

20 December 2006

Frequently Asked Questions

Electronic Discovery and Data Preservation

1. What do “electronic discovery” and “data preservation” mean?

“Discovery” is the process by which relevant information is exchanged between parties in a lawsuit. It is conducted by producing documents and the taking statements from witnesses. Federal and state courts have long recognized that electronic data is subject to the same discovery rules as other evidence relevant to a lawsuit. The issue has received substantial national attention recently, however, because of a series of court rulings resulting in the imposition of huge sanctions on parties for their failure to preserve electronic data and because of amendments to the Federal Rules of Civil Procedure that took effect on December 1, 2006. Upon notice that a lawsuit has been commenced against the University (or a charge filed with an administrative agency), or if it is reasonably anticipated that a lawsuit may be brought (or a charge filed), the University and all of its faculty and staff members are now under a legal duty to preserve all evidence, whether hard copy or electronic, that might become relevant to the lawsuit.

2. What data needs to be preserved?

The new federal rules require a party to suspend routine or intentional purging, overwriting, re-using, deleting, or any other destruction of electronically stored information (ESI) relevant to a lawsuit. ESI might be at a University work station, on a laptop, or at an employee’s cell phone. ESI includes all forms of electronic communications such as e-mail, word processing documents, calendars, voice messages, instant messages, spreadsheets, videos, digital photographs, information in PDA’s, and data in any other locations where electronic information may be stored. ESI must be preserved so that it can be retrieved – if necessary – at a later time. The ESI must be preserved in its original electronic form, so that all information contained within it, whether

visible or not, is also available for inspection. It is usually not sufficient to just make a hard copy of ESI.

3. What will I have to do?

You will be notified of the duty to preserve electronically stored information through a preservation notice. Preservation notices are explained further in Executive Memorandum No. 29, which is at http://www.nebraska.edu/about/exec_memo29.pdf. If you receive a preservation notice, you will be asked to cooperate with the University to ensure that we identify and preserve all relevant potential sources of electronically stored information in your possession or under your control. You will be asked to complete and return a questionnaire identifying all potential sources of electronically stored information. It is critical that you complete and return this questionnaire without delay. Until University information services staff have taken steps to preserve your electronically stored information, you should be particularly careful not to delete, destroy, purge, overwrite, or otherwise modify existing electronic data.

4. For how long will material be subject to a preservation notice?

The office that issued the preservation notice will notify you when you and the University are no longer obligated to retain the preserved data. Generally, this will be when the statute of limitations has expired with respect to the claim or – if litigation has been commenced – when the lawsuit and all appeals have been concluded. When the duty to preserve evidence ends, the archived data will be returned to you or destroyed, at your option.

5. Do I need to also preserve data on my home computer?

The same rules apply to any computer that stores information potentially relevant to a lawsuit. Thus, if you use your home computer for University-related business (including e-mail on your University e-mail account or on a personal account such as AOL, GMail, etc.), you must preserve the data on that computer.

6. I already deleted something that might be relevant - - Should I be concerned about that?

The duty to preserve information arises only when litigation can be reasonably anticipated. Electronically stored information not preserved before that time should not create a problem.

7. What if I am involved in an ongoing matter relating to the person who is suing the University?

You must also preserve any new electronic information that is generated after receipt of a preservation notice that may be relevant to the dispute (such as an employment claim by a current employee where relevant new documents may be created during the ongoing employment relationship). University information services staff will work with you to ensure the preservation of new data.

8. Who is going to be paying for the cost of preserving ESI?

The costs associated with complying with the e-discovery requirements will be handled in the same manner as other litigation expenses are presently handled.

9. Who will be looking at my data?

Initially, no one will review your data. If and when a discovery request is made, the University or someone authorized by the University will conduct the review. On occasion, before a discovery request is made, the Office of University General Counsel may want to review electronically stored information to assist in answering the lawsuit or to comply with initial discovery obligations.

10. Who decides what data will be turned over to the opposing party?

The same rules of relevance that apply to “paper” discovery also apply to the discovery of electronically stored information. Before any data is turned over to the opposing party, the Office of University General Counsel or counsel retained by the University will usually review it for relevance and determine that it is not otherwise protected or privileged.

11. Since when did we have to go to all this trouble?

Electronically stored information has been discoverable since the 1980’s. Because of egregious misconduct by some parties and because of the ever-widening use of computers, over the last several years the courts have developed rules specific to the preservation of electronic data. The new amendments to the Federal Rules of Civil Procedure addressing electronic discovery took effect December 1, 2006.

12. What if I don't want to disclose my data?

The University and its employees have a legal duty to preserve, and subject to the rules governing discovery, turn over electronically stored information. In short, the law does not offer us a choice. Failure to abide by the law may result in judicially imposed monetary sanctions and adverse findings in the litigation. The University will take steps to protect privacy and to ensure that protected/privileged information is not disclosed, but ultimately the courts will decide whether information must be disclosed.

13. What should I do with my electronic data if I leave the University?

If you plan to leave your employment with the University during the pendency of a lawsuit for which you have received a preservation hold, you should confer with the Office of University General Counsel or before relinquishing control of your computer.

14. What if I have additional questions?

Contact the Office of University General Counsel (402) 472-1201.