

# Your Word Is Not Enough

Records Management in  
an E-Discovery World

Monday, June 5<sup>th</sup>, 2017  
SCCE Higher Education Compliance Conference  
Adam Haney and Nedra Abbruzzese-Werling

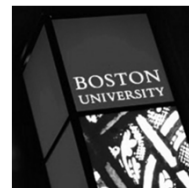
## Who We Are & Where We Come From



Adam Haney  
Assistant Counsel  
Upstate Medical University  
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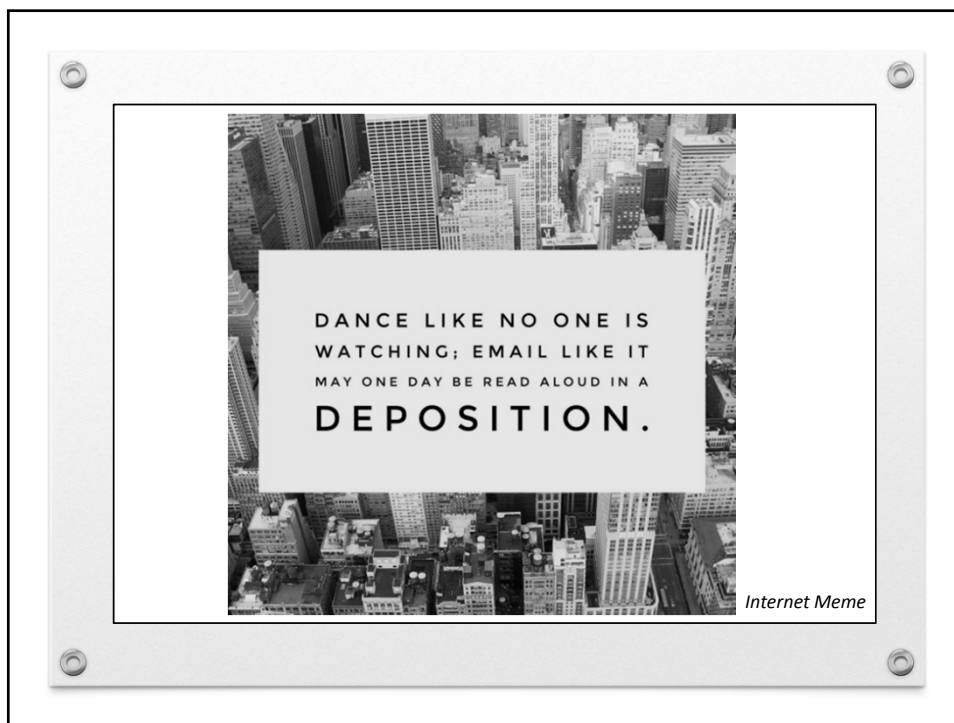


Nedra Abbruzzese-Werling  
Associate Vice President for  
Compliance Services  
Boston University  
Boston, MA



## Goals for This Program

- Discuss the nexus between good records management and compliance
- Provide considerations and practical tips to take steps to:
  - Create a Records Management Policy or improve upon your existing Policy
  - Implement a records management program on your campus that facilitates and encourages compliance with your records Policy



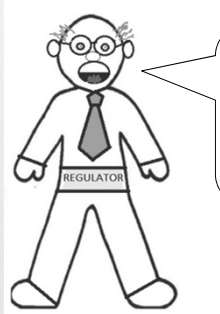
## Meaning Behind the Title

In the compliance world, our **SPOKEN WORD** is not enough. We must preserve adequate and appropriate records for a specific period of time to be able to demonstrate compliance. In that way, records management and retention is critical to compliance.

## Meaning Behind the Title

**SPOKEN WORD IS NOT ENOUGH**

So in conclusion... We complied with 15 CFR 2478 (g) perfectly!




That's nice.

**SHOW**  
**ME!**

## Meaning Behind the Title

If you complied with the law, but it wasn't systematically documented, regulators will treat it as though it never happened.



SHOW ME THE COMPLIANCE!

## Compliance and Records Management

Our records must demonstrate compliance, so we must be proactively:

- **DOCUMENTING**  
our compliance efforts into physical records
- **PRESERVING**  
appropriate records
- **DISPOSING**  
of records that are past their retention safely

**SAFELY & CONSISTENTLY**

## Document, Preserve, Dispose

### DOCUMENTING

**So you can produce evidence to show you complied, whether because of:**

- An information request
- An audit or review by oversight agency
- In preparation of litigation and discovery/e-discovery

## Document, Preserve, Dispose

### PRESERVING

**Maintain records you need safely, for as long as you need them, in a usable format**

- Store in an organized way so your institution:
  - Knows what it has
  - Can find what it has
  - Knows what its lost in case of disaster  
*(Ex. fire, breaches, roof collapse)*
- Reduce cost of records storage

## Document, Preserve, Dispose

### **DISPOSING SAFELY & CONSISTENTLY**

Only keep records as long as they are needed to preserve resources, including:

- Storage space
- Amount of time it takes to manage records
- Reduce server and security costs
- Breach loss: Less data to breach, know what has been breached

Dispose of records that no longer have a legal or operational purpose, in a secure way, to have benefit of the safe harbor afforded by courts.

## Records Retention and Management

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### **Back to Basics**

Definitions and Key Concepts

**Records Management and Retention**

Definitions

What is a "record"?



**Not your grandpa's records**

**Records Management and Retention**

Definitions

What is a "record"?

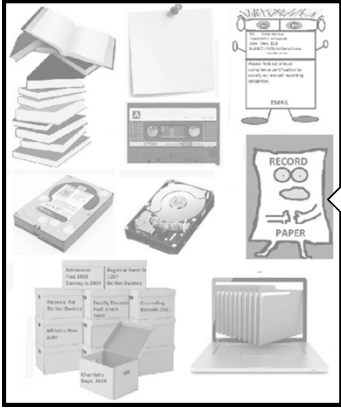
- Any **DOCUMENTARY MATERIAL**,
 

Files	Films	Blue Prints	Papers	CAD Files
Photos	Metadata	Recordings	Email	PDF's
Books	Post-its	Tapes	Messaging Systems	Other
- That is **RECEIVED, STORED, PRODUCED** or **TRANSMITTED** by any department, office, employee or agent in the course of business, *and*
- Has a **LEGAL, OPERATIONAL** or **HISTORIC** value to the institution.

