

Disclosure in the electronic age

It is estimated that 90% of all documents are now created, viewed and stored electronically. Around 70% of these electronic documents are never reduced to paper.

The use of technology has led to an increasing variety of different methods of communication and electronic storage: PDAs, instant messaging, Blackberries, mobile phones more sophisticated than some computers, voicemail and more. These technologies can pose significant risks:

- Critical business information on portable devices in the hands of employees may not be backed up to the employer's servers and if the device is lost, may end up in the wrong hands.
- The potential for a "smoking gun" email. Once a document has been created it may be around forever unless proper steps are taken to permanently eradicate it.
- Electronic documents can be copied and distributed into the wrong hands far more easily than paper documents.
- The quantity of documents stored electronically can make it harder to find critical documents easily despite sophisticated electronic search techniques.
- Each electronic document (e.g. an email or word processor document) will contain "hidden" information called "metadata". This information can often provide insight into issues that are crucial in litigation such as when a particular document was created or modified.

It is no longer the case that organisations can take the view that information stored on their computer systems is for their eyes only and electronic information is being used increasingly in litigation in view of the risks outlined above.

Due to the length of time that it usually takes for a dispute to develop and then finally get to court, it may take several years to get to trial. Therefore, cases coming to court today are based on documents and information created years ago using the technology of yesterday. Three years ago it was not common to have a mobile phone that could send emails. Today this is much more common. It may be the case that in three years time a piece of litigation will turn on the evidence of an email sent from a mobile phone earlier today. Few companies are geared up to enable this information to be collected, stored and then retrieved when appropriate.

On 1 October 2005 Part 31 of the Civil Procedure Rules was amended and parties now have to consider searching for electronic documents when carrying out disclosure.

The search for documents must now cover electronic documents and email communications that are held on computer systems, servers, back-up systems and other electronic devices or media including portable and handheld devices. This does not just mean a search of the email inbox of the MD, all electronic information on any electronic device held by an employee could potentially be relevant.

In addition, the Rules now provide that the definition of a "document" covers: "electronic documents, including e-mail and other electronic communications, word processed documents and databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media, the definition covers those documents that are stored on servers and back-up systems and electronic documents that have been "deleted". It also extends to additional information stored and associated with electronic documents known as metadata."

The disclosure statement has been expanded so that parties will have to certify whether or not an electronic search was carried out and, if so, how. Given the potential costs that could be involved in carrying out a proper search, this is an issue that organisations need to get to grips with now as part of their ongoing risk management. In particular, companies should consider implementing properly thought out document management and retention policies to ensure that, in the case event of substantive litigation, they have the ability to identify and retrieve those electronic documents that are going to be critical to their position.

To discuss any issues arising from this article, please contact Tim Rutherford on 01895 207828 or tim.rutherford@ibblaw.co.uk