

# **ROYAL COURT OF JERSEY**

**RC17/08**

## **Discovery of Documents held in Electronic Form**

1. The purpose of this Practice Direction is to provide guidance to parties on how to make discovery of Electronic Documents in a proportionate and cost effective manner.
2. This Practice Direction shall apply to all cases where the discovery to be provided is or is likely to consist substantially of electronic documents.

### **Definitions**

3. In this Practice Direction the following words or phrases shall have the following meanings:-
  - a. 'Data Sampling' means the process of identifying relevant Electronic Documents through creation of a sample of representative individual documents;
  - b. 'Discovery Data' means information relating to Electronic Documents which are to be disclosed by a party, including for example the type of document, the date of the document, the name of the author or sender and the recipient, and the party disclosing the document;
  - c. 'Electronic Document' means any document held in electronic form including an Electronic Image. It includes, for example, email and other electronic communications such as text messages or similar means of communication and voicemail, word-processed documents including presentations and spreadsheets and databases, photos or videos and documents stored on portable devices such as memory sticks and mobile phones. In addition to documents that are readily accessible from computer systems and other electronic devices and media, it includes documents that are stored on

servers and back-up systems and documents that have been deleted. It also includes metadata and other embedded data which is not typically visible on screen or a print out;

- d. 'Electronic Image' means an electronic representation of a paper document;
- e. 'Keyword Search' means a software-aided search for words across the text of an Electronic Document;
- f. 'Metadata' is information about an Electronic Document. Metadata is typically embedded information about the document which is not readily accessible. It may include (for example) the date and time of creation or modification of a word-processing file, or the author and the date and time of sending an email. Metadata may be created automatically by a computer system or manually by a user; and
- g. 'Original Electronic document' or 'Original Format' means an Electronic Document stored in the original form in which it was created by a computer software programme;

## **General Principles**

- 4. When making discovery of Electronic Documents the parties, their legal representatives and any experts retained to assist the parties should have regard to the following general principles:-
  - a. Discovery of Electronic documents should be managed efficiently in order to minimise the cost incurred;
  - b. All parties to a dispute should as far as possible cooperate with each other in relation to discovery of Electronic Documents. This includes taking all reasonable steps to agree the process by which discovery of Electronic Documents is provided and exchanged, and providing information on the process, or processes used to make discovery;

- c. Appropriate technology should be used in order to ensure that the disclosure of process is carried out efficiently and effectively;
  - d. As far as is reasonably practical, the legal adviser of each party should allocate an individual within that legal practice to be primarily responsible for the management of the discovery process. Where a party uses an independent expert to assist with the discovery process, that party shall identify that expert to all the other parties to the litigation;
  - e. When managing the discovery process and when providing discovery, a party must at all times act in a manner consistent with the overriding objective;
  - f. In providing discovery of Electronic Documents a party should take reasonable steps to avoid giving disclosure of irrelevant documents, or adopting an approach which may place an excessive burden in time and costs on the party to whom disclosure is given;
  - g. As far as is reasonably possible, discovery of Electronic Documents should be in their Original Format unless the Court orders otherwise.
  - h. Subject to the obligation to provide Electronic Documents in the Original Format, Electronic Documents shall generally be made available for inspection in a form which allows the party receiving the documents the same ability to access, search, review and display the documents as the party giving discovery;
  - i. In making discovery where the metadata is part of the Original Format it should be provided as part of discovery unless the Court orders otherwise; and
5. A party who provides discovery without first discussing with other parties how to provide discovery in accordance with the terms of this Practice Direction may be required to meet the cost of that discovery at its own expense and/or may further be required to carry out further searches for documents at its own expense.

## **Preservation of Documents**

6. As soon as a party is aware that litigation is contemplated, that party must immediately take all reasonable steps to ensure that potentially discoverable Electronic Documents are preserved.
7. As soon as a party retains a legal representative, that legal representative must inform its client of the need to preserve all potentially discoverable documents including Electronic Documents.
8. The party and its legal advisers in either case shall take all reasonable steps to ensure that no potentially discoverable document is destroyed pursuant to any document retention policy or otherwise in the ordinary course of business.
9. The party and its legal advisers may be required to provide information to the Court and the other parties to demonstrate it has fulfilled its obligation to preserve documents by reference to the questions set out in schedule 1 to this practice direction.