### Records Management and Retention

Definitions

What is a "record"?



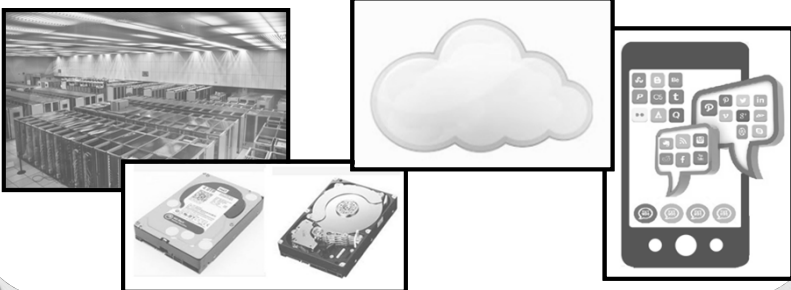
Campuses maintain records in **MANY FORMS** in the ordinary course of business.

### Records Management and Retention

Definitions

What is "ESI"?

**ESI = Electronically Stored Information**  
Everything on hard drives, servers, wireless devices, etc. is ESI






## Records Management and Retention


### Records versus ESI

Only ESI with a **legal, operational, or historic** value is a record  
= Not all the ESI your institution has are RECORDS you need to keep

We are RECORDS because what is written on us serves a **LEGAL, OPERATIONAL or HISTORIC** value to our campus.



A cartoon character representing an email record. It has a rectangular body with a white background and a black border. The top of the body is labeled 'RECORD'. The character has two eyes, a mouth, and two arms. The body contains a sample email header: 'To: Jack Spang', 'From: SONY Electronics', 'Date: May 2012', and 'SUBJECT: ANNUAL Compliance Certification'. Below the header, it says 'Please find our annual compliance certification to satisfy our annual reporting obligation.' The bottom of the body is labeled 'EMAIL'. The character has two small legs at the bottom.




A cartoon character representing a paper record. It has a rectangular body with a white background and a black border. The top of the body is labeled 'RECORD'. The character has two eyes, a mouth, and two arms. The body contains a simple drawing of a document with a checkmark. The bottom of the body is labeled 'PAPER'. The character has two small legs at the bottom.


## Records Management and Retention

### Records versus ESI


Only some of the information contained within these electronic devices and storage are "records"




A photograph of a server room with rows of server racks.



A simple icon of a cloud representing cloud storage.



An icon of a smartphone.



Two hard drive icons.

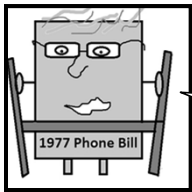
## Records Management and Retention

### Triggers that convert old information into a "Record"

**ESI or physical records converts to a record in specific circumstances:**

- Reasonable anticipation of litigation makes non-records relevant and valuable to a legal process
- Audit or review by an oversight agency where records are subject to review
- Public information request where, if you have the information at the time of the request, it is now in the public interest

**BUT, only ESI that exists at moment of "trigger" can convert to a record**




HOORAY! That request for information made me relevant again!!!

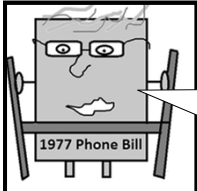
## Records Management and Retention

### Takeaways

- Most of the information your institution is storing is not even a record (just paper and ESI with no legal, operative, or historic value)
- Most emails = not records
  - Exception: HR context, where your emails often serve as documentation of employee history, including complaints, issues, reports, etc.



I serve a legal, operational, or historic value to your campus.



I don't... unless you get a "trigger" and become relevant again.

**Records Management and Retention**

What is Records Management?

Identifying Retaining & Storing  
 Preserving Classifying  
 Disposing Archiving  
 Tracking Prioritizing  
 Securing Retrieving

**RECORDS**

**Records Management and Retention**

What is Records Retention?

**Systematic Legal Disposal of Obsolete Records**


- Retention period of a document =
- period of time a document should be kept or "retained" in paper or electronic format
- At the end of the retention period, the document is destroyed

**Retention periods based on:**

- Statutes of limitation - Legal Value
- Need to institution - Operative Value
- Permanent Retention - Historic value

## Records Management and Retention

What is Records Management and Retention?



Disposing of Records  
(in any form) that met  
their retention

## Records Management and Retention

What is “e-discovery”?


A short hand term for the process of preserving and exchanging ESI in the context of modern litigation or other legal processes.

- The “ **E** ” in E-discovery = Electronic
- E-discovery = Electronic Discovery
- Data is identified as potentially relevant by attorneys and placed on a legal hold for litigation, information requests, FOIL/FOIA requests, audits or investigations
- Evidence is then extracted and analyzed using digital forensic procedures, and is reviewed

