THE FUTURE OF EMAIL PRESERVATION

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Jason R. Baron
Director of Litigation
Office of General Counsel
National Archives and Records Administration

A NEW ERA OF GOVERNMENT

PRESIDENT OBAMA'S MEMORANDUM DATED 1/21/09 ON TRANSPARENCY AND OPEN GOVERNMENT

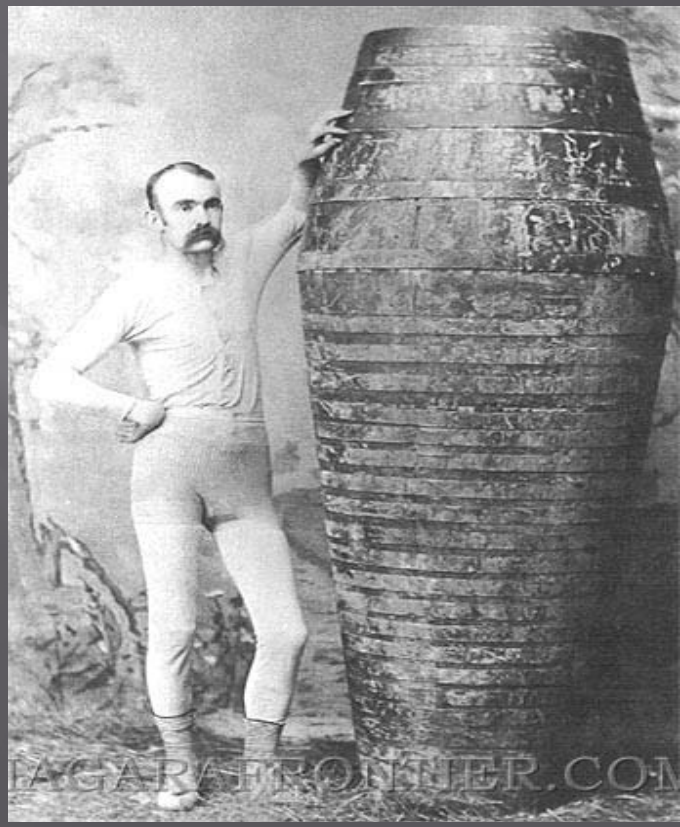
HTTP://WWW.WHITEHOUSE.GOV/THE_PRESS_OFFICE/TRANSPARENCYANDOPENGOVERNMENT

Email is still the 800 lb. gorilla of ediscovery

(see 36 CFR 1236.22 (2009))

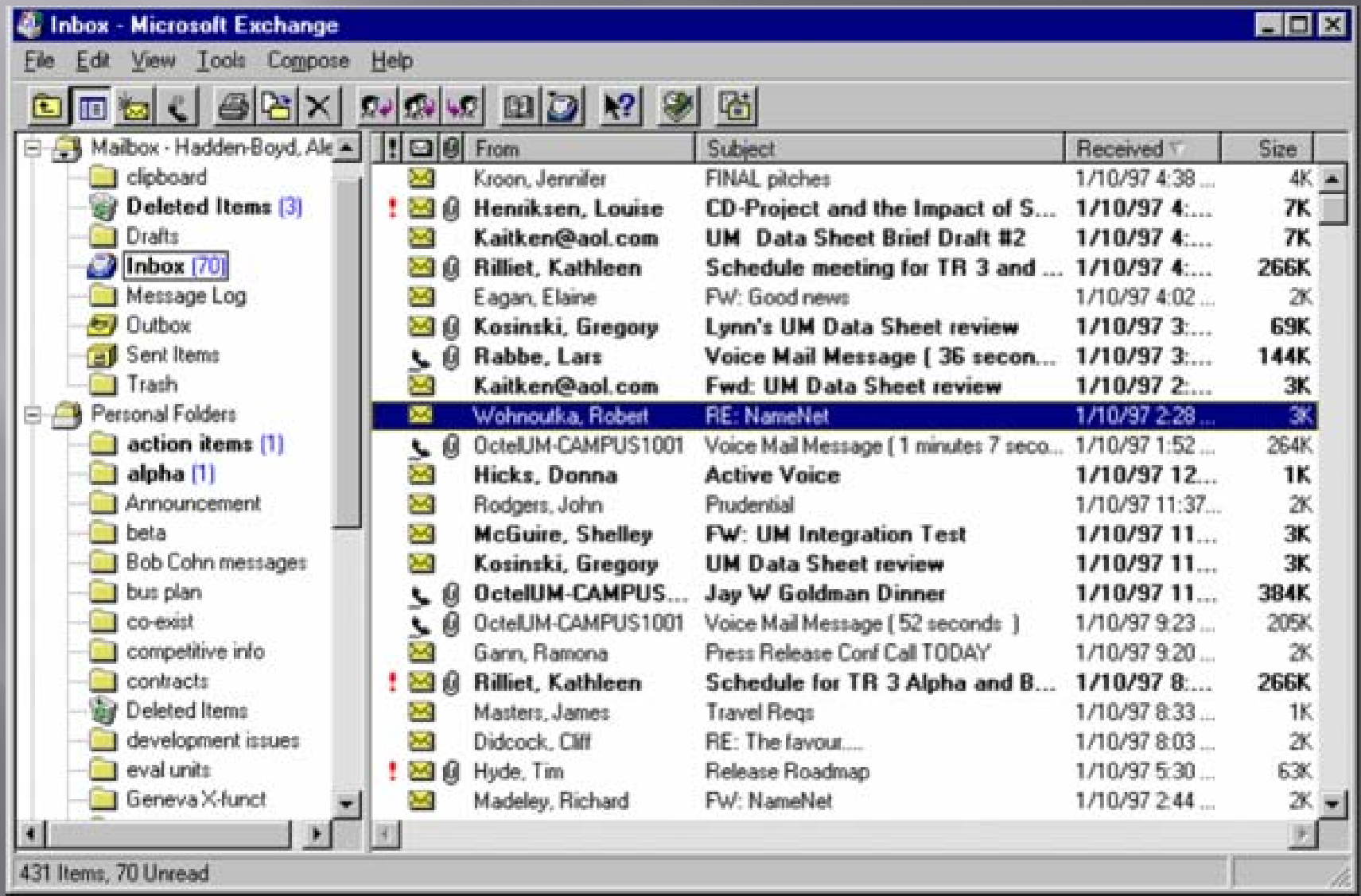
….The ever increasing volume of email is a problem