## **Obligations prior to the first directions hearing and the provision of information**

10. Each party and any legal representative for that party must, before the first directions hearing:-
  - a. provide to all other parties information about their intended approach to discovery of Electronic Documents; and
  - b. as far as is reasonably practical enter into discussions to seek to agree on how electronic discovery is to be provided.

11. Where a case involves or is likely to involve significant quantities of Electronic Documents or where the majority of the discovery is likely to involve Electronic documents, the parties shall provide information to each other prior to the first summons for directions in relation to the possible scope and extent of discovery in the proceedings by reference to the matters listed in the schedule to this Practice Direction
12. In particular, in complex cases discussions on how discovery is to be provided should begin at the earliest possible stage. Consideration should also be given to seeking orders for the provision of discovery at an early stage of the proceedings.
13. The information to be provided in discussions should cover the following matters:-
- a. the categories of Electronic Documents within the parties' control, the computer systems, electronic devices and media on which any relevant documents may be held, a party's storage systems and document retention policies;
  - b. the proposed scope of the search for Electronic Documents, and why the scope is reasonable;
  - c. any tools and techniques proposed to be used to reduce the burden and cost of disclosure of Electronic Documents, including:-
    - i. limiting disclosure of documents or certain categories of documents to particular date ranges, to particular custodians of documents, or to particular types of documents;
    - ii. the use of agreed Keyword Searches;
    - iii. the use of agreed software tools;
    - iv. the methods to be used to identify duplicate documents;

- v. the use of Data Sampling;
  - vi. the methods to be used to identify privileged documents and other non-disclosable documents, to redact documents (where redaction is appropriate), and for dealing with privileged or other documents which have been inadvertently disclosed; and
- d. the use of a staged approach to the disclosure of Electronic Documents;
- e. how Electronic Documents, have been and will be preserved;
- f. the formats in which Electronic Documents are to be provided and exchanged on inspection and the methods to be used;
- g. the proposed basis of charging for or sharing the cost of the provision of Electronic Documents, and whether any arrangements for charging or sharing of costs are final or are subject to re-allocation in accordance with any order for costs subsequently made; and
- h. whether it would be appropriate to use the services of a neutral facility for storage of Electronic Documents.

### **Searching for documents**

14. The extent of the reasonable search required for Electronic Documents shall be determined having regard to the general factors listed in Practice Direction RC17/07 at paragraph 10 relating to discovery together with the following:-

- a. the accessibility of Electronic Documents;
- b. the location of Electronic Documents;
- c. the likelihood of locating relevant Electronic Documents;

- d. the cost of recovering any Electronic Documents;
- e. the cost of providing inspection;
- f. the likelihood that the Electronic Documents could be materially altered in the course of recovery, disclosure or inspection;
- g. the availability of documents or contents of documents from other sources; and
- h. the significance of any document which is likely to be located during the search;

15. By reference to the issues between the parties, it may be reasonable to limit searches for Electronic Documents to part only of a party's systems to documents during a defined period, to documents falling into a particular category or categories, and/ or to documents held in a particular location or locations or a combination of any of the above;

16. Discovery may also be limited in respect of Electronic Documents that are not reasonably accessible. The onus will be on the party alleging that documents are not reasonably accessible to provide evidence in support of its position;

17. A party proposing to make discovery by use of Keyword Searches or other automated search techniques should be able to explain:-

- a. why the proposed searches or techniques more likely than not will result in the most relevant documents being disclosed;
- b. why they will not lead to excessive quantities of relevant documents being produced,
- c. how key word searches or other automated searches might be supplemented with manual reviews;

18. Any party should be ready to explain to the other party and to the Court the methods it intends to use or has used. The information provided should be by

the lawyer with the responsibility for the disclosure process and any individual expert retained to assist on the disclosure process;

19. Where a party seeks disclosure of additional metadata from that contained in documents provided in Original Format, the party seeking disclosure of additional metadata must demonstrate that the relevance and the materiality of the requested metadata justifies the costs and burden of producing that metadata;

20. Parties using document management or litigation support systems should be able to explain whether metadata or other useful information relating to documents is stored with the documents themselves.

21. The parties shall use reasonable endeavours to cooperate in resolving any issue or difficulties arising in the process of electronic discovery. In the event that such issues arise that would in the reasonable opinion of any of the parties adversely impact the timetable for discovery, including for example the collection of an excessive number of Electronic Documents, the parties shall meet to discuss such problems and seek to agree a way forward which is consistent with the objective of ensuring that the process of electronic discovery is appropriate and concluded in a timely fashion and at reasonable cost. In the case of difficulty or disagreement, the matter should be referred to the court for directions at the earliest practical date.

