

Electronic record retention

What are the legal duties of a public agency to maintain their electronic records? This month SDRMA invited attorney Neil Meyers of the Daly & Heft law firm, which serves the greater San Diego County area, to provide members with the most current information regarding the retention of electronic records in the workplace.

Electronic Information Must Be Preserved Whenever Litigation Is Reasonably Anticipated

Recent studies estimate that over 80 percent of all work is now created and stored in electronic form. It follows logically that when litigation occurs, the information relevant to the litigated issues was likely created and stored in electronic format. New Federal laws and proposed California laws aim to ensure access to and production of such Electronically Stored Information (ESI) during the discovery phase of litigation. The new Federal “E-Discovery” rules have been in place since 2006, and equivalent State law rules have been introduced in the state Legislature during the 2009-2010 session as Assembly Bill 5. This article discusses the federal and proposed state rules, and a public agency’s obligation to preserve ESI in anticipation of litigation.

Definition of ESI

The Federal rules define ESI as any writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations stored in any medium from which information can be obtained. The proposed California statutes define ESI as information that is stored in an electronic medium. The statute further defines “electronic” as relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.

Duty to Preserve ESI

The duty to preserve ESI begins when the client reasonably anticipates litigation. Both the Federal and the proposed California statute provide that absent exceptional circumstances, a court may not impose sanctions for failure to provide ESI that is lost, damaged, altered, or overwritten as a result of the routine, good-faith operation of an electronic information system. However, once litigation is anticipated, the loss, damage, alteration or overwriting of known and discoverable ESI is no longer a routine or good faith activity, subjecting the client to potentially devastating evidentiary and monetary sanctions.

“Reasonable Anticipation of Litigation”

Federal law uses the term “reasonable anticipation of litigation” as the trigger mechanism for the duty to preserve ESI. The same standard will likely be adopted in California. Reasonable anticipation of litigation is determined on a case-by-case basis considering the facts and circumstances known to the agency regarding the potential for litigation. The few cases that so far have addressed this issue hold, for example, that future litigation must be “probable” which has been held to mean “more than a possibility” of litigation. Under this standard, the receipt of a government or administrative claim or a letter from the plaintiff’s counsel threatening a lawsuit probably triggers the preservation obligation. However an agency will have to determine on a case-by-case basis whether it “reasonably anticipates litigation” after a difficult or contentious disciplinary action or termination. The same is true with a police action or accident resulting in serious injury or death.

Litigation Hold Procedures

Once it is determined that the “reasonable anticipation” threshold is met, the agency must then initiate “litigation hold” procedures in order to preserve all evidence that it knows may lead to the discovery of admissible evidence in the case. Some cases discuss that upon recognizing the threat of litigation, a party need not preserve every shred of paper, every e-mail or electronic document and every back-up tape. However, the duty to preserve extends to ESI, documents or



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tangible things made by individuals likely to have discoverable information relevant to the claims and defenses of any party, or which is relevant to the subject matter of the dispute. A significant burden is placed on both agency staff and its legal counsel to affirmatively inquire and search for ESI that may be subject to the hold. In one recent well-known example, a technology corporation was sanctioned over \$7 million, and their lawyers were referred to the California State Bar for possible disciplinary action, for their failure to meet their affirmative burden to search for, locate and preserve relevant ESI.

Litigation Hold Response Team

For an organization of significant size, having many departments, employees and ESI sources (desktops, laptops, servers, PDA's, surveillance cameras, dispatch tapes, etc.), many commentators recommend the development of litigation hold "response teams" that can immediately locate and protect ESI. In general, the team should include the agency's IT department staff or consultant and legal counsel. The team will (1) determine the preliminary scope and subject matter; (2) identify and list all persons with knowledge of facts that may relate to the pending or potential litigation, including persons who created, edited, communicated, handled, or had custodial responsibility for potentially discoverable ESI, documents and tangible things; (3) develop a plan for preserving; and, (4) immediately preserve all potentially discoverable ESI, documents and tangible things held by persons with knowledge of facts that may relate to the pending or potential litigation.

Production of ESI

Of course, the required preservation of known discoverable ESI is just the first step in the process. If litigation never happens, the hold is removed and the information falls back into the agency's routine systems operations, including its document destruction policies. If litigation does begin, the production of ESI is governed by either the Federal or likely the proposed State rules of civil procedure. Under Federal Rule 26, within just a few months after service, the agency, through its lawyers, will need to unilaterally exchange "reasonably accessible" ESI. Under the proposed California statute, employing the same "reasonably accessible" standard, the agency will need to produce its ESI within about 30 days of its lawyer's receipt of a demand for production from opposing counsel. If the ESI source exists, but is not reasonably accessible, the statutes provide for protective order motions to control the undue burden and/or expense of accessing that data, pos-

sibly shifting some or all of that cost to the opposing party or setting other conditions.

Conclusion

An event that may result in litigation requires careful consideration whether ESI litigation hold procedures should be implemented. Agency "first responders" such as its risk managers, HR professionals, claims adjusters and legal counsel should be aware of these issues in order to initiate a collaborative inquiry and determination. If it is determined that the preservation duty is triggered, then immediate efforts are required to locate and preserve the discoverable known ESI within the agency electronic storage systems.

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