The average French (or German) lawyer would be surprised to learn that, in England and Wales, parties to litigation have broad obligations to disclose to each other documents relevant to the dispute between them. They would be positively dismayed to learn that this includes disclosing documents which damage your case and/or enhance the case of your opponent. On the other hand, a US lawyer would be surprised that the parties' disclosure obligations stop there and do not go on to include, as a matter of course, so-called 'train of enquiry' documents (ie, any document that is reasonably calculated to the disclosure of further relevant data).

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It is important therefore, when considering disclosure obligations in litigation, to understand this legal and cultural 'cards on the table' context. This may assume particular significance in the context of electronically stored information (ESI), given its proliferation and growth in the number of sources where it may be located.

In this article I will explain how the requirements to disclose ESI in English litigation have developed and how the openness and transparency required under the current disclosure regime has significant implications for information and records management professionals.

Disclosure in England and Wales

In England and Wales, the last significant reform of disclosure obligations in litigation took place back in 1999 when 'discovery' became 'disclosure,' with a more streamlined test (in effect the exclusion from disclosure, other than in exceptional cases, of 'train of enquiry documents'), and a push towards greater transparency and (it was hoped) proportionality. Under these rules, parties were (and are) obliged to conduct a 'reasonable search' for disclosable documents, the scope of which was to be assessed by various factors such as the number of documents, the nature and complexity of the proceedings, the ease and expense of retrieval of the documents and the significance of any document that was likely to be located during the search.

Transparency was supported by the requirement on each party to produce a Disclosure Statement, setting out what searches that party had made and (significantly) what searches that party had not made. These rules remain the regime under which disclosure is conducted in England and Wales.

However, the 1999 rules, although defining 'document' as "anything in which information of any description is recorded," did not specifically acknowledge or explain the application of disclosure obligations to ESI. Although it was generally accepted that computer-generated material should fall within such obligations, no thought had been given to the extent of these obligations and how the parties should approach the disclosure of ESI in practice.

ESI is recognised - paragraph 2A

This lacuna was addressed in 2005 with the introduction of paragraph 2A to Practice Direction 31 (the Practice Direction supporting the rules regarding disclosure of documents). Paragraph 2A expressly acknowledged that the broad definition of document did, indeed, extend to ESI, including email, word-processed documents and databases. It also identified, in addition to readily accessible ESI, servers and backup systems as locations of potentially relevant data, and that 'deleted' documents and metadata might also be potentially disclosable.

The 2005 amendments also provided that parties should discuss any issues that might arise regarding searches for, and preservation of, electronic documents, and that this might involve the parties providing information to each other about electronic devices, media, storage systems and document retention policies.

There was also an acknowledgement that the factors impacting upon the extent of the reasonable search should specifically take into account the nature of ESI (a

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topic to which we shall return). It was also understood that the exponential growth of ESI within organisations required a different approach from the page-turning review conducted in the context of physical files. Keyword searches (as agreed, so far as possible, between the parties) were regarded as a potentially reasonable alternative to a full review of each and every document. Finally, the disclosure statement was amended to make specific references to those sources of ESI which a party had and had not searched.

The Courts become involved - Digicel, Earles & Goodale

Some three years passed before cases began to emerge in which Judges assessed the adequacy of parties' compliance with their obligations under the new E disclosure rules. Most significantly, in *Digicel v Cable & Wireless*[1] the Judge was particularly critical of Cable & Wireless' conduct of its disclosure of ESI. Cable & Wireless had refused to engage in prior discussions with Digicel concerning the extent of the searches that it was going to undertake for ESI, effectively leaving Digicel to complain about the disclosure if they turned out to be dissatisfied with what was produced (which they were). In obliging Cable & Wireless to re-run and expand (at considerable expense) many of the searches, the Judge deprecated what he characterised as their unilateral approach and emphasised the importance of the parties discussing in advance the searches that they would be making for ESI.

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Another case in which a party incurred the wrath of the Court for failing to comply with its obligations was *Earles v Barclays Bank*[2]. In this case, the defendant bank had failed, after it had received a solicitor's letter from its customer, to preserve >>>>>

[1] [2008] EWHC 2522 (Ch)
[2] [2009] EWHC 2500 (QB)

>>>>> (by way of a "litigation hold") emails and call records with the customer. Barclays ultimately won the case but was punished (by being denied most of its costs) because the Judge considered that, had Barclays retained the relevant records, it would have been clear at a much earlier stage that the claimant's case could not be maintained and considerable costs would have been saved.

Finally, in *Goodale v Ministry of Justice*[3] the reluctant defendant Ministry was obliged by the Court to carry out searches for ESI and, to that end, to complete a questionnaire providing detailed information as to the sources and locations of its ESI. The significance of the questionnaire was that it was, in fact, the result of work that was being undertaken at that time to replace the existing E Disclosure Practice Direction with a more peremptory and granular version which came into effect on 1 October 2010.

The current regime - Practice Direction 31B

The new Practice Direction (31B) has replaced the old paragraph 2A and has provided a more prescriptive and detailed regime for the disclosure of ESI. There is an express obligation on the parties to engage in early discussion concerning the disclosure of ESI, as well as the use of technology in the management of that disclosure process. Further, the Practice Direction contains a specific obligation on the parties' legal representatives to notify their clients of the need to preserve disclosable documents as soon as litigation is contemplated.

As part of those obligatory discussions, the parties are expected to discuss with each other the categories of ESI in their control as well as the systems, devices, media, storage and software on which that ESI resides. The parties are also obliged to discuss the tools and techniques that they propose to use, including identification of custodians, date ranges, document types, keyword searches, software tools, de-duplication and even data sampling (where appropriate).