In a world of limited tools and resources…..



Beyond email: text messaging

Voice mail captured in “Unified Messaging Systems”



Emergence of Web 2.0 Social Media

A Future Forecast for E-mail: Partly Sunny, Partly "Cloudy"?

Email Issues Addressed in *Armstrong v EOP* & GRS 20 Cases

- Email messages can be federal records under 44 USC 3301
- Agencies must manage the unique "electronic" email record, as it is only a "kissing cousin" of a hard-copy printout
- General schedule 20 allows for deletion of electronic versions of email on the desktop provided recordkeeping copy kept in either paper or electronic form

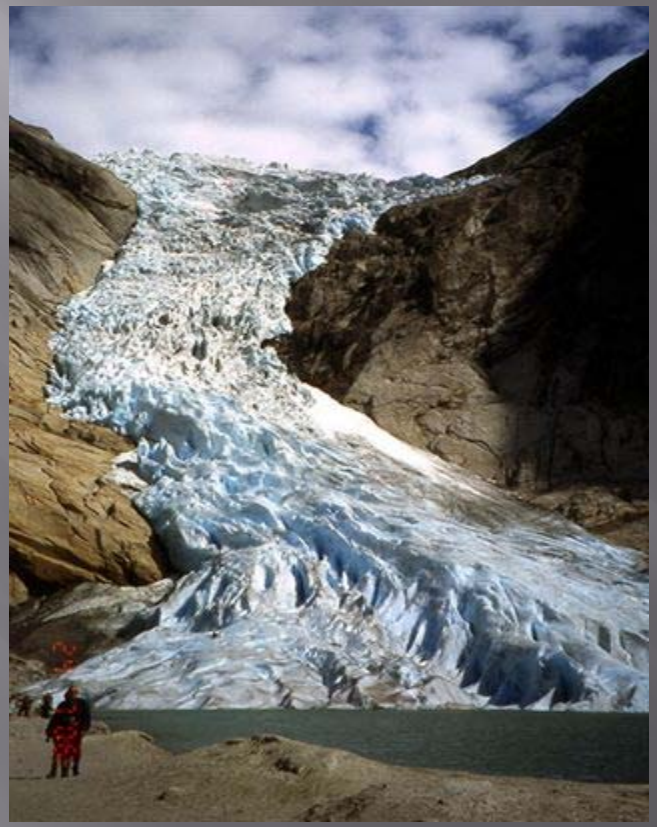
Transitory Email Reg

- NARA final regulations published in the Federal Register on February 21, 2006 (71 F.R. 8806), modifying regs now contained at 36 CFR 1236.22 (2009)
- Email records appropriate for preservation for less than 180 days may be managed on live email systems and allowed to be deleted as part of automatic processes, without a user further needing to print out or electronically archive.

So what does your agency's pace of change feel like?

Like this?

Or Is It More Like This?



And What Can Each of Us Do About It?

