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# BUILDING A GLOBAL INFORMATION GOVERNANCE & DISCOVERY PROGRAMME – LEADERSHIP & STRATEGY

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EXPERT FORUM

# **BUILDING A GLOBAL INFORMATION GOVERNANCE & DISCOVERY PROGRAMME - LEADERSHIP & STRATEGY**



## PANEL EXPERTS

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**Daniel Lim** has more than 20 years of experience as a litigator and consultant on legal issues relating to digital information. He advises companies on e-discovery, data privacy, data security and information governance matters. He currently serves as e-discovery counsel for a major security technology provider and has completed e-discovery secondments and engagements with other Fortune 500 companies.

**CD: Could you outline why it has become increasingly important for companies to build a global information governance (IG) and discovery programme? What factors are driving this trend?**

**Lim:** As with most corporate initiatives, the driving factors behind the importance of developing a global information governance (IG) and discovery programme are cost and risk. We have learned over the years that with the rise in volumes of information used and disseminated by global business enterprises, the potential cost of managing and litigating even smaller cases continues to increase exponentially. Operations for multinational companies necessarily involve data sources across multiple business platforms, both on-premises and hosted through outsourced providers. These data sources, from a legal perspective, constitute 'potentially relevant' data sources that should be searched and evaluated for information responsive to a lawsuit or investigation. Also, data privacy restrictions on the collection, processing and review of employee, consumer and patient data continue to increase in the US and globally.

**Cheng:** Data forms the basis on which many companies' business models are run. The way corporations manage, use and protect this data can

have a significant impact on company reputation, success and the bottom line. Privacy and cyber breaches pose the top threats to the integrity of this data, while regulations demand that corporations deliver unprecedented levels of governance, transparency and accountability surrounding it. As a result, many concerns are investing in IG and discovery programmes to provide a structure for data management. Additional factors driving this movement include data growth and complexity and the legal landscape. There has been exponential growth both in the volume and diversity of data enterprises generate in the last decade. Additionally, data sources and storage options have also evolved rapidly, making today's data landscape larger and more complex than ever before. The regulatory landscape mandating how companies manage their data is complex, onerous and likely to continue diversifying. Companies are ever aware of the impact of fines to the business from regulators, including multi-billion-dollar penalties and sanctions that make headlines on a weekly basis.

**Earnshaw:** Electronic documents, communications and records are now a feature of almost every dispute or investigation that a corporation is required to respond to. Multinational corporations that operate in heavily regulated or highly litigious industries are increasingly faced with the costs and business disruption associated with having to identify, preserve, review

and disclose electronic records as part of these matters. The proactive consideration of these e-discovery obligations and the implementation of an appropriate internal programme will successfully reduce the cost, and minimise the business impact, of any response. Increasingly, corporations are looking to implement integrated IG and e-discovery programmes as they are typically two sides of the same coin: if a company knows what information it holds, where it stores it and has disposed of that which it does not need to retain, it has a significantly better ability to rapidly, and at considerably lower cost, respond to its discovery obligations in disputes and investigations.

**CD: What technical issues need to be addressed to improve the efficiency and accuracy of IG and discovery? How should companies go about implementing best practices?**

**Cheng:** IG programmes are most successful when firms think holistically about people, policies, processes, culture and technology. There is no single tool that covers all aspects of data management and analysis. Common technical challenges that companies face in this area include HR and organisational data. Some firms have more than 50 HR systems, each with different identifiers

and attributes. This creates a challenge when an organisation is trying to build or analyse the holistic data profile of an individual or locate all data pertaining to a particular person or issue. Another challenge is unstructured metadata. Data on file systems can be unreliable if it has been moved or

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FTI Consulting LLP*

used in ways which altered or failed to preserve its metadata. This can create challenges if organisations need to dispose of data based on metadata fields such as ‘date created’ or ‘last accessed’. Finally, there is the issue of legacy data volumes. When remediating data, it is crucial to account for legacy sources which may constitute significant data volumes. Firms must consider any special issues that may arise from the need to collect or analyse older data types.

**Earnshaw:** A properly integrated IG and e-discovery programme can significantly simplify and expedite the work required to respond to a demand for electronic documents and communications. However, there are three main technical issues that need to be considered to ensure success: the volume of data involved, the IT systems on which data is resident and the multitude of different formats that the data may be stored in. Ensuring that appropriate technologies, such as technology assisted review (TAR), are utilised to efficiently review large volumes of documents can reduce the time, and therefore costs, required for the process. Depending on the nature of the dispute or investigation, data sources might cover a range of systems from the simple to search and review, such as an email server or a directory of spreadsheets, to the more complex to search and review, such as an accounting system or an internal instant messaging platform.

