

Archiving old e-mail a compliance and legal issue

Companies invest in storage, retrieval technologies

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Special to The Globe and Mail

POSTED ON 12/04/07

Spoliation: it's an ugly piece of legal jargon. But if you haven't put in place an e-mail archiving policy, you may learn its meaning, and it won't be pleasant.

Samsung Electronics found that out a couple of years ago when its failure to produce requested e-mails in a legal dispute with Ottawa's Mosaid Technologies Inc. led a New Jersey judge to conclude the tech giant had engaged in e-mail spoliation (or destruction) to prevent the messages' contents from hurting its case.

"The fact that no technical e-mails were preserved . . . demonstrates, at the least, extremely reckless behaviour," the judge ruled. (Samsung ended up settling the case.) Others, from Philip Morris to Morgan Stanley to a growing number of Canadian firms, have similarly learned that arguing e-mails couldn't be located in time or were automatically deleted by the server gets no more credence today than claiming the dog ate them.

"It's been clear for a long time that legal discovery obligations extend to electronic documents, not just what's in the filing cabinet," says Jennifer Dolman, a partner at Osler Hoskins & Harcourt in Toronto who advises companies on electronic document retention. "Any responsible company has to get its act together, get a retention policy in place, and get ready."

E-mail has traditionally been considered ephemeral, spontaneously created and just as spontaneously erased. Today, however, electronic documents are the lifeblood of corporate life, representing 92 per cent of all business information, according to one U.S. study. In the wake of Enron and other corporate scandals, U.S. and Canadian regulations governing financial record-keeping -- as well as rules covering individual industries -- mandate that some e-mails must be kept for a set number of years, be accessible if requested, even be randomly reviewed for compliance.

In case of a lawsuit, a company that fails to produce required e-mails can face stiff fines and instruction that the jury draw an adverse inference. "If a company doesn't have an e-mail policy, that's a problem, and if they don't follow the policy they have, that's a problem," says Eric Godwin, CEO of Fortiva Inc., a Toronto-based e-mail archiving service.

Managing electronic traffic is a massive undertaking. According to Radicati Group, a Palo Alto, Calif., company, the average business user sends and receives 171 e-mails a day, a number that will double by 2010. While a typical e-mail today is about 20 KB, it's expected to grow exponentially with multimedia presentations, photos and video.

As mailbox sizes grow and e-mail servers strain under the volumes, firms are turning to technology to help them offload and archive old messages. Rather than just backing them up on tape, difficult to access later, new solutions stress sophisticated indexing features, allowing searches of headers, body text and attachments by keyword, grammatical construction or context.

Large companies that opt to archive e-mail on their own servers have a range of software applications to choose from, such as Symantec's Enterprise Vault or ZipLip's various archival suites. Messages are automatically indexed and stored for a set period before being deleted. Another route is an archiving service from Zantaz Inc., MessageOne or Fortiva,

among others. For a per-mailbox and storage fee, they capture e-mails, index and encrypt them, then store them at their own facilities.

Still another option is to invest in a caching appliance that strips attachments out of e-mails and archives them. These systems get plugged into the corporate network and are especially well-suited for businesses that frequently send and receive large files.

As the volumes of e-mail and regulatory demands grow, archiving technology is trying to keep pace. Systems only a few years old can be already out of date, with some comparing them to roach motels: information goes in but not out.

That's a problem if your company gets a court order to produce all e-mails related to a particular topic going back years. Without proper archival, it can cost millions of dollars to have staff wade through terabytes of information on back-up tapes, file servers and desktops. "E-mail archiving has gone from an IT-driven issue to a compliance and legal issue," says Bob Spurzem, an analyst with Ferris Research.

The issue has become pressing with the introduction of new Federal Rules for Civil Procedure (FRCP) in the U.S., which demand firms know exactly where their electronic documents are stored and be able to produce e-mail within 30 days. "The impact of FRCP is 10 times as big as the other factors before it because it affects everybody, no excuses," Mr. Spurzem says. "It's created a level playing field in the courts, treating e-mail the same as paper documents."

Legislation in Canada isn't as explicit regarding e-mail, but firms shouldn't use that as an excuse, Ms. Dolman says. In Ontario, rules of civil procedure have a sufficiently broad definition for documents to cover e-mail, and as of 2005, there are new guidelines that further clarify e-discovery demands.

What's more, any Canadian company sued in U.S. federal courts would have to abide by the strict American laws. "A Canadian company in 2007 should really be taking the same steps [as U.S. companies]," Ms. Dolman says.

Taking those steps isn't cheap. Researcher Gartner Inc. estimates the cost of outsourcing electronic communications management at \$2,500 (U.S.) to \$4,000 per megabyte.

Still, that's likely cheaper than doing nothing.

You've got mail

159: Average annual percentage sales growth between 2002 and 2006 for electronic records-management software

75: Percentage of global companies that will be involved in regulatory or legal proceedings that require them to produce e-mails in 2007

62: Percentage of surveyed U.S. companies that say they don't have an efficient method for searching their archived e-mails

48: Percentage of companies that report having had a major e-mail server crash within the previous six months

10: Percentage of outgoing e-mails that the SEC demands public retail companies randomly review for regulatory breaches

0: Number of e-mails U.S. President George W. Bush has sent since his 2001 inauguration for fear they may later be subpoenaed

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