Blackberry emails, et al: To save or not to save?

Many record retention programs are flawed, lacking in sound policy and good judgment.

BY DAVID B. HENNES AND SARAH F. WARREN

Modern mobile communication devices, such as blackberries and other personal digital assistants, enable us to communicate wherever and whenever. Statistics suggest that we are, in fact, communicating just so: in 2006, worldwide email traffic was projected at the rate of 183 billion messages per day. While critics say that mobile communication devices are addictive (indeed they are often referred to as "crackberries"), most also say that such devices increase productivity, improve responsiveness, and even enhance — rather than impede — one's work-life balance. Without question, blackberries have made communication between a company and its board of directors — and among board members themselves — significantly more efficient.

Despite these conveniences, there are inherent risks in the use of mobile communication devices. Take, for example, the blackberry's tiny keyboard and the repeated need to use the shift, alt, num, sym, and cap keys to formulate a grammatically correct sentence, which incentivizes most people to write or respond to an email in shorthand and to dispense with punctuation altogether. At a minimum, mobile device users tend to write less formally and think less about emails sent from those devices than emails sent from a desktop or laptop. While "loose" language may be appropriate for internal oral communication among colleagues, it is rarely — if ever — appropriate for external communications, and is never appropriate for formal written records. Many people use loose verbiage that reflects opinion and bias because they believe, albeit mistakenly, that email is private or personal. Indeed, several courts have now held that email sent from corporate servers is not presumptively private or personal.

Given this, how should directors handle the creation and retention of emails and other board-related documents?

Starting point

A well-designed and implemented record retention policy is an effective starting point. A record retention program serves many purposes, chief among them to enable organizations to rid itself of records of no value at the appropriate time, and retain records that are valuable to the organization or which the organization is legally required to keep. Record retention programs, which cover both hard copy and electronic documents, vary depending on the business, regulatory and, often, tax concerns of an organization.

Electronic record retention programs usually have presumptive limits based

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on duration (e.g., all nonfiled emails more than 30 days old will be deleted automatically) or quantity (e.g., after email boxes reach 1 MB limit, user will not be able to send new emails). Such programs can also be applied to instant messages and voicemails. Record retention programs should be well conceived and structured to combat any suggestion that documents were destroyed improperly or, worse yet, deliberately, in anticipation of litigation, a government investigation, or an audit.

As part of their oversight responsibilities, directors should, on a periodic basis, ensure that the company's record retention policy is maintained and enforced by appropriate personnel (and, if none exists, create one). Indeed, Arthur Andersen's ultimate demise stemmed from its indictment and criminal conviction (which was subsequently reversed) on grounds that it did not faithfully adhere to its record retention program and destroyed documents after receiving notice of a governmental investigation.

Unfortunately, many record retention programs are flawed in that they do not provide for the treatment of personal copies of records, which may be retained by one or more individuals within, or, with respect to independent board members, affiliated with, an organization. These copies have the same legal significance as evidence as an original. They are subject to subpoena and may be used against the organization (and the individual) during litigation even though the original may have been deleted under the organization's record retention program.

Consequently, in addition to abiding by the organization's document retention policy, individuals should implement and abide by a personal record retention policy, and should apply that policy to both hard copy and electronic records — even those exchanged via blackberry. In all instances, however, when an individual or organization receives notice of pending or actual litigation, government investigation, or audit (or if it is reasonably foreseeable that a litigation, investigation, or audit will take place), the deletion of potentially responsive records must cease immediately.

'Four values' of information

The determination as to what to keep and what not to keep is inherently subjective, and requires a business judgment as to the record's "life cycle" or intrinsic value. That is, a document should be retained only so long as it has some value in light of a business need or is required by law or regulation to be retained. Specifically, as defined by the records management profession, the four values of information are: "legal values," "fiscal values," "operational values," and "historical values" (see ARMA Glossary of Records and Information Management Terms [ANSI/ARMA 10-1999]).

On the one hand, legal values determinations are easy to make: legal record-keeping requirements are embodied in local, state, or federal statutes and regulations. There is no subjectivity required when considering whether to save these documents. On the other hand, fiscal values, operational values, and historical values determinations are more difficult to make because they are subjective in

How should directors handle document retention?

- Ensure implementation and application of a well-designed record retention policy.
- Follow the policy consistently and, when appropriate, delete records systematically and in the ordinary course of business — even those exchanged via blackberry.
- Generally, consistent with the policy, retain a document only so long as it has some value in light of a business need or is required by law or regulation to be retained.

