



**E-Records
E-Mail
E-Discovery**

The Trail of Electrons

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1. Raise awareness of the issues surrounding the use of email and electronic documents in business

2. Improve understanding of the legal and record-related terminology

3. Suggest mitigating actions

4. Provide references and resources

- I am not a lawyer. My opinions are not legal advice. Obtain advice of counsel familiar with electronic records issues for your business decisions
- “Contract” and “purchase order” are intended to refer to the legal contract regardless of value, product or service being procured
- No difference for Federal vs. commercial contractor unless specifically stated
- Reference handout item # • • • Ref. #



Files, Documents & Records

Paper

- Visible & common format
- Costly to store copy and distribute
- Difficult to index and search

Deliberate **document/record** decision.

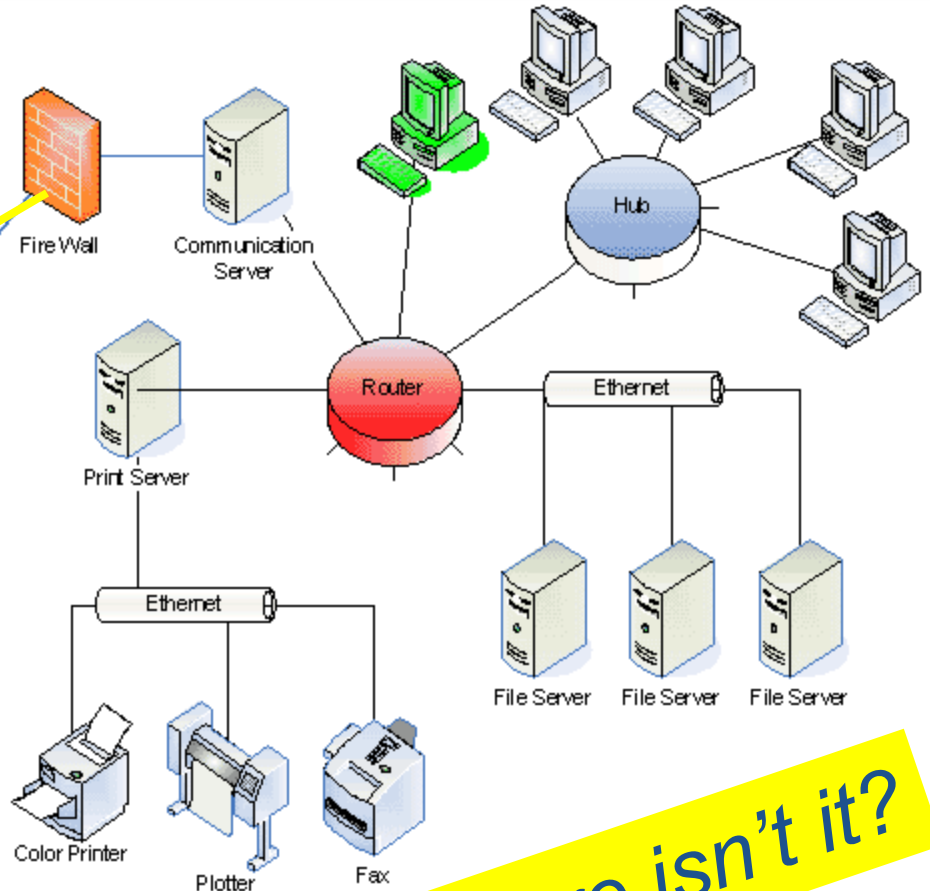
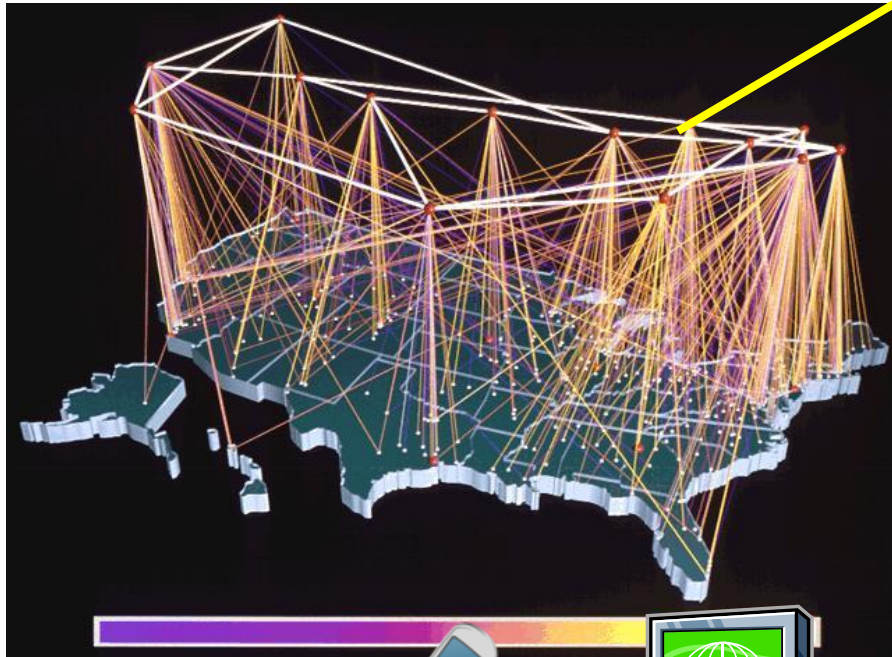
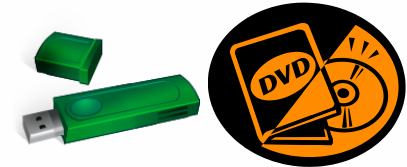
Electronic Files

