

The many questions in e-discovery

E-discovery opens a virtual Pandora's Box of digital information that can be searched, processed and reviewed, but that can also be deleted or altered if we are not judicious in our approach. Technology can make information readily accessible to the experts, in many cases even if that information has been deleted or removed from a user's operating system. Just what is discoverable and to what lengths should you go to retrieve that information? These questions will test your knowledge.



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1 Your mid-sized company has identified and must produce electronic documents relating to ongoing litigation brought against the company by a former client. In the regular course of work over the years, relevant documents were deleted. Should the deleted information be retrieved for the purposes of production during documentary discovery?

- (A) Yes, if the parties involved agree that it should be.
- (B) No, you are never obligated to retrieve deleted data.
- (C) Yes, if the court orders that it must be done.
- (D) Yes, in the case of both (A) and (C).

2 Your company's email server distributes tens of thousands of email exchanges daily. Your inbox alone accumulates about a hundred emails per day (though it feels like tens of thousands). As part of the discovery process, you must retrieve all e-mails relating to the former client, dating back to 2009, as they are relevant to the dispute. Your personal archives go back three years, with the rest residing on backup tapes in an off-site storage facility. Who picks up the tab for retrieving these documents, given the amount of time and effort required to extract the information?

- (A) Your company pays for retrieving and producing the documents, but the former client pays the cost of taking a copy.
- (B) Your company pays for the retrieval and any copies.
- (C) The former client pays for the retrieval and any copies.
- (D) The costs of retrieval and copies are shared equally between the parties.

3 One of the emails that you retrieved from 2009 has come into dispute. Your former client insists that the version submitted into evidence has been tampered with. In that version, it looks like the dates, recipients, and the material content of the email message might have been altered. The former client is pointing to this as an example of disreputable behaviour by your company, but you are sure that, appearances aside, the information in the email is accurate. How can you prove the authenticity of the email?

- (A) On the examination for discovery, get the plaintiff to agree that the email is authentic.
- (B) Call upon an expert witness to verify the information in question and attest to its authenticity.
- (C) Give evidence yourself and/or call upon any other employees of your company who were copied on the email to provide evidence of its authenticity.
- (D) All of the above.

4 Your company maintains a database with information about the work it has done for all of its clients. Within that database, there is information about the work done for the former client. The former client has asked for an electronic copy of the entire database in its native format. Since the database also contains information about work done for other clients, which is not relevant to the dispute, you don't want to provide it to the former client. In fact, most of the information relates to other clients. Do you have to provide an electronic copy of the entire database?

- (A) Yes, the electronic database is a relevant document, and that entire document must be produced.
- (B) No, you don't have to provide an electronic copy, but you do have to provide a complete printout of the information in the database.
- (C) No, you only have to provide a printout of the information that relates to the former client in a format that makes it readable.

1 (D) It is recommended that counsel meet and confer at the outset of litigation to set the parameters of electronic discovery, including the scope of document production. The courts in some provinces (such as British Columbia and Alberta) have issued practice directions recommending this. If the agreed scope includes the retrieval of deleted data, your company should instruct a qualified person to proceed. Any deleted documents that have not been overwritten and can be retrieved would be produced during discovery. Regardless of what counsel has agreed upon, if the court later determines that the information is required, the court can order that any retrievable information be recovered and produced. If there is no agreement or order to retrieve deleted data, a party is not obligated to retrieve such information.

2 (A) In the ordinary course of litigation, your company is required to pay for the costs of producing documents, electronic or otherwise. The opposing party must pay the costs of taking a copy of those documents. At the end of the litigation, the court may make an award for the costs of production against the losing party. It is only in unusual circumstances that one party might obtain an order before trial directing that the opposing party pay all costs of the documentary production process upfront.

3 (D) While it is unlikely that the plaintiff will provide an admission, it is still an option for proving authenticity, particularly if there is other evidence produced to support the authenticity, or evidence to contradict the plaintiff's account. Others who have knowledge of the document in question can also be called

upon to give evidence of its authenticity. (However, practically speaking, it may be difficult to find witnesses who can clearly recall an e-mail received in 2009.) Expert witnesses can also be relied upon to investigate and provide testimony with regard to an electronic document's authenticity.

4 (C) Databases are recognized as being a unique type of file, more like a filing cabinet than a single document. In most cases (including this example), where the database contains irrelevant and/or privileged information, providing a printout of the relevant information in a readable format is all that is required. When a court is asked to order access to the database itself, it will weigh concerns about privileged, irrelevant, private, and commercially sensitive information, against the likely benefits and value of the access to the other party. If the entire database is relevant, however, it should be produced. For more complex databases, production in its native format (electronic, rather than printout), with the software required to read it, may be necessary.

YOUR RANKING?

- **One correct:** *might be time to brush up*
- **Two correct:** *not bad, but some further work needed*
- **Three correct:** *very well done, but not perfect*
- **Four correct:** *excellent*

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