

# 6 CRITICAL QUESTIONS TO ASK

## When Identifying Enterprise Recordkeeping Requirements

### EXECUTIVE SUMMARY

Global companies seeking to manage increasingly vast information stores face a variety of challenges and risks. This paper focuses on one particular challenge: the identification of recordkeeping requirements. Poor or ill-considered choices in this area can slow down—or even paralyze—an otherwise well-considered information governance program.

To prevent that, we recommend that multi-jurisdictional companies undertake a six-step process for determining their records management requirements. This should be done before they choose a records management provider or begin developing strategies and systems for information governance.

These six steps include:

1. Decide between internal and external legal counsel
2. Decide on the type of provider that's best for your firm
3. Decide how much of the legal process to outsource
4. Determine your legal scope
5. Choose an optimal delivery format and mechanism
6. Plan ahead for updates.

Taking the time to consider these questions upfront will help you select the right provider and, in turn, develop the most effective records management program for your company.

## THE CHALLENGE: VAST INFORMATION, COMPLEX REGULATIONS

Companies with an international presence face unique challenges in regard to information governance. Legal obligations often conflict across jurisdictions, and the need to store data across borders and from unique business units complicates records management.

Even determining what your information obligations are can be a challenge. The number of legal, regulatory, and governmental bodies involved can number in the thousands, each with a body of content that does not explicitly point out recordkeeping requirements. Cross-language translations of this content may not be available, and online translations are notoriously unreliable.

To make matters worse, both in-house and external counsel are usually accustomed to researching case law and legal citations, not ferreting out information governance requirements. Their learning curve can impede progress toward developing a sound records management system—or stop it altogether.

How should a records manager proceed?

In this paper, we describe a six-step process for assessing your records management requirements. Once these requirements are fully understood, you can begin building an effective recordkeeping system to meet them—one that is clearly documented and legally sound.

Our recommendations are built on the Designing and Implementing a Recordkeeping System (DIRKS) Methodology, an eight-step process that helps companies improve their records management practices. Our recommendations are part of step three in this process: Identify Recordkeeping Requirements.

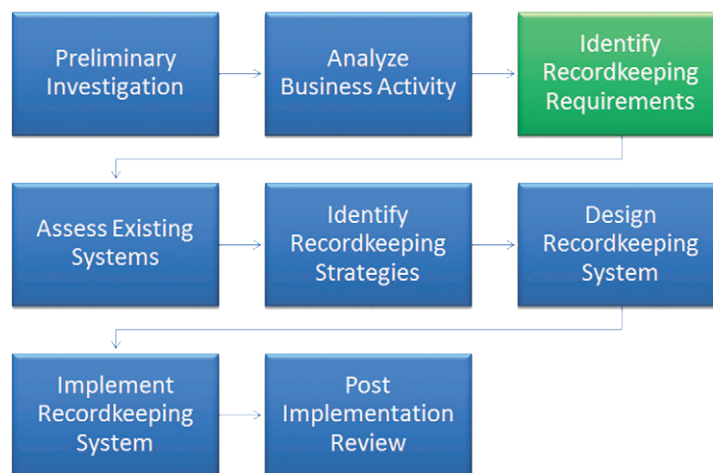


FIGURE 1: OUR RECOMMENDATIONS ELABORATE ON STEP 3 OF THE DIRKS PROCESS: IDENTIFY RECORDKEEPING REQUIREMENTS.

Following the six steps described here will help records managers, IT departments, and legal departments structure their requirements criteria and understand how to evaluate providers, both internal and external. The end result should be a clear path toward developing an information governance program that is legally compliant and clearly organized.

## STEP 1: DECIDE ON INTERNAL VS. EXTERNAL SUPPORT

The first decision to make when assessing your records management legal requirements is whether to rely on internal legal counsel or seek an external advisor.

Organizations with internationally based legal resources may find in-house counsel an appealing alternative, particularly if they are “free” to your project or program. Before choosing this route, however, carefully consider your internal resources’ ability to conduct complex research related to information governance regulations.

