Ensuring legal admissibility and managing disclosure of electronic records

Pro-active Strategies

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Pro-active strategies

- **The conference theme appears to be "admissibility and disclosure" – is this enough?**
- **The broader context: to prevail under legal challenge – and at reasonable cost**
- **Main reason for forward-planning: emergency actions are often inadequate and very expensive**

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Pro-active strategies

Strategy has to encompass:

- **Admissibility Tests**
- **Practical Mechanics of Disclosure: CPR31**
- **A "witness" who can attest to reliability and completeness**
- **Potential problems and practical resolution of "inextricably linked":**
  - **Privileged material**
  - **Confidential material**
  - **DPA conflicts**
  - **RIPA conflicts**

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Pro-active strategies

Two apparent alternative routes:

- **Certification of compliance with appropriate standards**
- **Forensic Readiness Program**

(in fact they can complement each other)

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Standards Compliance

- **BIP 0008-1: Code of practice for legal admissibility and evidential weight of information stored electronically**
- **BIP 0008-2: Code of Practice for Legal Admissibility and Evidential Weight of Information Communicated Electronically**
  - ➔ **Emails, SMS, IMs, web-services, EDI**
- **BIP 0008-3: Code of Practice for Legal Admissibility and Evidential Weight of Linking Electronic Identity to Documents**
- **BIP 0067:2006: A guide to developing a retention and disposal schedule for business information**
- ***and associated work-books***
- **ISO 15489: Records Management**

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Standards Compliance

Reasons for aiming for Standards Compliance:

- **Process is likely to identify a wide range of deficiencies which can then be corrected**
- **May be useful (or essential) contractually as defining expected service standards**

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Standards Compliance

Typical discovered deficiencies:

- No information policy document
- No retention schedule
- Inappropriate / inadequate security controls
- Lack of procedural documentation
- Insufficient control of document input procedures
- Insufficient information about the technology from the system supplier

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Standards Compliance

Typical discovered deficiencies:

- lack of documentation on audit trail content and access procedures
- use of inappropriate facilities, such as image clean-up or “deletion” facilities
- no thought of future migration requirements

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Standards Compliance

Limitations of Standards Compliance

- Standards do not absolutely guarantee admissibility or acceptability for weight
- Standards are inevitably generic – may not cover everything you really need and may also ask you to spend much time explaining and justifying why some aspects are irrelevant
- Can be disproportionately costly and disruptive
- Introduces a box-ticking approach over more fundamental analysis (if done badly)

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Standards Compliance

Limitations of Standards Compliance

- Rather useless if nearly all detailed activity is left to outside consultants
- Can produce a false sense of security
- May omit important informal records
  - → PCs, laptops, cellphones, PDA etc
- May not be especially persuasive in certain overseas jurisdictions
- May not deal effectively with the practical mechanics of disclosure, explanations to court, issues of inextricably linked material

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Forensic Readiness Programs

Essentially:

- **Based on threat analysis / scenario development**
- **Requires identification of potential evidence / disclosure requirements – and plan for their formal production**
- **Results in a proper Contingency Plan – which is tested and kept up-to-date**

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7-step Forensic Readiness Plan

Identify:

- the main likely threats/ legal challenges faced by your organisation
- what sorts of evidence / disclosure you are likely to need if you have to proceed to civil or criminal litigation
- what you will need to do to meet various regulatory and compliance requirements
- how far you may have that material already
- what you will need to do to secure additional essential material

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7-step Forensic Readiness Plan

- the management, skills and resources implications for your organisation
- turn the results into an action plan – which will need regular revision as the organisation and its ICT infrastructure develops.

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7-step Forensic Readiness Plan

The Good News:

quite a bit of the work may already have been carried out elsewhere in the organisation….

…….Disaster Recovery / Business Contingency Plans

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Business Contingency Plans

- **Preparation against disaster:**
  - → Fire
  - → Flood
  - → Terrorism
  - → Denial of access
  - → Computer failure
  - → Etc etc

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Business Contingency Plans

- **Tells organisation what to do:**
  - ➔ Emergency Priorities
  - ➔ Team that will act / Reporting Responsibilities
  - ➔ Migrated offices, locations
  - ➔ Migrated people
  - ➔ Migrated ICT
  - ➔ PR for customers, clients, investors, bankers, public-at-large etc

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Consequential Loss

What happens to profits ...