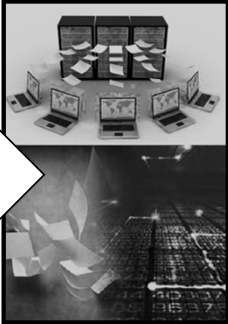
## Records Management and Retention

### What is "e-discovery"?

**Traditional Discovery**  
"Old School" Discovery



**E-Discovery**  
"Modern Day" Discovery

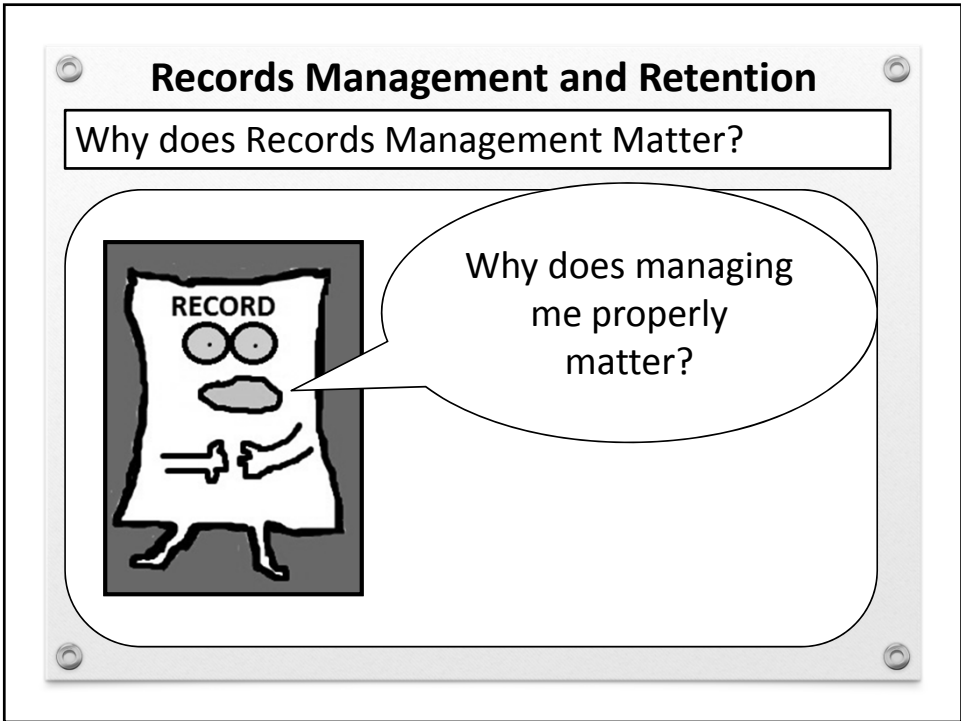


Both are "discovery" but traditional discovery involves paper and traditional mediums, and e-discovery involves electronic records and digital data..

## Records Management and Retention

### Why e-discovery is more complex?

- Conversion to formats that are usable can be difficult
- Electronic data comes in many formats
  - PDF, readable PDF, .doc, .tiff, .jpeg with metadata
- Determining where relevant data is located becomes more complicated
  - What server
  - What computer drives on who's computer
  - What programs (outlook, excel, Banner)
- Volume of information is growing exponentially



## Compliance and Records Management

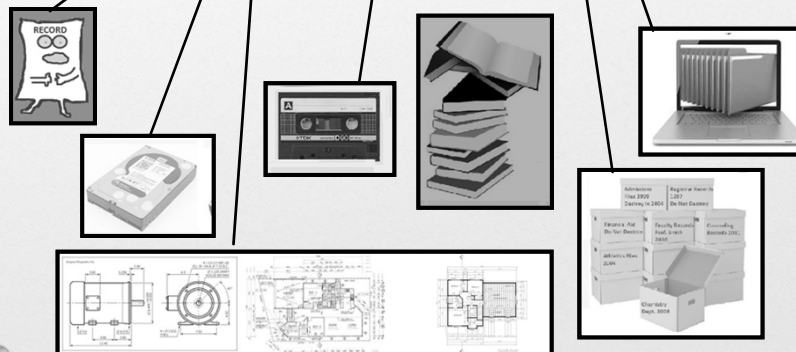
To show compliance ,we must be proactively:

- **DOCUMENTING**  
our compliance efforts into physical records
- **PRESERVING**  
appropriate records
- **DISPOSING**  
of records that are past their retention safely  
**SAFELY & CONSISTENTLY**

## Records Management and Retention

Why is Records Management soo complicated?

Records Come in many forms.



## Records Management and Retention

### Why does Records Management Matter?

Information is growing **EXPONENTIALLY**

Worldwide growth rate of digital data is staggering

- 2.5 quintillion bytes of data are created EVERY SINGLE DAY\*
- Amount of data is doubling every two years, and is estimated to reach 44 trillion gigabytes by 2020.\*\*
- In 2012, 1.8 million terabytes of data were created
  - **Terabyte:** one trillion bytes, or 1,000 Gigabytes
  - 1 Terabyte = 1,000 copies of the Encyclopedia Britannica
  - 67 terabytes = ALL of data in ENTIRE Library of Congress (including images)

How is litigation affected?

- Corporation created 5 million pages of data for 1 trial that only included 5,000 exhibits
- Costs of discovery and document production are stifling businesses and their ability to do their business and respond to discovery demands

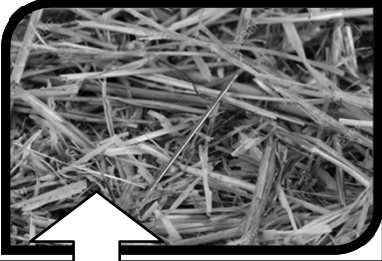
\* Compliance, Governance and Oversight Council (CGOC), an independent forum of data experts  
\*\* Analyst firm IDC declares that the amount, [Clearing Out Digital Debris with Information Governance IBM Whitepaper](#) • July 14, 2015.

## Records Management and Retention

### Why does Records Management Matter?

**Bad** = Too many records

**Good** = Keeping only the records you should have according to the schedule



You are MUCH less likely to find what you need, even if you have it.



## Records Management and Retention

Why does Records Management Matter?

Why is it important to have **LESS** records to sort through?

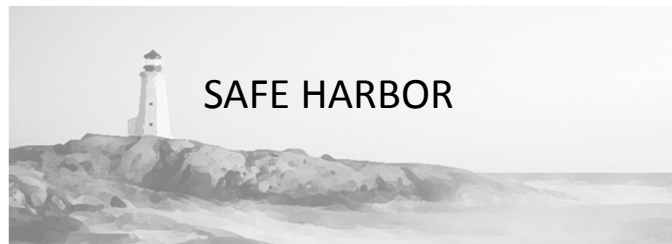
Resources – time and \$\$\$

- Document Review
- Electronic Records and Usable Formats
  - Records storage is more complex than physical paper and boxes
- “E-discovery”

## Records Management and Retention

Why does Records Management Matter?

Why is it important to **FIND** what you have?



Opposite of the Safe Harbor: Courts penalize for what you **SHOULD** have but cannot produce by making a negative inference as to the missing information.

- View missing records in the light most favorable to the opposition.

**Records Management and Retention**

Why does Records Management Matter?

