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How Many More Excuses In e-Discovery?

As the growth of electronic documents and data reaches exponential levels, so does the volume of electronic evidence that now needs to be considered in the event of litigation. These developments have placed a hefty price tag on businesses in terms of e-discovery and the need to find and retrieve disparate records for specific cases.

The potential pain is even greater for companies that have not put the appropriate technologies in place to streamline this process. Historically, UK courts have retained some sympathy for an exasperated defendant challenged with retrieving electronic data for the e-discovery process, particularly if it was felt that the plaintiff was planning an extended "fishing expedition".

The US, on the other hand, has definitely changed its tune on litigation readiness and e-discovery, introducing major changes to the Federal Rules of Civil Procedure (FRCP) on December 1, 2006. So, when and why did the courts start to care about things such as "electronically stored information"? Think back to the spring of 2006 and the now infamous Morgan Stanley case. Morgan Stanley became the poster child for litigation non-readiness and how to botch an e-discovery requirement. The financial services conglomerate was hit with a huge penalty in part because it couldn't guarantee that it had produced every e-mail related to a particular transaction. In its own defence, the company tried to ensure it had produced all relevant records, yielding more and more e-mails on previously lost tapes that had to be combed through. Eventually, the judge lost patience.

Legislative minefield

Despite high profile e-discovery cases and the subsequent clamp-down on any suspected wrong doing in America, it seems that the UK has yet to get to grips with e-discovery. Corporate data is governed by a complex array of legislative frameworks, which vary depending on the organisation's trade and location, leading to confusion over what data to retain and for how long. Companies have long complained that simply understanding the sometime conflicting requirements needs a sound legal practitioner and is not just for the faint hearted.


For example, companies need to take into account:

- The 1985 Companies Act: this defines mandatory data retention requirements relating to accounting records to enable an organisation to explain a company's transactions
- The Data Protection Act: covering how an organisation processes personal data from conception to destruction
- The Finance Act 1998: requires an organisation to retain data to prove that it has delivered a correct and complete tax return



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- Civil Procedure Rules 1998: specifying rules for electronic data disclosure, in the event of litigation.

In this regard, the UK is not alone in that the lack of an umbrella law that encompasses all the obligations that organisations must adhere to when handling electronic records for whatever reasons. As a result, organisations are baffled about how much data to retain, for what length of time and in what format, and precisely how to handle data in the event of litigation. And, as it is unlikely that any umbrella legislation will be introduced, organisations must get to grips with the requirements that they must adhere to as well as to start to consider best practices, before it is too late.

The clock is ticking

To date, specific timelines over the retrieval of data in a litigation case remains unclear, with only lip service being paid to the issue. In March 2005, the Litigation Support Technology Group (LIST) published a draft practice direction for the use of technology in civil proceedings, addressing electronic disclosure. It defined that the cost of collation, retrieval or analysis of electronic documents must be proportionate to the case. Meaning, it is at the discretion of the judge to dictate how long a company has to produce requested records and whether the cost of doing so would outweigh the charge against the company.

So, does this imply that it is only when amendments to the Civil Procedure Rules are made that UK companies will really feel the pressure of e-discovery preparedness? A Litigation Trends Survey conducted by Fulbright & Jaworski LLP in 2006 revealed growing number of lawsuits for UK companies – with companies reporting more than 50 pending lawsuits, tripling from 2005 to 2006 (compared to numbers doubling for their American counterparts). This litigation culture is likely to test the e-discovery preparedness of UK companies, before the amendments to the Civil Procedure Rules come into force. The recent AMD anti-trust action against Intel highlights how a company's e-discovery capabilities can be tested in a litigation case. The impact of e-discovery on Intel in this case is staggering; it has so far had to deliver 17 million pages of documents to AMD. Given the potential costs involved in document preparation, companies that do not have the appropriate systems in place to produce documents on demand will find it increasingly difficult (and cost-prohibitive) to manage litigation to their best advantage.

So, how expensive is it to recover data on request and does the process preclude some organisations from meeting an e-discovery request? The answer to the first part of the question is "it depends". For organisations still relying on tape restoration and traditional services from litigation support companies, the final bill can run into millions. For forward-thinking organisations that have implemented the appropriate archiving technology and the right policies and procedures to manage the data, tape restoration costs are eliminated. A conservative estimate shows that more than half of litigation support costs can be removed.

What is required?

