

# An Ounce of Prevention:

## Limiting Litigation Risks in the Social Media Age

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With rapid profusion and intensification of internet-based media, communication has never been so easy. But new technologies are also a mixed blessing. This is especially evident in litigation, where data can dwell on servers for years, like silent time bombs. Cases involving millions of dollars can turn on an unguarded remark inadvertently preserved in an e-mail or a text message. The new media can also become vehicles for illegal conduct such as harassment. And, even in routine cases, litigants are under an obligation to preserve all evidence, including all electronically stored information ("ESI") found on servers, desktops, laptops, smartphones or elsewhere that may be relevant;<sup>1</sup> Gathering and exchanging ESI --- a process known as "a-discovery" --- can be extremely burdensome and disruptive. Even worse, a litigant's failure to comply with document preservation duties can result in substantial sanctions- such as the striking of a defense -which may determine the outcome of a lawsuit, regardless of the merits.<sup>2</sup>

Regulating and controlling the flow of ESI poses particular challenges for towns and other municipalities because they are subject to special legal duties as governmental entities. These challenges, however, are hardly insurmountable. Effectively designed and implemented document retention procedures, combined with appropriate computer usage and social media policies, can mitigate both the risks and inconvenience associated with a-discovery and other aspects of modern litigation.

### **The Objectives of a Document Retention Policy**

Any municipal document retention policy must comply with the Local Government Records Law,<sup>3</sup> Under this statute, municipalities must maintain public records and may not destroy them except with the consent of the commissioner of education or in accordance with the commissioner's "Records Retention and Disposition Schedule:"<sup>4</sup> which sets forth minimum retention periods for a comprehensive range of records.<sup>5</sup> A "public record" includes "any book, paper, map, photograph, or other information recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business:"<sup>6</sup> This definition encompasses ESI and includes everything from a casual note, a rough draft or a scheduling request to formal correspondence, meeting minutes or a deed.

But municipalities are not required to retain all public records. The Records Retention and Disposition Schedule permits municipalities to destroy some records without satisfying a minimum retention period. In particular, municipalities need not retain "internal information records, including but not limited to calendars of appointments, office and travel schedule, memoranda and routing slips, routine internal reports, review and plans, used solely to disseminate information or for similar administrative purposes" for any specified timeframe.<sup>7</sup> Likewise, municipalities "may delete, purge, or destroy e-mail records provided that the records have been retained for the minimum retention established in this Schedule and are not being used for a legal action or audit:"<sup>8</sup>

Unless a legal claim is pending or reasonably foreseen, there is no special duty to preserve evidence for litigation. An effective document retention policy should therefore retain only those documents for which retention is mandated. All other documents should be destroyed regularly on an automatic basis to ensure that non-essential items, where ticking time bombs are most likely to lurk, are systematically discarded. For example, a municipality might institute an automatic "janitorial" function that purges e mails after 90 days, unless an employee makes a-conscious decision to save a message permanently. To the extent possible, all ESI should also be maintained "on the system" through a central server and not on laptops, PDAs, or portable storage devices, so that the municipality can monitor implementation of document retention and other ESI related policies.

A municipal document retention policy therefore should serve two basic objectives; it must adhere to Local Government Records Law while also ensuring that non-essential documents are regularly discarded.

### **Implementing an Appropriate Document Retention Policy**

While the details of any policy will depend on the specific needs of the municipality,<sup>9</sup> a few principles are generally applicable. To begin with, a municipality should appoint an administrator responsible for implementing its document retention policy. Not only is this common sense but the Local Government Records Law requires that each municipality designate a records management officer.<sup>10</sup> Each municipality should further maintain compliance logs and conduct periodic audits, as there is little point in having a document

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retention policy, unless it is both followed and effective. Likewise, document retention procedures should allow for implementation of a "litigation hold," suspending routine records destruction as well as ready retrieval of ESI for disclosure in litigation or in response to a Freedom of Information Law request or an audit.