**Why is it important to know **WHAT** records you have?**

- Data Breach Responses
- Discovery
- Disaster response (fire, flood, roof collapse)
- Day-to-day operations at your institution
- Information Security (including privacy laws)

**Important Records  
Retention Concepts**

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## Records Management and Retention

### Other Important Records Management Concepts


#### Records Custodian

Any officer, employee, or agent of the University who possesses, controls, or maintains any record, information, or data of the University. The records custodian is the office or person who has been deemed as the official keeper for that particular type of record.

- Only an office or person who is the official custodian of a record has an obligation to retain the information.
- If an office, or an employee, is not considered the official custodian of a particular category of records, they have no obligation to retain the information.

### Other Important Records Management Concepts


#### Records Custodian - Examples



**Registrars Office**

**Official custodian of:**

- Student transcripts
- Transfer records
- Other student records



We have some career counseling records, but the campus Office of Career Services is the **OFFICIAL CUSTODIAN** of those records, so we only have Courtesy/ convenience copies, and we have no legal obligation to retain these records (and we shouldn't retain them).

**Records Management and Retention**

Other Important Records Management Concepts

Convenience/Courtesy Copies

“Convenience” or “courtesy” copies is a term used to describe the records that are in the possession of an office/employee that is not the official custodian of those records, such that the copies are not “records” when in the possession of the office that is not the custodian. They are mere duplicates (“courtesy” or “convenience”) copies.

**Warning:**  
Anyone who has had to do a large document review knows that duplicate copies and multiple drafts are the WORST! Avoid duplicates at all costs!

**Records Management and Retention**

Other Important Records Management Concepts

Emails

Retention policies are best applied to information by subject, not by the medium on which it is stored. That’s why we don’t have retention policies for paper.

## Records Management and Retention

### Other Important Records Management Concepts

#### Emails

#### Are emails records?

- Most emails are NOT records
- United States Supreme Court endorsed the idea that unnecessary email should not be retained *Arthur Andersen LLP v. United States, 544 U.S. 696 (2005)*

**TIP: The SENDER's email is considered the "official" record with the obligation to keep it**

Recordkeeper

#### Why don't we have a set retention for email?

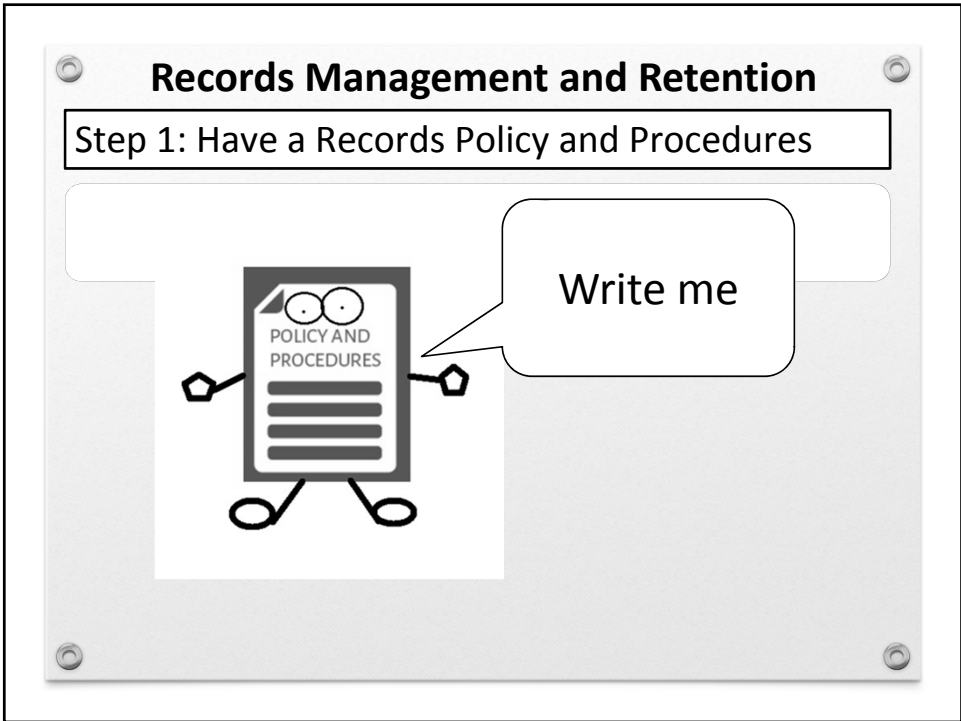
- Email is simply a medium
- Retention periods are best tied to the information in a record, not the medium on which it is stored

## Records Management and Retention

### Other Important Records Management Concepts

#### Emails

What makes me a record is what is written on me. If the content that is written in me is not an official record that serves a legal or operational purpose, I am JUNK!

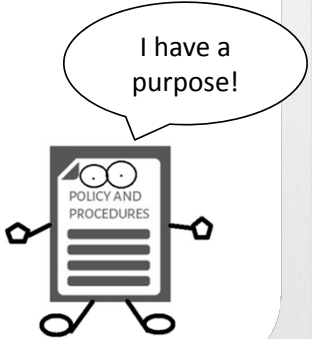



## Records Management and Retention

Step 1: Have a Records Policy

**What does a Records Policy Accomplish?**

- Delegates authority/power to destroy records after specific time
- **Reduces universe of information** by allowing for **predictable, rational, reasonable destruction** of records




## Records Management and Retention

Step 1: Have a Records Policy

**BEFORE you write a Policy...**

**Make sure you have the appropriate State authority to set retentions**

- Public schools may have State or County oversight
- MOU's you have signed
- Contractual obligations



## Records Management and Retention

**Step 1: Have a Records Policy**

**Policy Elements**

**Classify Records**

- Best practice: Define and classify records by type/subject matter
- Subject matter = FUNCTION of record
- Office organization isn't always the best way to organize
  - Office functions change over time at higher education institutions beyond the typical offices

A diagram consisting of seven overlapping circles, each containing the name of a university office or department: Admissions Records, Financial Aid Records, Bursar, Registrar, HR, Provost, and Executive Records.