Realistically, internal counsel may have only a vague notion of specific retention requirements, with little sense of what should and should not be retained at the record-type level. This is not to say that Internal legal resources are unqualified; rather, they are generally focused on mitigating risk and may not fully understand the implications of their advice from an IT or records management perspective. This type of viewpoint often results in overly broad retention requirements such as “save everything in Italy for 10 years” or “save all tax information for 7 years.”

Ask yourself this: Does your internal counsel truly have the capacity to undertake a major research assignment—one that may not be in their field of expertise?

In addition, you’ll want to assess your internal counsel’s willingness—and ability—to divert time and effort away from their day-to-day jobs. Do they truly have the capacity to undertake a major research assignment when resources are constrained and they are already devoted to transactions and other legal matters? Information governance efforts can be thrown months or even years behind when internal counsel initially commits to take on a research effort—only to withdraw their support later or produce content that’s too uneven to rely on.

The alternative to a do-it-yourself approach is to purchase research from a third party. External vendors often provide clear advantages over internal counsel, such as true information governance expertise, familiarity with international law, experience implementing records management systems across large enterprises, and the ability to provide dedicated, ongoing support.

The disadvantages include potentially steeper costs and the risk of choosing a provider whose knowledge of information governance may not be significantly stronger than that of in-house counsel.

All of these considerations must be weighed carefully when choosing between in-house and external support.

## STEP 2: DECIDE ON THE OPTIMAL TYPE OF PROVIDER

If you choose to go with an external vendor for records management research and support, you have several types to choose from. We group them into the following four categories:

1. “Magic Circle” international law firms<sup>1</sup>
2. Next-tier law firms
3. Records management consultancies
4. Research vendors.

In general, working with a law firm provides a distinct advantage: you receive legal *advice* rather than legal *information*.<sup>2</sup> However, not all law firms provide high-quality advice. For law firms without specialized practice areas in data protection or information governance, yours might be their first assignment.

Moreover, compiling sound advice takes experience in the areas of retention *and* research. Realistically, law firm research will most likely be conducted by a lightly experienced associate under the oversight of a more senior practitioner. Research boutiques and consultancies, in contrast, are likely to use more seasoned resources, particularly in their home jurisdiction.

Figure 2 outlines the advantages and disadvantages of the four types of providers. The choice is individual and should be based on the attributes that are most important to your firm. A key consideration in all cases is to understand who will conduct your research, and what oversight or quality control processes will be used..

| Type                                 | Examples           | Advantages  | Disadvantages                              |
|--------------------------------------|--------------------|---|--|
| Magic Circle International Law Firms | Clifford Chance    | • Legal advice  | • High cost                                |
|                                      | Linklaters         | • International reach                                 | • Normalize data via spreadsheet           |
|                                      | Allen & Overy      | • Strong reputation                                   | • Maintenance is bespoke                   |
| Next Tier Law Firms                  | Fulbright Jaworski | • Legal advice  | • High cost                                |
|                                      | Kirkland & Ellis   | • International reach can be extensive                | • Normalize data via spreadsheet           |
|                                      | DLA Piper          | • Good reputation                                     | • Maintenance is bespoke                   |
| Records Management Consultancies     | Huron              | • May cost less than law firms                        | • Legal information, not legal advice      |
|                                      | Duff & Phelps      | • RM experience is valuable in mapping law to records | • More expensive than services             |
|                                      | Cohasset           | • Implementation experience                           | • International quality varies             |
| Research Vendors                     | Fontis             | • Generally less expensive                            | • May require purchase of an application   |
|                                      | IRCH               | • Specialize in retention research                    | • Application may not be enterprise ready  |
|                                      | IRRdotcom          | • High quality in home jurisdiction                   | • International data quality may be uneven |
|                                      | Complanet          | • May provide application to manage content           |  |
|                                      |                    | • Maintenance is typically available                  |  |

**FIGURE 2: THE CHOICE OF AN EXTERNAL PROVIDER IS INDIVIDUAL, BASED ON YOUR FIRM’S UNIQUE NEEDS.**

1 “Magic Circle” refers to the top five law firms headquartered in London. However, the term is used here in a slightly broader context.

