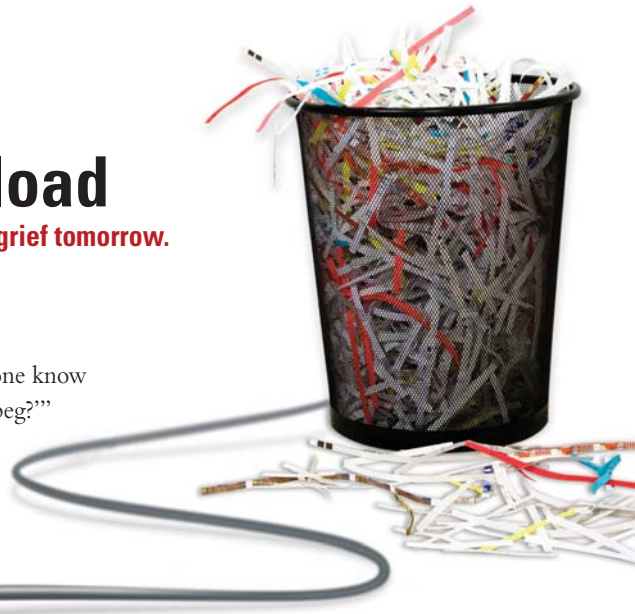
Managing information overload

Adopting e-discovery best practices today can spare you a world of grief tomorrow.

By Luigi Benetton



Thanks to the wonder that is electronically stored information, corporations profit from — and sometimes stagger under — more information than ever before. And few tasks highlight the mass of a company's data like e-discovery.

Those closest to the work know this well. "In-house counsel were dealing with electronic discovery long before anybody in a law firm had to deal with it," says Brett Burney, founder of e-discovery services provider Burney Consultants in Cleveland, Ohio.

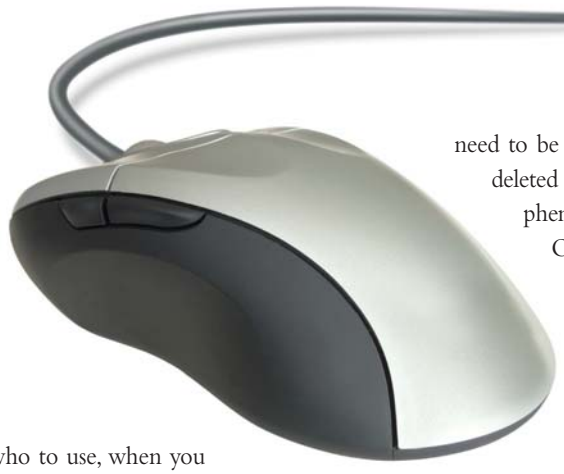
That experience has spawned best practices that inside counsel and their employers can adopt to lessen e-discovery consternation. Here are a few tips you can use to guide your company's e-discovery efforts.

Don't create more email than you need to

Consider e-mail, arguably the largest contributor to the information explosion. "The worst offender is the reply-all offender," says Glenn Smith, senior partner with litigation boutique Lenczner Slaght Royce Griffin LLP in Toronto.

Smith sees a role for both better systems and employee training on email usage, principally with respect to the consequences of irreverent and not-thought-out business emails.

"Say a team leader sends a broadcast email to 10 colleagues asking: 'Does anyone know a good business valuator in Winnipeg?'" Smith says. "Most recipients will hit reply all, so you get six emails saying no and four with various thoughts on who to use, when you don't give a darn."



Smith also takes umbrage with "email forwarders" who don't delete other people's email addresses to protect their privacy.

Don't keep more email than you need to

Modern email archiving solutions remove duplicate emails and attachments, keeping storage and backup costs in check. "Email archiving gets the corporation away from a reliance on end users to decide which emails need to be retained and which should be deleted — the 'fractal record-keeping' phenomenon," says Peg Duncan of Ottawa, a member of the steering committee and editorial board for Sedona Canada Principles.

"In advance of litigation, in-house counsel can ensure that the corporation keeps only what it needs for business or regulatory reasons and expunges the rest [which is the bulk of the information]," Duncan adds.

"Reducing the volume of information kept, and improving its organization directly affects costs and burden of preservation, collection, processing and review."

