

Electronically Stored Information Management, First Steps Towards Electronic Discovery The Case of the Business Sector / Alona Yom-Tov

Abstract

This research is centered on the management of electronically stored information in the business environment, with a focus on readiness for electronic discovery in civil legal proceedings. The business environment is a digital one. Virtually every business document is created, saved, maintained and stored electronically or digitally. Grenig, Stippich, Twigger & Marean report that 99% of all business information is created and saved electronically. Digital data is found in a variety of formats: email, audio files, image files, written messages, text messages, video files, animations, etc. The information is stored on computers, telephones, external storage devices, networks, and in the internet “cloud”. The quantity of stored business information is constantly growing.

Even though documents, data and electronic records are central for components of all organizations and businesses, most organizations and corporations in the business sector have not implemented coherent policies for electronically stored information management. In 2011, the “Information Retention and E-discovery Survey” conducted in the USA, Europe, and the Far East, examined methods of large organizations for managing massive quantities of electronic data and their ability and readiness to provide electronic discovery for legal proceedings. Results showed of the two thousand companies that participated in the survey, only half of them had implemented stable guidelines for saving and storing electronic data. Additionally, the survey showed that legal proceedings could require discovery of data found on social networks, cell phone messages, and text messages, even more so than standard email.

When an organization has no coherent policies for electronic information management and storage, serious difficulties are bound to develop. The quantity of stored data required to provide during the civil law discovery process is enormous, with courts of

law struggling to process the vast amounts of electronic data. According to Losey (2008), in the Enron case, the quantities of data stored on the organization's computers was twice the amount stored in the Library of Congress, equivalent to over 78 billion pages worth of data.

In 2006, the USA revised the procedure for discovery of legal documents in civil courts in order to take electronic data into account. In Israel, Kozlovsky (2000) reported that the prevalent use of computers for storing documents and storing them had long been the subject of numerous requests for the disclosure of electronic documents in the context of the document disclosure procedure. Although this was then a new technology, no binding guidelines have yet been formulated at the technological and organizational level for the preservation and accessibility of electronic records over time. There are still no special regulations or instructions pertaining specifically to electronic document discovery.

Research Objectives

In the absence of either guides or guidelines for managing electronically stored information in the Israeli business sector and lacking an orderly civil law method for revelation of electronically stored information, the essential question is: How should the business sector best manage electronically stored information for civil law document readiness? In an attempt to answer this question, research is focused on analysis of interviews and contextual elements. The aim of the study is to develop a suitable model for managing electronically stored information for the corporate business sector with an emphasis on readiness for electronic discovery. In case of a civil lawsuit, a business must present electronically stored information; if it is not already prepared, the financial expenses can be very high. Therefore, in the United States, it is recommended that organizations maintain a permanent system of readiness for electronic discovery. An additional purpose of this study is to present an outline that could serve courts as guidelines for electronic discovery. The pace of development of legislation has not been keeping up with the pace of technological development. Today, in 2021, no appropriate regulation for disclosure of electronic documents has been enacted and there is no procedure for electronic documents has been adapted from civil laws dealing with discovery.

Methodology

This study was designed in accordance with the qualitative paradigm, following the "Situational Analysis" methodology developed in 2003 by Adele Clarke, a student of Anselm Strauss, one of the two founders of "Field Anchored Theory". This study is among the first in Israel to be conducted according to the "Situational Analysis" research approach. The principal utility of Situational Analysis is expressed through mapping phenomena, exploring situations that involves numerous connections between different types of categories and elements. Following the preparation of complex maps, the elements were examined and classified by topic. Each element was designated by its own color, and the elements were thus classified into groups. The matrix of the study was then prepared, including the primary elements. The matrix presents ten essential types of elements: 1) organizational elements, 2) managerial elements, 3) human elements, 4) human collective elements, 5) behavioral elements, 6) technological elements, 7) legal elements, 8) regulatory elements, 9) time-bound elements, and 10) financial elements.

