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Archiving Old E-mail a Compliance and Legal Issue

By Joanna Pachner

Spoilation: 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 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.

"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, Hoskin & Harcourt LLP 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."

Today, electronic documents are the lifeblood of corporate life, representing 92 percent of all business information, according to one U.S. study. 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.

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.

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.

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