## Records Management and Retention

**Step 1: Have a Records Policy**

**Policy Elements**

**Establish minimum retention periods for the specific types of records**

- Retention periods should be based on the LEGAL, OPERATIONAL, and HISTORIC value to the institution

LEGAL	=	Statute of limitations Law/Regulation Existing Campus Policies Contractual Obligations
OPERATIONAL	=	How long do you NEED it for operations
HISTORIC	=	Records that deserve permanent retention Example: Official executive records, historic projects

An icon of a document with a checklist and the text 'POLICY AND PROCEDURES' written on it.



## Records Management and Retention

### Step 1: Have a Records Policy

#### Ways to Organize your Retention Schedule

#### Example: SUNY Policy's Financial Aid Schedule

Record	SIA Number	Content	Minimum Retention	Notes	Reason for Proposed Time
1. New Student Financial Aid Program records	22233	Including but not limited to: applications for assistance, financial aid determination records, copies of income tax forms, award and disbursement notices, verifications for non-taxable income and other tax-related records, instructor requests for work-study student, student work-study job descriptions, copies of work-study time records to verify hours with student schedule, and student's service information.	5 years after determination of eligibility		Required by NYHESC Institutional Participation Agreement (IP 15)
2. New Financial aid reports	22232	State and other reports covering multiple students, including but not limited to Tuition Assistance Program (TAP) reports	5 years		Required by NYHESC Institutional Participation Agreement
3. Student bankruptcy records	22233	Including but not limited to pleadings and correspondence with court, trustee, student, or creditor's committee	6 years after case closed		Sufficient to meet administrative operational needs.

**RECORD:**  
Type/category of record

**REASON FOR TIME validation for time length, whether legal, operational, or other**

**MINIMUM RETENTION:** You must keep record at least this long

**CONTENT:** Details the records that make up that type/ category


## Records Management and Retention

### Step 1: Have a Records Policy

#### Policy Elements

#### Identifies Records Responsibility

- Every employee (faculty and staff) needs to be responsible for the records they "own"
- Acknowledge that records management is everyone's job



#### Designation of Authority

- Designate Records Management Officer(s) to oversee records efforts and/or a Committee
  - Can be a centralized or decentralized model
    - One high level designee?
    - Designee/liaison in each office?
- Someone must oversee changes to retentions and compliance with Policy generally

## Records Management and Retention


### Step 1: Have a Records Policy

#### Policy Elements

#### Electronic Conversion

**Establish a process for Electronic Records Conversion within your Records Policy**

- Identify criteria for conversion so records are as legally acceptable as the original (in court or otherwise)
- Is it allowed for all records?
  - Legally? Yes, if State law allows
  - Federal law: There are very few records that are required to be kept in paper formats (ex. some medical records)
  - Federal government set trend: has been advocating for electronic records storage since the early days of the internet
- Don't keep paper after conversion
  - Exception: FAR Part 4 for institutions that for under 4.102, must keep digitized records for 1 year past digitization, See 4.70 3c3, [https://www.acquisition.gov/far/html/Subpart%204\\_7.html](https://www.acquisition.gov/far/html/Subpart%204_7.html)



## Records Management and Retention


### Step 1: Have a Records Policy

#### Policy Elements

#### Electronic Conversion Continued

#### Criteria for Conversion

- 1. Accurate Representation of Original:**
  - Electronic images should accurately and completely reproduce all the information in the records being imaged
- 2. Usable Format:**
  - Imaged records will not be rendered unusable due to changing or proprietary technology before their retention and preservation requirements are met
    - Does the file format have longevity?
    - Refer to Federal standards for preferred file formats for long term storage; Example: PDF-A for PDF's and word documents




## Records Management and Retention

### Step 1: Have a Records Policy

#### Policy Elements

Electronic Conversion Continued

#### Criteria for Conversion



**3. Records cannot be changed once converted:**

- Imaging system will not permit additions, deletions, or changes to the images without leaving a record of such additions, deletions, or changes

**4. Records can be authenticated by employees:**


- Designees of the institution will be able to authenticate the imaged records, including the manner or method by which tampering or degradation of the reproduction is prevented

## Records Management and Retention

### Step 1: Have a Records Policy

#### Footnote on Electronic Conversion

Electronic Conversion Continued

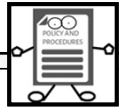


- Conversion of old records is **time consuming**
  - **You need a plan to ensure your institution has:**
    - **adequate IT Storage** System
    - **proper tools** for conversion and usable formats
    - **adequate staffing**
    - OCR (Optical Character Recognition) texting and indexing into your process
- **Document Management System** for sorting records is ideal (efficient retrieval, improved Data Governance, Centralizing force for information, build in set retentions, Indexing by text and type, avoid human error, helps with personnel turnover and absences, integrates with other systems)

**Keeping the original tangible copies? = Don't bother converting**

## Records Management and Retention

### Step 1: Have a Records Policy



#### Policy Elements

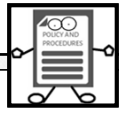
##### Electronic Signatures

You may want to address electronic signatures

- Look to State law to see if they are permissible
- Federal law says electronic signatures are ok (Federal Esign Act of 2000)

## Records Management and Retention

### Step 1: Have a Records Policy



#### Policy Elements

##### Prohibit Duplicate Record Sets

Have your Policy prohibit duplicate records

- You should not have two sets of the same records → doubles the effort to maintain and store (more space = physical or server)
  - Causes confusion, creates questions about which record set is most accurate and complete

##### Address Records “Custodians”

Who has “custody” of the official record

- Identify that only the official records “custodian” has the obligation to retain the record, and that other copies that exist are mere “courtesy” or “duplicate” copies of information that should be discarded after use
- Custodians should be based on office or position function, not specific people

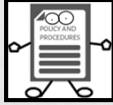
## Records Management and Retention

### Step 1: Have a Records Policy

#### Policy Elements

#### Address Plans for litigation and other regulatory compliance

- Process for litigation holds, audits, compliance reviews and assessments, Freedom of Information requests, and discovery requests
  - Reference existing policies
    - Freedom of Information (public institutions)
    - E-Discovery Policy
    - Litigation Process