- Invisible, exist anywhere
- Easy to save & copy
- Can be posted or emailed
- Can be indexed and searched electronically

Can become part of the record by accident

Ref. #
3,6,7

Where Is My File?



Where isn't it?



Electronic File Problems

- Email messages transmitted through multiple machines and servers
- Copies, different versions and drafts could be stored or backed up anywhere
- Data processing centers & cloud services add ownership and access issues
- Media format & retrievability not obvious
- Authentication can be difficult

Cloud Computing



ISM Podcast, Christina Kunz

[Bringing Cloud Computing Down to Earth](#)

Ref 2

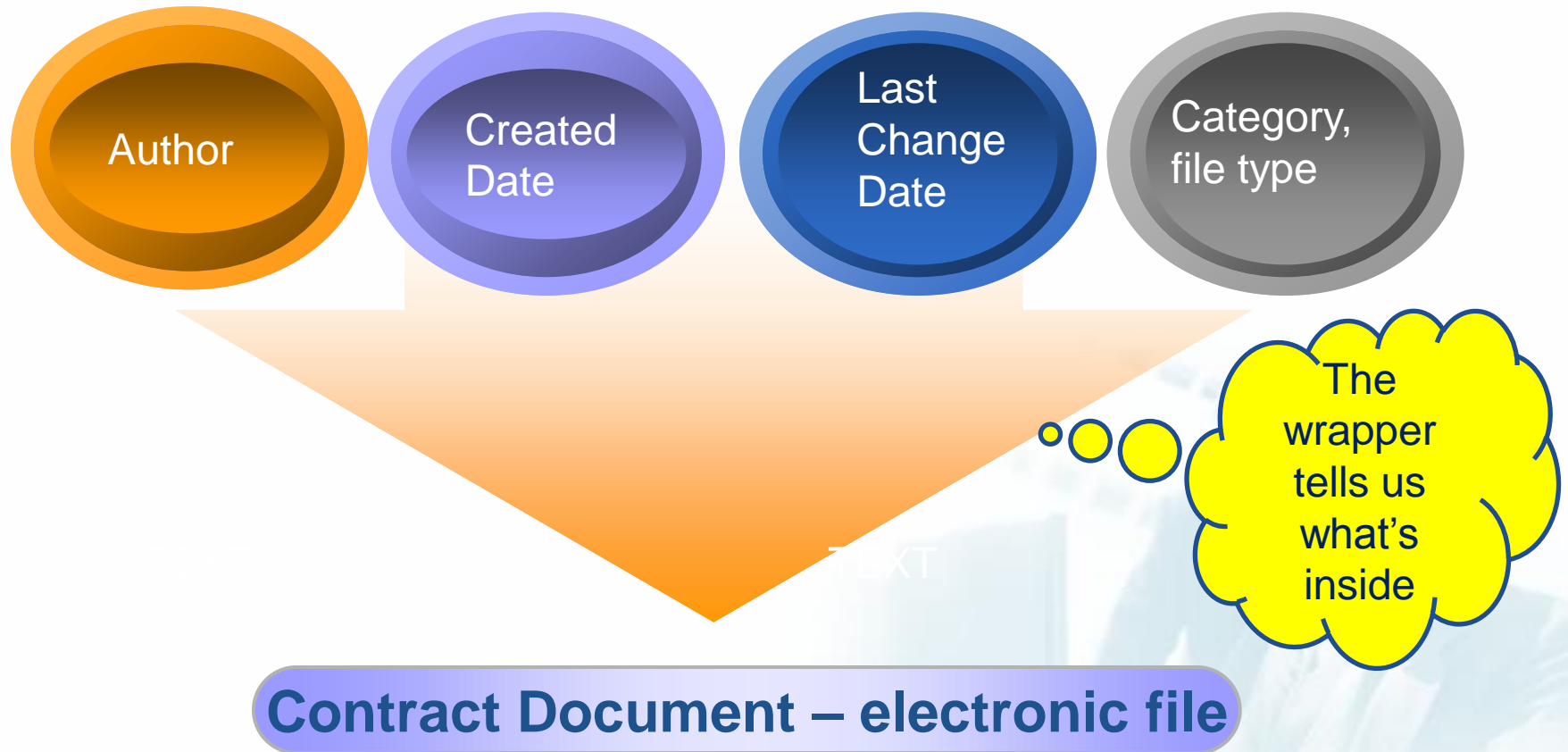
Google Data Centers

To ensure security, Google keeps every piece of data stored on at least two servers, with the most important data also held on digital tapes.

Ref 6



What is Meta Data?





