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Emerging Issues in E-mail and E-discovery

Why Your School District Must Properly Retain Electronic Documents

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Did you know that approximately 2.7 trillion emails will be sent in 2007 in the United States alone?

How many e-mails are sent in your school district each year? Is your district properly storing these e-mails? It might surprise you to find out that some e-mails and other electronically stored information are subject to the same records retention schedules and litigation discovery rules as all other public information in your district.

Q: Are e-mails considered records that need to be kept under our records retention schedule?

A: Needless to say, storing and recovering e-mails present challenges not found when dealing with paper documents. Often e-mails containing school business are not printed and filed in paper form. E-mails are easy to delete, and, more often than not, persons handling litigation in a school district might not even be aware that relevant e-mails ever existed. Sometimes e-mails are automatically deleted by an automated system. Despite these challenges, e-mails relating to school business are subject to the state records retention schedule and litigation discovery rules just as if they were paper documents.

So how long do e-mails have to be retained under the retention schedule? Unfortunately, there is no one retention period that applies to all e-mail messages. "E-mail" is the medium in which the record is stored, not a type of record. An e-mail message must be

retained for a length of time determined by the category of record, which is determined based on the content in that individual e-mail message. The determination of which category of record an e-mail fits into must be made on a case-by-case basis. Each school division's records management officer should develop procedures to ensure that records control schedules are applied to e-mails and other electronically stored information based on the content of the information. To accomplish this, the records management officer should explore systems to efficiently manage electronically stored information, including sorting, storage, retrieval, and destruction.

Q: What litigation discovery rules relate to electronic documents?

A: In December 2006, the Federal Rules of Civil Procedure were amended to address discovery of electronic data during litigation. The term "discovery" refers to the exchange of documents between parties in the litigation process. The rule changes address issues such as the initial disclosure of electronically stored information and the consequences of destruction or loss of such data. The rules related to the discovery of electronic documents are commonly called the "e-discovery rules." The changes to the rules primarily affect attorneys who practice litigation in federal courts, but compliance with the rules may affect a district's records retention practices.

A school district has an obligation to preserve documents and evidence related to an event once a lawsuit is filed and sometimes even when litigation is only anticipated. Any intentional destruction, mutilation, alteration, or concealment of evidence can result in sanctions against the district.¹

Under the new e-discovery rules, parties in federal courts will consider discovery of electronic material as an initial part of the case. Therefore, if the district is involved in such a lawsuit, the school district's attorneys must be made aware of the district's electronically stored information in order to comply with the new rules.

One of the new provisions requires that the parties make "provisions for disclosure or discovery of electronically stored information."² Another new provision requires that parties develop a discovery plan about electronically stored documents during conferences with opposing counsel.³ Your school district's attorneys will handle the specifics of complying with these e-discovery rules.

There is a "safe harbor" provision in the new e-discovery rules. This provision protects school districts

from discovery sanctions if electronically stored information cannot be provided to another party to the lawsuit because the information was "lost as a result of the routine, good faith operation of an electronic information system."⁴

Essentially, if electronic documents are lost or deleted during the system's regular operation, the district will not be sanctioned for failing to produce these documents. After litigation is filed or threatened, however, routine deletion of information is not likely to be protected by the safe harbor provision.⁵ Therefore, your district may need to suspend or alter its routine document destruction practices.

Q: How does the implementation of these new discovery rules relate to our school district's records retention policy?

A: When litigation is anticipated, you should discuss with the district's attorney whether a "litigation hold" should be placed on documents necessary to the potential claim so that these documents will not be destroyed in the district's normal operation.

¹ Fed. R. Civ. P. 37.

² Fed. R. Civ. P. 16(b)(5).

³ Fed. R. Civ. P. 26(f).

⁴ Fed. R. Civ. P. 37(f).

⁵ Fed. R. Civ. P. 37(f) (2006 Advisory Committee Note).

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