Illustration: Neil Webb

Managing electronic disclosure

Part two

In this article, the second in a two-part feature, Mark Huleatt-James and Richard Lewis examine how large companies can best prepare for and manage electronic disclosure exercises.

As electronic documents replace hard copy as the documentary foundation of court proceedings, companies are increasingly required to engage in electronic disclosure exercises. Given the complexity of these exercises, companies should be pro-active and plan for the possibility that they will occur. Time and effort spent by a company at a preliminary stage are unlikely to be wasted where the organisation will, in all likelihood, have to give disclosure of its electronic documents at some time in the future, with the added benefit that when that time comes, much of the work has been done.

This article, the second of a two-part feature, provides guidance to large companies on how to prepare for and manage an electronic disclosure exercise. It also explains how the disclosure exercise can be used to provide additional benefits to an organisation.

The first part of this feature considered the background to electronic disclosure and the obligations on parties to existing or contemplated litigation. Both parts of the feature draw primarily on the position under English law (and, to a lesser extent, US law). However, the first article includes a comparative table illustrating the approaches courts take towards disclosure in various jurisdictions (*see Managing electronic disclosure: part one at www.practicallaw.com/6-204-1350*).

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Data protection issues

One problem that is peculiar to electronic disclosure is how to deal with personal or part-personal e-mail communications. Since business e-mail is now used by most employees for the purposes of personal communication (despite most companies' warnings not to do so), the collection of an employee's "inbox" and "sent items" folders is likely to pick up a significant amount of personal correspondence. Quite apart from the sheer volume of irrelevant material that is likely to be collected in this way, this also raises serious legal questions in relation to a company's data protection obligations.

In England and Wales, for example, the Data Protection Act 1998 (DPA) imposes restrictions on the processing of personal data, which is defined broadly as any data "which relates to an identifiable living individual". The vast majority of personal e-mail communications usually fall within this definition and the act of preparing material for production along the lines outlined above usually amounts to "processing" for the purposes of the DPA. Where personal data is processed, the subject of the personal data gains rights to have access to the data in question and the party to litigation becomes subject to certain confidentiality obligations, such as the obligation not to transfer the data outside the European Economic Area unless the destination country offers "adequate" protection.

Given that data protection law is less stringent in the US than in the EU, it may be the case that production of personal data in cross-Atlantic litigation is in breach of the DPA.

Where electronic data is reviewed manually for relevance, this issue is unlikely to present major problems as personal e-mails will merely be removed as irrelevant (or redacted (edited) in the case of part-relevant, part-personal e-mails). However, if the population is large enough to make manual review prohibitively expensive, electronic keyword searches can be used to determine relevance. Any keyword search is likely to return false positives, and some of these false positives may amount to personal data. For example, if a company employee is going through a divorce and reviews the papers over e-mail before returning them to his solicitor, such communications could be picked up by a keyword search designed to locate documents of a legal nature.

(*For more detail on data protection issues, see Ensuring data protection compliance at www.practicallaw.com/0-107-4759 and Employee monitoring: highlighting the issues at www.practicallaw.com/7-200-9482*)

Preparing for electronic disclosure

An electronic disclosure exercise is unlikely to be cheap, even if conducted in the most efficient manner possible. As a result, it is imperative that planning at the outset is as comprehensive as possible to avoid having to revisit aspects of the project once it is underway. Good planning helps prevent costly and possibly irredeemable mistakes (such as data loss) being made.

A company would be well-advised to coordinate its efforts with experienced external lawyers at this early stage in the process, particularly if it has not undertaken a large electronic disclosure exercise before. A number of law firms have increasing expertise in this area since it is becoming a significant part of almost every major piece of litigation they handle. They can provide educated guidance regarding such issues as likely data sources and appropriate technologies.

When planning an electronic disclosure exercise, the following issues should be identified at the outset:

- What the company hopes to achieve from the data collection process.
- Where company data is located.
- The admissibility and weight (as evidence) of electronic documents.