Litigation Hold – our action

➤ We anticipate legal action

□ Identify & notify key players

- ✓ don't forget former employees or
- ✓ contractors if they have your data) and
- ✓ new or temporary employees

Ref. 16

□ Prevent **spoilation**

□ Preserve evidence in all locations, including backup tapes

Ref. 8,



Discovery Order - Reality

Produce all relevant emails text messages by March 15

- ❑ In your in-box, subfolders, archive folders
 - ❑ In un-emptied trash or copied to a colleague
 - ❑ Include attached files or links to other files
 - ❑ Stored on network drives, backup drives, USB drives, smart phones, laptops, etc.
- We have to search them all!
- Then review, categorize and ready for submittal

Discovery order is limited only by the creativeness of opposing counsel and the patience of the judge

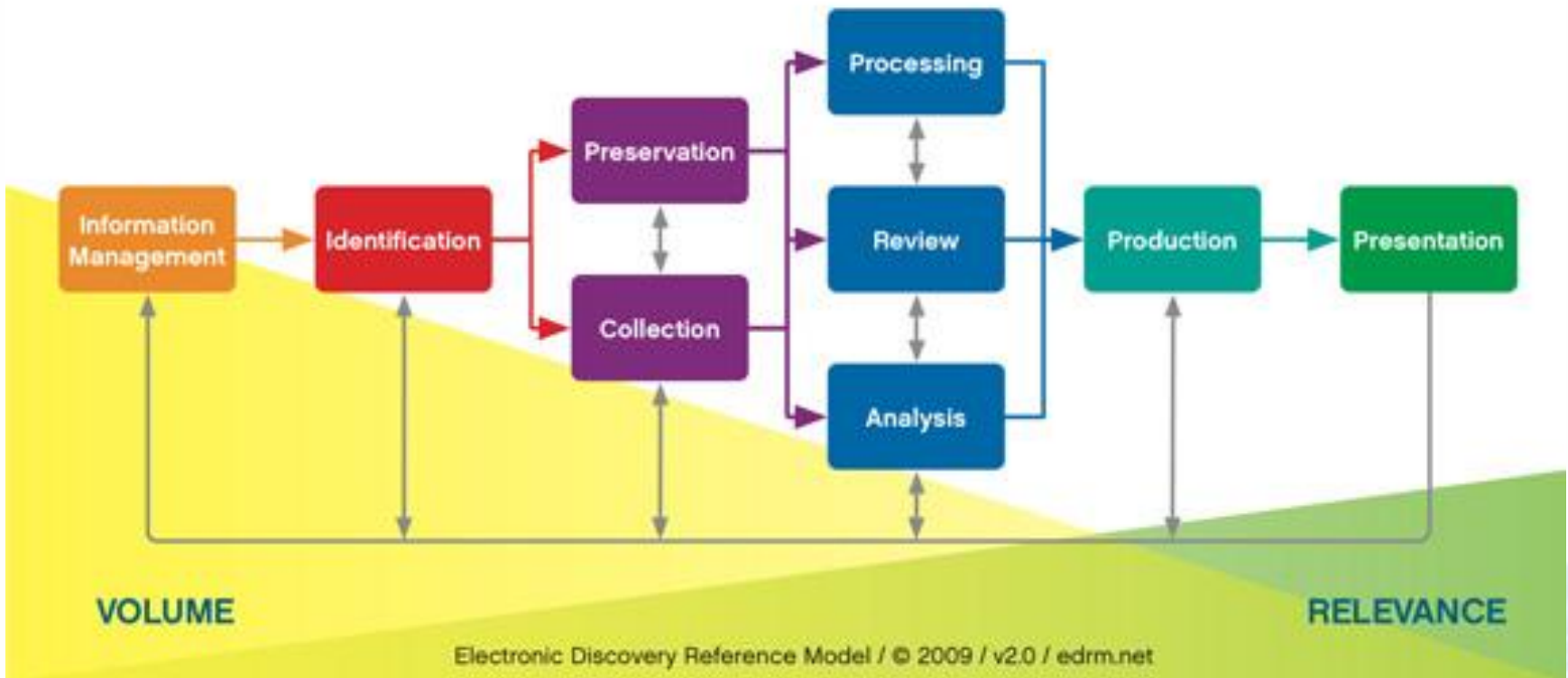
➤ Producing electronic evidence is not enough.