2 *Legal information* is information about the law designed to help the buyer safely cope with its legal needs. *Legal advice* is defined as written or oral statement that interprets some aspect of the law, court rules, or court procedures or recommends a specific course of action to a user in the user’s specific factual circumstances. Legal advice can only be provided by a licensed officer of the court within the relevant jurisdiction.

### STEP 3: DECIDE HOW MUCH OF THE LEGAL PROCESS TO OUTSOURCE

Determining a retention rule for each type of record created at your company is more art than science. Referring back to the DIRKS process shown in Figure 1, this process involves associating legal recordkeeping requirements with a classification scheme of business activities and making a risk-based judgment on retention.

Most legal retention rules are not hard and fast, and decisions on retention should include consideration of non-statutory elements such as limitation periods and penalty provisions. They should also be based on your advisor's experience with related research and litigation.

With this in mind, you'll need to decide how much of the legal process you want to outsource. For example:

- ✓ Are you interested in only the final advice? That is, the provider's recommended rules without explicit reference to the legal citations driving those rules?
- ✓ Do you just want the raw materials? In other words, do you want to receive only the legal citations and do the rule setting internally?
- ✓ Or, do you want end-to-end advice? That is, do you want the provider to recommend rules *and* provide clear evidence of the justification for each rule, with full legal citations attached and auditable?

Be specific in communicating your expectations about the research providers' level of involvement in making risk decisions. And be clear about the costs involved in each level of effort.

Doing so will help to avoid unexpected surprises when the information is delivered.

Decide now: Do you want only the final advice on retention rules? Or do you also want the legal citations to back it up?

## STEP 4: CLEARLY DEFINE YOUR LEGAL SCOPE AND PLAN AHEAD FOR USE

The compliance aspect of information governance involves two areas: retention and data protection. The latter includes considerations related to privacy and international data transfer.

Legal information about retention primarily underpins the disposition phase of the information lifecycle, but it can also include format, content, and access requirements. Legal information about data protection and transfer primarily address processes, although some prescribe maximum retention periods.

Understanding the potential uses of each type of information and being prepared to use the information in an operational setting is important before the information becomes stale.

For example, for retention information, you'll need to make several decisions:

- ✓ How will the retention schedule be distributed? Is that mechanism ready to implement?
- ✓ Will retention schedules be embedded in the records management modules of content systems? If so, what schedule information must be populated to execute lifecycle tasks?
- ✓ Is the retention schedule an important supporting schedule to a major information governance policy update? If so, is the rest of the policy ready for publication?

Understand what information you'll receive, and be ready to take action as a result.

Requirements for recordkeeping come from a variety of statutory and regulatory sources. You'll need to determine:

- ✓ The retention types you expect to be researched
- ✓ Statutory retention minimums
- ✓ Production requirements that do not specify retention
- ✓ Penalty provisions for failure to produce certain records
- ✓ Limitations of action
- ✓ Limitations of assessment
- ✓ Administrative requirements, such as language, format, or location
- ✓ Retention maximums from overlapping data protection law.

For data protection information that is still changing rapidly, you'll want to determine:

- ✓ Which areas of data protection you expect to be researched? Personal data protection law is most common, but what about contractual, third-party, corporate and banking secrecy sources?
- ✓ Will the information become part of an audit program? If so is the audit ready to start?
- ✓ If the data is being used to evaluate privacy and transfer provisions in existing contracts and agreements, are the contracts at hand?

The important point is to be ready to use the information you acquire before its shelf life expires.

## STEP 5: CHOOSE AN OPTIMAL FORMAT AND DELIVERY MECHANISM FOR YOUR RESEARCH

Legal research is typically text-based, as in the case of a topical brief or analysis of a court decision. Retention research is commonly provided in the form of a narrative-style discussion of a certain requirement or set of requirements, with the exact statutes and regulations footnoted or appended.

Unfortunately, delivering content in this format forces the user to read thousands of pages of research in order to gain a full understanding of their legal recordkeeping requirements. Not an easy task, or one that's likely to provide reliable results.

Some providers offer research in spreadsheet or tabular form, making the research somewhat easier to sort and search. Nonetheless, this format still leaves the user with a "document" that is not easily dissected or distributed.