What the company hopes to achieve

A data collection exercise might be undertaken for a number of reasons, including to:

- Allow for electronic searching.
- Allow for various types of file (that is Word, Excel and so on) to be searched by a single application.
- Integrate electronic and hard copy material.
- Preserve all relevant metadata attaching to original electronic material.
- Allow for additional coding to be added (for example, privileged information).
- Allow for each document to be assigned a unique document number (a Bates number).

Locating data

It is crucial to give early consideration to where the company's data is located (including data which a company has the right to access). It is possible, especially in this era of outsourcing, that a company's data is stored overseas, in which case it is necessary to consider issues ranging from possession and control (*see Managing electronic disclosure: part one at www.practicallaw.com/6-204-1350*) to data protection (*see box, Data protection issues*). It is also important to establish whether any companies to whom storage of data has been outsourced have made back-ups of that data and where such back-ups may be stored.

In England and Wales, the accessibility of, and costs involved in, retrieving materials on back-up tapes are necessary considerations when assessing what constitutes a "reasonable search" under Practice Direction to Part 31 of the Civil Procedure Rules (PD31 of the CPR), which came into force on 1 October 2005. This issue also applies in US litigation, as back-up tapes may need to be produced. (*See below, Assessing the scope of the exercise, and Managing electronic disclosure: part one: Reasonable search at www.practicallaw.com/6-204-1350.*)

Admissibility and weight of electronic documents

In England and Wales, admissibility of electronic evidence is governed by the Civil Evidence Act 1995. Such evidence is, for the most part, admissible.

The evidential weight given to electronic documents at trial is primarily a matter of common sense for the judge to decide in light of all the relevant circumstances. It is worth bearing in mind, however, that the

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fact that electronic documents are by their very nature easy to manipulate means that their evidential value is not always guaranteed. As long as a company has appropriate and well-documented procedures in place for storing electronic information, and compliance with these procedures can be demonstrated, there should usually be no major concerns about the evidential weight given to the electronic information in civil proceedings.

The admissibility and evidential weight given to electronic documents in a US court are governed by the Federal Rules of Civil Procedure. Electronic documents will almost always be admissible and the evidential weight of an electronic document will usually be equivalent to that of an original paper document.

Although it may seem as though it is best to consider the admissibility and weight of documents at the end of an exercise, it does make more sense to think about this issue at the outset. By considering at an early stage what types of documents can be used in court and what effect they might have, informed decisions can be made about the type of sources that should be searched.

Managing the disclosure exercise

When beginning an electronic disclosure exercise, a company should first:

- Establish a master plan. It is important to approach the process from the outset as a project management exercise. A master plan detailing the work that has been done, the work that still needs to be done, by whom it should be carried out and by when helps to ensure that a company runs the exercise as efficiently as possible.

- Assess available resources against the timescale within which the project should be completed. By undertaking this exercise at an early stage, a company can make provision for any additional resources it might need as the project develops.

Once these preliminary steps have been taken a company should:

- Place potentially relevant information on hold.

- Assess the scope of the exercise.

- Consider whether to use any of the technologies available to simplify the process.

- Ensure that data identified as potentially relevant is preserved.

- Remove duplicated documents from those collected (the process of de-duplication).

- Determine how to review the data collected to find relevant information.

- Consider storing the collected data on a host system for review before it is imported into any litigation support system.

- Determine the format in which relevant data is to be produced to the other party to the litigation.

Placing information on hold

The first thing that a company must do when litigation is in prospect is to ensure that all potentially relevant information is immediately placed on hold so that it no longer falls within a company's routine document destruction procedures. The most common way in which a party to litigation can fall foul of a court due to its disclosure practices is a failure to preserve potentially relevant information after such time when litigation is clearly in prospect.

It is also important to note that the scope of documents that must be preserved once litigation is in prospect may, and usually will, be broader than the scope of documents that will ultimately require disclosure. In England and Wales, the 2004 Commercial Court (Cresswell) working party on electronic disclosure briefly considered the scope of documents that should be preserved once litigation is in prospect. It considered that, in principle, the obligation to retain documents should extend not only to documents that would ultimately fall within standard disclosure, but also to any other documents that may be relevant to the litigation and especially those that could later be the subject of an application for specific disclosure.

The hold order, or preservation notice as it is sometimes known, should:

- Identify the key players and events in the litigation in question.