## Records Management and Retention


### Step 1: Have a Records Policy

#### Policy Elements

#### Outline Limited Criteria for When Records Should Be Held Past their Retention

Records should ONLY be retained past their retention period unless they serve an essential LEGAL, OPERATIONAL, or HISTORIC value to the institution, that is documented, based on one of the following justifications:

- 1. Discovery:** The records are the subject of a litigation discovery request.
- 2. FOIL/ Information Request/Audit/Compliance Assessment:** The records are the subject of a current, ongoing FOIL or information request that has not yet been resolved or closed.
- 3. Legal Hold:** The records are the subject of a legal hold



## Records Management and Retention

### Step 1: Have a Records Policy

#### Policy Elements


#### Outline Limited Criteria for When Records Should Be Held Past their Retention continued...

**4. Historic:** The records could be considered historic

- Work with your Archivist or Librarian for Criteria
- Most should be built into your schedule as “Permanent Retention”

**5. Justified ESSENTIAL Operational Value and Need:** Records serve an essential operational value to the office, and that the operational value outweighs the risks that come with holding onto the records.

- Operational value and need should be used **sparingly** to justify retaining records longer than the minimum retention
- need should be documented
- Should require higher-level approval to retain longer, given the risks/cost that come along with holding records longer than your schedule




## Records Management and Retention

### Step 1: Have a Records Policy

#### Policy Elements

#### Information Security

- Establish or reference physical and technical security standards for records
- Incorporate your existing Information Security Policies and Procedures into your records Policy by reference
- Tip: don't regurgitate or duplicate information security standards into Records Policy



## Records Management and Retention

### Step 1: Have a Records Policy

#### Policy Elements

#### Records Disposal

- **Confidentiality:** Disposition should be carried out in a way that ensures confidentiality of records
- Require more secure disposal methods for confidential records/PHI/HIPAA/PII
  - Shred on premise
  - Incinerate (secure records until they are destroyed)
  - Consignment to a paper recycling plant?

## Records Management and Retention

### Step 1: Have a Records Policy

#### Policy Elements

#### Require Destruction Documentation

- Document Your Destruction for audit trail of how you followed your Policy:
  - Record identity, inclusive dates, and approximate quantity of records that are disposed of

#### Address Email Retention

- Emails are treated like any other ESI, and most emails are not “records”
- Emails cause confusion, so state explicitly in Policy

## Records Management and Retention

### Other Records Management Considerations

### Related Records Management Considerations

**Data Governance:**

- Are records clearly organized so we can find them when we need them?

**Data Mapping:**

- What documents do we even have, and where?
- Are they “records”?

**Fiscal Issues:**

- Are documents managed in the most cost effective and functionally useful manner?
- Who pays for storage?

**These concepts don’t need to be incorporated into your “Policy” document, but are issues to address as you craft your Policy.**

## Records Management and Retention

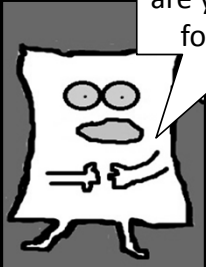
### Other Records Management Considerations

### Related Records Management Considerations

#### Succession Plan for Records

**Employee leaving or retiring?**

- Address plan for records in advance of their departure, just as you would address getting back their computer and shutting off their email and computer access
- Records succession plan should be built into every employee departure
  - Who will assume custodial roles over records left behind?



**Happy Retirement Bob!... now what are your intentions for my future?**



**Records Management and Retention**

Other Records Management Considerations

**Related Records Management Considerations**

**E-Discovery Policy**

**You may want to establish an E-discovery Policy at the same time you create or update your Records Policy**

- Sets up framework for preparing for and managing legal holds and e-discovery
  - Response Team
  - Best practices for pre-discovery RM
  - Creates tracking mechanism
  - Mandates Compliance, but already a legal obligation, so policy would provide clarity
  - Gives actors authority and resources


**Records Management and Retention**

Other Records Management Considerations

**Related Records Management Considerations**

**E-Discovery Policy**

**Who are the key people?**  
 Counsel + IT + RMO + ?  
 Charged with Policy  
 Compliance  
 Communicates Regularly  
 Manages Legal Holds  
 Tracking  
 Trains Constituents  
 Reports to Management  
 Review/Production



## Records Management and Retention

### Other Records Management Considerations

#### E-Discovery Policy

Should outline specific duties for:  
Counsel, Custodians, IT, RMO's, and any other key people

The diagram illustrates four key roles in an E-Discovery Policy. From left to right: 1. Counsel, represented by a man with glasses and a suit. 2. Custodians, represented by male and female icons. 3. IT, represented by a man with glasses and a computer. 4. RMO's (Records Management Officers), represented by a man with glasses and a stack of papers. Arrows point from the text 'Counsel, Custodians, IT, RMO's, and any other key people' to each of these four illustrations.

## Records Management and Retention

### Other Records Management Considerations

#### E-Discovery Policy

#### Legal Preservation Notice\*

- A set of written instructions that is sent from Counsel to Key Persons in order to initiate a Legal Hold. A Legal Preservation Notice may be issued electronically; however, it should include an appropriate acknowledgment of receipt. At a minimum, a Legal Preservation Notice should include information related to:
  - The nature of the Triggering Event giving rise to the Legal Hold;
  - The ESI or other records that are subject to the Legal Hold;
  - A brief recitation of the legal obligations related to Legal Holds in general;
  - Instructions for preserving the relevant ESI (including any transfer instructions);
  - Contact information for both legal and IT advice.

\*Definition from the SUNY E-discovery Policy

## Records Management and Retention

### Other Records Management Considerations

#### E-Discovery Policy

#### Triggering Event\*

- Any event or set of circumstances that cause Counsel to reasonably anticipate litigation or another legal process that gives rise to a preservation obligation.
- Factors to consider in determining whether a Triggering Event has occurred include but are not limited to:
  - Likelihood of litigation or other legal processes, including communication from potential parties to a lawsuit or their representatives;
  - History of the institution related to a potential matter in dispute;
  - Location, durability, and control of potential ESI;
  - Media coverage;
  - Seriousness or magnitude of potential legal action;
  - Relative burdens and costs of preservation effort;
  - Common sense and professional judgment.

