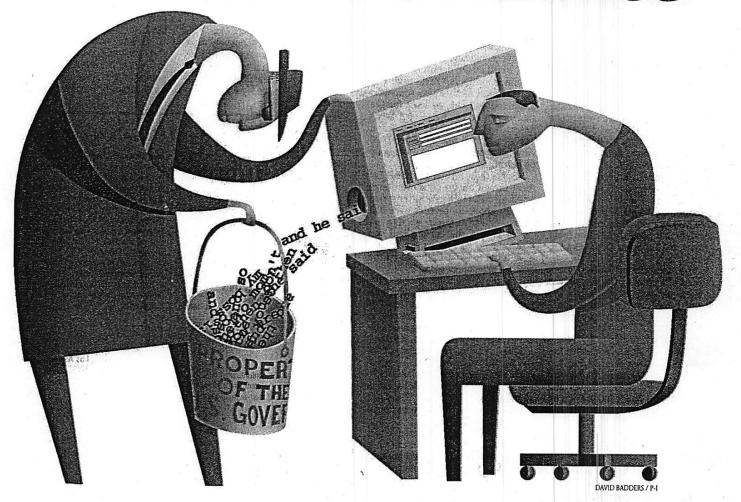
When misconduct allegations surface, e-mail proves vital

Electronic evidence



But it's up to companies to handle it properly

GUEST COLUMNIST

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PUT YOURSELF in the White House. It's Sept. 30. An e-mail from Alberto Gonzales blinks back at you from your computer screen.

Somebody illegally leaked the identity of an undercover CIA officer. And now the Justice Department is investigating.

Every e-mail you wrote from Feb. 1 to Sept. 30 is about to be turned over to the Justice Department's investigators. You maybe never heard of Valerie Plame before news accounts of the leak. But now everything you

wrote to anyone could be scrutinized by people you don't know for ties to the leak.

Mundane correspondence about your job. The note from your college buddy planning that fishing trip next June. That snipe to your office mate about your boss' dumb request for a memo you gave him last week. Embarrassing remarks you made about the political party in power, or a company with significant ties to your spouse's. Those exchanges with your ex . . .

Your inclination is to start deleting stuff.

But forget it. You're had. And your boss will be too unless she preserves every e-mail, relevant or not, embarrassing or not.

In some ways, the White House is like any business. It uses a computer network and its employees use e-mail. White House employees, like employees everywhere, sometimes create problems for their employer. Typically, they don't include divulging the nation's secrets. But they can be big problems for an employer: sexual harassment, theft or wrongful disclosure of company trade secrets, illegal accounting practices, and rogue employee criminal conduct, to name a few.

E-mail evidence is particularly important because e-mails are often the smoking gun, or an e-mail trail leads to the smoking gun. An e-mail revealed the shredding of documents at Arthur Andersen. E-mail exposed Merrill Lynch analysts condemning stocks as "disasters" or "dogs," while Merrill Lynch publicly promoted

According to accounting firm KPMG, 6.6 trillion e-mails are generated in the **United States each** year. To help understand that magnitude, consider the following analogy to time: 6 trillion seconds equals 189,276 years. ... There's a lot of e-mail out there, and e-mail is often the smoking gun in a lawsuit.

Be sure to preserve it

them to investors.

against Frank Quattrone, a former star investment banker. E-mails Clinton/Monica Lewinsky scandal obstruction of justice charges were noteworthy in the President Credit Suisse First Boston staff to 'clean up" files that led to It was an e-mail that asked

evidence are now too numerous and common to ignore the Examples of e-mail as crucial

that litigation is likely duty can arise even before a evidence, including e-mails. This sometimes required to preserve current scandal, businesses are awsuit, when a company learns Like the White House in the

with the Central Intelligence Agency; and

requirements. well served by following these electronic evidence. Businesses are regulatory obligations to preserve are subject to statutory or In addition, some businesses

may need to be preserved as well the electronic record of the e-mails destroying certain backup tapes, when it was prevented from day of the Reagan administration printouts of e-mails. Rather, as the isn't as simple as saving paper White House learned on the last Preserving e-mail, however,

employee misconduct scandal called the Iran-Contra Affair. who was embroiled in an infamous Council employee, Oliver North, e-mails of then National Security Reagan administration contained The federal court later ruled The e-mail back-up tapes in the

recipients of the e-mail. original electronic version, such as it can omit important parts of the that a printout of an e-mail is a data about the sender and "dismembered document" because

paper printouts of their exchanges use e-mail, it is not enough to save involved in the workplace problem herefore, if the employees

potentially incriminating evidence, they'd be better off not to preserve Some executives may think

excerpts from white house memo

STAFF, Sept. 30: ALBERTO GONZALES, WHITE HOUSE COUNSEL'S OFFICE, TO WHITE HOUSE

devices, notes, memoranda, and diary and calendar entries, that relate in any way to: 1. Former U.S. Ambassador Joseph C. Wilson, his trip to Niger in February 2002, telephone calls having been made), correspondence, computer records, storage records of any kind (including but not limited to any records that memorialize present, all documents, including without limitation all electronic records, telephone preserve and maintain the following: "For the time period February 1, 2002, to the "Pursuant to a request from the Department of Justice, I am instructing you to

