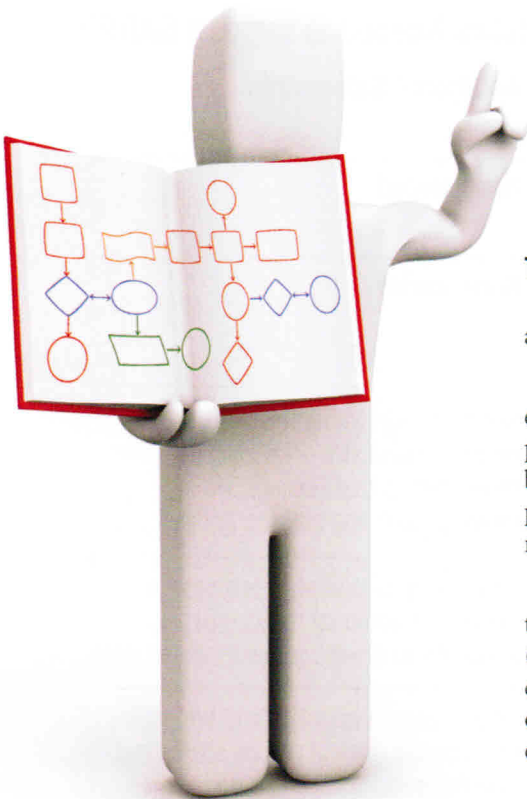


GARPSM

Mapping a Route for Compliance

John Montaña, J.D.



It might be tempting to suppose that ARMA International's Generally Accepted Recordkeeping PrinciplesSM (GARPSM) break new ground. While the promulgation of the eight principles is a recent and noteworthy development, a closer look reveals the eight principles noted on page HT4 and described at www.arma.org/garp are firmly rooted in information management best practices and long-standing U.S. federal law and case law.

Legal precedent abounds, in particular, for the principles of accountability, integrity, and compliance, as described below.

The Principle of Accountability

Consider first the principle of accountability:

An organization shall assign a senior executive who will oversee a recordkeeping program and delegate program responsibility to appropriate individuals, adopt policies and procedures to guide personnel, and ensure program auditability.

Consider this rule in the context of the case of *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (Fla. 1984). In that case, serious issues with discovery and document production ultimately resulted in a default judgment against Piper.

Piper alleged that it had a records retention program and that the program justified the non-production of certain records. Piper used as its witness in this regard its director of engineering. In concluding that there was neither accountability nor responsibility, the judge excoriated Piper and the witness stating:

"I was not impressed with the credibility of [the witness] who appeared to me to be a classic 'company man,' who would color his testimony in favor of his employer."

and

"Piper presented no evidence to substantiate [the witness's] claim that the

document retention procedures are strictly complied with by Piper's employees."

and

"Piper's absolute failure to provide any evidence on this issue must be construed as a tacit admission that the policy is a sham."

That's strong language. It's also a clear indication that the judge was looking for evidence of leadership, accountability, and enforcement – and that he didn't find it weighed heavily in his decision to enter a default judgment – in 1984.

"A policy by itself means nothing," said Mark Weintrub, senior legal consultant at Axyon Consulting and former industry general counsel. "The keys are things like organizational culture, effectiveness of implementation, embracing necessary methods and processes, and zero tolerance for failure to adhere to principles and standards. All of these things must come from leadership at the top of any organization."

T.M. Ravi, president and CEO of Mimosa Systems, noted both the symbolic and practical need to have executive leadership.

"In many cases it will come down to 'good faith intent' to try to meet applicable requirements," Ravi said. "The executive needs to pull in legal and IT to discuss and certify that the solution out in place will meet expectations. No manual or technology solution is 100%, and the courts and

regulatory agencies realize this. That's why a big part of the analysis of a given situation will depend on how the executive and company tried to meet requirements."

The Principle of Integrity

Consider next the principle of integrity:

A recordkeeping program shall be constructed so the records and information generated or managed by or for the organization have a reasonable and suitable guarantee of authenticity and reliability.

The mandate of this rule is actually enshrined in the Federal Rules of Evidence (FRE). Consider the language of F.R.E. Rule 803 (6); Rule 803 (7); Rule 803 (8):

"The following are not excluded by the hearsay rule . . . : An (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses . . . *unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.*" [emphasis added]

This means that bringing a record to court simply isn't enough. The record must be created and maintained in a manner that demonstrates authenticity and reliability. And this has been the case since at least 1979, the year the FRE were promulgated.

Likewise, the law of the United States (and, for that matter, any other country) is liberally sprinkled with legal requirements that some party or another keep "accurate records" of one sort or another. (See, for example, 12 USCS § 1766; 15 USCS § 78j; 16 USCS § 670h and Ala. Admin. Code r. 80-1-22-.25, among many thousands of other similarly worded requirements.)

According to Ravi, complex data and information systems don't need to be an impediment here. "Information technology solutions can be set to capture, index, and compare content to existing policies and automatically store that data in conformance with policies," Ravi said.

The Principle of Compliance

Consider next the principle of compliance:

The recordkeeping program shall be constructed to comply with applicable laws and other binding authorities, as well as the organization's policies.

In 1947's *Shapiro v. United States*, 335

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U.S. 1 (S. Ct. 1947), the Supreme Court of the United States quoted the U.S. Senate Committee on Banking and Currency to say this about the importance of legally mandated recordkeeping requirements:

"[N]o investigatory power can be effective without the right to insist upon the maintenance of records."

