

white paper:

# RIM in the age of legal discovery:

## Strategies for litigation-proofing your organization's information

**Part 1:** How to build a RIM program that addresses legal discovery before it happens



This two-part white paper presents strategies for better supporting discovery at the proactive and reactive stages. Part 1 outlines six essential steps for integrating discovery requirements directly into your RIM program, including policies, records retention schedules, disposition processes and filing systems. Part will 2 talk about how RIM can help when discovery actually occurs, applying long established best practices to some of the highest risk scenarios an organization can face.

Business records are one of the strongest forms of evidence in legal proceedings, as they are both a by-product of and direct contributor to virtually every conceivable action a business engages in. Legal discovery (the act of locating, preserving and making evidence available to all parties of a legal action) is therefore very much focused on the role of records as “documentary evidence”. Here are six steps to help ensure your organization’s RIM practices are ready for any potential legal discovery scenarios.

## Step 1. Before you start: Engage legal

Whether you are building a RIM program from scratch or bringing a somewhat dated service into the digital realm, you should pursue all opportunities to directly involve your organization’s legal professionals in the development process. This will help you to:

- emphasize the role of records in protecting the organization’s assets, interests and operations
- show the value of RIM as a risk mitigation and compliance tool for the organization as a whole
- identify legal requirements, risks and discovery scenarios that need to be accounted for in program design and RIM controls

Establish relationships that will later facilitate the transition from proactive recordkeeping processes to more reactive discovery tasks.

## Step 2. Know your exposures

Given the strong role that RIM can and should play in your organization’s legal compliance and discovery program, it is critical that you gain a thorough understanding of relevant requirements and risks. This means a documented review of the different statutes, regulations and other legal requirements impacting the organization’s business across different countries, states, provinces and territories. Any litigation, claims, or other legal discovery scenarios that could affect your organization will be pursuant to those same laws. Such analysis should also include all relevant areas of law, as defined by your organization’s business functions. Depending on what your organization does, these may include laws related to:

- accounting, taxation and other financial controls
- employment, payroll and labour relations
- occupational health, safety, hygiene and wellness
- environmental protection, including the mitigation of threats to air, water and land
- incorporation and partnerships
- general legal limitations applicable to contracts, simple transactions, debt obligations, torts and other claims
- regulations specific to whichever industrial or business sector defines your operations e.g. mining, energy, manufacturing, financial services, pharmaceuticals

## Step 3. Make it your policy

A ‘*Records Management Policy*’ provides the organizational mandate and overall direction for records creation, retention, handling and disposal. In a discovery situation that same policy is the key to an effective legal defense, providing direct evidence of the organization’s best efforts to manage records in accordance with best practices.

Your policy should make it clear that recordkeeping is a serious legal responsibility affecting all stages of the record life cycle. At a minimum, the policy and any supporting procedures should:

- Emphasize the role of records as documentary evidence. The language used in your policy should focus on records as a source of legally admissible proof, which will make them a critical risk management tool. This will help ensure that records receive the attention that they need, while supporting the value proposition of the RIM program.

- Assign specific roles and responsibilities for managing records. For a RIM program to support discovery effectively, it must ensure that the right people exercise accountability for records and fulfil essential responsibilities at all stages of the records life cycle, from the frontline staff who create records every day, to the more senior leaders who eventually sign off on disposal of records which are no longer required to be retained.
- Establish standards for the creation of authentic, reliable records regardless of media or format. Whether records are created in paper or electronic form, they must meet requirements for legal admissibility and evidentiary quality.
- Provide a clear mandate for the retention and eventual disposal of records. As long as there are no legal proceedings already pending, it is perfectly legal to dispose of records that have satisfied normal retention requirements. By making that point an explicit part of your policy direction, you establish records disposal as the normal and defensible course of your business processes.
- Specify criteria for purging transitory or non-record material. Not every document, communication or dataset is a record. Materials such as duplicate copies, minor drafts and externally produced reference materials offer little or no value and therefore do not need to be kept. Your policy should clearly specify the types of recorded materials that are outside of the scope of the official retention program, allowing for their timely, secure disposal.