**Lim:** The most important factors to address with any corporate technology platform for IG and discovery purposes are the ability to evaluate the data within a system for information that is potentially relevant to a legal matter and the ability to extract the information needed for a legal matter that is cost-effective and does not disrupt

business operations. A good recent example is the increased use of web-based platforms for project management. While such platforms appeal to business users for purposes of collaboration and ease of use, such systems are not always easy to search and retrieve information that may be relevant to a pending legal matter.

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*Daniel Lim,  
Shook, Hardy & Bacon LLP*

**CD: What role should senior management play in developing a global IG and discovery programme? What skills and understanding do they need to acquire?**

**Lim:** Senior management’s active participation in the development and execution of a successful IG and discovery programme is crucial. One suggestion

is to put together a list of company-authorised platforms to conduct business matters and review this list, perhaps as part of the annual budget process. If a company allows employees to use communication systems, such as instant messaging or chat systems, senior management should make an informed decision as to whether such information will be retained and the policies to be applied in the event of a legal hold. With any technology system to be used for business purposes, senior management should understand who owns the data, who has access to the data and who is responsible for responding to, and paying for, requests for information relating to the data.

**Earnshaw:** The role of senior management in a global IG and e-discovery programme is primarily that of budgetary support and sponsorship to drive a ‘tone from the top’ that the correct management of the corporation’s data assets is critical to the risk management practices of the business. There is unlikely to be a need for senior management to have the detailed technical or legal knowledge of the processes or requirements involved in the day-to-day implementation of a programme. There should be a familiarity with the overall role and benefits that the programme will deliver, and the ability to communicate this out to the different geographic regions and lines of business involved.

**Cheng:** Executive leadership and the board need to actively sponsor the IG programme for it to be successful. While a one-time clean-up or one-time policy project can provide a temporary boost, meaningful change needs to be understood and supported from the top. The challenge with IG is that typically there is no single owner due to its cross-stakeholder nature. IG leaders often work in silos, which is one of the core root-causes of data compliance gaps. There must be an appropriate governance and accountability structure, funding and ongoing support to set IG as one of the top five corporate initiatives. At senior levels, firms need change agents that are willing to meaningfully support IG and align it with core firm functions. At the departmental and individual contributor level, people must be willing to change business processes and think more broadly about data obligations and risk.

**CD: Could you highlight any recent legal or regulatory developments that need to be factored into IG and discovery programmes?**

**Earnshaw:** Data privacy is the topic that is top of mind with almost all companies implementing e-discovery and IG programmes around the globe. In recent years the privacy of personal data has become a very hot topic, heightened by the implementation of the General Data

Protection Regulation (GDPR) in Europe, and the progression into legislation around of world of similar instruments. Additionally, we are seeing regulatory requirements – other than government investigations or litigation – such as the provision of documents to regulators as part of the merger approval process, become heavily focused on the provision of internal company documents, requiring a company to go through a process akin to disclosure in litigation.

**Cheng:** Privacy fever seems to be sweeping the globe. It began last year with the GDPR. Now the California Consumer Privacy Act (CCPA), the Data Protection Bill in India and many more are cropping up and impacting companies across all industries and the globe. For many companies outside the EU, the GDPR introduced previously unheard-of rights for individuals, elevated day-to-day management and processing responsibilities regarding personal data, and required companies to revamp their incident response and breach capabilities and staffing. Several companies have used GDPR as a catalyst to reboot IG programmes which had previously stalled, leveraging executive and board-level interest in privacy and cyber risk to finally properly invest in a transformation programme.

**Lim:** The relevant legal or regulatory developments will depend on the industry. For companies handling consumer data, a recent important development is

the passage of the CCPA, which places significant requirements on for-profit entities doing business in California involving consumer data. The CCPA bestows a number of rights and consents required from consumers for the use and sale of their data and enables fines of up to \$2500 for negligent violations and \$7500 for intentional violations per violation. More generally, the 2015 changes to the Federal Rule of Civil Procedure 26(b)(1), relating to proportionality, should continue to provide relief to litigants from overbroad and costly discovery. However, a number of well-known states continue to be forums where overbroad discovery, particularly for consumer product liability matters, remains an ongoing issue.

**CD: In your opinion, how important is it for companies to train staff on IG and discovery techniques? What benefits might this yield if a dispute escalates to litigation?**

**Cheng:** Training and communication are critical for IG or any data compliance programme. Scaremongering about fines is ineffectual because in regulated firms employees face compliance fatigue. Corporate training programmes should consider how data privacy, security, records management, legal and e-discovery obligations relate to one another and how key messages relevant to individuals can be distilled and prioritised. IG training is most effective when it is stakeholder-specific and brings together policy, process and technology changes. An application owner has a very different

set of responsibilities for data than a front office employee, and each will have differing levels of engagement.