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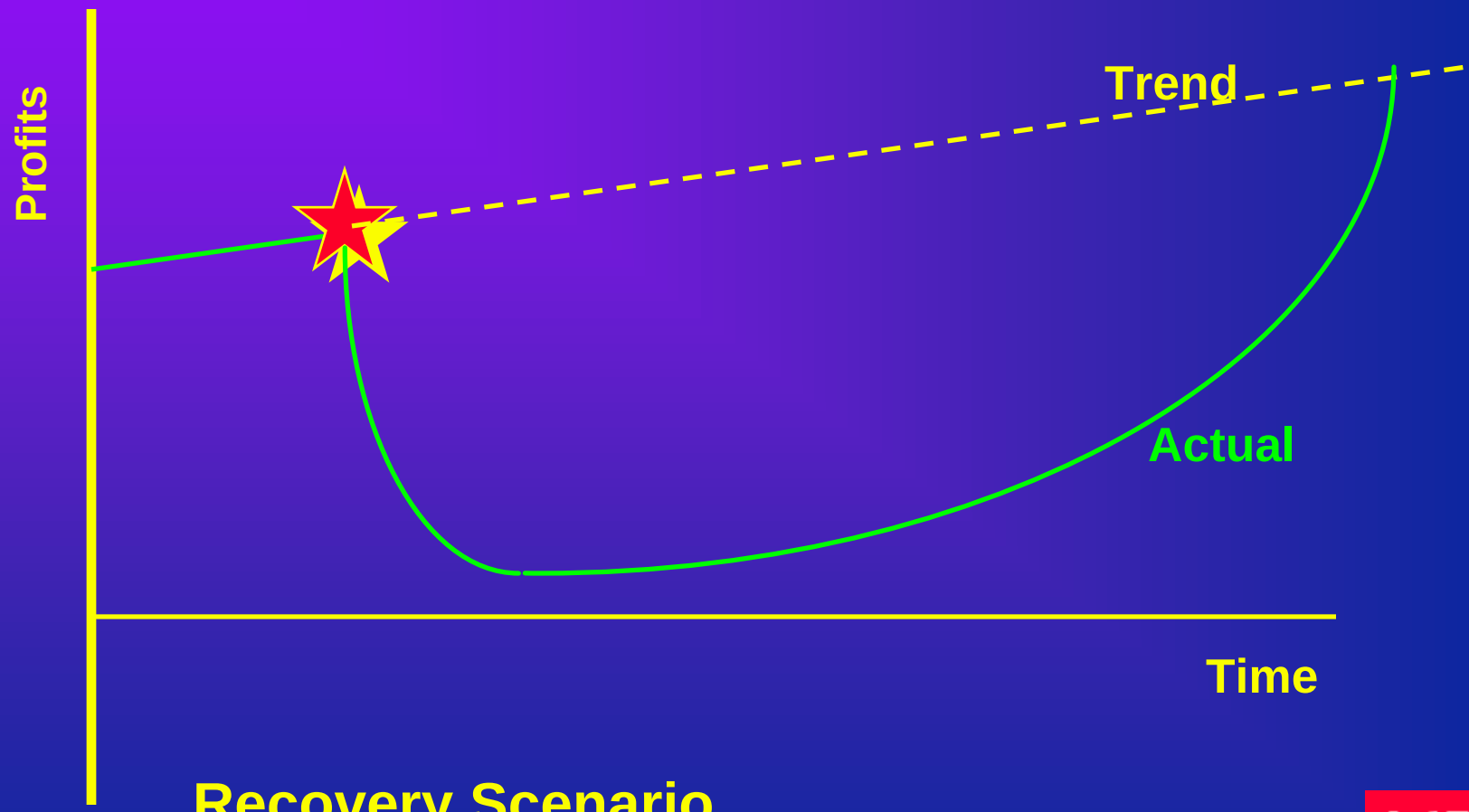
Consequential Loss



