



# Legal Aspects of Records Management

[www.archives.nysed.gov](http://www.archives.nysed.gov)



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## Objectives

- Understand legal requirements for RM
- Learn about laws and relevant court cases
- Understand how legal discovery works
- Know consequences of not keeping records



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## Agenda

- The legal importance of a records program
- The laws and the consequences
- Legal discovery, including e-discovery
- Practical steps going forward



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## Note

- We are not lawyers
- Though we interpret law all the time
- We do not provide legal advice
- Talk to your counsel for legal interpretation



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How Laws Affect a Records Management Program

## LEGAL & BUSINESS REASONS



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## Legal Framework

- Local, state & federal laws govern RM
  - Regardless of format
- Understand & comply with applicable laws
  - RM program must support and sustain laws
- Know consequences of non-compliance
  - Goal: reduce your risk exposure



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## RM Legal Objectives

- Meet requirements imposed by law
- Fulfill FOIL requests
- Fulfill legal discovery requests
- Meet government's business needs



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## Meet Legal Requirements

- Records Management program must
  - Comply with mandated laws
  - Demonstrate intent to comply
- Ensures accountability
  - Government's accountability
  - Government employee's accountability



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## FOIL and Discovery Requests

- Meet Freedom of Information Law requests
  - Timely retrieval of relevant records
  - Including electronic records
- Comply with discovery requests
  - Retrieval & preservation of applicable records
  - E-discovery now wide ranging & challenging



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## Meet Business Requirements

- Support government business operations
  - Records support government services
  - Records required to perform daily work
- Protect essential business records
  - Help preserve those records
  - Part of business continuity & disaster recovery



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## If Records Not Managed Well

- Stiff financial penalties
- Criminal penalties
- Inability to perform required work
- Added expenses for legal discovery
- Loss of public trust and support



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## What about you?

What are specific legal effects government has suffered from not properly managing records?



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**THE LAWS**

Which ones do you have to be concerned about?



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**Intents of Records Laws**

- Define “record”
- Identify records custodians
- Ensure authenticity
- Protect confidentiality
- Meet retention periods
- Show intent
- Demonstrate integrity



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**Which Laws Apply to Me?**

- Local
- State
- Federal



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## Local Laws

- Laws enacted by your local government
- Can be laws focused on records
- Can be laws that indirectly affect RM
- Different from government to government



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## State Laws

- Arts and Cultural Affairs Law
- NYS Freedom of Information Law
- Electronic Signatures and Records Law
- Personal Privacy Protection Law (for state)



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## Arts & Cultural Affairs Law, Art 57-A

[http://www.archives.nysed.gov/a/records/mr\\_laws\\_acal57A.shtml](http://www.archives.nysed.gov/a/records/mr_laws_acal57A.shtml)

- AKA Local Government Records Law
  - Defines “local government” and “record”
  - Requires RM program and RMO
  - Establishes LGRAC, grants, regional program
  - Requires Archives’ authority to destroy records
  - Permits reproduction of records and disposition of originals



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## Part 185, 8NYCRR

[http://www.archives.nysed.gov/a/records/mr\\_laws\\_reg185.shtml](http://www.archives.nysed.gov/a/records/mr_laws_reg185.shtml)

- Regulations of the Commissioner of Education (for Local Governments)
  - Provides details to support the law
  - Defines duties of RMOs and LGRAC
  - Establishes rules for retention schedules
  - Defines reprographics and e-records
  - Governs storage of LG records off site
  - Further defines LGRMIF grants



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## § 185.6 Special approvals for disposition of records

- For Local Governments
  - (a) Records not listed on a records schedule
  - (b) Records damaged by disasters
  - (c) Disposition of records predating 1910
  - (d) Disposition of employee records



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## Arts & Cultural Affairs Law, § 57.05

[http://www.archives.nysed.gov/a/records/mr\\_laws\\_acal5705.shtml](http://www.archives.nysed.gov/a/records/mr_laws_acal5705.shtml)

- For State Agencies
  - Defines "record"
  - Establishes State Archives
  - Defines the Archives as the state's repository
  - Formalizes establishment of Records Center
  - Requires Archives' authority to destroy records
  - Gives Archives authority to develop regulation