**Lim:** Companies should provide periodic training and updates on the appropriate use of corporate data systems. Most organisations have corporate policies as to use of information systems. However, most employees do not receive training on use of corporate information systems beyond their initial on-boarding. As part of a periodic review of company-authorised platforms for employees to use for their business activities, employees should be further trained as to the appropriate use and information to be incorporated into these systems.

**Earnshaw:** The communication and training that accompanies the implementation and roll out of an IG and e-discovery programme are critical to its success. Those employees whose roles will require active involvement in the process, mainly from the legal and IT functions, will need to have the appropriate technical and legal education covering the technologies and methodologies involved. Should an internal review escalate to a more formal level, then the business can be confident that fully defensible and documented, robust processes have been followed that can be defended in court or to a

regulator. Employees across the business who may become custodians of communications, records or documents that are required to be collected, reviewed and produced also need to be educated, although in different aspects. What actions will

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they be expected to take if they are identified as a custodian in a matter? What will happen to the data on their devices or in their email account? What level of privacy they can expect, or not, for any personal data stored on corporate devices? Finally, those employees identified as the owners of corporate systems – such as HR platforms, email systems, accounting systems or third-party instant messaging systems – need to have an understanding of where the data for those systems is stored, how the data can be accessed and what service level agreements (SLAs) exist with providers.

**CD: What challenges and pitfalls might arise when deploying a global programme across borders? How should companies address local laws and nuances?**

**Earnshaw:** Any global programme that is implemented should be designed both top-down and bottom-up, to ensure compliance with local country data privacy and regulatory requirements, as well as that globally consistent technical and documentation approaches are incorporated into the structure. Companies are often surprised that there cannot be a single, consistent approach to data privacy, document retention or data transfer that can be applied globally, due to the patchwork of different requirements that exist across different countries, industries and legal systems. One area that is often overlooked is the difference in cultural attitudes that exist between myriad disparate countries and business units that have of been brought together, often by acquisition, to form the current version of the corporation. The nuances of communication, approach and local engagement required should not be underestimated for the successful implementation of a global IG and e-discovery programme.

**Lim:** Many companies struggle with applying different compliance requirements to their data in different jurisdictions. Attempting to apply a single

'lowest common denominator' approach can be costly, as more onerous data privacy requirements are applied in jurisdictions with different rules. Use of binding corporate rules and standard contractual clauses to address cross-border transfers provides some benefit to organisations. However, companies should continue to consult with legal counsel to ensure that cross-border transfers comply with current legal requirements.

**Cheng:** Corporations are increasingly global in nature, which presents both opportunities and challenges when managing data. There are a few challenges to be mindful of in global IG programmes. First, cross-border data flows which need to be governed appropriately by companies in policy and practice, considering the local data transfer laws of the sending and receiving countries. This can be complicated in the context of litigation as well as in determining which rules apply to data. Second, there are many laws and regulations governing personal information in different countries and regions. A company operating across the world will be under different rules for managing employee data in France, compared to China, for example. Third, retention and record keeping legislation varies in different countries, sometimes to a large degree. It is good practice for companies to develop global retention taxonomies and policies which take variances into account and align with IG technology disposal solutions. Finally, cultural differences can

impact not only stakeholder engagement, policies and how individuals think about information, but also the relationship with the parent company.

**CD: What key piece of advice would you offer to legal departments on establishing effective IG and discovery policies and procedures? To what extent should they place a consistent emphasis on litigation readiness?**

**Lim:** Parties should keep in touch with business users as to the information systems they are using. They should also use proportionality principles to guide ongoing document preservation and retention policies. For new and existing business applications, consider how the legal department can retrieve and process relevant information efficiently, in the event of a legal matter.

**Cheng:** If a company does not already have a defensible disposal programme, it is time to get started. The legal department is well positioned to help launch this because it plays a critical role in determining what data needs to be preserved for litigation. A disposal programme can start with a legal hold inventory. This may sound simple, but

in practice a lot of firms have retained everything because it was 'too difficult' to map legal holds with specificity. Knowing preservation obligations for specific matters, date ranges and custodians is a key foundation for knowing what needs to be preserved. This step is key because it also reveals which data is not subject to regulatory obligation and can be disposed of. With regulations such as the GDPR requiring data minimisation or deletion, getting on the path to disposal as soon as possible is important.

**Earnshaw:** One piece of advice to a corporation looking to implement a global e-discovery programme is not to try to boil the ocean. Start with the basics and grow the programme over time. Get the right external advice and initially focus on the key communications systems, such as email and instant message platforms, and key document storage systems, such as file servers and SharePoint. Augment these technical steps with education to employees about protocols for data retention and destruction. With these aspects, a large proportion of the data that is likely to be required will be covered, and employees will understand the basics. From this point, a programme can be expanded to cover other systems and provide more specific training to those involved in the process. **CD**