Recovery Scenario

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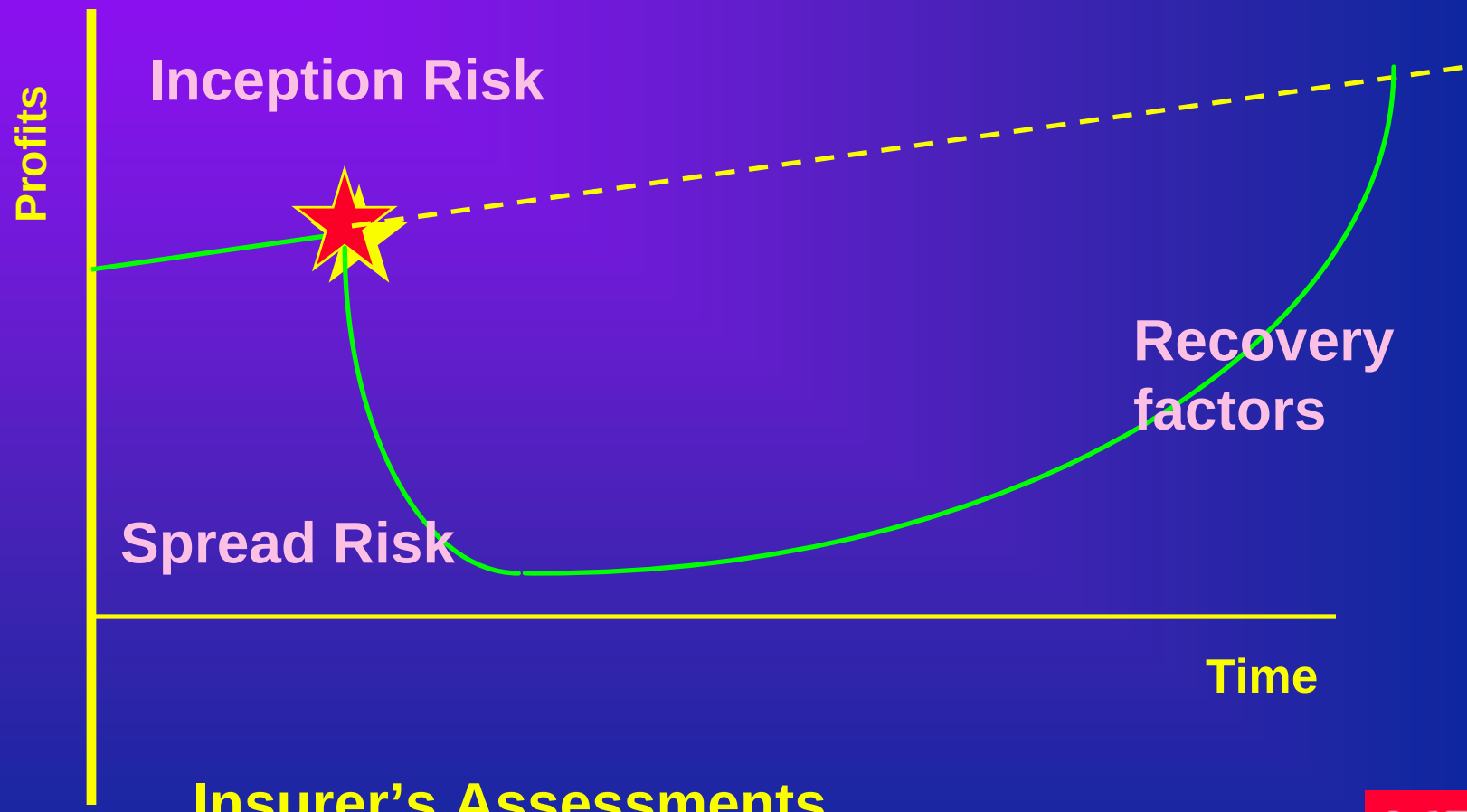
Consequential Loss



Insurer's Assessments..