Four Recordkeeping "Paths" for Preservation of E-mail

- **Print to paper (General Records Schedule 20, Item 14)**
- **Disaster Recovery Backup tapes (GRS 24, Item 4)**
- **Online user-based foldering in proprietary live systems**
- **Electronic recordkeeping under DoD 5015.2 version 3**

The Tree = The Organization’s Knowledge

And Every User’s Email Account as a Separate Twig

Hot topic: Metadata

- What is it?
  - Email header information (possibly hidden)
  - Proprietary features of word processing (e.g. summary fields)
  - Embedded & shadow data
  - Deleted keystrokes
  - Tracking info
  - Spreadsheet formulas
- Format issues and metadata
- Metadata ethics: inadvertent production

TWO RECENT CAUTIONARY TALES

In re Fannie Mae Litigation, 552 F.3d 814 (D.C. Cir. 2009)

Aguilar v. ICE Division of US Dept of Homeland Security, 2008 WL 5062700 (S.D.N.Y. Nov. 21, 2008)

Impact of Technology on E-Records Management Applications: Snapshot FY2010

- A universe of proprietary products exists in the marketplace: document management and RMAs
- DoD 5015.2 (version 3) compliant products
- However, scalability and useability issues exist
- Utopia is records mgmt without extra keystrokes, completely transparent to end-users
- Agencies must prepare to confront significant front-end process issues when transitioning to electronic recordkeeping
- Records schedule simplification is *key*

The transactional toll of user-based recordkeeping schemes

…. and the need for better, automated solutions ….

The Future of E-mail: Electronic Archiving?

- What is it?

  100% snapshot of (typically) email, plus in some cases other selected applications
- How does it differ from an RMA?

  Existing "out of the box" email archiving products focus on preservation of evidence, not records management *per se*
- NARA Bulletin 2008-05

The Future "Promise" of Electronic Archiving

- 100% archiving of email & ESI on the desktop
- Transport out of email store into generic format (e.g., XML)
- Use of smart filter technologies on front and back end to segregate permanent from the temporary (with capture and transfer to NARA of the permanent)
- Culling for non-record material using certain agreed-upon protocols
- Default temporary record status of remaining archived materials
- However: all "eggs" in the search basket

A Possible Path Forward?

- Email archiving in short term, synced to existing proprietary software on email system
- Designation of key senior officials as creating permanent records, consistent with existing records schedules
- Additional designations of permanent records by agency component
- "Smart" filters/rules built in based on content, to the extent feasible to do
- Default are records in designated temporary record buckets, disposed of under existing records schedules.

How To Avoid A Train Wreck With Email Archiving….

Capture E-mail But Utilize Records Management!

Help may be on the way!

H.R. 1387 (111th Congress): EMPA

- Electronic Message Preservation Act,sponsored by Rep. Paul Hodes, passed the House on March 17, 2010
- Referred to Senate Committee on Homeland Security and Governmental Affairs
- Would have Archivist issue regulations
  - Requiring electronic capture, management and preservation of electronic records
  - Requiring electronic records to be readily accessible for retrieval through electronic searches
  - Establishing mandatory minimum functional requirements for electronic records management systems to ensure compliance