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## Part 188, 8NYCRR

[http://www.archives.nysed.gov/a/records/mr\\_laws\\_reg188.shtml](http://www.archives.nysed.gov/a/records/mr_laws_reg188.shtml)

- Regulations of the Commissioner of Education (for State Agencies)
  - Defines “state agency”
  - Provides details to support the law
  - Requires RM program and RMO
  - Defines duties of Archives and RMO



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## Part 188, continued

- Establishes rules for retention scheduling
  - Including records damaged by disasters
- Establishes rules for State Records Center
- Defines requirements for
  - Imaging and microfilming
  - Electronic records
- Describes transfer of archival recs to Archives



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## Records Where NYSA Does Not Control Retention

- Court records
  - Judiciary Law, Article 4, §89.1 (Appellate)
- Records of district attorneys
  - Judiciary Law, Article 4, §89.2
- Canceled obligations
  - Local Finance Law, Article 2, Section 63.10



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## Special LG Records Issues

- Birth, Death, and Marriage Records
  - Under jurisdiction of DOH
- Municipal Court Records
  - (N.Y. Uniform Justice Code §2019-a)
  - State records in the care of a town or village
  - Filed with municipal clerk when municipal justice leaves office
  - Jurisdiction of Office of Court Administration
- Deeds of Gift & Deposit Agreements



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## Freedom of Information Law

[www.dos.state.ny.us/coog/index.html](http://www.dos.state.ny.us/coog/index.html)

- Defines terms of access to public records
- Appointment of Records Access Officer
- Requires keeping a subject matter list
- Request must reasonably describe records
- Sets deadlines for responding to requests
- Denial of access must be in writing



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## FOIL Non-Compliance Risks

- Fees imposed if denial is unreasonable
- E-records can't be created to impair access
- E-records structure must allow segregation



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## New York State ESRA

[www.its.ny.gov/policy/esra/esra.htm](http://www.its.ny.gov/policy/esra/esra.htm)

- Electronic Signatures and Records Act
  - Govt can create, receive, and retain e-records
  - Covers private sector and individuals also
  - Electronic signatures are legally binding
  - Generally not required to use e-signatures
  - Makes NYS ITS the Electronic Facilitator



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## Exceptions to ESRA

- Certain documents excluded from ESRA
  - Wills and trusts
  - Do not resuscitate orders
  - Powers of attorney
  - Health care proxies
- Recent amendments to ESRA
  - Allows donation of anatomical gifts
  - Allows e-recording of deeds and mortgages



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## New York State PPPL

[www.dos.ny.gov/coog/pppl.html](http://www.dos.ny.gov/coog/pppl.html)

- Personal Privacy Protection Law
  - Applies only to state agencies
  - Requires collection of only needed data
  - Requires good RM practices
  - Allows people to access or correct their info
  - Regulates disclosure of such records
  - Exempts the State Archives for its archives



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## Civil Practice Laws & Rules

<http://codes.lp.findlaw.com/nycode/CVP>

- Code of civil practice & associated court rules
- Many rules cover statutes of limitation
  - Used by Archives to establish retention periods
- Best evidence rule (Rule 4539)
  - Permits use of copies in court when copies were prepared in regular course of business
  - Use of copies permitted even if originals exist



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## Specific Rules within CPLR

- Rule 4518
  - Original records, even e-records, are admissible
  - If made in the regular course of business
- Rule 4521
  - Defines how public officials can indicate the lack or non-existence of a particular record
- Rule 4540
  - Defines how public officials authenticate copies of public records
- Others cover admissibility of certain records



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## Federal Laws

- Federal Rules of Civil Procedures
- Health Information Portability and Accountability Act
- Family Educational Rights and Privacy Act
- USA Patriot Act
- eSign



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## Federal Rules of Civil Procedure (FRCP)

- Discovery rules for subpoenas & litigation
- Govern conduct of civil procedures in federal district courts
- Describe scenarios when records disposition can occur
- Severe penalties for non-compliance or premature destruction



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## E-Discovery Revisions in FRCP

- E-records discoverable
- E-records usable as evidence
- Must be produced within 30 days
- Requestor may specify form of production
- Third parties may be subpoenaed
  - Such as cloud storage service providers