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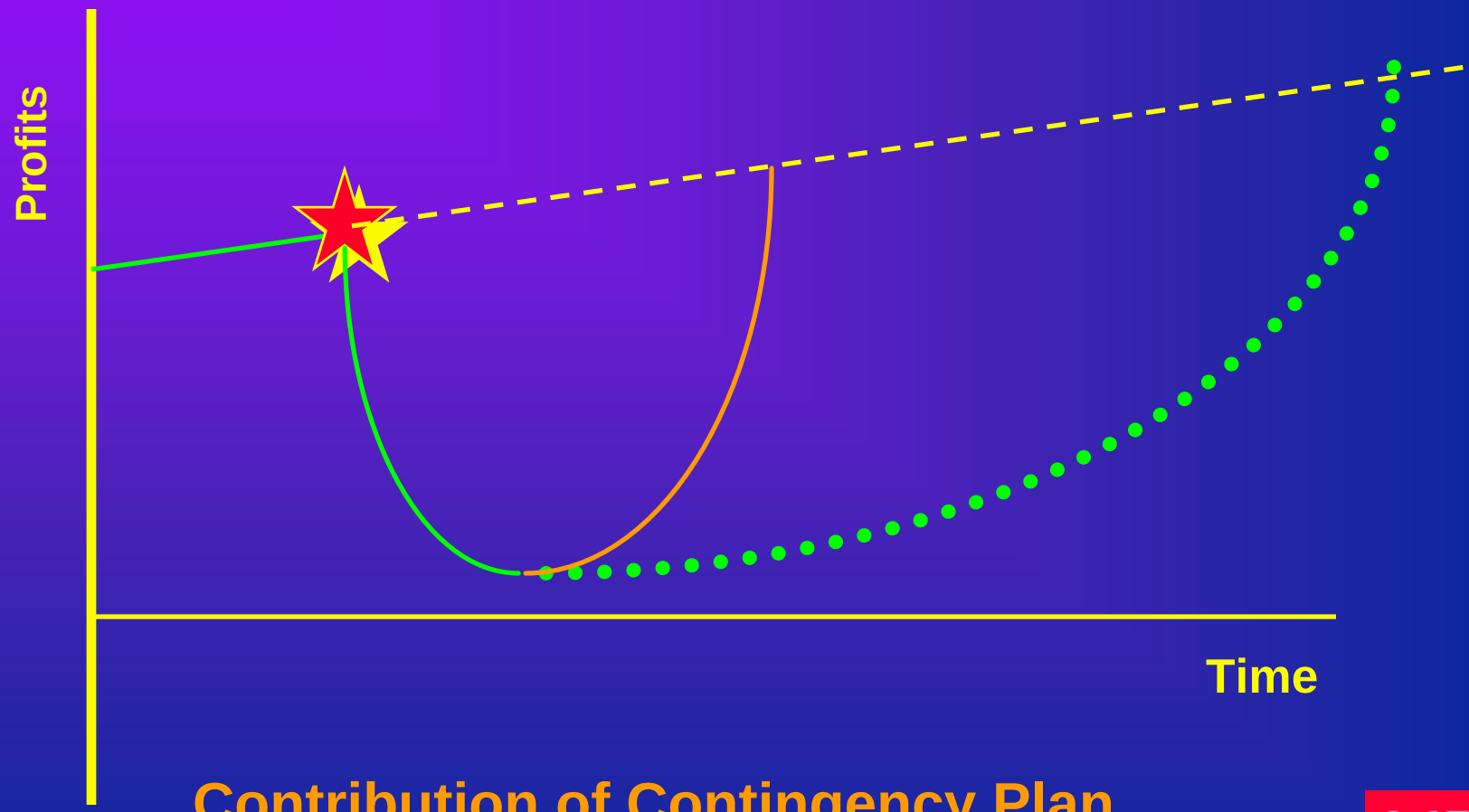
Consequential Loss



Contribution of Contingency Plan..

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Business Contingency Plans

Research, Design

- Business Analysis
  - → to determine priorities (it's too expensive to restore everything instantly)
- Relation of business processes to specific ICT resources, hardware, software, communications links; availability of back-up
- Detailed plan for who does what when
- Emergency Response Team
- Internally published Plan
- Frequent Testing and Revision

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Business Contingency Plan / Forensic Readiness Plan

Research, Design

- Business Analysis
  - → to determine evidential and disclosure needs
- Relation of business processes to specific ICT resources, hardware, software, communications links; availability of back-up
- Detailed plan for who does what when
- Reporting requirements
- Internally published Plan
- Frequent Testing and Revision

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Forensic Readiness Plan: Additional Requirements

- Legal / Regulatory requirements
- Analysis of back-up plans
  - ➔ Incremental / complete
- Specific Data Retention / Destruction requirements
- Decisions about mode of disclosure
  - ➔ Electronic, print-out, extents, etc
- Witness to explain systems, material produced, testify to reliability and completeness

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Reliability/ Weight Persuaders

- What does the system do?
- What are the inputs and outputs?
- How long has it been in existence?
- What record is there of failures and glitches?
- If there were failures – what would they look like?
- What security precautions are in place?
- Is there a distinct audit process?
- How specifically has an exhibit or disclosure been produced?
- What is meant by “complete”?