- Identify the business units affected (for example, marketing, research and development and so on).

- Be distributed to all who may be affected by it.

Consideration should also be given as to which third parties, if any, should be notified of their duty to retain documents. Third parties that can be affected in this way might include lawyers, accountants, consultants and contractors, all of whom may have relevant information in their own records held on behalf of the company that is a party, or potentially a party, to litigation.

Merely circulating a hold order, however widely and in however great detail, might not be sufficient to protect a party to litigation if relevant material is destroyed in any event. It is important that a company recognises that employees may not sufficiently acknowledge a hold order and that it therefore needs to take additional steps to ensure compliance. After circulation of the initial hold order, a company should consider taking the following steps to ensure employees' compliance:

- Re-circulation of the hold order at regular intervals.

- Suspension of policies asking for employees to delete e-mails.

- Modification of user privileges allowing employees to delete or alter electronic documents (including e-mails).

- Restriction of activities that might lead to the alteration of metadata, such as moving or copying files.

Inadvertent destruction of documents must also be avoided. If a company does a haphazard job of enforcing hold orders, with the result that documents that could be key to either side's case are destroyed, it can be difficult to persuade a court that

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these records were not selectively "lost" and may lead to an adverse inference being made against the offending party.

Assessing the scope of the exercise

In England and Wales, parties are required to conduct a reasonable search for disclosable electronic documents, as clarified by PD31. Under recent amendments to the discovery rules in the US (which come into force on 1 December 2006) there is also a requirement of reasonableness, in that litigants will usually need to produce all reasonably accessible electronic information that is responsive but not privileged. (*See Managing electronic disclosure: part one: Reasonable search at www.practicallaw.com/6-204-1350.*)

When a party to litigation in England and Wales or the US comes to assess the scope of an electronic disclosure exercise, it is important that it bears in mind the requirement of reasonableness when determining the sources of documents and extent of the search to be undertaken.

First, companies should identify all sources on which relevant data is likely to be held. These sources are likely to be more extensive than those initially identified. They extend beyond the obvious sources, such as the company's central server and the individual employee's PC to additional sources such as floppy disks, CDs and DVDs, laptops, databases, back-up tapes, home PCs, voicemail, handheld devices (such as Blackberrys), personal digital assistants and, in some cases, mobile phones (which may hold relevant text messages). Possible sources can also include external servers to which the company has access.

An attempt to identify the relevant data sources should not necessarily be confined to the physical locations in which data is held, but should also include consideration of which employees and departments are likely to have relevant material. After identification of the relevant individuals, a decision must be made regarding whether to either:

- Collect from these individuals all information stored on the data sources described above; or

- Rely instead on the individual concerned (or a legal assistant in association with the individual concerned) to identify those folders of e-mails and other electronic documents that they think are relevant to the litigation, and collect only that material.

The main advantage of selective collection, especially in sizeable matters involving large corporations, is a big reduction in the costs associated with ploughing through huge numbers of mainly irrelevant documents. These savings do, however, come with related drawbacks, as there is a significant risk of missing important material, which would necessitate returning to the data source later on in the exercise. There may also be a lack of consistency within the collected set, as selection depends on the judgment of a number of individual employees with different levels of knowledge of the issues.

Technology suppliers

The effort involved in electronic disclosure can be reduced by specifically designed technologies aimed at simplifying the process. There are a large number of different technologies on the market and they do not all perform the same functions. To the uninitiated in-house counsel the variety of technologies can seem overwhelming. See box, *Available technologies* for some guidance on the different technologies on the market.

Preservation of underlying data

Once what is considered to be relevant data has been identified, great care must be taken to preserve its integrity. It is important to appreciate that there is more information contained, for example, in an e-mail than what appears on-screen. The underlying information that lies behind every piece of electronic data is known as metadata (data about data). Metadata includes such information as when a file was created, edited and deleted and, in the case of e-mails, when the e-mail was sent, received, read and forwarded. If the authenticity of such an e-mail is later challenged and the e-mail has been collected in such a way as to ensure the preservation of underlying data, the prospects of defeating such a challenge will be greatly improved.