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## HIPAA

[www.hhs.gov/ocr/privacy/hipaa/understanding/summary/](http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/)

- Health Information Portability and Accountability Act
  - Standards to protect patient records
  - Provides patients' right to access health records
  - Guarantees security and privacy for certain classes of health information
  - Now allows disclosure of health information
    - 50 years after person's death



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## PHI

- Protected Health Information (PHI)
  - Part of HIPAA
  - Information used to identify an individual
    - Patient name, phone number, email address, SSN, health plan number, identifying characteristics, and more
  - Requires higher protections than other info



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## HIPAA Still Applies

- Even if not providing health care services
  - If help administer health plan to employees
    - Must ensure health plans comply with rules
    - Flexible Spending Accounts (FSAs) offered
  - Fire departments providing ambulance or emergency medical services
- Penalties
  - \$100 to \$50,000 or more per violation



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## FERPA

[www.ed.gov/policy/gen/guid/fpc/ferpa/index.html](http://www.ed.gov/policy/gen/guid/fpc/ferpa/index.html)

- Family Educational Rights and Privacy Act
  - Protects confidentiality of student records
  - Provides parents and students the right to inspect, review, and correct information
  - Schools need written permission to release
  - Schools may disclose directory information
  - Schools must annually notify parents of rights



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## USA Patriot Act

[www.justice.gov/archive/ll/highlights.htm](http://www.justice.gov/archive/ll/highlights.htm)

- Provides Justice Dept expanded access to
  - Telephone and email communications
  - “Business Records” (Section 215)
- Allows more electronic surveillance
- Requires immediate compliance
- Includes gag order



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## eSign Act

Electronic Signatures in Global & National Commerce Act

- Allows digital signing of contracts
- Similar to ESRA, but across state lines
- Records must remain accessible for required retention period
- Records must be accurately reproduced



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## eSign Limitations

- Does not apply to
  - Wills, trusts, adoptions, divorce decrees
  - Certain areas of Uniform Commercial Code
  - Court orders and notices
  - Court briefs and pleadings
  - Notices of default, foreclosure, or eviction
  - Transportation of hazardous materials docs



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## Case Law

- Law developed through courts
  - Legal precedents based on court decisions
  - Also referred to as common law
  - Distinguished from statutes
  - Legal principles developed in case law



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## Case Law Example

US District Court, District of Columbia, 1993

- Armstrong v. Executive Office of President
  - Electronic rendition of paper record is record
  - Electronic rendition is not just a copy
  - Paper version may not reflect all information contained in electronic rendition
  - Metadata is part of the record



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## Case Law Example

Supreme Court of Arizona, 2009

- Lake v. City of Phoenix
  - Hidden metadata is part of public record
  - Printed copy of record deemed not suitable
  - Embedded information within e-records reveals more information and must be provided



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## Case Law Example

Court of Appeals of Washington (State), Division 1, 2009

- Mechling v. City of Monroe, Wash.
  - Emails from public officials' personal email accounts are not automatically exempt from disclosure under public records laws
  - If any portion of a record qualifies as a public record, then the entire record is a public record
  - Although exempted information can be redacted



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## LEGAL DISCOVERY



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## Discovery Defined

- Pre-trial phase of a lawsuit
- Opposing party can obtain evidence
- Critical to understand because
  - High risk
  - High cost
  - Extremely time-consuming



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## Key Steps in E-Discovery

1. Identification
2. Collection and preservation
3. Processing (review and analysis)
4. Production and presentation



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## Identification

- Locate relevant records and information
  - Identify potential custodians and repositories
  - Potentially disclosable for a legal proceeding
  - Inventories and retention schedules may help
  - Inside or outside of your facilities



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## Collection and Preservation

- Place hold on data
  - Ensure records protected against tampering and destruction
  - Suspend records disposition
  - Gather, copy, and preserve
    - Hardcopy records (paper and microfilm)
    - Electronic records
      - Digital docs, voicemail, scanned images, email
      - ECMS, application servers, backup tapes



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## Collection Risks

- Collecting too much
  - AKA over-inclusiveness
  - Lawyers charge per hour to review files
  - Risk of sharing confidential information
- Not finding everything
  - AKA under-inclusiveness
  - Sanctions for noncompliance
  - Missing key records for either party