Wilson, his trip to Niger in February 2002, and/or his wife's purported relationship and/or his wife's purported relationship with the Central Intelligence Agency; Contacts with any member or representative of the news media about Joseph C.

individual(s) acting directly or indirectly, on behalf of these reporters." Contacts with reporters Knut Royce, Timothy M. Phelps, or Robert D. Novak, or any fou must preserve all documents relating, in any way, directly or indirectly, to these

presidential or federal record or even if its desfruction might otherwise be permitted." subjects, even if there would be a question whether the document would be a

consider the consequences. before doing so, companies should to exist in boardrooms today. And lack of corporate ethics that seems another anecdotal example of the reasoning would be illegal, and ollowing through on this knee-jerk will be used against us?" However

considering that it costs next to employee, but failed to produce a lawsuit involving a former settlement this summer for failing expensive lesson, especially required by statute. It was an preserve tapes for three years, as many others because it didn't to retain e-mail backup tapes. drubbing and paid a \$100,000 SG Cowen took a public relations Cowen produced 39,000 e-mails in The investment banking firm

taught. When litigation is likely, companies should immediately and nothing to save backup tapes.
The lesson need not be so hard following measures: simultaneously implement the

copy of this notice. matter and time frame, and keep a may relate to the relevant subject word processing documents that e-mail, electronic calendars, and to retain documents, including Instruct employees, in writing,

> is resolved. are safely stored until the problem network and server backup tapes are not recycled. Pull all archival backup tapes and ensure that they Immediately ensure that

problem is resolved information technology managers to preserve the tapes. There may be and secure location until the and store the duplicate in a safe their hard disk drives are created evidence quality mirror images of these individuals and ensure that with outside counsel to identify in an alleged misconduct. Work more than one employee involved or recycle their backup tapes. But directly to the company's when litigation is likely, talk can be recorded over and re-used to a standard cassette tape in that it purposes. A backup tape is similar disaster recovery and other on their computer system for back up or store data that is saved Therefore, most companies reuse Most businesses automatically

employees sometimes try to destroy try to be even trickier. As we saw in the Arthur Andersen case, are tricky, and people sometimes Computers and hard disk drives

> sometimes they try to destroy electronic evidence by deleting the relevant employees. and investigate the computers of all is necessary to forensically preserve often possible to retrieve deleted make matters trickier, though it is e-mail server's backup tapes. To e-mail may not be saved on the the computer remains in use. So it be automatically lost over time if files for a period of time, they can incriminating e-mail, the deleted tech savvy employee deletes incriminating files and e-mail. If a

a law firm with in house hard disk outside counsel on this process-or copy – or clone – of the appropriate hard disk drives and store the clone in a secure location. Consult with this are privileged. drive imaging capabilities to ensure an evidence quality mirror image the wrongful and automatic that communications surrounding destruction of evidence by creating Protect your company against

the plan to destroy backup tapes containing Iran-Contra Affair erode the White House's credibility charges, either of which would controversy or possibly criminal identity, it will likely result more of the undercover CIA operative's connected to the illegal disclosure mishandles the electronic evidence money. If the current White House cost both the sting of a public e-mail. For SG Cowen, the lesson administration, the duty to for handling this investigation. relations black eye and a lot of And history may yet judge harshly resulted in a protracted legal battle. preserve electronic evidence lesson For the outgoing Reagan

suggests that little sympathy exists for companies and executives who current business and legal climate companies into trouble. The their wrongdoing. that attempt to destroy evidence of outright condemnation for those fail to meet their legal duties, and longer get their bosses or come a time when employees no It isn't likely that there wil The costs can be enormous

This too is not likely to change

STIME AVAILABLE OF

FOR EMPLOYEES:

public trial evidence. employees around you, could mean private will instead become part of those of the company or other remember that your own actions, or When using company e-mail, that correspondence you think is

could be made public in a lawsuit. and links to everyone you e-mailed Presume that all of your work e-mai

be recovered, sometimes easily. delete an e-mail doesn't mean it can't Remember that just because you

family and your friends. Choose them back to haunt you, your company, your Your words in an e-mail could come

FOR EMPLOYERS:

tell employees in writing, as soon as When you learn of a possible lawsuit copy of this notice. possible, to preserve e-mails. Keep a

on paper copies of e-mail secure location. Importantly, do not rely employee computers created. Store the nave mirror-images, or clones, of computer services staff to prevent cloned copies and backup tapes in a backup tapes from being reused, and Take immediate action with your

above to protect your communications. Consult with an attorney on the

evidence – is critically important allegations of employee misconduct including preserving electronic The last thing anyone needs

when faced with an employee

penalty or a loss of credibility. misconduct allegation is a stiff legal

such as e-mail. You may contact him via representing companies and individuals in disputes involving "electronic proofs' his practice on commercial litigation and e-mail at markw@digital-legal.com. firm of Blank & Associates P.S., focuses Mark Walters, a lawyer in the Seattle