- ❑ Who created the file? When?
- ❑ Where it was stored?
- ❑ Who had access to it or how was it controlled?
- ❑ Who viewed, copied, edited or could have tampered with the file?
- ❑ When, why and by whom was any part of it (including metadata) modified or deleted?

Ref. 4

Discovery Model

Electronic Discovery Reference Model



Ref. 5



Compliance Issues

- Technology assisted review (TAR)
- Document format (PDF or?)
- Culling, Clustering, de-duplication
- Privileged Communication
- Collateral damage & clawback
- Forensic accounting, legal specialists
software vendors - ubiquitous

Warning: Not all managers and not all lawyers are conversant with electronic record issues . Retain competent counsel.



Who Controls Our Files?

- In the Cloud or software service provider?
 - ❑ Cloud contract must anticipate discovery
 - ❑ Provider must be able to comply with e-discovery requirements
- Demonstrate that records have not been spoiled or changed
- IT personnel must be prepared to support
 - ❑ Retrieve records and preserve metadata
 - ❑ Provide files in standard formats

*Warning: IT suppliers have different ideas about compliance requirements.
Do not assume the IT folks understand your business needs.*



How to Get in Trouble

- Inadequate litigation hold
 - ❑ Lose control of evidence
 - ❑ Company policy & rogue employee defense
- Destroy records in anticipation
 - ❑ Rambus case
- Fail discovery obligation
 - ❑ Spoiled data
 - ❑ Incomplete compliance



Ref. 8

➤ Fail to consider, smart phones & social media

- ❑ BP oil spill case, Kurt Mix

Ref. 10

➤ Underestimate compliance cost & effort

- ❑ OFHEO case - \$6M error

Ref. 14

➤ Mix privileged data or vital data

- ❑ Inadvertent production of a privileged document may waive the privilege only for that document or for all privileged documents on that subject or on all subjects.

