



Crossroads

Developments in electronic records management and information technology

NAGARA Crossroads 2009-1

This issue of *Crossroads* continues a series of white papers on various topics related to electronic records written by members of the Committee on Electronic Records and Information Systems (CERIS). This white paper covers the topic of legal discovery and how it impacts records management. It was written by **Caryn Wojcik**, government records archivist with the Michigan Historical Center, Department of History, Arts and Libraries.

CERIS White Paper

Discovery: How the Legal Process Can Impact Records Management Professionals

Discovery is a pre-trial process in which each side requests relevant information and documents from the other. Parties must provide the requested information or documents or show good cause to the court why they should not have to do so.

Discovery is not a new process, but one that has existed for many decades. However, the widespread use of computers to conduct business in both the private and public sectors, as well as for personal use, has forced the courts to address the unique challenges that using electronically stored information (ESI) as evidence pose in the legal process. As a result, the Federal Rules of Civil Procedure (FRCP) were amended in December 2006 to address electronic discovery. "E-discovery" is the process of collecting, preparing, reviewing, and producing ESI in the context of preparing a case for trial.

The changes in the FRCP include an obligation for lawyers to "meet and confer" early after a case has been filed,

to discuss e-discovery matters including formatting, preservation, and access to documents in the form of ESI. Since 2006, many professions that previously did not concern themselves with the litigation process (including many records management (RM) professionals) are learning that they may have an enhanced role in litigation, particularly in the discovery process.

This issue of *Crossroads* identifies the types of questions that may be asked of a RM professional throughout the course of the legal discovery process. These questions are intended to document how records are managed and destroyed in the "normal course of business" and to verify the authenticity of any information gathered. RM program managers should consider how they or their staff would respond to these types of questions, and whether new policies or procedures are needed to better prepare their agency for the eventuality of a legal action.

General Questions

- When was the RM program created?
- Which government agencies does the RM program serve?
- How many people are employed in each job classification level within the RM program?
- Has the RM program issued records management policies and/or procedures for government employees to follow? Were these documents also issued to contractors/ vendors, volunteers, students, etc.? Do these policies/procedures or supplemental documents address and the retention of electronic records? Do they specifically address the retention of e-mail messages?
- How are the policies/procedures distributed to the intended audience (government employees, vendors, volunteers, etc.)? What training programs are available to government employees to distribute the information?

Record Retention Questions

- Does the agency involved in this legal action have one or more approved records Retention and Disposal Schedules? Do such schedules cover electronic records?
- How were the schedules developed? Who inspected the records listed on the schedules? What appraisal criteria influenced the selection of the retention period(s)? Were federal/state/local laws and regulations consulted when selecting the retention periods?
- Who approved the schedules?
- When were the schedules approved?

- Are these the first versions of the schedules, or were other versions of the schedules in place when the relevant records/data to this legal action were created? Can you produce older versions of the schedules?
- Does anyone audit compliance with the schedules? When and whom?

Record Storage Questions

- Is the RM the physical custodian of any records created by the agency involved in this litigation?
- What documentation does the RM agency have about the contents of these records?
- How is the chain of custody for these records documented?
- Who had access to these records while they were in storage? Can you identify the dates when the records were accessed and by whom they were accessed?
- What procedures does the RM program follow when disposing of records that it is the physical, but not legal, custodian of?
- What procedures are used to preserve or hold records that are scheduled for disposition? What procedures are used to release holds? What documentation exists to demonstrate that these procedures were followed?
- Have any records relevant to this litigation been transferred to the government's archives?

RM Database Questions

- Does the RM program employ a database to manage any of its business processes? If so, which business process(es) does it support?
- Is the RM database backed-up for disaster recovery purposes? If so, how frequent are the full and incremental backups?
- What audit trails are employed to track access and modifications to the RM database? How long are the audit trails retained?
- How do users access/log into the RM database? How are passwords and access rights assigned?

Evidence Preservation Questions

- When were you instructed to preserve potentially relevant records/data relating to this legal action? Who instructed you? How did you receive the instruction (is there a document that contains the instructions)?
- Once you received instructions, what actions were taken to:
 - Preserve potentially relevant electronic and paper records
 - Notify employees, consultants, contractors and other third parties (such as other government entities or private sector partners/clients) to stop deleting or altering potentially relevant records/data
 - Prevent PCs of key individuals from being disposed of should they leave the agency or receive new equipment
 - Prevent key individuals from destroying or altering relevant records/data
 - Prevent vendors or service providers who are storing and

maintaining records/data from destroying or altering relevant potential evidence

- Prevent automatic purging or overwriting of data or records on active computer systems (including e-mail, databases, etc.)
- Prevent backup tapes from being overwritten
- Suspend normal destruction of records/data
- Remind employees of the existence of a litigation hold
- What changes were made to the backup tape rotation cycle to accommodate the litigation hold? When were these changes implemented?
- How did you determine that the correct tape(s) were held?

Litigation Support Questions

- Can you identify agencies or individuals who possess data/records that are potential evidence to this legal action?
- What records series are relevant to this legal action? How are these records created? How can we verify their authenticity?
- What format do these records series exist in? What metadata may exist about these records?
- Are you aware if any of the data/records involved in this legal action contain private or confidential information?

Bibliography

- For additional questions, see Nelson, Sharon D., Olson, Bruce A. and Simek, John W.; [The Electronic Evidence and Discovery Handbook](#); American Bar Association Publishing; 2006.
- Many states have adopted e-discovery rules. A listing of them is available at <http://www.ediscoverylaw.com/2008/10/articles/resources/current-listing-of-states-that-have-enacted-ediscovery-rules/>.
- The Sedona Conference® is a very good general resource on all matters involving e-discovery www.thesedonaconference.org.
- Caryn Wojcik also developed a list of potential questions that could be asked of information technology departments as part of a legal discovery process http://www.nagara.org/associations/5924/files/Crossroads_2009_1-Discovery_Questions_IT.pdf.

All hyperlinks in this issue were valid as of the date of publication.

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