Metadata is by its nature fragile and, if the requisite care is not taken, can be compromised by the very act of data collection and processing. It is therefore important either to choose a method of data collection that does not compromise the metadata, or that the correct metadata is archived before it is altered by the collection process. Suppliers of electronic disclosure technology should be able to recommend approaches to deal with this issue (*see box, Available technologies*).

Data processing

Once all the potentially relevant data has been collected, it must be manipulated in such a way that it can easily be both searched against and reviewed. Many electronic documents will not at first be in a suitable format due to their being, for example, password protected, encrypted, compressed, corrupted or unsearchable by nature (that is, TIFF or some PDF files). It is necessary to resolve all (or as many as possible) of these issues, especially if conducting an initial relevance search using keywords, as such a search is not comprehensive if run against unrefined data.

Most of these challenges can be addressed with relative ease (for instance, it is fairly straightforward to make PDF files searchable, although in some cases they may need correction where the scanning is of poor quality) but they should be discussed with the company's technology provider at an early stage. It is prudent to factor in additional processing time (and cost) to deal with these types of complexities.

De-duplication

The ease and regularity with which e-mails and their attachments can be sent to multiple recipients can result in significant numbers of such documents appearing again and again within the collected set. If the set were to be reviewed before the removal of these duplicates, not only would significant time and cost be wasted, but the review of the same document by different reviewers would raise the issue of conflicting decisions regarding both relevance and privilege.

The removal of duplicate documents from the collection is known as "de-duplication" and can be carried out using the metadata of documents to identify two or more doc-

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Available technologies

There are four groups of technologies currently on the market to deal with electronic disclosure. Some of these are designed to deal with more than one element of the process:

Litigation support tools
Products such as Concordance, iConnect, Ringtail, Summation and Zantaz/Introspect are the traditional tools on the market and are regularly used by most of the leading law firms. They take and present information in scanned or native format (that is, data retained in its original format, such as Word or Excel, rather than scanned as either TIFF or PDF) and display it along with any coded information. These products have recently become more adept in dealing with native format files and providing simultaneous access to users around the world. Some of these products can be hosted by external suppliers.

Visually-orientated litigation support tools
Products such as Attenex and Aungate are characterised by their visual, top-down approach to dealing with data, which allows users to see visual representations showing, for example, which individuals were involved with particular issues and the amount of communication they entered into with other individuals. This is useful when considering information flows in an organisation rather than specifying a traditional search term based on the fielded information in the documents such as authors, addressees or dates. They encourage counsel to take a far more hands-on approach to the interpretation of information, enabling them to interpret and manipulate the data in a way that allows different inferences to be drawn.

In-house tools
Tools such as Kroll's EDV or Lexis Nexis's Applied Discovery are used in litigation support organisations or by consultancies looking to extend their product base and to offer a wider portfolio of services to their clients.

Non-legal tools
These are products designed mainly for sophisticated electronic searching, including concept searching, such as Autonomy (Aungate), which have been around in the corporate world for some time but can also be used in a legal environment.

Outside the core group of products, a niche sub-group of products exists to provide tools and utilities to help with specific issues arising in the course of electronic disclosure. One such issue is how to deal with the inevitable duplicates that are typical of electronic disclosure. Products such as Equivio can deal with this issue.

uments that are in fact duplicates of one another. The process of de-duplication is usually carried out across the mailboxes of all custodians whose documents have been collected and can result in reducing the total document population by as much as, or even more than, 50%, dramatically reducing the cost of review.

One potential pitfall, however, of undertaking de-duplication as described above, could occur where a duplicate e-mail is removed from the document set of every custodian but one. If the custodian whose copy of the e-mail is retained is later excluded from the review, the e-mail in question may never be reviewed or produced. It is advisable, therefore, to keep track of the de-duplication process to allow re-population of de-duplicated items in such a situation.

Review

Once the data has been collected and de-duplicated, parties need to consider how they intend to search such data sources for relevant information. Given the huge volumes of material likely to be found in electronic form (usually far more than would be the case in a hard copy review), it might not be necessary to review each and every document in its entirety for relevance. In England and Wales, an alternative approach envisaged by PD31 might be to use electronic searches to reduce the initially large document population to a slightly more manageable level. Such electronic searches could take the form of either:

- Straightforward keyword searches, in which the application searches only for the terms specified; or
- Concept searches, a more sophisticated search method where the application's search is expanded to include synonyms of the specified terms.