### **Affidavit of discovery**

22. When the affidavit of discovery is provided, the affidavit of discovery must identify the processes followed by a party in providing Electronic Discovery.

23. The Electronic Documents being disclosed should be set out in a single, continuous table or spreadsheet, each separate column containing exclusively one of the following types of Discovery Data:-

- a. discovery list number (sequential);

- b. date;
- c. document type e.g. letter, email, spreadsheet;
- d. description of document (if not clear from its title);
- e. author/sender and organisation where relevant;
- f. recipient and organisation where relevant; and
- g. discovery list number of any parent or covering document.

24. Other than for discovery list numbers, blank entries are permissible and preferred if there is no relevant discovery date (that is, the field should be left blank rather than state 'Undated');

25. Dates should be set out in the alphanumeric form i.e. 'dd/mm/yyyy'; and

26. Discovery data should be set out in a consistent manner.

### **Provision of electronic copies of disclosed documents**

27. The parties shall co-operate at an early stage about the format in which Electronic Documents are to be provided. In case of difficulty or disagreement, the matter should be referred to the Court for directions at the earliest practical date, if possible at the first directions hearing.

28. Save where otherwise agreed or ordered, electronic copies of disclosed documents shall be provided in their Original Format, in a manner which preserves Metadata relating to the date of creation of each document.

29. The parties shall provide any available searchable versions of Electronic Documents with the original. A party may however choose not to provide searchable versions of documents which have been redacted. If searchable versions are provided, they are provided on an 'as is' basis, with no assurance

to the other party that the searchable versions are complete or accurate. Any searchable version shall comply with the principle set out in paragraph 4.h of this Practice Direction.

30. Subject to paragraph 31 below, if a party is providing in electronic form copies of disclosed documents and wishes to redact or otherwise make alterations to a document or documents, then the party redacting or altering the document must:-

a. inform the other party that redacted or altered versions are being supplied; and

b. ensure that the original un-redacted and unaltered version is preserved, so that it remains available to be inspected if required.

31. Paragraph 30 above does not apply where the sole alteration made to the document is an alteration to the Metadata only as a result of the ordinary process of copying and/or accessing the document for the purposes of providing discovery in compliance with this practice direction.

## **Costs**

32. Save where otherwise agreed or ordered, all costs and expenses associated with electronic discovery shall be for the account of the relevant party on whose behalf they are incurred, including for the avoidance of doubt any charges by a third party service provider in respect of:-

- a. the collection, processing, loading and hosting of data;
- b. licence fees payable on a per user basis in respect of the document review platform, database and/or server;
- c. training, project management set-up and ongoing technical support in respect of the document review platform;

33. Nothing in the foregoing shall prevent a party from claiming and recovering its costs (including the costs of electronic discovery) in the normal way at the conclusion (or earlier if appropriate) of the proceedings.

This Practice Direction will come into force on 1<sup>st</sup> June 2017

## **Schedule 1**

1. What date range do you propose that searches for Electronic Documents should cover?
2. Who are custodians of your Electronic Documents?
3. What types of relevant electronic communications were in use during the date range?
4. If you do not intend to search any category or type of relevant communication please explain why not?
5. Are back-ups or archive of any relevant Electronic Documents available and if so where are such back-ups located?
6. Is it your intention to search back-ups or archives?
7. Do you consider the key words should be used as part of the discovery process?
8. If so you should identify the key words proposed to be used.
9. You should also explain the extent to which key word searches have been or are intended to be supplemented by any other form of search identifying the processes to be followed, by such other review.
10. For cases with significant amounts of Electronic Documents you should consider whether other automated searches or techniques such as a technology assisted review are to be used as part of the process of discovery.
11. You should explain the likely cost of providing discovery of Electronic Documents by reference to the methods of providing discovery you intend to adopt.

12. You should provide details of the software processes and methods intended to be used to provide discovery of Electronic Documents.
13. You should identify any particular difficulties you envisage in relation to the provision of discovery including any issues relating to documents that may be particularly difficult to access, for technical reasons or where concerns about data protection obligations might arise.
14. You should explain your document retention policy.
15. You should set out how you propose to provide the Electronic Documents to the other party or parties.
16. You should explain whether you intend to provide discovery of documents in their original format and whether or not you intend to disclose metadata.
17. If you are seeking the metadata of Electronic Documents which is not intended to be provided, you should set out why such metadata is required.