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E-disclosure

THE FUTURE IS NOW

With the growth of online social and business communication, the courts increasingly require the disclosure of electronic documents and other computer data by parties to litigation. Ivan Moody of Watmores Solicitors looks at the consequences of e-disclosure for the public services.



You may recall a recent story involving the social networking site, Facebook. An employee, keen to keep the world abreast of the progress of her day, posted a more colourful version of the following: "I HATE MY JOB! My boss is a pervert and is always making me do **** stuff just to annoy me!"

Unfortunately, she forgot that she had previously made her boss a Facebook friend. He read the message and responded in kind: "Hi Lindsey. I guess you forgot about adding me on here? Firstly don't flatter yourself. That **** stuff is called your "job". But the fact that you seem to be able to mess up the simplest of tasks might contribute to how you feel about it. You seem to have forgotten that you have 2 weeks left of your 6 month trial period.

Don't bother coming in tomorrow. I'll pop your P45 in the post..."

This is one example of someone falling foul of electronic communication. This article looks at the role of electronic communication in modern litigation and, in particular, disclosure. Litigation always involves disclosure or discovery - the parties to the case are compelled to disclose all relevant documents even if they are detrimental to their case. There are severe penalties to those who fail to provide all relevant documents or potentially seek to suppress or destroy damaging documents, with such actions amounting to contempt of court.

The Old Regime

In the old days, the public sector and their lawyers could deal with disclosure by simply opening the relevant filing cabinet and making a list of the documents therein but times have changed. The courts have recognised that, as corporations rely increasingly on less paperwork and on more computer data files, the old regime is not fit for purpose; e-disclosure is the future.

'Documents' are defined under Civil Procedure Rule (CPR) 31.4 to mean "anything in which information of any description is recorded". This obviously extends to any electronically stored documents, including emails, Word documents, PowerPoint presentations and even, in theory, text

messages and voicemail recordings. It also includes those documents that are purported to have been deleted.

The extent to which a party is obliged to search for and disclose electronic documents is set out in the Practice Direction to Part 31 of the Civil Procedure Rules at 2A.1. It sets out the requirements for disclosure, demanding a 'reasonable' search which may, depending on the circumstances, lead to a quite detailed interrogation of computer servers and other electronic devices.

In practice, the requirement to search for electronic documents will be limited by the nature of the case and the overriding objective (CPR 1(1) in fact demands proportionality). The effort required to weed out wrongdoing in a multi-million pound dispute between global corporations will not be the same as the obligation to conduct electronic searches in a low value manual-handling personal injury claim. The search should always match the complexity of the case.

Parties are expected to work together to come up with appropriate limitations on what needs to be disclosed. In the recent case of *Digicel (St. Lucia) Ltd-v-Cable & Wireless (2008)*, it was revealed that some 1.1 million documents had to be reviewed at a cost of £2.175m in lawyers' fees. Only 5,200 of those documents were ultimately deemed relevant.

In many circumstances, the most effective way to search for documents will be by keyword search, using words relevant to the issues to find or filter documents. For example, a claim by a specific individual might involve a search for any references to that person by surname or other terms agreed, as far as possible, between the parties. However, the implication of the Practice Direction is that a keyword search will be the starting point, useful when a review of every document would be unreasonable but, by itself, may be deemed insufficient.

Apart from the inevitable time, effort and cost involved in carrying out such searches, what do public sector bodies have to worry about? As Moran J observed in *Digicel*, "It is well known that people say things in emails which they would not dream of putting in a letter...or a formal note...It may only take one revealing

statement in a document, perhaps in an email, to show clearly what people thought or what people were intending to achieve...a matter that might not have been revealed in many tens of thousands of other documents in the trial bundles".

Take, for example, a case in which a disgruntled employee claims that he or she has been harassed or bullied at work or has been unfairly selected for redundancy. It might not be unreasonable for the court to compel the employer to disclose any emails in which the employee had been discussed. A few careless comments by a frustrated line manager could appear very damning in the cold light of a court room.

Disclosure

In reality, the public sector is already involved in e-disclosure. So many records are stored electronically that it is often easier to simply hit the print button than trawl through paper files. The point to be aware of is that the position regarding the disclosure of electronic documents is no different to that of paper documents; one cannot be selective about which electronic documents are to be disclosed, anymore than one can be selective about paper disclosure. If relevant electronic records are known to exist, they cannot legitimately be withheld, unless it can be maintained that they are not relevant to the issues.

To date, there has been little pressure to comply with the spirit of the Practice Direction; that is likely to change. Senior Master Whitaker has led a team creating a new Practice Direction. This is presently being reviewed by the Civil Justice Council but, if implemented, is likely to involve the parties having to complete a questionnaire setting out precisely what steps have been taken to comply. It is inevitable that, in the coming months and years, public sector organisations will find that requests for electronic data are commonplace. If there is a message to be distributed by risk managers during these early days, it must simply be that officers and employees should avoid saying anything in electronic format that would be uncomfortable for them to hear read back to them at a future date in the courtroom. ■