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Forensic Readiness Plan: Additional Requirements

- **Anticipation of "inextricably linked" material:**
  - → Privileged material
  - → Confidential material
  - → DPA conflicts
  - → RIPA conflicts
  - → Employee and 3rd party rights

Eg email databases, other databases, forensic recovery situations

In specific situations may need negotiation, appointment of trusted third party, Single Joint Expert

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Forensic Readiness Plan: Additional Requirements

- **Informal Sources**
  - → apparently insignificant items of hardware which may be drawn into disclosure / have evidence
  - → Laptops
  - → Cellphones, PDAs
  - → Telephone records
  - → Home PCs
  - → External hard-disks, USB st

Likely to be significant arguments about privilege, privacy, DPA, RIPA etc

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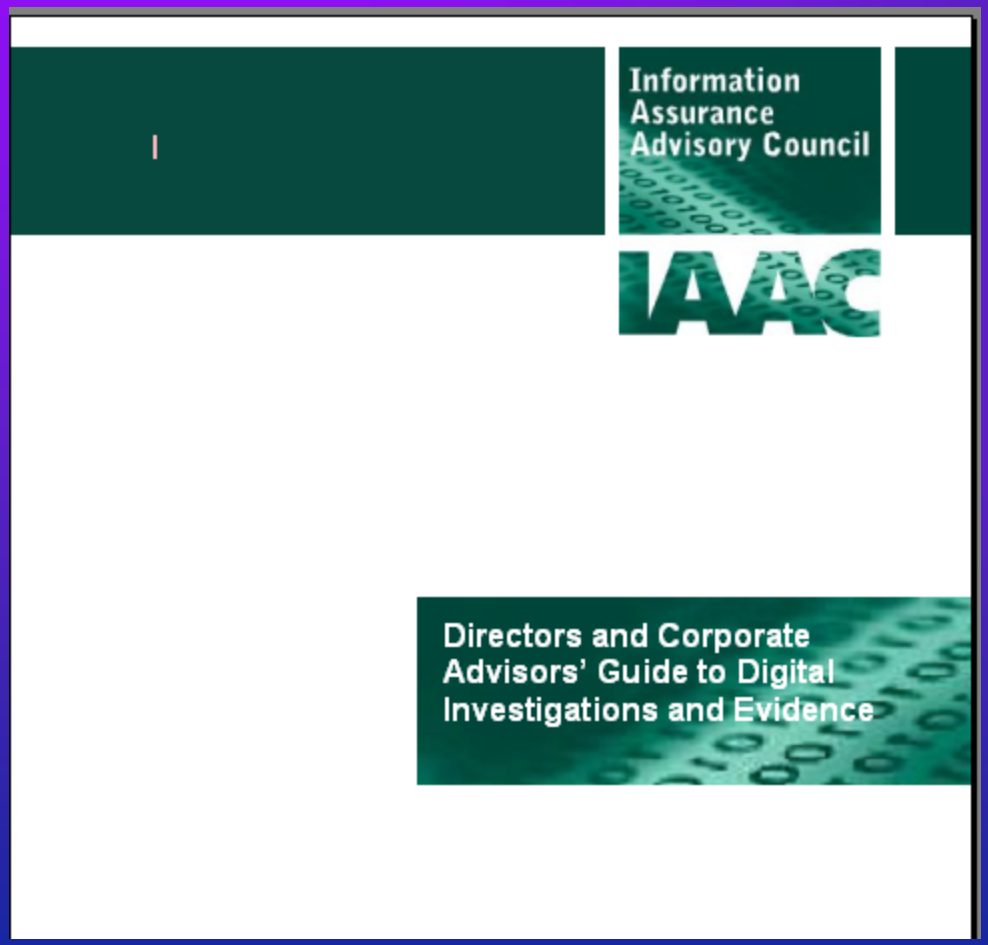
Guide to Digital Investigations and Evidence



First published 2005; new edition due

www.iaac.org

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Forensic Readiness Plan

Who prepares?

- You can use consultants / templates / standards work-books to assist
- But in the end responsibility must devolve to a senior full-time employee of the organisation

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Forensic Readiness Plan

Why have plan?

- To reduce costs and panic
- External consultants will have to “learn” the business
- Lawyers will have to identify admissibility and privilege issues on the spot
- Can also be used for other legal situations, eg internal disciplinary disputes, routine transaction disputes, to aid law enforcement

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Pro-active strategies

- **Compliance with standards and legalistic concern with the problems of admissibility may not be enough**
- **The broader context: to prevail under legal challenge – and at reasonable cost**
- **Main reason for forward-planning: emergency actions are often inadequate and very expensive**

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