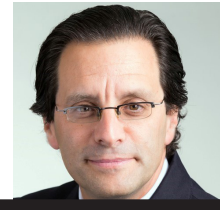


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Outside Counsel's Role in Information Governance

The biggest IT challenge corporations are facing today is the growth of data, estimated at 40-60 percent annually.

A CSC study claims that by 2020, 100,0000 companies will store one petabyte of data, a size 100 percent larger than the Library of Congress's entire printed collection. Combine this with recent headlines about large data security breaches and that an average breach costs a corporation \$5.5 million, according to the IBM and Ponemon Institute Research's "2014 Cost of Data Breach Study," and the enormity of this problem begins to come into focus.

As the data problem grows too large to ignore, information governance — the framework for and the practice of proactively managing the valuation, creation, storage, use, archival and deletion of data — is gaining mindshare among stakeholders and executives at corporations. To fully understand the legal implications of information governance (IG) decisions, an in-house lawyer must also be a technologist, litigator, regulatory expert and contract attorney. Outside counsel can add all of this expertise and help benchmark what is standard in the overall legal and regulatory landscape.

PROBLEMS GETTING OFF THE GROUND

Cybersecurity alone is reason enough to address information governance. Experts confirm that protecting an entire enterprise from hackers is impracticable, so corporations must focus on securing critical data. Doing so requires an understanding of

what critical information the corporation is housing (personally identifiable information, credit card data, intellectual property, regulated records, etc.) and where it is within the network.

Despite all this, the vast majority of proposed IG programs never get off the ground. Budget allocation, a lack of immediate results, uncertainty about how to measure success, failure to obtain C-level endorsement and insecurity about how and where to start are a handful of reasons IG projects fail to launch, but corporate legal departments (with outside legal expertise) can help overcome these obstacles.

LEGAL'S DOMAIN

Legal departments are heavily involved in managing legal and regulatory risks. Historically, legal teams have had a more reactive role — IT or another department brought a problem to them after damage was done. As e-discovery has become a standard practice, making legal holds and data privacy issues part of their domain, counsel are becoming more proactive regarding the overall data landscape and decisions made about data risk management, such as security, retention and deletion. Organizations in highly regulated industries feel this pain more acutely and tend to be more sophisticated in addressing IG. Still, data challenges are creating pressure across the board and can no longer be ignored.

It is not common for outside counsel to have a seat at the table during IG discussions, though they should. Outside counsel understand downstream risks, expectations from courts and

regulators, and best practices. Given the lack of clear responsibility for data risk management in many organizations, outside counsel can help drive a shift toward broader IG involvement and solutions that will significantly improve the company's data landscape. They can also provide insight into lessons learned from the mistakes and successes of other companies, which helps internal stakeholders become comfortable with IG projects and ensure they are within industry standards.

WHAT TO BRING TO THE TABLE

How can outside counsel get a spot at the table during client IG decision-making? And once there, what are the most impactful steps to take? Here are three key ways outside counsel can add value:

1 Understand the Internal Landscape:

Before bringing in a laundry list of recommendations and/or warnings, counsel must do their homework on the client company. Corporate culture, appetite for risk and openness to changing processes will have bearing on the decision-making process. The first step is to secure an executive sponsor who can drive the project and push past any obstacles arising from cultural factors or how the company has managed data in the past. An IG project cannot be successfully implemented without C-level involvement.

Work with key stakeholders to evaluate each one's unique motivators, as they will vary greatly between the GC, CISO, CIO, etc. Discuss the merits of the project, and help stakeholders understand the "gives" and "gets" involved. During these discussions, come to the table prepared with a detailed risk analyses and ROI calculations for proposed projects. Help the client understand how much the projects will cost, how much they will save in the long run, the risks involved and how to mitigate those risks. A best practice is to start with small projects that can show value quickly and grow in scope (and ROI) over time.

Remember that organizations might run the gamut in their approaches to data preservation, ranging from "keep everything" to "delete everything" to a Wild West data environment with very little policy. Geographical factors come into play as well. Multinational corporations must consider overseas data privacy laws and global environments of bring your own device (BYOD). These factors make a huge impact on how IG should be approached, and an attorney must understand these nuances in order to advise clients effectively.

2 Consider All Variables:

Attorneys are trained to focus on risk in all scenarios. However, risk is not the only variable in proactive IG and often takes a backseat to other factors such as cost, disruption to the organization and ROI of the project. Because IG is not typically case-driven, outside counsel could run into problems approaching it with a "sky is falling" attitude rather than a holistic business view.

For example, clients will be more receptive to an approach that balances the likelihood of running afoul of regulators with strict regulatory risk prevention. Most stakeholders will be focused on either cost or business process improvement, and attorneys who can look at the overall picture will be much more successful in obtaining corporate approval.

Look beyond risk reduction to ensure programs include strategies for cost containment and minimizing disruption. Attorneys who do this can work with clients as true partners and drive change in how outside counsel's role in IG is viewed.

3 Show Results:

Instead of a high-level vision, start with projects that show actual results, such as upgrading outdated email archives, remediating old storage tapes or creating a solid BYOD strategy. Advise clients to make steady progress with attainable results along the way. Completing one project will make all subsequent ones easier, regardless of scale.

Imagine IG kicking off with a project focused on creating, implementing and enforcing a new legal hold policy: Everyone involved will get a better understanding of how the process works, the resulting benefits and how risks were mitigated. There will always be risks with projects, but a start-small approach that emphasizes high-value areas gives everyone time to get on board and become comfortable with what is involved.

Take, for example, the process of dealing with legacy storage. Legal and compliance teams partner on this work, which involves inventorying and addressing regulatory and legal hold obligations on data, refreshing backups, eliminating storage tapes and enforcing archiving policy. This can provide immediate results. An organization could have 100,000 backup tapes, of which only 100 are subject to current legal holds. A matter might arise that involves 60,000 of those tapes; however, if they have been remediated as part of an archiving policy, they cannot fall under future legal holds, which can save a company millions of dollars.

AN ONGOING, STRATEGIC EFFORT

Information governance efforts flounder when clients take on too many aspects of IG at the same time and fail to secure buy-in from senior management. Instead of taking on everything at once, attorneys should help clients triage and fix immediate problems, and then deal with legacy issues and more proactive efforts.

Proactive IG must be viewed as an ongoing, strategic effort that requires participation from numerous business functions. With the right approach, it can be done in a results-driven way that delivers measurable and immediate value to the organization. Counsel must remember that IG is ultimately a cultural shift in corporate governance that will take years. Projects always take longer than expected, but when a focus is placed on moving forward one step at a time, real value and success can be attained. **ILTA**



This article was first published in ILTA's April 2015 white paper titled "Information Governance" and is reprinted here with permission. For more information about ILTA, visit www.iltanet.org.