➤ Assume this is an IT issue -

- ❑ Business process owner has to be involved

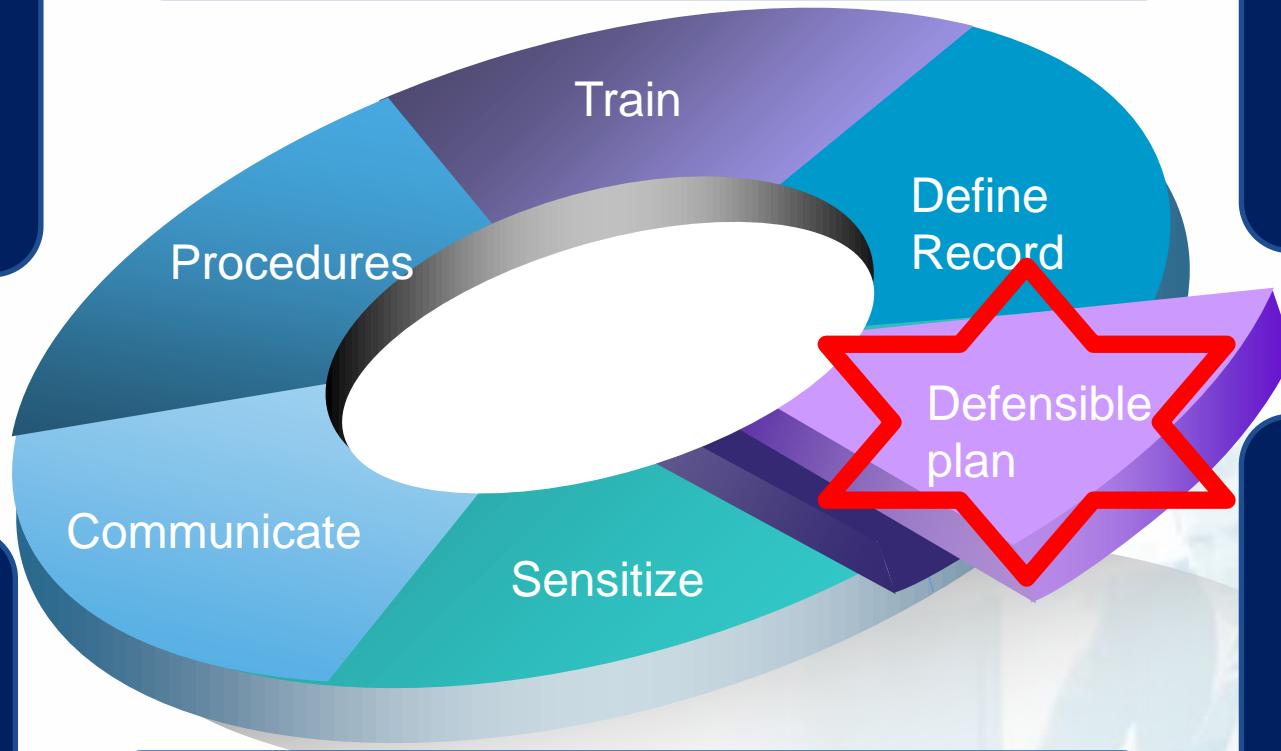
Action Plan



Does everyone understand the risks and know how to respond to a legal hold?

How are we going to capture the records?

What records are required for this activity?



How are we going to store the records?

When and how are we going to retire records and non-records?

What is the retention period?



Contract Requirement

➤ FAR 4.703 Policy

□ (a) Except as stated in [4.703\(b\)](#), contractors shall make available records, which includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form, and other supporting evidence to satisfy contract negotiation, administration, and audit requirements of the contracting agencies and the Comptroller General for—

(1) 3 years after final payment or, for certain records;

What is a Record?

- National Archives & Record Administration
 - ❑ GRS-3 – procurement documents
 - ❑ GRS -20 – electronic records (April 2010)
 - ❑ Describes what documents should be kept and the normal retention period
- Presidential initiative 11/28/11, OMB 8/24/12
 - ❑ Requires that to the fullest extent possible, agencies eliminate paper and use electronic recordkeeping ...applicable to all executive agencies and to all records, without regard to security classification or any other restriction.

References
9, 11



What is a Record?

- GAO, OMB, IG, DCAA audits & cases
 - ❑ What documents do we need to survive an incurred cost audit or a DOL Davis Bacon audit?
- What project records do we need
 - ❑ Warranty, QA, safety envelope, proof of insurance
- What records does finance need?
 - ❑ Tax payments,
- What records does the legal counsel want to retain?
 - ❑ Executed contract, stop work notice, claim
- Records by department/function?
 - ❑ We may not all have the same needs or retention criteria.



What IS/NOT a Record?

