INNOVATIVE DRIVEN

Risk Assessment and Compliance Programs for Information Governance
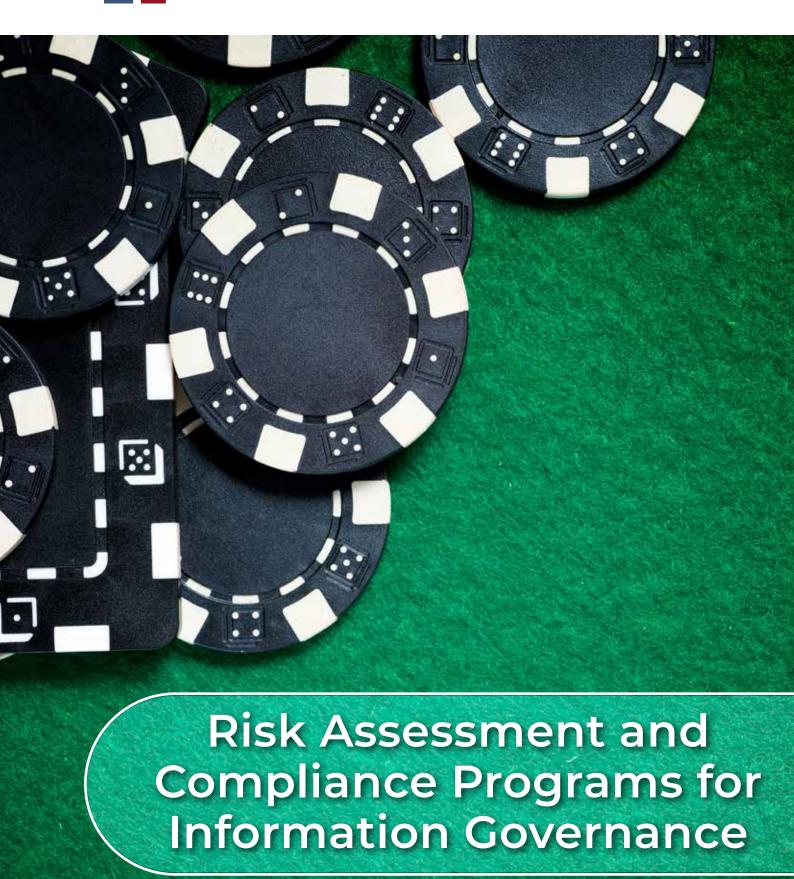
Risk Assessment and Compliance Programs for Information Governance

By Tara S. Emory, Director of Consulting,
Innovative Driven

Introduction

Compliance programs are increasingly common and necessary for companies to avoid litigation and investigations. They include policies, monitoring and training that represent a conscious decision by companies to assess financial risks and manage them according to the level of risk. Of course, litigation and investigations can and do take place anyway, often at great expense to the company. Yet, many compliance programs fail to address the risk presented by voluminous, unorganized data when litigation does arise -simply because the issue has not been considered.

Generally, compliance programs address areas where a company faces risk of breaking the law. Because the nature of information governance risks are different, they are often overlooked. However, lack of information governance carries real risks, because it significantly impacts monetary and operational costs of litigation. First, data volumes are the primary driver of discovery costs; companies with large data stores have high costs. Second, identification of where relevant data resides is required in order to comply with discovery requests; disorganized data creates risks of sanctions. Third, a repeatable discovery process tailored to a company's data profile creates efficiencies in discovery management and increases defensibility; lack of a plan can be expensive and risks gaps in the process. Companies should assess these risks to determine the most appropriate solutions for their needs and level of exposure. They can then implement those solutions into their compliance programs.

The following three risk factors are key to assessing the risks created by insufficient information governance, in the event of litigation:

Risk Assessment and Compliance Programs for Information Governance

Risk 1: Low Value Data

The more data a company has, the more expensive litigation is likely to be. Federal Rule of Civil Procedure 26 provides that the scope of discovery includes any documents relevant to a claim or defense. Based on that rule (and regardless of supposed limits based on proportionality to the needs of the case), discovery requests are almost always broad in scope in order to include as many documents as possible. To comply, companies must issue very broad legal holds, and engage in a process of searching, collecting, reviewing and producing documents that is rarely in proportion to the actual needs of the case.   It is estimated just legal holds alone may cost large companies up to $40 million each year,   while the costs of collecting and reviewing the data can drive costs much higher.