\*Definition from the SUNY E-discovery Policy


## Records Management and Retention

### Other Records Management Considerations

#### E-Discovery Policy

Counsel should drive the litigation hold process (case law)

- Determine if a “Triggering Event” requires a litigation hold
- Identify relevant documents and custodians
- Determine appropriate search terms or key words for use in search tools/software on an ongoing basis
- Identify the appropriate time period for the Legal Hold and determine whether the Legal Hold is continuing or only retrospective.
- Define scope/types of ESI for recipients of Legal Preservation Notice.



## Records Management and Retention

### Other Records Management Considerations

#### E-Discovery Policy

##### Counsel considerations



- Nature of the issues raised or likely to be raised in litigation
- Amount that is or is likely to be in controversy
- Nexus of the information to issues that may be involved in the litigation; the costs to preserve and potentially restore information
- Whether preservation would affect ongoing or future business activities
- Whether there are other sources of such information, and other relevant factors

## Records Management and Retention

### Step 2: Implement your Records Policy

#### Communicate Policy

- **Publish Records Management Policy, Procedure, and Schedules** in place where other all other institution policies are located
- Communicate all the reasons it is critical to compliance

#### Establish RM as an institution-wide priority

- **Tone from the top** - Designate Records Management as an important and essential initiative
- **But don't forget about the Mood in the Middle** – Outreach to offices to discuss Policy and their records obligations and practices



**Records Management and Retention**

**Step 2: Implement your Records Policy**

**Establish RM Partners/Liaisons for Buy-In**

- **Identify key people** responsible for moving records management forward
  - Liaison/ Custodian in each office to facilitate compliance in office
  - Grassroots effort to spread word and create action
- **Use Committee to get buy-in**

**Reward Compliance**

- **Reward compliance** with policy
  - Carrots/sticks
  - Award for best RM efforts at an office

**Records Management and Retention**

**Step 2: Implement your Records Policy**

**Create Financial Incentive for Compliance**

- Push Records storage and information security costs onto the individual departments
  - Professor X wants to keep everything in long-term storage forever? Okay, Organic Chem. Dept., but here is the bill!

**Build Records Management Compliance Into Every Job Description**

- Require proper management of the records there are the custodian for

## Records Management and Retention

### Step 2: Implement your Records Policy

#### Integrate with IT

- Integrate IT Systems with Records Management
- Build retention into the technologies
- Make retention part of the IT process

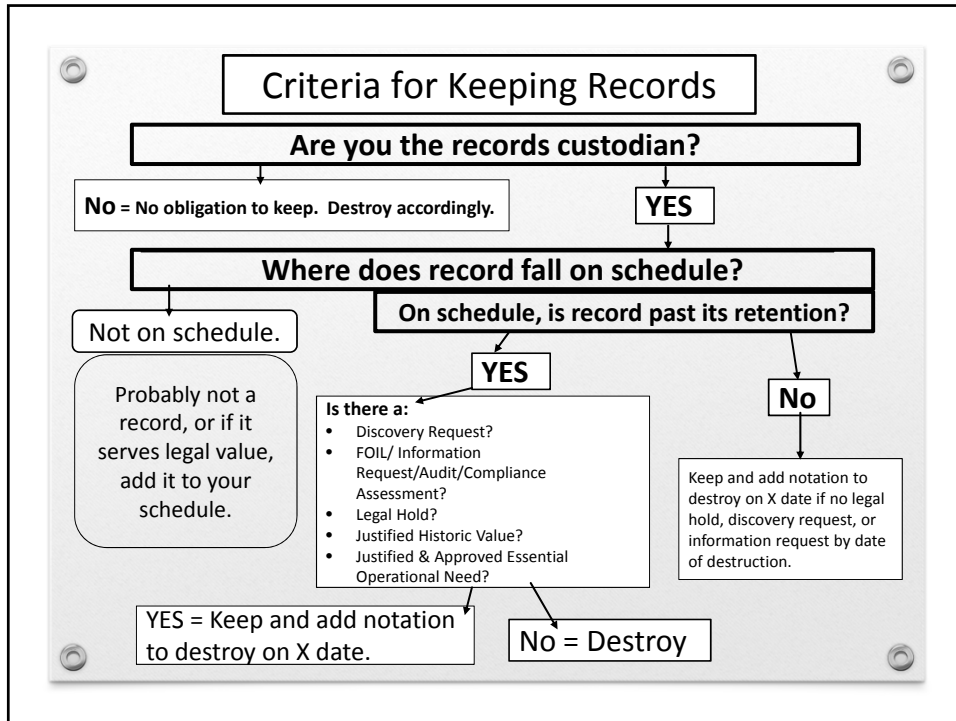
#### Improve Long-term Storage Process

- Create processes and forms to force people to evaluate need to retain records

## Records Management and Retention

### Criteria for Keeping Records

1. **"Am I, or is my office, the OFFICIAL Custodian" of these records?**
  - No = dispose (in safe manner)
  - Yes = Go to # 2
2. **Figure out where the records you have fit within the schedule**
  - Not on schedule = Most likely not a record, so dispose (in safe manner)
  - Yes = Go to # 3
3. **How long does it say I need to keep the record on the schedule?**  
**Once the given MINIMUM retention period for a particular record has passed, the records should be disposed of in a secure manner**
  - Shredding, incineration, controls
4. **If you are going to keep a record longer than the schedule states, you should have a reason based on one of the 5 justifications**
  - "Because I want to keep them is NOT a good reason
  - Document your good reason




## Records Management and Retention

### Step 2: Implement your Records Policy

#### Communication & Training Plan

- **Develop a roll-out plan that includes training of all employees**
  - Ensure staff training to reinforce policy
    - Annual training of all employees
    - Manage records plan when employees leave
    - Develop plan with each office and train them on applicable functional schedules
    - Train all new employees
- **Offer continuous support to offices with records questions**
  - Listserv
  - Website
  - Campus newsletter