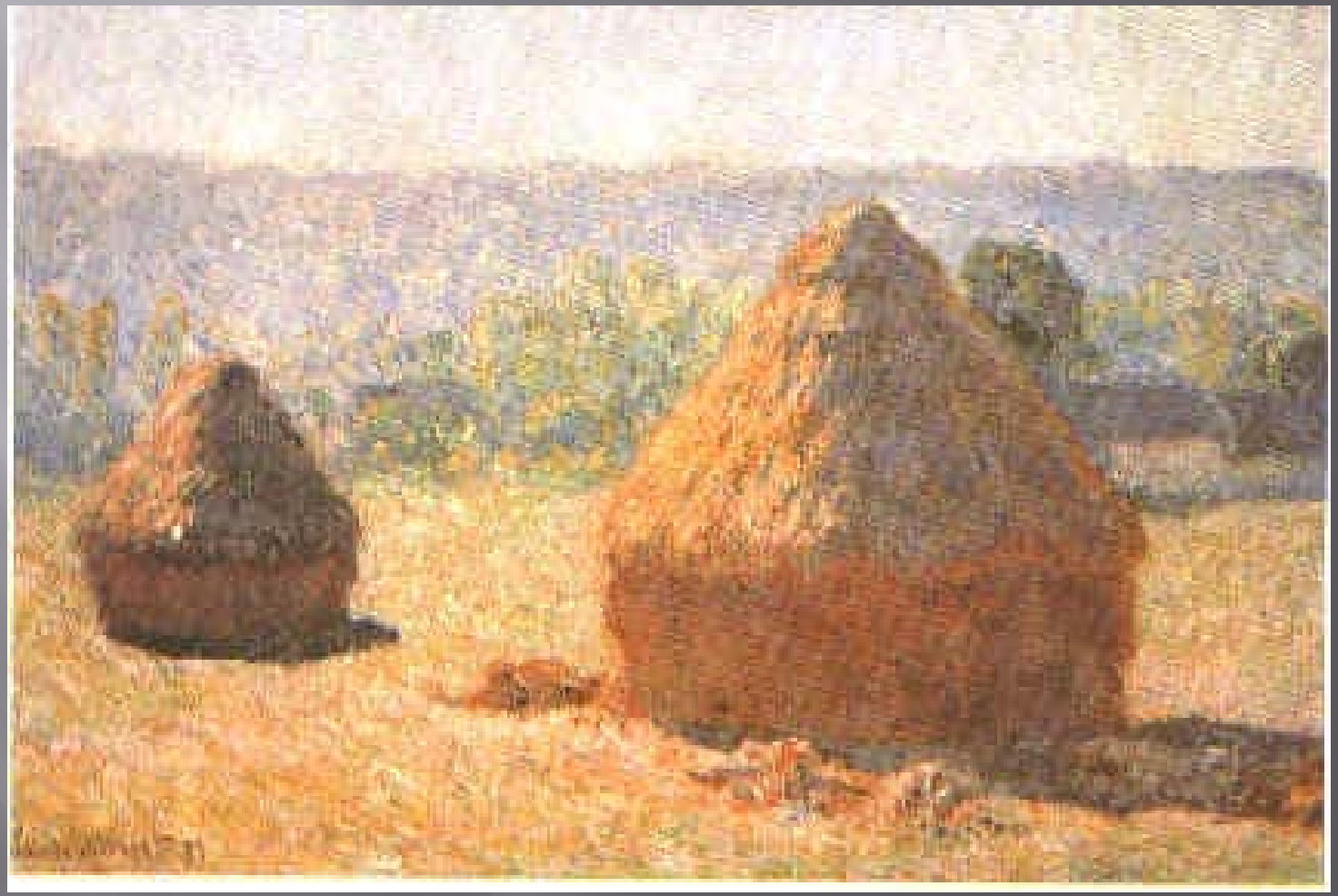
H.R. 1387: EMPA (cont'd)

- "Electronic messages" means electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals
- "Electronic records management system" means software designed to manage electronic records, including by
  - (A) categorizing and locating records;
  - (B) ensuring that records are retained as long as necessary
  - (C) identifying records that are due for disposition;
  - (D) ensuring the storage, retrieval and disposition of records.

H.R. 1387: EMPA (cont'd)

- EMPA would require NARA to promulgate regulations within 18 months of enactment
- EMPA would require regulations to include timelines for agencies "that ensure compliance as expeditiously as practicable but not later than four years after the date of enactment"
- EMPA would require that, to the extent practicable, the regulations include requirements for the capture, management, and preservation of other forms of electronic records beyond "electronic messages"
- Reporting requirements for agencies: 4 years after enactment

The Challenge of Searching Larger and Larger Haystacks….



to find relevant needles…

ends up like searching in a maze…

Judge Grimm writing for the U.S. District Court for the District of Maryland

"[W]hile it is universally acknowledged that keyword searches are useful tools for search and retrieval of ESI, all keyword searches are not created equal; and there is a growing body of literature that highlights the risks associated with conducting an unreliable or inadequate keyword search or relying on such searches for privilege review." ***Victor Stanley, Inc. v. Creative Pipe, Inc.,*** 250 F.R.D. 251 (D. Md. 2008)

Judicial second guessing of failure to use e-search capabilities: *Capitol Records v. MP3 Tunes*, 261 F.R.D. 44 (S.D.N.Y. 2009)

- "In [a prior case] the Court notes its dismay that the party opposing discovery of its ESI had organized its files in a manner which seemed to serve no purpose other than 'to discourage audits. . .' Similarly, in this case, [the party] host[ed] no ediscovery software on their servers and apparently are unable to conduct centralized email searches of groups of users without downloading them to a separate file and relying on the services of an outside vendor."

Judicial second guessing of failure to use e-search capabilities: *Capitol Records v. MP3 Tunes* (con't)

Court went on to add:

"The day will undoubtedly will come when burden arguments based on a large organization's lack of internal ediscovery software will be received about as well as the contention that a party should be spared from retrieving paper documents because it had filed them sequentially, but in no apparent groupings, in an effort to avoid the added expense of file folders or indices."

What does the road ahead for your agency look like?

How do you perceive your role in making change happen?

I can be my agency's email archiving Iron Man!

Gosh, I'd like to try but I need lots of help…..

Don't bother me, I'm counting down my days to a nice pension ….

Taking a Leap of Faith into Email Archiving…

NARA Will Help!

Jason R. Baron
Director of Litigation
Office of the General Counsel
National Archives and
Records Administration

(301) 837-1499
jason.baron@nara.gov