One of the key provisions added by PD31 is the obligation of the parties to discuss any issues that may arise regarding searches for electronic documents before the first Case Management Conference. These discussions should include both the data sources to be searched and the method by which the searching is to be carried out. If these issues are discussed and agreed at an early stage, as envisaged by PD31, the likelihood of either party having to go back and search for additional documents further down the track should be greatly reduced.

Finally, remember that one of the keys to conducting a successful search for electronic data is the maintenance of a transparent audit trail. This makes the party giving disclosure far less vulnerable to accusations of performing an inadequate job.

Hosting

The way in which electronic information is dealt with in the course of disclosure highlights the fundamental differences between paper and electronic disclosure. In fact the paper comparison is frequently inadequate when describing some electronic information that can never be printed out, such as audio-visual files, 3D spreadsheets or records taken from trading floors.

The proliferation of e-mail communication (both for business and personal purposes) makes it increasingly likely that a significant amount of electronically produced material will not be even potentially relevant to the particular litigation. Increasingly, therefore, there is little point in bringing the data in-house (either at the company or its law firm) until it has been culled and initially reviewed externally for relevance.

Many technology providers (*see box, Available technologies*) can provide access to material hosted on one of their own servers on behalf of their clients. The data is reviewed for relevance on the host system and only then imported into a firm's litigation support system. Many of these hosting tools can also act as the repository for disclosure information from litigation's inception to the trial.

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Planning and managing an electronic disclosure exercise: key steps

Preparing for the exercise

Planning is essential to avoid costly and possibly irredeemable mistakes. Consider co-ordinating efforts with experienced external counsel at this stage. Then, identify:

✓ What the company hopes to achieve from the data collection process.

✓ Where company data is located.

✓ The admissibility and weight (as evidence) of electronic documents.

Managing the exercise

As a preliminary matter:

✓ Draw up a master plan setting out the work that has been done, the work that still needs to be done, by whom it should be carried out and by when.

✓ Assess available resources against the timescale of the exercise.

Then:

✓ Place potentially relevant information on hold so that it no longer falls within a company's routine document destruction procedures. Issue a hold order to achieve this, and ensure that it is properly disseminated to company employees and relevant third parties.

✓ Assess the scope of the electronic disclosure exercise. Identify all relevant data sources.

✓ Consider whether any technology suppliers can help to simplify the data collection process (*see box, Available technologies*).

✓ Ensure that the integrity of relevant data is preserved (for example, an e-mail's metadata).

✓ Process the data so that it can easily be searched against and reviewed.

✓ Remove duplicate documents from the data set (de-duplication).

✓ Determine how the data is to be reviewed, for example, by using keyword searches or concept searches.

✓ Consider whether to host data on a separate server (perhaps a technology provider's). Data can then be available at all times to the company and its legal team.

✓ Agree, with the opposing party, on a format for the data that is to be exchanged.

Hosting data electronically, whether in-house or externally, is advantageous to a multinational company and its legal team since information can then be made available around the clock and everyone involved can be assured that they are viewing the most up-to-date versions of the data. When working with international providers, it can even be possible to take advantage of their international presence to get work processed around the clock by branches of the provider in other countries.

The nature of electronic hosting is such that its physical location is of reduced importance and, as a result, there has been a trend, especially on the part of US companies, to have their data hosted and processed off-shore to take advantage of reduced costs. European companies have, however, been more reticent about adopting this approach for fear of breaching European data protection laws when outsourcing this type of activity to jurisdictions that do not offer similar levels of data protection (*see box, Data protection issues*).

Output formats

Ultimately, the parties to litigation need to exchange their data in an agreed format. The volume of data involved, especially when dealing with electronic information, is such that making production via floppy disk is unlikely to be viable in all but the most minor of exercises. Far more likely is that production is made using DVDs or external hard drives, both of which have far greater storage capacities.

Although there are initiatives underway in England (via organisations such as Sedona and LiST) to set up exchange standards to ease this process, it is likely to be some time before they are in force. In the meantime, it is up to the parties to ensure that they take care to make production in a suitable manner.

