Introduction to E-Discovery

Issues & Recommendations
for State Organizations

Issues

- What is E-Discovery?
  - Any process in which electronic data is sought, located, secured, and searched with the intent of using it as evidence in a civil or criminal legal case.
  - Preparing for e-discovery requests will likely result in:
    - Alteration of current State processes with respect to business records and knowledge assets
    - The purchase of new technologies to manage State records and knowledge assets
    - An increased need to keep State employees informed about their responsibilities with respect to handling records and information

Issues (cont'd)

- Why E-Discovery?
  - As official government records and other information continues to move into electronic form, more discovery requests will be made for that information if the State becomes involved in a lawsuit.
  - Hence, it is critical to be able to identify where the information is located and how it can be retrieved.

Issues (cont'd)

- Information Technology Provider Responsibilities
  - Using **technology** to locate electronically-stored information (ESI) and successfully retrieve it when e-discovery requests are made.
  - Service providers and physical data custodians may have responsibilities regarding the **storage, preservation and retrieval of agency information resources**.
    - These evolving responsibilities with respect to managing electronic records and information may require updates to currently existing **service level agreements** (SLAs).
  - ESI requested during the course of the discovery process **could be located in any number of IT systems, state-issued devices or even state employees' personal IT devices**, such as PDAs.
    - In addition, potentially discoverable information must be identified as it exists within the mounds of other information held by the state and then retrieved in a form that can be eventually handed over to the requesting legal counsel.

Issues (cont'd)

- What's at Stake?
  - If the State is involved in litigation**, the outcome of the case could hinge upon the location and retrieval of ESI**. In the event that organizations cannot locate or retrieve discoverable information, the State could be penalized to the point of turning the case to the opposing side's favor.
  - Ultimately, **a negative litigation outcome could cost substantial amounts of taxpayer dollars** that might be spent on more pressing priorities.

Issues (cont'd)

- Why Now?
  - On December 1, 2006, the way that litigants in federal civil lawsuits conduct discovery changed to reflect the **increasing prevalence and relevance of ESI in legal proceedings**. Prior to this change, many courts had been grappling with issues surrounding the treatment of electronic records discovery.
  - The new **amendments to the Federal Rules of Civil Procedure (FRCP)** in essence made it more difficult to use the fact that information is held in electronic form as a defense to fulfilling discovery requests.
  - The requirement that is implicit within the new e-discovery amendments is that **states must now plan ahead of time** to better organize and manage their vast stores of information.

Issues (cont'd)

- ESI is Anywhere
  - This information could be stored anywhere in the enterprise – from the State data center to an agency IT system to an employee's personal PDA that contains both personal and work-related information.

Issues (cont'd)

- Legal Holds
  - Organizations are under the **duty to preserve information** if they reasonably anticipate that a lawsuit may commence.
  - In such instances, the State must issue a "legal hold" which is basically an instruction to the pertinent State employees to **preserve information that could be discoverable** in the eventuality that the State becomes involved in a court case.

Issues (cont'd)

- Equal Footing for Paper and Electronic Information
  - The federal judicial system placed electronic information on the same footing as paper information via the e-discovery amendments.
  - Therefore, it is likely that e-discovery requests will become more prevalent as well and organizations will increasingly be faced with finding and retrieving all types of information stored electronically.

Issues (cont'd)

- The Form of ESI Doesn't Matter
  - Discoverable electronic information **must be produced** regardless of:
    - the **device** on which it is stored (computer, server, cell phone, PDA, digital camera, black box, RFID, thumb drive)
    - its **location** (in-house, network, hosted)
    - its **format** (word processing document, spreadsheet, database, e-mail, xml, html)
    - its **digital object type** (office documents, e-mail, database, web pages, audio, video, voice mail, log files, instant messages)

Issues (cont'd)

- Production of Discoverable ESI is Required
  - Those involved in federal cases are **now specifically required to disclose electronic information at various points in time as cases proceed** in the court system and can request the other side to produce such electronic information.
- Undue Cost or Burden is No Guarantee
  - If electronic information is "not reasonably accessible because of undue cost or burden," then it does not have to be produced.
    - However, the court still retains the latitude to order the discovery of such electronic information upon a showing of "good cause."
    - Judges' decisions in weighing the benefits versus the burdens of producing electronic information can be difficult.
  - With the e-discovery amendments, **no guarantees exist that difficulty in producing electronic information will constitute a sufficient excuse** for non-production.

Issues (cont'd)

- Less Time for Finding ESI
  - At the very inception of a lawsuit, the e-discovery amendments require the production of electronic information to support each side's claims and/or defenses.
  - The rules also provide specific timeframes for production of electronic information at other points within the course of a lawsuit.
  - Generally, **state IT departments must comply with e-discovery requests within 30 days**.

