

# E-Discovery

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## Overview

- The Federal Records Act in the 21<sup>st</sup> Century
- Focus on Preservation orders & legal holds
- A Word About Search and Retrieval
- CREW 2008 Report
  - Record Chaos: The Deplorable State of Electronic Record Keeping in the Federal Government
- Additional Sources



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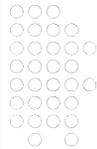
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## Definition of federal record under 44 USC 3301

...all books, papers, maps, photographs, *machine readable materials*, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and *preserved or appropriate for preservation* by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of data in them. (Italics added.)



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## Foundational elements of recordkeeping in government



- Presidential Memorandum – Managing Government Records, issued November 28, 2011
- Agency file plans and agency records schedules
- Appraisal decisions signed off by Archivist on what constitute permanent records (eventually accessioned into NARA), and what constitute temporary records (stored by agencies during active use and then at offsite federal or other record centers for the duration of the retention period of the records)
- Record schedules subject to public notice in Federal Register
- Unscheduled records cannot be disposed of until such time as they have been scheduled
- General Records Schedules for admin. records
- See 44 USC 3303, 3303a(a), (d)

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## Lifespan of Federal Records



- The definition of what constitutes a federal record (44 USC 3301) allows for tremendous flexibility in what is considered to be “record” material, spanning from ephemeral records (retained for hours/days) thru to short term temporary (weeks/months), long term temporary (years or decades) to permanent records (forever)
- Problem: matching up the retention span of various e-records with the working life of information technology

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## Fast Forward to 21<sup>st</sup> Century E-Records in Government



- E-mail with word processing attachments
  - Integrated with Voice Mail and VOIP
    - Electronic Calendars
    - Instant and Text Messaging
- Web portals, blogs & wikis, RSS feeds
  - Videoconferencing & Webcasting
    - Structured databases
  - Flash drives & new storage devices
- Remote PDAs, Blackberrys, etc. etc. etc.
- Social Media: Facebook, Twitter, Flickr, etc...

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## Transitory Email Reg



- NARA final regulations published in the Federal Register on February 21, 2006 (71 F.R. 8806), modifying 36 CFR 1234.24
- Email records appropriate for preservation for less than 180 days may be managed on live email systems and allowed to be deleted as part of automatic processes, without a user further needing to print out or electronically archive.

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## Is Data Different From Paper?



- *Public Citizen, Inc. v. Carlin*, 2 F.Supp.2d 1, 13 (D.D.C. 1997), *rev'd*, 184 F.3d 900 (D.C. Cir. 1999) ("Simply put, electronic communications are rarely identical to their paper counterparts; they are records unique and distinct from printed versions of the same record.")
- *Armstrong v. EOP*, 1 F.3d 1274 (D.C. Cir. 1993)
- Fed. R. Civ. P. 34 (comment): "Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper."

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## The Intersection of the Federal Records Act and E-Discovery



- + As a baseline, the FRA already requires appropriate preservation of all electronically stored information which falls within the federal record definition (44 USC 3301)
- + The existence of a valid record retention policy is a factor used by courts in considering whether to impose sanctions when hearing allegations of destruction of evidence

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## Requirement to Preserve Electronic Data



- By EEOC Regulation: 29 C.F.R. § 1602.14
- By Federal Rules of Civil Procedure: Rule 37
- By Other Statutes

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## Spoliation



*West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2nd Cir. 1999):

“The destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”

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## What does this mean for agency management of federal records?