## Records Management and Retention

### Step 3: Committee

#### Committee Action


Assemble a **committee** with select members from each department

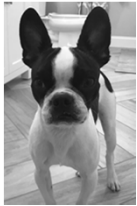
- Legal, Record Management, Compliance, HR, Finance, Information Technology



**HR**


**IT**






**Records Management**

**Legal**






**Compliance**

## Records Management and Retention

### Step 3: Committee

#### Committee Action

- Establish the Committee Charge and Define **clear goals**
- **Set dates** for each phase of the project
- **Designate leader** of committee who will convene committee and keep it on course towards goal completion





## Records Management and Retention

### Step 4: Records Inventory

#### Assess & Inventory Campus Records

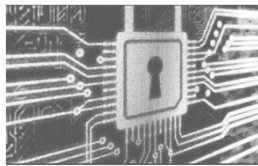
- **Conduct a records inventory to:**
  - Identify records that currently exist as well as where and how they are maintained and secured
  - Identify the medium the records are kept in (electronic, paper, other, combination)
  - Identify the custodian
- **Use records inventory to develop a plan for disposing of records that have already exceeded their required retention periods**
  - Set specific goals for process with realistic completion dates
  - Establish time frames for getting existing records, documents, and ESI in compliance with new schedules

## Records Management and Retention

### Step 4: Records Inventory

#### Inventory Considerations

- Where is your Sensitive Data
- Encryption
- Access
- Screen vendors
- Locking doors and file cabinets
- Mobile devices clean, password-protected, under institution control
- Synchronize security with records retention
- Destroy records appropriately



## Records Management and Retention

### Step 4: Create Records Management Culture

#### Communication is **CRITICAL** to getting personnel to start thinking about their records

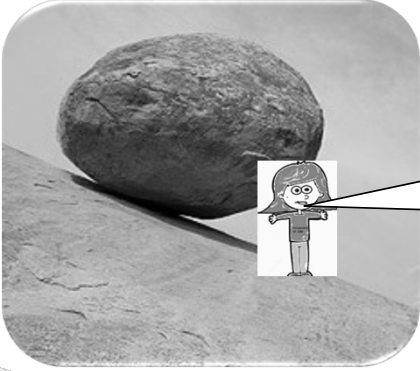
- **Continual training, communication and outreach with offices and records liaisons**
  - Communicate the risks, the “why”
  - Get your records policy incorporated into your onboarding/annual training efforts
- **Create a website, a guidebook with answers to common questions, FAQ’s**
- **Add records management to every training you conduct**
  - Have introductory slides on every training you conduct that shows people where they can find policies, websites, and your records schedule
- **Fight the common misconceptions**

## Records Management and Retention

### Step 4: Create Records Management Culture

#### Common Misconceptions, a.k.a. Alternative Facts

**Fighting against misconceptions is an uphill battle!!!**



Here are the **ACTUAL** facts about records management and retention!

**Records Management and Retention**

**Step 4: Create Records Management Culture**

**Common Misconceptions, a.k.a. Alternative Facts**

Alternative Fact	Fact
If I scan a paper record into a digital image, I have to keep both the paper copy and the electronic copy.	Electronic record is acceptable so long as you reproduced the record accurately upon conversion.
The "SEVEN YEAR" rule	Each record usually has a unique retention based upon it's use.
I need to keep stuff forever in case people ask for it because that will make things easier.	Just because some people may ask for it at some point in the future is not a good enough reason to overcome your obligation to follow your schedule.
It is safer if I keep all records I have forever.	No, it's not. (Breach, storage costs, not finding what you need to produce because you have to much).

**Records Management and Retention**

**Step 4: Create Records Management Culture**

**Common Misconceptions, a.k.a. Alternative Facts**


Alternative Fact	Fact
Courts will punish us if we can't produce the original record.	Safe harbor will apply if we followed our reasonable records schedule.
I need to keep stuff forever because my institution will get in trouble if I can't produce it.	Not following your records policy poses a bigger risk.
My records are all electronic, so I don't need to get rid of anything.	Electronic records should be treated just like paper records, or records in any other format for that matter.
Records management isn't my job, since we have a Records Management Officer. So I don't have to manage my records.	EVERY employee (yes faculty too!) are official "record-keepers" for the institution.

**Records Management and Retention**

Step 4: Create Records Management Culture

**Fight against records “hoarding”**

- **Disposition should be carried out regularly, at least once a year**
  - Facilitate annual disposal of records
  - Host a Campus Records day
  - Host a Records Management Week
  - Have a shredding day and publicize it
- **Don’t wait until storage becomes a problem**

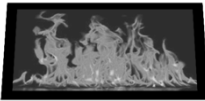



**Records Management and Retention**

Step 4: Create Records Management Culture

**How do you get offices to care about records management?**

- Pass the cost off to the office: make them pay for storage and any out-of-the-ordinary discovery issues
- Fire, roof collapse, flood
- Discovery/information request with huge set of documents to review



## Records Management and Retention

### Step 5: Continual Monitoring

- **Establish a continual audit and review process**
- **Audit compliance with your records policy**
  - Add compliance with retention schedules to your internal audit plan
- **Review Records Management Policy and schedules on an annual basis and update when necessary to account for:**
  - Legal changes
  - Operational changes
  - Personnel changes
  - Completeness, relevancy, clarity

## RESOURCES

### SUNY

- [SUNY Records Retention and Disposition Policy](#)
- [SUNY Legal Proceeding Preparation \(E-Discovery\) Procedure](#)
- [SUNY Compliance Website Page on Records Management](#)
- [Records Retention and Disposition at SUNY Campuses Guidance](#)  
Comprehensive handbook for SUNY campuses with the basics of Records Management.
- [SUNY Email Retention Guidance](#)  
The purpose of the guidance is to help SUNY campuses with regard to retention of emails

National Archives File Format Recommendation

<https://www.archives.gov/records-mgmt/policy/transfer-guidance-tables.html>

Boston University

- Policy <http://www.bu.edu/policies/record-retention/>
- Record Retention Table <http://www.bu.edu/policies/record-retention-table/>

**Records Management and Retention**

- **QUESTIONS?**

**THANK YOU!**

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