In contrast, some research vendors deliver their research through software or web-based service. The advantage of application-based research is that it tends to be broken down into smaller pieces and is therefore more easily sorted and analyzed.

Research is available in text, spreadsheet, application, and web-based formats. Decide ahead of time which one makes the most sense for your firm.

Still, it's vital to evaluate the application to be sure that it won't create more problems than it solves. For example, you should find out:

- ✓ Can it be deployed and supported within enterprise technology architectures?
- ✓ Can it be accessed globally, and is access based on a role-based permission model?
- ✓ Will the application pass muster with IT security?
- ✓ Does the application include the ability to author retention schedules?
- ✓ How do you get the retention schedule out of the application? That is, how do you distribute it?
- ✓ Can the application integrate with downstream content management systems?

Finally, the format of the content can significantly influence the usefulness of the information moving forward. For example:

- ✓ Is it important to you to have the full text of the law readily available?
- ✓ Has the research been translated? If so, by whom? (Note: the native language of the law is the only valid citation.)
- ✓ Are URLs to source text provided so that follow-on research can be easily conducted?

Answering these questions ahead of time will help you select an application that's useful, rather than unwieldy.

## STEP 6: PLAN FOR UPDATES BEFORE YOU START

Over time, periodic updates can be the most costly and difficult aspect of maintaining legal defensibility of your information. What may seem like the correct initial choice can be laid asunder by data that is either difficult or impossible to maintain over time and must be redone in order to keep valid.

When you're selecting a provider, gain a clear understanding of how they propose to keep your records management program compliant with changing legal and regulatory requirements on an ongoing basis. Your provider should include this information (as well as an accompanying quote) in their initial proposal. And if possible, you should secure a maintenance agreement in advance.

When understanding a provider's plans for data maintenance, ask these questions.

- ✓ How will the legal information be maintained?
- ✓ How will the update process actually work in practice?
- ✓ How will major changes be distinguished from minor updates and interpretations?
- ✓ How will you be alerted to new regulations within the same legal scope that you originally acquired?
- ✓ How will changes be audited? Can they be referenced well into the future?

Updates can be the most costly and difficult aspect of legal defensibility. If possible, secure a maintenance agreement with your provider upfront.

Developing a concrete plan for ongoing updates will keep your information governance system legally compliant over time, and ensure that your initial investment in research does not go to waste.

## CONCLUSION

To summarize, developing an effective records management system for a global enterprise represents a significant challenge. Smart companies take the time upfront to accurately evaluate their legal recordkeeping requirements before they choose a provider or begin thinking about strategies and systems.

That evaluation should focus on several questions: deciding who the best type of provider will be, assessing the level of effort you want to outsource, deciding the scope of retention and data protection required, choosing the ideal format for the content, and selecting a solid maintenance plan.

Coming to a consensus on these questions ahead of time will help you select the right provider for your firm and, in turn, develop the most effective records management program for your company.

Identifying requirements upfront will help you select the right provider and, in turn, develop an effective records management program for your company.

## NEXT STEPS

If you'd like to learn more about best practices for identifying legal records management requirements, contact Fontis at [info@fontisinternational.com](mailto:info@fontisinternational.com) or (719) 694-2480.

If you'd like to arrange a trial of our unique subscription-based legal retention research product, visit [www.fontisinternational.com](http://www.fontisinternational.com)

## ABOUT FONTIS

Fontis International is focused on the unique challenges of international information governance in the global enterprise. Fontis was founded to fill the gap left by a large universe of law firms, records management consultants, and content management technology vendors that offer only point solutions based their specialty.

Our international legal research, retention schedule management software, and advisory services provide an end-to-end solution for developing and maintaining a legally defensible enterprise records management program. In addition, we have a particular focus in the financial services arena, where regulatory issues are complex and the stakes can be high.

Visit [fontisinternational.com](http://fontisinternational.com) to learn more about our firm.

**Fontis International, Inc.**  
**200 Quebec Street**  
**Bldg. 300, Suite 111**  
**Denver, CO 80230**

**Phone: (719) 694-2480**  
**Fax: (719) 694-2484**  
**E-mail: [info@fontisinternational.com](mailto:info@fontisinternational.com)**