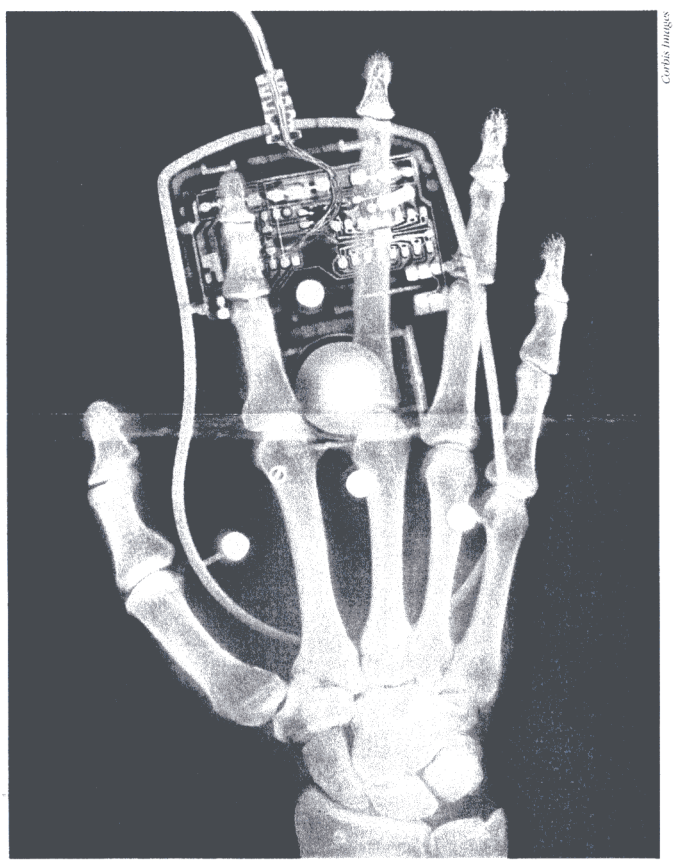
In England and Wales, e-disclosure is a grey area. Do we need a body of case law to outline companies' disclosure obligations, or will a code of good practice suffice? Ed Sautter and Stephen Brown ask, do we know where we stand?

The rules of disclosure

It remains to be seen whether and, if so, how quickly there emerges a body of case law or accepted good practice concerning a party's obligation to give disclosure of electronic documents under the Civil Procedure Rules (CPR).

The fact that most businesses these days are likely to produce and hold the great majority of their documents in electronic form means that, when considering a party's obligations to disclose documents in legal proceedings, one will increasingly look first to electronic, rather than physical, records.

But when a party comes to consider its obligations to disclose electronic documents, there is, as yet, little specific guidance as to how to interpret the CPR.



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The rules

The CPR makes scant reference to electronic records, although rule 31.4 defines a document as "anything in which information of any description is recorded". This is a very wide definition comprehending all kinds of electronically created and held records. E-mails, Excel spreadsheets and PowerPoint presentations all fall within this definition. So too do electronic versions of documents that may also exist in physical form, for instance word-processed documents.

Rule 31.7 sets out a party's obligation to make a "reasonable search" for documents. The factors relevant in deciding the reasonableness of that search include:

- the number of documents involved;
- the nature and complexity of the proceedings;
- the ease and expense of retrieval of any particular document; and
- the significance of any document that is likely to be located during the search.

It should be noted in passing that this relates to so-called 'standard disclosure'; the court has the power to order specific disclosure and in the Commercial Court there is provision for seeking, in appropriate cases, more extensive 'special disclosure'.

These provisions reflect the 'overriding objective' that runs through the CPR and which introduces the principle of proportionality into the conduct of litigation in general and to the process of disclosure in particular.

The factors in rule 31.7 do not take specific account of the existence of electronic documents and, as yet, there is very little guidance in the form of decided cases indicating how these factors will be interpreted specifically in that context (note, for instance, the decision in *TGN Limited v Royal SunAlliance* [2002], which concerns physical documents).

Draft protocols

However, various interest groups have considered the extent to which parties should be obliged to take a standardised approach to the disclosure of electronic documents. Both the questionnaire appended to the paper produced by the Commercial Litigators' Forum in October 2003 and the (as yet unpublished) draft data exchange protocol accompanying the draft practice direction produced by the the Litigation Support Technology Group (LiST) contemplate significant exchanges of information between the parties as to the architecture of their respective computer systems. The proposed questions require the parties to identify each location where electronic documents may be held, for instance PCs, servers, laptops, back-up media and PDAs (such as BlackBerrys).

Given this likelihood of increasing openness concerning each party's computer network, clients and their legal advisers will need to answer very specific questions about the searches of their computer system that they have conducted, or have not conducted, in compliance with their disclosure obligations.

E-mails

While it is now largely understood that e-mails are disclosable, to what extent is it reasonable (within the meaning of the CPR) to be obliged to recover deleted e-mails, and what are the limits of a 'reasonable search' in this context? Is it where the party's own IT department is needed to recover deleted e-mails from appropriate servers or is it where external IT specialists are required to carry out such recovery?

The parties and, if necessary, the court will need to balance the various factors referred to above — the greater the complexity of the proceedings (including the amount of money at stake) and the significance of the documents likely to be located, the more likely it is that a more extensive search should be conducted. However, the party under pressure to disclose may argue that such a search is too time consuming and/or expensive, especially if it involves the retention of external IT specialists.

Metadata and back-up media

Parties are also now beginning to grapple with the issues of metadata — the hidden properties of a document that are not present in its physical manifestation, but are present in the electronic. The issue is given heightened emphasis when it is being suggested that it is more appropriate to exchange electronic documents in their native format rather than, for instance, as PDF documents.

Metadata may well be relevant where there are allegations that electronic documents have been tampered with or where, for instance, there are allegations that e-mails have been forged. However, in other cases where such issues are unlikely to arise, it may be more difficult to argue that the metadata of a document are relevant and should be disclosed.

A further issue concerns whether it is reasonable to disclose material from back-up media. If all relevant material has not successfully been preserved from the active computer system it may well be appropriate for back-up media to be reviewed.

Costs

The potential scope of electronic disclosure and the burdens associated with it have led commentators to question whether a more innovative approach to the incidence of costs should be taken.

In normal circumstances parties bear their own costs of disclosure and, if successful at trial, recover those costs, subject to assessment. However, if the court decides that, in order to deal with a case justly in accordance with the overriding principle, disclosure should be given of records that the disclosing party can only recover at considerable expense, it may take the view that it is appropriate for those costs to be borne by the party seeking the disclosure or that such costs should be borne by that party if nothing relevant is found as a result of the search.

Rule 44 of the CPR makes it clear that the court has a discretion as to whether, how much and when costs are to be paid. Cost shifting orders have been made in the US. The relevant criteria have been most definitively summarised in the *Rowe* and *Zubulake* decisions (especially in the area of obtaining records from back-up tapes), although the latter decision has, to an extent, restricted the likely scope for cost shifting orders.

Also relevant in this context is the principle of proportionality, which specifically includes consideration of the financial position of each party. Consequently, a party that is significantly wealthier than its opponent may find itself bearing greater obligations (and cost) than its opponent.

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