Keep records management policies up-to-date

Burney often finds the policies he reviews

Further reading

To effectively handle e-discovery, counsel must understand what it means. Tap in to the wealth of knowledge on the web. Sedona Conference publishes its work at www.thesedonaconference.org/. Sedona Working Group Seven (WG7) continues to refine Canada's take on e-discovery.

The Electronic Discovery Reference Model (www.edrm.net) develops guidelines and standards for e-discovery consumers and providers.

E-discovery Canada keeps track of new developments at www.lexum.umontreal.ca/e-discovery/ as well as all Sedona Canada principles: www.lexum.umontreal.ca/e-discovery/documents/SedonaCanadaPrinciples01-08.pdf

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are inadequate for the times. "Many policies I find are five to eight years old," he says. "They haven't been revised, and you know how technology has marched forward even within [the last] five years."

Duncan notes that businesses need to treat systems like Microsoft Sharepoint differently from simple shared drives on the network. She also looks beyond technology to hot-button issues in specific industries, such as food contamination or other product liability matters. That can prompt new document retention policies, such as tracking e-mail of people closely involved with emerging issues.

"You're not putting a litigation hold in place," Duncan says. "You're just being aware that others in your industry have been found liable and you could be too."

Produce only what's required

Massive volumes of electronic information have led to "brute force" reviews of large volumes of electronic documents, which can drive litigation costs so high that litigants settle out of court.

Duncan doesn't feel this should be the case. "The richest source of relevant information will be the documents held by the core custodians from the core time period," says Duncan, who advises studying these documents before designing a search for other relevant documents.

Outsource e-discovery tasks when necessary

"I'm starting to find distinct areas of e-discovery that are great for in-house counsel, while other aspects must be outsourced," says Burney, who suggests inside counsel handle collection and document management ("They know what is relevant and what isn't.") while outside lawyers review documents produced.

"This isn't an all-or-nothing decision," he says, adding that any "insourcing" be subject to the corporation having the staff and skills to handle e-discovery.

Duncan offers a caveat: "If fraud is alleged, the prudent in-house counsel would encourage the use of external forensic investigators with experience in gathering and processing the type of information involved," she says.

Rate skills over cost control

"In-house e-discovery offers the advantage of control over costs — at least superficially," Duncan notes. "However, you need knowledgeable counsel and specially trained IT, along with good project management skills and an aptitude for detail work."

Monitor the e-discovery process

Even if e-discovery service providers handle the entire process, "lawyers should not step back," Smith says. "E-discovery vendors don't get the litigation side. Outsourcing does not get you away from the problem that this could cost you a lot of money. Somebody must be in charge of the vendor."

Designate an in-house e-discovery manager

In certain large corporations, that "somebody" is a lawyer whose daily work centres on e-discovery. That person, according to Duncan, "becomes a bridge between outside counsel and the client in the discussions about early case assessment, scope of discovery, determination of time frames and custodians, and so forth."

Don't expect candidates who already know the job. "There's no e-discovery class in law school," Burney points out. Duncan lists risk assessment, cost-benefit analysis and project management as core skills needed for the task.

Assemble an internal e-discovery team

The internal head of e-discovery also assembles and co-ordinates an internal e-discovery litigation response team, whose members come from across the organization and bring a variety of skills to the task. "When something does hit the fan, there's a group of people that comes together," Burney says.

E-discovery SWAT team

Peg Duncan recommends that inside counsel enlist the following people in an e-discovery preparedness effort:

Records and Information Management (RIM): to establish information management policies, practices and retention periods

Audit: to review compliance with RIM retention and destruction

IT: to mind the electronic stores

CFO: to determine what initiatives can be funded and which will have the most impact on reducing risk in an environment of limited resources.

In addition, everyone in the C-suite needs to be briefed on the importance of e-discovery initiatives and litigation holds, so they can spread the message with authority throughout the organization, Duncan adds.

Seek synergy between e-discovery projects and other business objectives

Businesses of any size can benefit from even a few e-discovery-readiness policies.

For instance, having executives travel with forensically clean laptops and smartphones reduces the number of devices to search during a discovery effort, while offering outsiders fewer windows into proprietary company information.

In Smith's opinion, preparedness comes down to a 21st-century document management system. "Large firms develop systems of document preservation before litigation that will not only benefit them in litigation, but also from a management standpoint," Smith says. "To build a system to protect against litigation isn't enough." ■

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