Retention

- Municipalities are responsible for retaining and destroying the public records they create and receive while conducting public business in accordance with law, and more specifically, in accordance with an approved Retention and Disposal Schedule.
- Public records are defined as recorded information “prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.” FOIA, P.A. 442 of 1976, as amended.
- Electronic public records are no exception to the rule.
Retention

- Pay attention to the substance, not the form, of the electronic record, to determine its retention period.
- Electronic records include e-mail messages, word-processed documents, digital images and databases and electronic spreadsheets.
- These, in turn, may be stored on computer and server hard drives, smart phones, and personal digital assistants (Blackberries or Palm Pilots).

Retention

- As with General Retention Schedules, an Electronic Storage Schedule or Policy must take into account statute of limitations requirements, audit requirements, administrative needs, and potential historical value.
- Electronic records cannot be destroyed if they have been requested pursuant to FOIA, or if they are part or potentially part of on-going litigation (even if their retention period has expired) (FOIA/litigation “freeze”).

Retention

- Electronic records that are deleted are not necessarily destroyed.
- Most electronic records will not remain stored in their original format for the life of their retention period.
- Electronic records take on a life of their own, with destruction potentially dictated by storage capacity of your computer system rather than a schedule based on the law. (In other words, the IT person designed the deletion schedule, which may or may not comply with the legal requirements).
Retention
- Records Management Services, Department of History, Arts & Libraries
- Model Electronic Storage Policies

Disclosure
- Freedom of Information Act
- Litigation

Freedom of Information Act
Requires disclosure of Public Records not exempt from disclosure.

Penalties under FOIA for failure to disclose:
Attorney’s fees and Punitive Damages
Litigation Considerations

MCR 2.302: Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things.

Litigation Considerations

MCR 2.313: Motion for Order Compelling Discovery.

Attorney’s fees.
Sanctions.

Litigation Considerations

FRCP 16: eDiscovery.

Requires any search for documents to include a search for electronically stored information.

Implications
Safe Harbor for Routine Deletion of E-Data
Litigation Considerations

Adverse Jury Instruction:

A party who fails to produce evidence at trial under its control allows the jury to draw the inference that evidence would have been adverse. Clark v Kmart Corp, 249 Mich App 141; 640 NW2d 892 (2002).

MCL 750.491

Destruction of a Public Record in a manner not permitted by the Records Management Handbook is a MISDEMEANOR punishable by up to 2 years and $1,000.00.

Failure to Disclose

Automatic Email Storage

- On the server – a centralized computer “serving” multiple computers on the same system. Multiple users have access to all information stored there.
- On the hard drive – the storage center of an individual computer where all files and folders of the individual are stored.

Where your Email is stored depends on your program.

- Outlook Express – stores on the hard drive.
- Lotus Notes – stores to the server.

Smarter Email Storage Options

- Within the Email System.
- Creation of an Email Archive.
- Outside of the Email System.
Within the Email System

- Storage within the active email system.
- Create topical folders within the system to facilitate organization and retrieval of messages.

Pros

- Messages are stored.
- Drag and drop filing is quick and easy.
- Easy to search for, forward, and reply to messages.
- Messages remain linked to their attachments and transactional metadata.

Cons

- Easy for users to save every message instead of analyzing whether it should be saved.
- Resulting in space and performance problems for the email storage system.
- Messages generally accessible by account holder only or those with access.
- Messages are stored outside of the “file” where other documents on the same subject are stored.
- Older messages generally will not be purged or not purged properly.

Email Archive

- Archive feature of the email system.
- May be automated.
- Stored in a physically separate location from the "live" messages.

Pros

- Drag and drop filing is quick and easy.
- Easy to search for, forward and reply to messages.
- Messages remain linked to their attachments and transactional metadata.
- If archive stored on the server, it will be "backed up."

Source: Michigan Municipal Review; Records Management Services, Department of History, Arts and Libraries, March/April 2007

Cons

- If the archive is on the hard drive, it will not be backed up.
- Space and performance problems.
- Messages only accessible by the account owner. Difficult for others to find.
- Off-site storage.
- Failure to purge or purge properly.

Source: Michigan Municipal Review; Records Management Services, Department of History, Arts and Libraries, March/April 2007
Outside the Email System

- “Save As.”
- “Print.”

Save As

- Convert emails to text files.
- Store them in the same location where all other documents related to the subject matter are stored within the computer.

Pros

- Not automatic – users must analyze whether the document needs to be saved or can be removed from the system.
- Email stored on site.
- Email may be renamed to give more meaning.
- If stored on server, documents will be backed up.
- Multiple persons may access.

Cons

- The physical link between the message and its attachments will be broken.
- Cannot reply to or forward the message automatically using the email system.
- Purging issues.

Source: Michigan Municipal Review; Records Management Services, Department of History, Arts and Libraries, March/April 2007

Print

Convert electronic messages into paper messages.

Pros

- Requires thought.
- On site storage.
- Multiple persons will have access.
- Familiar.

Source: Michigan Municipal Review; Records Management Services, Department of History, Arts and Libraries, March/April 2007
Cons

- The physical link between the message and the attachment will be broken unless stapled together.
- Cannot reply to or forward the message automatically.


Records Management Application

- Special Software designed to support the retention of and access to electronic records.
- The software will assign retention periods to all electronic records based upon the legally mandated retention periods.
- Expensive technology.

Questions?