Often, the biggest factor in predicting discovery costs is whether a company has effective retention and deletion policies. With no deletion practices, a company will accumulate data by exponential amounts each year.

Risk 2: Disorganization

Many organizations hold their data in a variety of places and forms: email, desktop computers, mobile devices, an array of structured databases, company shared drives, department shared drives, personal drives, internet sites, intranet sites, social media accounts, cloud computing services, voicemail, backups, messaging systems, archive systems, portable media, and of course, paper records. If a company has not inventoried all of these sources, it will be unprepared when faced with requests for a document production, which usually implicate any and all data sources in the company's custody.

Above all, disorganization creates a risk of sanctions in discovery. Without a clear idea on where relevant data may be found, counsel will have difficulty implementing an effective legal hold. When data is collected, the company is more likely to accidentally overlook a significant source of data. Failure to produce relevant data could result in sanctions for the company as well as the individual attorneys involved in compliance efforts. Moreover, efforts to identify and inventory all data while under the pressure of litigation is often very disruptive to ordinary business activities, and expensive as the result of premium fees paid to attorneys and other experts who must quickly sort through data sources.

Risk Assessment and Compliance Programs for Information Governance

Risk 3: Lack of Defined Process

The process of responding to a discovery request requires timely execution of specific tasks. Organizations that do not have a plan on how those steps should be taken and by whom run the double risks of sanctions and expense. Any gap in the process of responding to discovery requests may undermine the defensibility of compliance. In addition, lack of clear guidelines may result in an inefficient and more expensive process. This is especially true where the company relies on different counsel and support staff for different cases; often, each case requires "reinventing the wheel" to respond to requests that may be very similar to requests handled in prior cases.

Even companies with a well defined process for discovery (sometimes called a discovery "playbook") risk problems if employees are not properly trained on how to implement the process. For example, the process of issuing legal holds requires the legal department to promptly issue the holds, the IT department to act quickly to collect or lock down data at risk of deletion, and custodians to acknowledge and follow the hold. Without proper training on this process for the legal, IT and business personnel, a company faces increased risks of sanctions if any responsive information is deleted.

Next Steps: Adopting Policies to Address the Risks

The key to information governance is implementing policies that reflect deliberate decisions based on a company's data and litigation risk profile. It should not be the default result of failing to consider the risks. As with other compliance policies, information governance requires a combination of policies, practices, tools and training, which must reflect the particular needs of each company. Once risks and needs are evaluated, the company can determine the best course of action for each of these. Information governance programs commonly include mapping of data and data flows, data remediation, establishing a discovery playbook, identification of supporting technology, development of policies for employee data, and training employees on those policies. Because the nature of data and ways we use it are constantly changing, companies should periodically reevaluate their information governance policies.

Risk Assessment and Compliance Programs for Information Governance

ABOUT INNOVATIVE DRIVEN

Innovative Driven, developer of the ONE integrated e-Discovery platform, is a leading provider of customizable e-Discovery solutions and services across the Electronic Discovery Reference Model, as well as comprehensive computer forensics and expert consulting services.

For more information contact:

Wynter Grant, Executive Director of Sales

wynter.grant@innovativedriven.com I 877.637.4836

ABOUT THE AUTHOR

Tara Emory, Esq., is the Director of Consulting of Innovative Driven, Tara consults with companies and law firms to create information management and efficient e-discovery processes that reflect a best fit for each client and case. Tara speaks and writes frequently on information management and e-discovery, and is a member of The Sedona Conference Working Group 1.

References:

1. Studies have shown an average of 30% of documents reviewed are actually produced, and only 0.1% of documents reviewed are marked as evidence for trial –and most cases never actually go to trial. See Nicholas M. Pace & Laura Zakaras, Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery, RAND Institute for Civil Justice (2012), p. 27; Lawyers for Civil Justice et al., Litigation Cost Survey of Major Companies (2010), p. 3.

2. William H. J. Hubbard, Preservation Costs Survey Final Report: Prepared for Civil Justice Reform Group 20 (2014).

3. It is estimated that the amount of data in the world will continue to double every two years through at least 2020. IDC, The Digital Universe of Opportunities: Rich Data and the Increasing Value of the Internet of Things (2014), available at http://idcdocserv.com/1678.