify the *owners of records* and enact precise hold orders to those individuals.
- **When asked about use of various record “platforms” in discovery...**

Many records “platforms” are always or usually used for production and research demands.

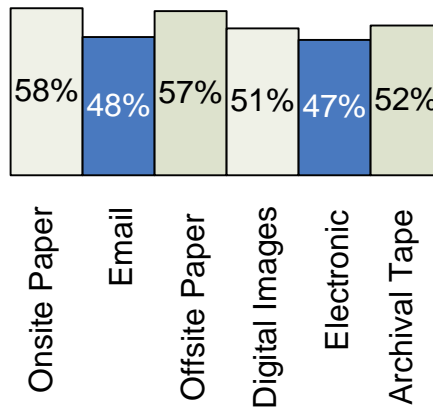


- When asked about the most frequent “support” areas involved in production and discovery...



- When asked about their level of satisfaction with the ability to actually locate needed records in a timely manner...

Provide the percentage of time records can be located and produced as needed on each of these platforms.



Email Issues

Email is a major issue for corporations, but the real “problem” stems from companies allowing employee discretion, which include:

- *Record type naming* (categorization) practices.
- Filing decisions.
- Disposition practices.

By enabling employees to adopt their own records management practices, email is vastly over-retained, clogging overloaded servers, consuming huge sums of discovery and review costs, causing unmerited settlements and other obvious problems.

Over-retention is a major issue because it is at the heart of most records-related problems, including:

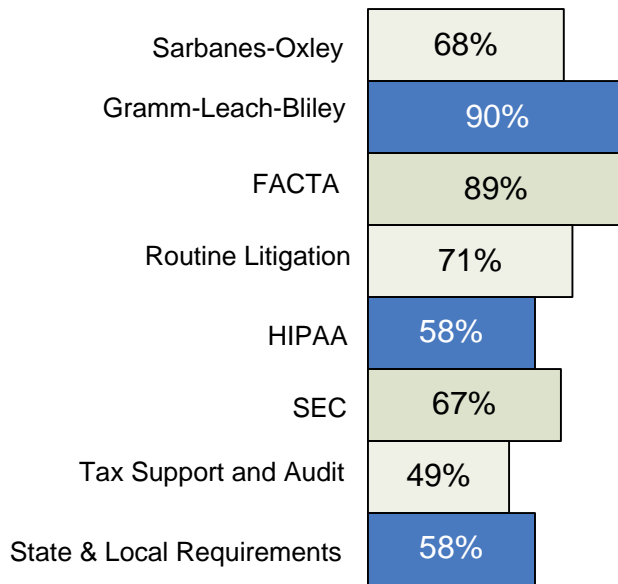
- Failed systems and technology initiatives.
- Unnecessary operating and maintenance costs.
- Legal discovery problems and expense.
- Other financially, legally and publicity perilous situations.

Regulatory Tagging Insights

Regulatory tagging is becoming a “top-five” issue because lawmakers are promulgating non-retention related regulations and obligations. These include rapid discovery, privacy, secure destruction and other requirements.

- **When asked about “regulatory tagging”...**

Companies responding that they have NOT tagged records against non-retention obligations



- Over 55 percent of companies have not identified records subject to FACTA and HIPAA, nor have they taken steps to ensure secure destruction of these records.

Conclusions

We believe that a great deal of technology spending for records-related issues is wasted money. Knowing upfront what record types exist, volumes, usage and other key metrics and facts would significantly and positively alter expenditures and the success rates of such initiatives.

On the compliance side, unenforced records policies expose a gap in corporate responsibility. Given the severe downside to poor policy development and enforcement, along with vast over-retention and difficulty in identifying, protecting and producing records, it would seem that enforcement of records policies would be top-of-mind for corporate management. But that is obviously not the case, at least so far.

Policies that expose corporations to far less receive far more attention and seriousness. A records policy lapse can cause many tens of millions in damages, professional and management time consumed unnecessarily, bad publicity and other repercussions; certainly warranting more attention.

We obtain clients for three reasons. Most commonly, they have learned of records-related problems through peers or the papers or the trade associations, and they want to implement a proactive strategy for records management to ward off risks to their companies.

Second, companies want to conduct assessment work with us because they know we don't have any equipment, software, storage services or billable hours to sell, and presumably our work will be much more objective than providers of such services.

Thirdly, companies may need help addressing their particular problems, where we encourage companies to take steps to fix the problems before they become big problems that sometimes take years from which to unwind.

Contact us for information about our services. If we cannot help, we will refer you to someone who can help.