## Step 4. Develop a records retention schedule

A core principle of any discovery-ready RIM program is an effective and well-maintained retention schedule. Records need to be retained long enough to meet the wide range of requirements uncovered in your analysis of applicable statutes and regulations, but once those requirements expire, records can and should be securely disposed of to mitigate any legal risks their existence can expose your business to.

Some essential strategies for building a discovery-ready retention schedule are:

**Stay functional:** Records should be categorized based on the business functions and activities they support. Start by analyzing the different business activities your organization performs and which sets of records support those activities. Different activities bring different legal requirements and risk profiles, so using those activities to categorize the records means keeping the records in anticipation of those same requirements and risks. In other words, records are classified by their discovery requirements, making sure they are there when you need them.

**Follow the law:** Dig deep into the statutes and regulations uncovered as part of your initial legal analysis. Many of these laws will tell you which records to keep and for how long. Some will even prescribe the specific location, medium or format in which the records must be retained. An effective retention schedule includes a formal tabulation of applicable retention requirements, which are then cross-referenced with records classification categories in order to inform the official retention period for each category. This not only helps ensure you keep records long enough; in a discovery scenario, the retention schedule and supporting research also serve as documented evidence of the organization's attempt to comply with every conceivable requirement, defending the organization against possible charges of obstruction.

**Know your limits:** In addition to direct, explicit requirements to retain records, records retention research should also incorporate legal limitation periods. Most statutes set clear time limits on when a law suit, claim, prosecution, audit, assessment or other legal proceeding can occur, triggering discovery. Factoring these limitation periods into your retention decisions will help realize three benefits when discovery occurs:

- ensuring you have all the relevant evidence that you need to either pursue or defend against a legal action
- eliminating out-dated or irrelevant material that would slow down the discovery process, increasing the costs and risks for all parties involved
- purging records that have outlived their retention periods that could be used against your organization in a legal action

## Step 5. Implement a records disposition processes

Records disposition is a formally documented process for reviewing records that have met the end of their records retention period to determine if they can be destroyed, deleted or transferred to the custody of an archival institution, where applicable.

From a discovery standpoint, a formal disposition process meets two basic needs:

**Preserving evidence:** The disposition review is a last chance to identify records potentially responsive to litigation, investigation or audit (i.e. legal holds). In other words, it spares from destruction/deletion any records that are subject to discovery. The disposition process should include review and sign-off by multiple stakeholders, including the leadership of the department that created or captured the records, as well as representatives of the organization's legal, audit and compliance functions. For government organizations, consultations should also include those responsible for responding to requests under Freedom of Information and equivalent legislation, to ensure that any in-progress requests are also provided for.

**Avoiding "adverse inference":** Destruction of records is perfectly legal, provided that it is done in the ordinary course of business, and not a targeted attempt to hide evidence and obstruct justice. Consider the output of a disposition process: A high-level description of the records being destroyed or deleted, along with signed attestation by stakeholders who made their best efforts to identify and preserve any records needed for discovery purposes. Once discovery does happen, your organization can show that disposition was all part of a normal process, which was based on a records retention schedule built in consideration of legal requirements.

## Step 6. Know how to find stuff

During a discovery scenario, it is important to be able to find your records in a timely manner, often under intense time pressure. Litigators and investigators don't discriminate against records based on departmental ownership, storage location or media, so it is vital that you develop a comprehensive classification system that identifies records at the macro and micro levels. Here are some of the key records retrieval tools that you should consider developing or improving:

- an organization-wide records classification scheme that identifies records for each business function and activity
- filing systems and labelling standards to support the efficient storage and fast retrieval of paper files and other physical records
- detailed records taxonomies, metadata indexing and other tools to locate records relevant to discovery across different departments and teams
- electronic RIM software capable of storing and retrieving digital content, while at the same time searching, tracking and cross-referencing physical files
- full text search capabilities, allowing discovery teams to automate their review of record content
- where a RIM system includes scanned images of paper documents, consideration should also be given to Optical Character Recognition (OCR) software, extending auto-search capabilities to records which once required hours of manual review

Once you have developed all of these RIM controls, the job of discovery-friendly RIM can be far from over. Part 2 of this series will look at strategies for putting core RIM tools to good use, allowing you to protect your organization and increase your own value proposition.

## What's next

Get in touch with a TAB expert today for more information on how to make your RIM program discovery friendly.

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