Issues (cont'd)

- Preservation of Information and Legal Holds
  - The rules recognize the difficulty of preserving electronic information due to its often voluminous and dynamic nature. The rules attempt to have organizations and individuals involved in litigation address those issues early in the discovery process, especially since the operation of most IT systems involves the automatic creation, deletion, or overwriting of certain information.
  - **Decisions on what to preserve and not preserve can be difficult and involve examining the impact of preservation on the operation of critical IT systems.**

Issues (cont'd)

- Information that Does Not Need to be Produced
  - The volume of data, its fluidity in some instances, and the existence of metadata and other "embedded" information that is not readily apparent can pose problems for asserting privilege for **certain items of electronic information** that **may be excused from production**.
  - The amended rules recognize this and attempt to require all involved in a case to **talk about these issues and reach agreements as to review protocol**.

Types of Metadata

Contextual
- Title
- Summary
- Keywords
- Thumbnail image
- Pointers to more information

System Level
- Locations
- Creation dates
- Access dates
- Codes
- Links

Application Level
- Result summary
- Input parameters
- Images
- Text
- Restart Files
- Pointers to more information

Issues (cont'd)

- Access to IT Systems and Staff
  - The e-discovery amendments provide that one side may be required to grant the other side access to a specific computer or computer system as part of a discovery request. This also could include giving the requesting side technical support, information on application software, or other assistance.
  - Those involved in a lawsuit also can request to "inspect, copy, test, or sample" electronic information, which could give rise to privacy and confidentiality issues that must be addressed.

Issues (cont'd)

- Routine Alterations and Deletions of Information
  - The e-discovery rules implemented new provisions regarding the loss of electronic information, sanctions and penalties.
    - This was an attempt to recognize the routine alterations and deletions of information that take place in the ordinary course of business and have nothing to do with litigation.
  - The rules make clear that, absent exceptional circumstances, **sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system**.

Recommendations

- Identify the Stakeholders
  - An initial step is identifying the various stakeholders within state government that have a role to play and expertise to contribute regarding e-discovery.
    - For example, the **Attorney General's Office** which protects the state's interest in lawsuits has an interest in being able to retrieve documents with ease and efficiency for legal purposes.
    - Moreover, the **State Records Center** has an interest in being able to store documents in a way that will make them retrievable for generations to come so that the history of the state and its operations can be preserved.
    - Others to consider including are **electronic records managers, IT managers and staff, attorneys and business managers**.

Recommendations (cont'd)

- Policies and Procedures
  - Organizations should update and/or create information management policies and procedures that include:
    - **e-mail retention policies,**
    - **off-line and off-site data storage retention policies,**
    - **controls defining which users have access to which systems and under what circumstances,**
    - **instructions for how and where users can store data, and**
    - **backup and recovery procedures.**
  - Assessments or surveys should be done to identify business functions, data repositories, and the systems that support them.
  - **Legal must be consulted.** Organizations and their legal teams should work together to create and/or update their **data retention policies** and procedures for **managing litigation holds**.

Recommendations (cont'd)

- Clean House
  - The biggest data storage problems are created by **e-mail, information on file servers, and an uncontrolled approach to backup and recovery**.
    - At the organizational level, this results in offline storage on tapes of data that are so old, the systems that originally created them are no longer used by the business.
    - On an individual level, employees tend to keep information on their hard drives "just in case" they might need it.
  - **Identify *all* sources of backup and offline data**
  - Work with users to **rationalize their storage requirements** and decrease their storage budget.

Recommendations (cont'd)

- Technology
  - To bring the problem of redundant, disorganized, unstructured information under control consider **enterprise content management** and **integrated content archiving** solutions.
  - A growing number of vendors also offer **policy management systems**; rule-based software that allows lawyers, users, and IT people to participate in writing and automating retention policy.
  - **Search and information access** vendors also play in the e-discovery space, allowing companies to categorize and find what they have and what they need to respond to requests for information.
  - The management of information retention policies is key to making this technology work.

Recommendations (cont'd)

- Training
  - Make sure all State employees **know what materials to keep and what to discard**.
    - It is reasonable for the State to rely on employees to save documents that might be in litigation.
  - **All e-mail**, both personal and job related, **creates a potential litigation risk**.
    - Employees should realize the lack of privacy in e-mail.
    - If managers imagine their e-mail blown up on a highway billboard, that's exactly how it looks at trial.
    - **"Never put anything in an e-mail you wouldn't want your mother to read!"**

E-Discovery Education Resources

- Electronic Discovery Reference Model
  http://www.edrm.net/
- The Sedona Conference Publications
  http://thesedonaconference.org/content/miscFiles/publications_html
- Federal Rules of Civil Procedure
  http://judiciary.house.gov/hearings/printers/110th/civil2008.pdf
- Seek and Ye Shall Find? State CIOs Must Prepare Now for E-Discovery!
  http://www.nascio.org/publications/documents/NASCIO-EDiscovery.pdf
- Build an E-mail Discovery Plan
  http://www.windowsitpro.com/articles/print.cfm?articleid=49896