The Commercial Court Working Party's Report on Electronic Disclosure has defined the processes of disclosure obligations as:

1. Identify how many of the documents which might be relevant to the case have been created by electronic means;
2. Identify whether these electronic documents have been preserved and where they might be stored;
3. Retrieve, and search for, any relevant electronic documents;





4. Conduct a review of the electronic documents;
5. Produce the electronic documents, ideally in an agreed format.

Any organisation under scrutiny must be able to document these processes in a way that when it is produced to the court as evidence, it has full evidentiary weight in court. It came as something of a surprise that Morgan Stanley wasn't able to deliver such evidentiary certainty in the Perelman case. It failed to satisfy the court that it had handed over all records requested. Morgan Stanley is not exactly a novice in the area of data management. It has billions in reserve, sophisticated executives in the boardroom, high-priced counsel on the payroll, stringent data retention policies in place and an expensive technology infrastructure. Yet, despite this, it received sanctions totaling more than \$1.45 billion – this would seem a high price to pay for not implementing appropriate technology. But in Morgan Stanley's case, that's what it boiled down to.

With judges having to become more technically savvy, given that most discovery orders now involve e-discovery, companies should no longer assume that the courts will assume such a discovery order is too costly.

Getting to grips with data capture and discovery

If data retention is addressed by the appropriate technologies and policy procedures, the electronic discovery process can be cut down to a manageable cost. Meaning, the call for endless delays to deliver records could be a thing of the past. So, how do companies get into a position of "knowing before they go"? Unfortunately, there is a lot of work to be done to get companies into this position. The Fulbright & Jaworski LLP 2006 survey revealed just how un-prepared UK companies are when it comes to e-discovery, with 35 per cent of UK organisations admitting that they were "not at all" or "poorly prepared" to handle e-discovery issues.

So how can this be fixed? The first step is to understand that "traditional" methods that rely on tape backup don't cut it any longer. Organisations need to develop policies that determine which records to keep and for how long. A streamlined process that automatically enforces policies is essential to ensure a compliant framework for creating a corporate memory with expert recall for legal discovery and compliant destruction for continual risk mitigation. Ideally, the organisation should implement a centralised and integrated archive to manage the retention and disposition of all electronic records (and not just e-mail) and make them easy to search and retrieve as needed. While many organisations have been focused on retention, today's litigation requirements mean that accurate search and fast retrieval are now equally important. Organisations also need to think about migrating historical data from disparate locations, including tape backups, to the centralised archive to ensure that these records are also indexed and categorised for future search and retrieval. The categorisation should include the retention, destruction and security privileges relating to that item of data – enabling data to be destroyed at the right time.

During the data transfer process the inter-relationships between individual data elements must be retained to support specific requests for information. For example, the retrieval of data must allow for cross-matching of information, so that data pertaining to a specific record can be easily retrieved on demand. This 'data-mapping' will enable organisations to be able to understand where all documents relating to a particular project, individual or customer are located (and thereby isolate and collect them on demand). By managing the growing volumes of electronic content in this way and accessing it through a single online portal, organisations not only quickly have access to the information they require, they also ensure that country-specific data retention and management

requirements can be adhered to. For example, data entered in each country can be tagged to maintain compliance with local legislation, ensuring that varying laws in each country are not overlooked.

Accused of deleting?

E-discovery is as much about proving that relevant documents have not been destroyed as it is the production of relevant documents. When the spot light is on, the temptation to delete an incriminating email or file is a very real one. Recently, the cash for honours debacle highlighted the potential for incriminating correspondence to be the focus of a re-investigation. When documents appear after the litigation case or investigation has begun, it is for the courts to decide whether this information was purposely withheld. The legal ramifications of destroying potential evidence could result in a judge presuming guilt in the litigation case, or the accused being charged with attempting to pervert the course of justice.

It is therefore essential to halt all routine document destruction after the onset of a litigation case. It is not enough to just give instructions to employees that documents must be preserved (as highlighted in the current Intel case). In the same way that routine retention and archiving should be automated, legal case hold must be automated and managed, independent of users who may or may not be tempted to alter or delete records. Practically speaking, the only way to manage this is through a centralised archive with integrated retention and case hold capabilities. In addition, the existence of a well-observed document destruction policy will help to counter any accusation of improper motives in the event of litigation (such policies should be regularly reviewed to ensure they comply with evolving best practice). Most importantly, a detailed audit of what data and records are stored, what needs to be purged and what data is retained is crucial to delivering evidential certainty.

Conclusion (The end is near)

While there is still some scope to request the court's grace when it comes to an e-discovery order, the clock has been ticking for some time and judges are becoming aware that affordable technology has existed for some time to manage e-discovery requests. Do not expect that endless delays in e-discovery will be accommodated. Businesses that don't want to be at the mercy of a judge in a litigation case, need to get to grips with the appropriate policies and procedures that accommodate all the legislative requirement that relate to their business.

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