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## Processing

- Review and analysis of collected data
- Need people, skills, and technology
- Need special software for large volumes
  - De-duplication of files (eliminate copies)
  - Pre-processing applications that filter
    - By owner, date range, file type, and size



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## Production and Presentation

- Determine what needs redacting
- Determine presentation format
  - Difficult to review native files
  - Consider plaintext, PDF, HTML, XML, along with native version
  - Include metadata and header information (such as routing info in an email)
- Transfer to removable media



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## Cost of E-discovery Identification and Collection I

- Rowe Entertainment v. William Morris Agency
  - \$9.75 million to restore emails from 200 tapes
  - Plus hundreds of thousands of dollars to review 250,000 email messages



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## Cost of E-discovery Identification and Collection I

- Murphy Oil v. Fluor Daniel
  - \$6.2 million to restore, review & print emails from 93 backup tapes, and six months of staff time
  - Failed to follow own policy of recycling backup tapes after 45 days, so forced to review all tapes



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## Costs of E-discovery Processing and Review

- Internal review = \$2K per gigabyte
  - Legal review: \$32K per gigabyte
- Inability to produce records
  - Legal sanctions
  - Costly fines
  - Unfavorable rulings



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## Demonstrate Good Faith

- An important consideration by courts
  - Can minimize potential sanctions and fines
- A strong RM program is a good start
  - Strong foundation to build upon
  - Periodic and consistently applied enforcement



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## Case Law Example

Supreme Court of Washington, Div. 1, 2008

- O'Neill v. City of Shoreline
  - Home computer may be inspected
  - Case involved emails sent and received from council member's home computer and personal email
  - City must inspect personal computer to determine if records are on it
  - Must provide records regardless of format or if on personal or home computer
  - City must provide email metadata as well



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## Case Law Example

United States District Court, E.D. Virginia, 2006

- Samsung v. Rambus
  - Informal instructions insufficient for legal holds
  - Instructing employees to "look for things to keep" is not enough if litigation expected
  - Reasonably should have anticipated litigation
  - Must suspend routine destruction policy to ensure relevant records are preserved



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## Case Law Example

Supreme Court of Wisconsin, 1965

- Youmans v. Owens
  - Any records created within one's authority as a public official constitute public records
  - Personal social media accounts may be public records
  - Even if the official claims these were created in a private role



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## Redefinition of Legal Hold

- Stopping scheduled records destruction because of pending or expected
  - Litigation
  - Governmental investigation
  - Audit
  - Special organizational requirements



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## Case Law

US District Court for Southern District of New York, 2003

- Zubulake v. UBS Warburg
  - Start hold as litigation is reasonably expected
  - Identify sources of info to ensure preservation
  - Evaluate internal compliance with records retention and storage practices
  - Save active files and ensure backup data is safely stored
  - Monitor compliance with hold, re-issuing hold to ensure new employees know about it



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## If Potential for Litigation...

- Halt record destruction process
  - As soon as aware of litigation possibility
- Contact senior officials and legal counsel
- Limit discussion to appropriate parties



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## Steps to a Legal Hold

1. Identify potential records custodians
2. Compose a hold notice
3. Distribute the hold notice to custodians
4. Maintain and update the notice
5. Maintain an audit trail
6. Repeat as necessary



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## What Would You Do?

- How would you manage legal holds in your organization?
- How soon could you identify the records?
- Who would be in charge of what job?



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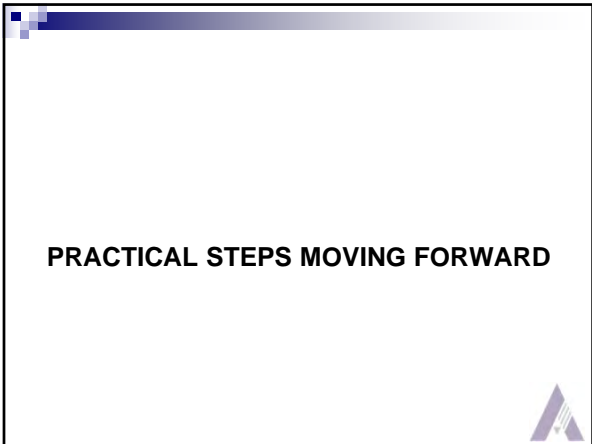
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**PRACTICAL STEPS MOVING FORWARD**