Lastly, municipalities should regularly train their employees concerning document retention and other ESI-related policies. Centralized IT administration can only accomplish so much. Ultimately, each municipal official and employee must make appropriate choices on a day-to-day basis concerning which documents to retain. Since the Records Retention and Disposition Schedule contains detailed requirements for each area of municipal government, employees should understand both what is specifically required for their own work and the principles governing appropriate information technology use and document retention generally.

## Computer Usage and Social Media Policies

Of course, the best way of avoiding ticking time bombs is to prevent their creation in the first place. Computer usage and social media policies play an important role in this regard. Such policies should restrict employees from using work computers or electronic devices to access social media for non-work related reasons. Employees should understand that they may only conduct official business or represent themselves as a spokesperson or agent of the municipality on social media if expressly authorized. The policy should likewise state that unlawful conduct is prohibited, and workplace policies against harassment, discrimination or other misconduct apply in the virtual realm.

In addition, computer usage and social media policies should emphasize that employees have no reasonable expectation of privacy in their work Internet accounts or electronic devices, and the municipality may monitor their Internet usage without notice, regardless of whether a communication was transmitted from the office during normal business hours or from home.

Unlike private employers, municipalities must be mindful of their employees' First Amendment rights. Nevertheless, municipalities may limit employee speech of purely personal concern by employees acting pursuant to their official capacities,<sup>11</sup> or that unduly burdens the efficiency of public services.<sup>12</sup> So, municipalities may implement appropriately tailored and applied computer usage and social media policies.

## Conclusion

Document retention, Internet usage and social media policies can greatly diminish litigation risks faced by municipalities from ESI both by ensuring that only

necessary records are retained and minimizing the misuse of information technology. But these policies must be implemented in advance and followed consistently. Once litigation commences, a municipality has a duty to preserve all relevant evidence and must be prepared to disclose, and defend itself, based on the records that have been preserved, whether deliberately or not.

## (Endnotes)

1 See, e.g., *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003). See also *R.F.M.A.S., Inc. v. So.*, 271 F.R.D. 13 (S.D.N.Y. 2010); *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, 2007 U.S. Dist. LEXIS 66767 (N.D.N.Y. 2007).

2 See, e.g., *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 881 F. Supp. 2d 1132 (N.D. Cal. 2012); *Bozic v. City of Washington, Pennsylvania*, 2012 U.S. Dist. LEXIS 172316 (W.O. Pa. 2012); *Pension Comm. of the Univ. of Montreal Pension Plan v. Bane of America Securities, LLC, et al.*, 716 F. Supp. 2d 236 (S.D.N.Y. 2010).

3 Art and Cultural Affr. Law Art, 17 (CLS 2012).

4 Art and Cultural Affr. Law § 57.25 (CLS 2012).

5 8 NYCRR 185.11, App. H (hereinafter, "Records Retention and Disposition Schedule MU-1"). A copy of the schedule is also available from the Web site of the State Archives at [http://www.archives.nysed.gov/a/records/mr\\_pub\\_mu1.shtml](http://www.archives.nysed.gov/a/records/mr_pub_mu1.shtml) (assessed March 11, 2013).

6 Art and Cultural Affr. Law § 57.15 (CLS 2012) (emphasis added). This definition of public record differs from that under the Freedom of Information Law, which defines "record" to include, "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever, including ... computer tapes or discs ..." Pub. Off. Law § 86(4). But the Freedom of Information Law pertains to the disclosure of existing records. Unlike the Local Government Records Law, it does not concern the management, custody, retention, and disposal of records. See Comm. on Open Gov't, FOILA0-18052 (Mar. 24, 2010).

7 Records Retention and Disposition Schedule MU-1 at Item 18 in the General Section.

8 Id. at p. xiv.

9 Each municipality should consult with IT professionals and legal counsel to determine an appropriate policy that is best suited for its needs. The state Archives also makes available extensive literature and training opportunities addressing appropriate municipal document retention procedures.

10 Art and Cultural Affr. Law § 57.19 (CLS 2012).

11 *Garcetti v. Caballo*, 547 U.S. 410, 126 S. Ct. 1951 (2006)

12 *Pickering v. Bd. of Ed.*, 391 U.S. 563, 88 S. Ct. 1731 (1968).