- + Agencies will be confronting requests for initial disclosure of ESI on their electronic systems
- + Includes electronic mail, other networked applications, and databases maintained by an agency that are relevant to the particular action
- + Federal ESI may be subject to production in particular requested formats, with or without metadata
- + Important that key designated personnel know scope of their agency’s holdings & retention of records under existing schedules, to serve as trusted reporters
- + What’s good for goose, good for gander: an agency’s affirmative requests of private parties should be tailored to the new rules



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## Excuses That Don't Work



1. Regular Data Retention Policy
2. Ignorance of Pending Complaint
3. Paper Versions Produced
4. Burden of Production

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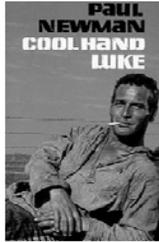
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## Zubulake:

Zubulake IV – 220 FRD 212  
(S.D.N.Y. 2003)  
Zubulake V – 229 FRD 422  
(S.D.N.Y. 2004)



“What we’ve got here is a failure to communicate”



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## Rosetta Stone Approach



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## A Special Word about EEO Actions & Grievances

- + Leading edge of case law, e.g., *Zubulake V*
- + Ephemeral "gotcha" email
- + Best practice: agency instructions to ADOs & responsible management officials at or before formal admin complaint: preserve *all* your electronic records



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## Consequences for Failure to Preserve Electronic Data

### • 29 C.F.R. § 1614.109(f)(3)

Draw an adverse inference

Consider the matter to which the requested information or testimony pertains to be established in favor of the opposing party

Exclude other evidence offered by the party failing to produce the requested information

"Issue a decision fully or partially in favor of the opposing party"



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## EEOC Decisions

- *Stokes v. HHS*, EEOC No. 01933987 (1994): adverse inference where the agency failed to maintain rating or ranking sheets
- *Bayda v. DOJ*, EEOC No. 01955738 (1997): adverse inference where agency destroyed documents "as a matter of routine"
- *Petersel v. USPS*, EEOC No. 0720060075 (2008): "the applicable EEOC regulation does not require proof that the party intentionally destroyed evidence. Instead, the question is whether the party fails to produce the information 'without good cause.'"
- *Chhe v. HUD*, EEOC No. 0720090008 (2010): agency did not satisfy burden of production where interview notes destroyed.
- *Gennetten v. Navy*, EEOC No. 01973098 (1999): adverse inference should have been drawn by AJ against the agency for failure to maintain selection documents; OFO finding of discrimination



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## Other Penalties



- **Unlawful Destruction of Records**

- *United States v Salazar*, 455 F.3d 1022 (9th Cir. 2006)

- **Obstruction of Justice**

- *United States v. Lundwall*, 1 F.Supp.2d 249 (S.D.N.Y. 1998)

- **Sarbanes-Oxley Act of 2002**

- **Rules of Professional Conduct**

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## What's an Agency Lawyer to Do?



### Best practices at the erecords/ediscovery nexus:

- \* Inventorying for the purpose of obtaining intellectual control over your Agency's electronic systems (network applications, backups & legacy media)
- \* Understanding existing records schedules & retention periods for your Agency's records (and consider updating & simplifying schedules in anticipation of transition to electronic recordkeeping)
- \* Consider appointing "Knowledge Counsel" in General Counsel and Solicitor offices to act as agents of change, working with CIOs and records officers
- \* Formulating explicit e-records guidance on what constitute records, and including holds guidance
- \* Providing training on FRA and e-discovery obligations

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## A Plug for Dealing With Search Issues In the Context of Real User Needs



- Finding responsive needles in E-haystacks: the problems with keywords
- Maximizing recall of responsive docs
- Weeding out false positives
- Evaluating competing search products in the marketplace against some objective standard lawyers will embrace

See The Sedona Conference © Best Practices Commentary on The Use of Search and Information Retrieval Methods in E-Discovery (Aug. 2007), <http://www.thesedonaconference.org>

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### Additional Resources

- Title 44 U.S. Code, Chaps 21, 29, 31, 33
- 36 C.F.R. Part 1234 E-Records Mgmt
- <http://www.archives.gov/records-mgmt/>  
(comprehensive records management website, with toolkit of best practice white papers, including on transitioning to electronic recordkeeping; FAQs on many subjects, including scanning documents, instant messaging, wikis)
- DoD 5015.2 -- [www.archives.gov/records-mgmt/resources](http://www.archives.gov/records-mgmt/resources)
- [www.thesedonaconference.org](http://www.thesedonaconference.org) (Sedona Guidance and Sedona Principles white papers)

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