The Questionnaire

At the heart of the new Practice Direction is the Electronic Documents Questionnaire ("the Questionnaire," as road tested in the Goodale case). Although the Practice Direction does not make use of the Questionnaire compulsory, the Court may order its use if the parties are unable to reach agreement concerning disclosure of ESI, or where the agreement that they have reached is regarded by the Court as inappropriate. In any event, it is generally regarded as inevitable that the Questionnaire will become the default template for the required disclosure of information concerning ESI and proposed searches for it.

The Questionnaire itself makes it clear that all potentially relevant sources of ESI must be considered. In addition to identifying all potentially relevant custodians, the following types and locations of ESI are expressly identified:

Communications: email (including Web-based accounts such as Yahoo, Hotmail and Gmail), instant messaging, voicemail, VOIP (Voice Over Internet Protocol), recorded telephony, text messaging, audio files, video files;

Electronic documents; Word (or equivalent), Excel, PDF, TIFF, JPEG, PowerPoint, CAD (or equivalent);

Software/equipment/media: servers, PCs, laptops, notebooks, handheld devices, PDAs, off-site storage, removable storage (CD-ROMs, DVDs, USB drives, memory sticks).

In this regard it is noteworthy that, in addition to the more 'traditional' sources of ESI (to which reference had been made in the previous version of the Practice Direction), the identification of such communications as instant messaging, text messaging and VOIP makes it clear that the categories of potentially disclosable ESI are not closed.

The reasonable search

As noted earlier, the extent of the required 'reasonable search' is clarified by reference

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to a number of factors. In the specific context of ESI, the Practice Direction (like its predecessor) identifies, in the context of the ease and expense of retrieval, following additional factors:

- The accessibility of ESI;
- The location of ESI and its repositories;
- The likelihood of locating relevant data;

[3] [2009] EWHC B41 (QB)

- The cost of recovering any ESI;
- The cost of disclosing and providing inspection;
- The likelihood that ESI will be materially altered in the course of the disclosure process.

The new Practice Direction has also added a further general factor - the availability of documents or their contents from other sources. This should make it easier for a party to resist demands that it should search multiple, or less accessible, sources of ESI if the data there is likely to be duplicative of that already disclosed.

A further factor is the significance of any document which is likely to be located during the search. In other words, searches for less accessible ESI are more likely to be justifiable if the material is likely to be of significant, rather than peripheral, relevance.

Keywords, concepts and clustering

Practice Direction 31B acknowledges that keyword searching may still be appropriate but acknowledges that injudicious use of keyword searching may (a) result in important documents being overlooked (in which case, in relation to certain sources of ESI, a more granular search may be required) or (b) result in excessive irrelevant documents being found (reflecting the all too common experience of a keyword search producing large amounts of irrelevant data). The Questionnaire expressly anticipates discussion between the parties (in appropriate cases) about the use of more sophisticated technology and software (such as clustering or concept searches). At the time of writing, there is still a significant degree of caution concerning the use of such technology but, as volumes of ESI continue to increase exponentially and the limitations of both keyword searches and the inconsistency of human review become more manifest, there is likely to be a push for greater use of such resources.

E Disclosure and records management policies

For the records manager, there is particular significance in the question at paragraph 13 of the Questionnaire - "do you have a document retention policy." Further, paragraph 14 asks "have you given an instruction to preserve Electronic Documents, and if so, when?". In this regard, the good faith operation of a defensible records management policy has a number of significant beneficial consequences:

- it explains the existence (or non-existence) of potentially relevant records (somewhat akin to the "safe harbor" provision in the US Federal Discovery rules)
- it embeds a legal/litigation hold procedure such that when litigation is reasonably anticipated, adequate steps can be taken to prevent what would otherwise be the routine destruction of relevant ESI
- it anticipates specifically the procedural requirements to preserve and disclose relevant ESI
- it helps to ensure that an organisation has the documents it needs to pursue or defend legal proceedings

A range of adverse consequences potentially await a party which fails to preserve (and subsequently disclose) relevant records in circumstances where the Court concludes that a preservation duty has been breached. In the worst cases, a Court may draw adverse evidential inferences from the absence of such material or strike out all or part of a defaulting party's claim or defence.

Litigation preparedness

Consequently, in terms of risk management, the questions that should be asked are:

- is your company able to provide the information required by the Practice Direction and Questionnaire accurately and on a timely basis?
- is your company able to preserve relevant ESI for potential disclosure by implementing appropriate legal/litigation holds?
- do your company's records management practices reflect the provisions of your records management policy?
- do you have the records that you need to pursue or defend the litigation?

Such litigation preparedness can be developed by conducting a comprehensive data mapping exercise, so that the sources and locations of the organisation's ESI can be readily identified. This will include identifying and cataloguing key persons and data sources. For instance, some personnel/business areas may be regarded as carrying potentially more risk in a litigation context and it may be sensible to obtain external advice as to the greatest areas of such risk and as to the relationship between that risk and the records generated and stored by the organisation.

Such preparedness also ensures that legal hold procedures are properly embedded as a matter of procedure and practice within the organisation's records management policy. These strategies should extend to legacy data and its remediation.

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Of course, many of these observations concerning good practice apply with equal force to a regulated entity (such as a firm regulated by the FSA) in the context of regulatory enquiries or proceedings, in addition to the specific records management obligations to which the entity is subject under the relevant regulatory regime.

The importance of the disclosure of ESI in litigation, the strict and detailed provisions of the disclosure rules (in particular the new Practice Direction) and the specific acknowledgement within those rules as to the potential importance of a party's records management policy, place the records manager at the heart of the risk management that is essential in minimising the adverse impact of litigation.

The Author

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