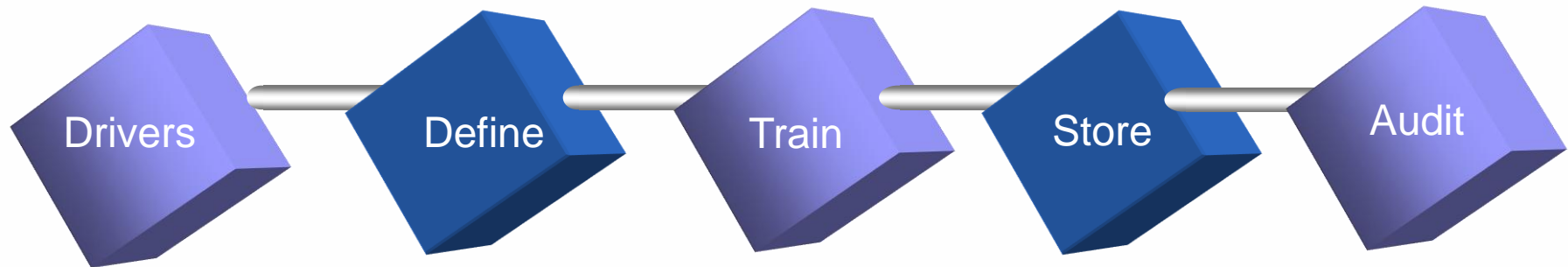
➤ Files

- ❑ Working copies
- ❑ Notes
- ❑ Drafts
- ❑ Unsigned
- ❑ Old versions
- ❑ Reports
- ❑ Emails
- ❑ Text messages

➤ Considerations:

- ❑ Is it the only evidence?
- ❑ Audit support
- ❑ Decision support
- ❑ Lifespan – keep until when?
- ❑ Authority to destroy should be documented in policy

Records Management Plan



- Legal
- Tax
- NARA
- FAR
- Risk of loss
- HR
- Environment

- File type
- Purpose
- Capture date
- Retention
- Separate risks

- Management
- Legal
- Staff
- Contractors
- IT staff

- Security
- Backup
- “information lifecycle governance (ILG)”
- Preservation
- Retirement

- Awareness
- Compliance
- Exceptions
- Recovery
- Spoilage
- Duplication
- Garbage



Other Considerations

- International electronic commerce, evidence and discovery rules are different
retain knowledgeable counsel
- Train personnel think about what they write.
Email and text messages:
 - ❑ Will be found....
 - ❑ Will be misinterpreted by opposing counsel
 - ❑ Will be used against you
- Clean hidden data out of electronic files
- Store records in a format that cannot be changed

Ref.
15

- References, documents and web sites are listed in the handout. Included are active hyperlinks if available



Ref. #

- Slides and handout posted online at
 - ❑ www.mltweb.com/handouts/discovery.pdf
 - ❑ www.mltweb.com/handouts/references.pdf
- More info and articles:
 - ❑ www.mltweb.com



Discussion?

WWW.MLTWEB.COM
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Bookmarks

- INFORMATION FOR CONTRACTORS
- TABLE OF CONTENTS
- ENCLOSURE 1 - INTRODUCTION TO THE DEFENSE CONTRACT AUDIT AGENCY (DCAA)
- ENCLOSURE 2 - PREAWARD SURVEYS OF PROSPECTIVE CONTRACTOR ACCOUNTING SYSTEMS
- ENCLOSURE 3 - PRICE PROPOSALS
- ENCLOSURE 4 - COST ACCOUNTING STANDARDS
- ENCLOSURE 5 - CONTRACT FINANCING AND INTERIM AND FINAL VOUCHERS
- ENCLOSURE 6 INCURRED COST PROPOSALS
- GLOSSARY



DEFENSE CONTRACT AUDIT AGENCY
8725 JOHN J. KINGMAN ROAD, SUITE 2135
FORT BELVOIR, VA 22060-6219

PPS

June 26, 2012

DCAA MANUAL
NO. 7641.90

INFORMATION FOR CONTRACTORS

1. PURPOSE. This manual supersedes DCAA Pamphlet 7641.90, *Information for Contractors*, dated January 2005. The manual is designed to assist contractors in understanding applicable requirements and to help ease the contract audit process. It describes what contractors should expect when doing business with the U.S. Government and interacting with DCAA auditors. The examples in this manual are presented to illustrate some of the more frequent requirements that contractors encounter when working with DCAA auditors, and in responding to the Government procurement and administrative process. These examples are intended solely to provide better insight into the procurement process and should not be construed as uniform guides. Nor should this manual be considered a substitute for the applicable rules and regulations, as not all requirements are contained herein. Each contractor must tailor its responses to its individual situation.

2. APPLICABILITY. This manual applies to all contractors interacting with DCAA auditors, as a result of doing business with the U.S. Government.

3. PROCEDURES. See Enclosures 1 through 6.

4. RELEASABILITY. Unlimited. This manual is approved for public release and is available on the Internet from the DCAA's web site at www.dcaa.mil and the internet library at

THE FUTURE OF EMAIL PRESERVATION

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