To achieve this, it is advisable to swap test data in advance of the agreed exchange date to ensure that each party can comply with the agreed obligations. Parties should ensure that the data exchanged is real data from the case, rather than sample data that has been put together purely for the test exchange. The use of real data could reveal potential issues that the sample data would not, such as the presence of US-style dates or firm-specific issues, for instance the use of the term "correspondence" to cover the document types "letter", "fax" or "e-mail".

Although there is a trend towards disclosure in native form (that is, data retained in its original format, such as Word or Excel, rather than scanned as either TIFF or PDF), this is not necessarily the case in all jurisdictions. In the US, for instance, the production of documents as scanned PDFs is preferred (unless an order to the contrary is made) as this lessens the likelihood that metadata is inadvertently handed over. When making production in the form of TIFFs or PDFs, it is prudent to ensure that they are searchable so that additional expense is not incurred in converting the contents to allow for optical character recognition (OCR).

Where the documents to be reviewed are likely to be written in more than one language, it also makes sense to check the ability of the software to deal with foreign language documents. This is especially important where documents might be in languages with different character sets (such as Chinese or Cyrillic). In this case, it is better to employ software capable of dealing with, and searching for

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phrases in, a number of different languages and character sets within the same database.

Obtaining additional benefits from the exercise

Although undertaking electronic disclosure can often appear more expensive than hard copy disclosure, the increased expenditure is usually the result of the sheer number of documents produced electronically, which tends to be far greater than the number of hard copy documents generated in similar circumstances. It is, of course, possible to print out each and every electronic document and conduct a traditional hard copy disclosure exercise. This approach would alleviate the need to deal with the majority of issues outlined above. On closer inspection, however, the figures tend to suggest that adopting a hard-copy approach to electronic disclosure is by far the more expensive option.

A number of case studies demonstrate the savings achieved, both in cost and time, by undertaking disclosure electronically. For example, in June 2005 Legal Technology Insider reported that in one case (worked on by Lovells), two million electronic documents were filtered down to just 11,000 in a three-month time period at a cost of US$1 million (about EUR789 000). This represented a saving of at least 75% in terms of both cost and time based on the original estimate to complete the same project using traditional methods, which envisaged a one-year timescale and a total cost of US$4 to US$5 million (about EUR3.16 million to EUR3.95 million).

It is, however, important to bear in mind the dangers of adopting a "one size fits all" approach to electronic disclosure. Each particular piece of litigation and its associated disclosure exercise has its own individual requirements, and the technology used should be tailored to these specific needs on a case-by-case basis.

When studied in-depth, the case studies mentioned above reveal that the use of technology to aid in the conduct of electronic disclosure provides a significant benefit to a party to litigation. Not only does it reduce the time and expense of electronic disclosure, but the material returned can be re-used internally as it amounts to a ready-made database of material relevant to the subject matter of the litigation, and can be useful for a party to search for and identify its own key documents as new issues emerge during the course of the litigation.

Documents that may be helpful in establishing a particular fact can be hyper-linked into the statements of case to allow ease of reference and location. In addition, the electronic disclosure exercise creates what is in effect a "portable library" of one party's documents, which can be loaded onto a laptop and be an easy reference source for counsel when out of the office at witness interviews, court hearings and so on. Such a library can also be made available to other parties, such as co-defendants, via the internet at little extra cost and could ultimately be used to create an electronic trial bundle in truly large-scale matters.

Even outside of the litigation for which the disclosure exercise is conducted, the existence of a database of this type can provide ongoing benefits to a company. One example might be a company that faces repeated disputes that tend to be similar in nature, such as a clothing company attempting to ensure its trade marks are not infringed. Once the relevant documents have been scanned and coded for the purpose of disclosure in one such piece of litigation, the database can be re-used each time a similar dispute arises.

These types of benefits can also extend to areas outside the litigation arena in some circumstances. Extending the clothing company example, the materials collected for the purposes of the trade mark protection litigation could also be used to form a marketing database, which might be searched when a company wants information about previous marketing campaigns carried out for a particular brand or product.

PLC Cross-border

Related information

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