How is electronically stored information managed, organized, and stored in the private business sector? To answer this first question, in-depth semi-structured interviews were conducted with twenty-two interviewees at various management levels and representing different fields of practice: Information Systems Managers, Administrative Managers, Accountants, Computer Consultants, and Lawyers. The recorded interviews were transcribed and divided conceptually into paragraphs. Each paragraph was inserted separately into the table and labeled an "analysis unit". Key phrases and concepts were identified in each analysis unit. Initial maps including these contextual elements were then created.

The second question is: What guidelines for managing electronic records are distributed by Government Archives to government offices, local authorities and government corporations and to what extent are they suitable for use in the private business sector? Documents were collected from Government Archives in the field of electronic records management and civil digital information. The documents were divided into statements, main categories and sub-categories. The main categories present the primary infrastructures that form the basis of the Government Archives'

guidelines for electronic information management. Initial maps that include the contextual elements were then prepared.

The third question is: How do American and Israeli attitudes toward electronically stored information management and civil law compare and contrast? Documents, laws and civil procedure regulations were collected. For the United States, references to electronic discovery of electronic documents in civil law from the mid-2000s to the present were examined, as well as the adaptation of the law to the digital information age.

Results

My analysis of interviews concerning the first research question (above) revealed the following findings:

- Six significant elements affect the retention of electronically stored information in the business environment: 1) the digital environment, 2) the role of the manager, 3) data retention periods, 4) organization of electronic information, 5) storage of electronic information, and 6) guidelines for the preservation of electronic information.
- The role of the manager is significant for promoting the awareness of electronic information management for a business.
- A prominent preference was found for storing information permanently: 64% prefer permanent storage, 29% store according to accountant's instructions, and only 7% store according to set retention periods.
- Information is generally organized and stored according to the ad hoc decisions and personal considerations of employees or managers.
- Most businesses do not follow set guidelines for managing electronically stored information. 33% reported that directives to store all data permanently, 11% reported that instructions for storing information according to orderly retention periods, 11% reported directives to keep e-mail, and 11% reported instructions to store data in the cloud.
- In the absence of guidelines for managing and organizing electronic information is fraught with danger. Risks observed are: flooding of information, difficulty

in accessing information, lack of uniformity and disorder, difficulty in locating and retrieving information, impediments of flow of information, increasing legal financial expenses.

The following findings emerged from analysis of the contextual elements of the official documents of the State Archives concerning the second research question,

- Five central issues were found where guidelines of Government Archives can serve as guidelines for managing electronically stored information for the private sector: 1) professional framework, 2) normative framework, 3) technological framework, 4) definition of storage periods, and 5) definitions of work processes.
- Several types of benefits can be gleaned from guidelines of Government Archives for managing electronically stored information. Strategic benefits include: a basis for continuous refinement of approaches, dealing with technological innovations, empowering employees, assimilating digital culture, developing a strategic vision, and organizational change. Economic benefits include: increased business efficiency, professional benefits, cost savings, addressing problems before they develop, and reducing costs. Administrative advantages include: varying forms of retention and search methods, streamlining of information flow, process improvement, enhancing control of information.

From the analysis of contextual elements of documents, laws and regulations of civil law procedures from the United States and Israel that examined, the third question was addressed

- There is a difference between Israel and the United States regarding management of information stored electronically in the administrative arena and in the legal arena relating to civil law.
- In Israel, two principal arenas are related to the management of electronically stored information and the disclosure of documents: the legal arena and the administrative arena. There are three arenas in the United States: the legal arena, the administrative arena and an additional technological arena.

- The most influential element revealed in conceptual analysis of the arenas in the United States is the collective human element “research groups.”
- The procedure for document discovery in Israeli civil law is outdated and not suitable for presenting electronic documents.

Three main flaws were found in the document disclosure process: damage to the disclosure of the truth, damage to the state of equality, and damage to efficiency.