Directors and the company's record retention policy

- Directors can ensure that the company has designed and implemented a record retention policy.
- Directors can ensure that a record retention policy is well conceived and structured to combat any suggestion that documents were destroyed improperly or deliberately.

To save or not to save?

- *Drafts of Transactional Documents:* Since draft documents (including emails, notes, etc.) frequently play a prominent role in litigation, only those drafts actually exchanged, but not all email and non-email documents associated with those drafts, should be retained by the company.
- *Personal Note Taking at Board Meetings:* If board members take and retain notes at board meetings, then the opportunity arises for a third party to later examine any discrepancies in those notes when compared against the final board minutes or against another board member's notes. This counsels against the taking (and retaining) of personal notes.
- *Note Taking On Information Packets:* If board members make comments on documents distributed in advance of board or committee meetings (or do so electronically), then the opportunity for a third party to later examine those notes again arises. As long as the company retains these documents, directors should not retain them or their communications relating to them.

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nature. As one might suspect, the advice given as to how to make these determinations is not always consistent and depends in large part on the facts and circumstances at hand. With respect to board members, several key categories of documents come to mind, most of which are nowadays distributed, exchanged, reviewed, edited, and stored electronically.

For example, consider the issue of drafts of transactional documents, which directors often receive and which frequently play a prominent role in litigation. This was recently evidenced by the litigation arising from the failed Cerberus-United Rentals transaction, which turned on the invocation of the seldom-used "forthright negotiator" principle by the Delaware Court of Chancery. Draft records, which may include preliminary thoughts, emails, notes, and outlines in working files, as well as supporting source documents and multiple versions of a document, can be helpful in reconstructing events (e.g., the negotiation of a contract). Consequently, such documents — even if they reside on a blackberry — may have value to an individual or an organization (historical value in this case) and arguably should be retained even after the final record or document is created.

However, some advise that, absent a specific legal requirement, it is not necessary to keep internal drafts and comments once a final record or document has been created. Yet others counsel that "meaningful drafts" — even internal ones — should be retained. Still others advise that, if draft records are shared with individuals outside an organization, a complete set of the drafts and comments that were exchanged (via email or otherwise) should be retained. This will serve as proof of the development of the final document, and may be used to demonstrate the intent of the parties should, for example, the final document contain ambiguities (as in other United Rentals litigation). In balancing the risks in this area, a prudent director's compromise is to ensure that the company is retaining all drafts exchanged, but not all email and non-email ancillary documents associated with those drafts. If the company is retaining these drafts, the director need not retain his or her own copy.

What about personal note taking?

Another issue is personal note taking at board meetings. Since the board's secretary keeps accurate notes of the events that transpire, note taking by board members is typically unnecessary. While notes can serve a business purpose, they are, by their nature, incomplete. Even when there is a formal corporate record such as the minutes of board meetings, if litigation arises over a corporate action, a board member's notes will be sought in discovery. Indeed, if board members retain notes, then the opportunity arises for a third party to later examine any discrepancies or missing information when compared against the board minutes, or against another board member's notes. This counsels against the taking (and retaining) of personal notes.

The issue of note taking also arises with respect to the information packets that are distributed to board members in advance of board or committee meetings. These packets typically include an agenda and can include draft financial statements, press releases, other public filings, and, under some circumstances, stock option or other compensation agreements. If a special meeting or committee meeting of the board has been called, then the information packets may include draft documents specific to the purpose behind the board meeting. During or before board meetings, board members sometimes mark up or jot down thoughts and comments in the margins of these documents or, in some cases, do so electronically. Sometimes board members share those subjective assessments via email with other board members.

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Again, as with note taking in general, the opportunity arises for a third party to later examine any discrepancies when compared against the final document, another board member's copies of the drafts, or email communication among board members. So long as the company retains the packet distributed to the board, which becomes part of the official record along with the minutes, directors should not retain versions of the documents with their notes or their communications relating to those documents.

Be consistent and systematic

Whatever an individual's record retention program is (e.g., to file and retain records, to delete records after a week, to delete them after a month), the program should be followed consistently, and records should be deleted systematically and in the ordinary course of business. Typically, as long as records are deleted in the regular course of business using sound business judgment, and are not subject to litigation or under required retention obligation, directors can safely avoid the pitfalls of retaining records that should not have been kept. ■

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