Likewise, in 1974, the same court observed in *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (S.Ct. 1974) that:

"[There is] a sufficient relation between [the banking industry] and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection."

In other words, there's a strong public interest in making businesses and other entities keep records, and as a result, the government can impose a duty upon organizations to keep records. Insofar as an organization's own policies and procedures are concerned, consider the *Carlucci* judge's statement concerning compliance with policy, bearing in mind that this, in combination with other issues, served as the basis for a very strongly worded opinion culminating in default judgment:

"Piper has utterly failed to demonstrate that its document retention policy is actually implemented in any consistent manner. The defendant included with its initial response to plaintiffs' motion a copy of a portion of the Corporate Procedures

Manual addressing document retention. At the evidentiary hearing, I relied on that document to inquire of [the witness] regarding Piper's means of authorizing and documenting the disposal of records.

He was unable to answer my questions and it has become apparent that the document submitted to me is virtually irrelevant to the issues before this court."

Collectively, these court cases point to some things that lawyers already know: when it comes to records, there's a legal duty of compliance with applicable authority, and that authority comes from two places – law and internal policy. And, there are standards against which judges are prepared to measure organizations that include the obligation to maintain records properly and make them available to interested parties, including litigants, the courts, and government agencies.

This isn't a surprise in the business community either. Ravi points out the dangers of ignoring the matter of compliance.

"Companies that play fast and loose with potential evidence are more and more finding themselves on the losing end of a legal action," Ravi said. "These days, judges' expectations are that a company knows their responsibilities in discovery, and those that don't measure up have problems."

And, lest anyone suppose that these are merely American notions, consider the following from Argentina Commercial Code, Art. 44:

"Books of Commerce must conform to accepted principles and norms."

and Vietnam's Decree of the Council of Ministers Regulating Detail in the Implementation of the Law on Foreign Investment, Art. 96:

“An enterprise with foreign invested capital shall keep its books of accounts according to generally accepted international accounting principles and standards recognized by the Ministry of Finance of Vietnam.”

and smart records custodians have known them for a long time as well, even if they didn't think of them in the context of codified principles such as GARPSM.

That should tell everyone else something important: While GARPSM gets the

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Similar language exists in many other places as well. The concepts behind GARPSM aren't local – they're the expectation virtually everywhere.

The General Acceptance of GARPSM Doctrine

These examples are a few among hundreds or thousands that could be cited. What they and many other cases, laws, and rules illustrate is that these three GARPSM principles are neither new nor novel.

Rather, they're the rationalization and codification of long-established legal doctrine. What GARPSM has done is simply change the context within which they operate from that of pure legal compliance and litigation to the broader arena of good management.

The rationale, however, remains the same. Collectively, the cases, rules, and laws cited here demonstrate the demand by the legal system that records be kept in accordance with legal requirements, that they be accurate records, and that there be programmatic accountability to ensure that they are properly kept.

These considerations are as compelling outside the arena of a lawsuit as they are within litigation, for the same reasons: the organization, and society itself, have a strong interest in accurate, properly maintained records and in demanding the kind of accountability that will ensure this happens.

Lawyers aren't the only ones who know these things – smart organizations

basic principles together on the same page for the first time, it does so in the context of an informed legal and records management community that has long recognized the validity and enforceability of the concepts underlying the principles.

A Safe Route Through the Legal Minefield

So, if an organization winds up in court getting beat over the head with GARPSM because it's got lousy records, the defense that GARPSM is some newfangled thing the law doesn't recognize won't get it very far.

The other side can point to hundreds of cases and thousands of laws that already demand the same standards of performance and accountability. It can also point to the many smart and well-run organizations that work diligently to be GARPSM-compliant as the standard that all organizations should be measured against.

If that prospect makes organizations nervous, it's not GARPSM they should be nervous about. It's the well-established concepts that underlie it. An organization's failure to meet the demands of those concepts is what will sink it – regardless of GARPSM.

The losing parties in many already-decided cases can attest to that. Those cases predate GARPSM in its codified form, but that didn't stop judges or juries from hanging their hats on something that looked and sounded very GARPSM-like when it came time to render judgment.

So, organizations should view GARPSM as a map for a road that is safely winding through a legal minefield that has always existed. An organization with a records program that isn't very GARPSM-compliant is teetering on the edge of the minefield. As it becomes more compliant, it will move away from the edge toward safety. Organizations moving in that direction will find a lot of value in just moving, Ravi noted.

“Even in federal discovery, rule 37(e) of the *Federal Rules of Civil Procedure* acknowledges that corporate infrastructures are complex, so they built in a ‘safe harbor’ that says if a company inadvertently destroys data it should have retained, the courts will not hold them responsible if they can show documentation that they made a good faith attempt to comply,” Ravi said.

Weintrub concurs: “You'll probably never be 100% compliant, but you need a standard to shoot for or you'll never get anywhere.”

Simply put, moving toward compliance is valuable in and of itself.

“The value from improvement isn't just a dollar-for-dollar reduction in exposure,” Weintrub said. “The intangibles, such as a shift in organizational culture, result in an exponential return on money and resources invested in improving a records management program.”

Organizations are mistaken to think they can avoid crossing the minefield – and to deny needing a roadmap to navigate safely through it. As the business and legal terrain constantly changes, organizations will continue to need that map to keep them on the safe path and out of danger.

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