This study examines how the business sector should manage electronically stored information with an emphasis on readiness for the process of electronic document discovery in civil litigation. In order to encompass the topic from different angles, three secondary questions were asked that examine the topic from several perspectives. The first answer provided a perspective from the data revealed from the analysis of the interviews. The second answer provided the perspective from the data revealed from the analysis of the content of government publications on the subject of electronic record management and digital information. The third answer provided a perspective from data that emerged from the examination of the electronic discovery situation in the United States, focusing on key concepts, problems, benefits, principles, and processes. The aim of the study was to create a model for managing electronically stored information in the business sector that includes a process of readiness for electronic discovery. An additional result was to suggest the legal arena a model for producing electronically stored information by disclosing documents in civil law. Analysis of the findings revealed difficulty in identifying the situation and defining it both commercially and legally in Israel. Businesses that keep electronic records only to comply with the requirements of the law may achieve that goal of meeting the requirements of the law yet miss other goals: organizational goals, social goals and future goals. Missing out on organizational goals can be manifested at the strategic level in that a situation may arise in which it will not be possible to access and re-examine past decisions, or to make new decisions and take actions based on those decisions. Missing out on social goals can be manifest in the fact that organizational history will not be accessible, information will not be accessible for internal research needs for organizational improvement and no organizational memory will be preserved in the long run. To establish an electronically stored information management strategy, it is

important to develop a value system for electronically stored information management. A defined value system that is suitable for the goals and needs of the businesses is a necessary condition for the success of the business in the short and long term. Legally—an outdated document disclosure procedure is a liability. Digital evidence is piling up in the document discovery process, but there is still no push to change and adapt regulations for document discovery. Since it is difficult to get to the truth under present circumstances, the effectiveness of the procedure is impaired.

Research contribution

The study demonstrated that the private sector sorely needs a model for managing information stored electronically in the business environment. The first contribution of this research is to offer a model to the private business sector in Israel for managing electronically stored information, with an emphasis on document discovery. In the legal arena, the findings revealed that there are difficulties in the process of document discovery in cases of presenting electronically stored information in civil proceedings. The second contribution offers a model for producing electronically stored information in discovery process under civil law.

Limitations of the study

A major limitation stems from the lack of ability to generalize from the sample group, the statistical basis for extrapolating information about the general population. The study population was constructed using a snowball sample: at the end of the interview the interviewee was asked if he could refer the researcher to additional interviewees. Thus, the study does not purport to statistically represent the situation for all businesses in the private sector in Israel on the subject of electronically stored information management. However, the careful process of data analysis, analysis of words and terms, recurring topics and discourse research has enabled the construction of foundations, elements, contexts and categories that constitute the research results.

Avenues for Future Research

The study findings presented new issues in electronically stored information management, opening doors for further research in several topics: electronically stored information management in the private sector, electronically stored information

management in the public sector and discovery of electronically stored information in civil law.

- The study found six particularly significant elements related to the preservation of business electronic information in the private sector: 1) the digital environment, 2) the role of the manager, 3) retention periods, 4) organization of electronic information, 5) storage of electronic information and 6) guidelines for managing electronic information.
- The study revealed that the private sector overwhelmingly prefers to keep electronic information on hand permanently but there are no specific guidelines for keeping the information long term. Future research can examine implications of the absence of an electronic information management policy: flooding of information, difficulty in accessing information, inconsistency and disorder, difficulty in locating information, impairment of information flow, and increased financial costs in law.
- As presented in the study, Government Archives have prepared rules, guidelines and guidelines for managing electronic records and digital information. Government ministries and local authorities are required by law to manage and retrieve information generated and received by their offices in a systematic manner. This study can help in future research and examine according to the same methods to what extent the provisions of Government Archives guidelines are met in actuality.
- Future research could focus on difficulties found here in examining issues related to electronically stored information in civil law document discovery: the amount of information, locating information, information deleted and destroyed, reviewing information, protecting information when it is confidential and maintaining individual privacy. Further research can examine defects revealed in the document discovery procedure: impairment of the disclosure of the truth, impairment of the value of equality and impairment of repeatable efficiency in the absence of a standard procedure for the discovery of electronically stored information.
- The study offers a recommended outline for discovering electronically stored information. Further research can test the effectiveness of the recommended

outline for electronic discovery concerning various issues related to electronically stored information

Concluding Remarks

This study is the first to present a model for electronic information discovery in civil law. The researcher is trained in information management, having graduated with honors with a Master's Degree in Information Technology from the Department of Information Science at Bar-Ilan University. In addition, she participated in courses in the Faculty of Law, including the Civil Law course at Bar-Ilan University, successfully passing all tests, including Civil Law.

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