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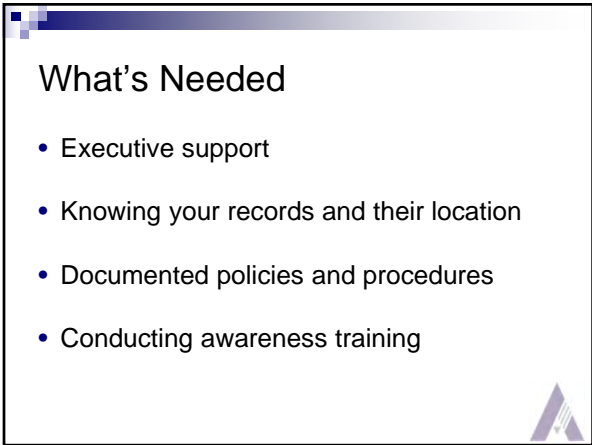
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**What's Needed**

- Executive support
- Knowing your records and their location
- Documented policies and procedures
- Conducting awareness training



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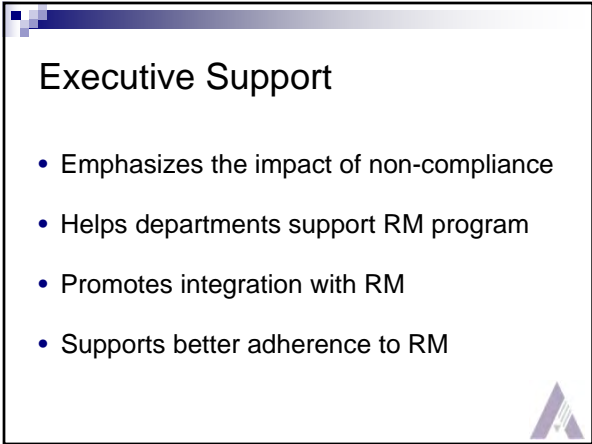
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**Executive Support**

- Emphasizes the impact of non-compliance
- Helps departments support RM program
- Promotes integration with RM
- Supports better adherence to RM



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## Know What You Have

- Inventory records
  - Hardcopy and electronic
- Organize records
  - Separate records from non-records
  - Facilitate access and retrieval
- Dispose obsolete records
  - Apply records schedules on time
- Protect and secure records
  - Security, preservation, and disaster protection



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## Policies and Procedures

- Policies
  - Broad rules to be followed
- Procedures
  - Specific actions or means to achieve outcomes
- These demonstrate good faith
  - Can minimize potential negative legal impact
  - But only if you also follow them



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## Awareness and Training

- Written policies are no good if not followed
- Ensure awareness of policies by all staff
- Provide policies and procedures training
- Reinforce periodically



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## Success Factors I

- Classify records at creation
  - Identify
    - Retention periods
    - Security levels
  - Failure to do so
    - Increases storage, retrieval time, and costs
    - Increases impact of broad records requests



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## Success Factors II

- RM must be involved in IT decisions
  - Significant role in planning IT systems
    - For discovery
    - For retention, disposition, and preservation
    - For access
  - Must partner with IT staff



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## Success Factors III

- Change Management
  - Help department staff adapt to change
  - Facilitate changes in work processes
  - Integrate RM in new processes and systems



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## Any other success factors?

What else would help?



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## FINAL WORDS OF ADVICE



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## Solid RM Programs Lead To

- Risk avoidance
- Reduced cost of FOIL compliance
- Reduced cost of legal discovery
- Less disruption of operations
- Increase staff efficiency
- Long-term cost savings



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## Not Following Legal Requirements

- Reduces government transparency
- Undermines public trust
- Reduces support
- Attracts undue attention
- Restricts ability to operate effectively
- Degrades ability to operate efficiently



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## Act Today

- Challenges increase as e-records grow
- If you don't know what you have
  - You don't understand your risks
  - You don't know what could happen
- This is merely good records management



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## Legal Aspects

Thank You!

*For more information*  
[www.archives.nysed.gov](http://www.archives.nysed.gov)



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