

UNIVERSITY OF CALIFORNIA
OFFICE OF THE GENERAL COUNSEL
1111 FRANKLIN STREET, 8th FLOOR
OAKLAND, CALIFORNIA 94607-5200
(510) 987-9800 FAX (510) 987-9757

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Writer's direct line: (510) 987-9726
E-mail: jeffrey.blair@ucop.edu

VIA E-MAIL

OGC Attorneys
Campus, Medical Center and Lab Counsel
Risk Managers
Campus and Medical Center Chief Information Officers
Campus and Medical Center IT Policy Coordinators
Campus Human Resource Officers
Academic Personnel Directors

Re: New Federal Discovery Rules Re Electronically Stored Information

As you know, the Federal Rules of Civil Procedure now require that when a lawsuit is filed in federal court, or the University reasonably anticipates a lawsuit, we must preserve all information, including electronically stored information ("ESI") relevant to the claims or defenses in the suit (or anticipated suit). While the general requirement to preserve documentary evidence has always existed, the addition of ESI to the mix creates formal obligations regarding electronic information, requiring the participation of personnel administrators, risk managers, IT administrators and campus counsel.

I understand that the campuses have thus far been working individually to comply with the new rules. Cynthia Vroom has been the point person at OGC for electronic discovery issues, and has worked with many of you on individual cases. This office is working on system-wide guidelines and procedures for compliance with the federal discovery rules and will circulate a draft for your review before they are finalized. In the meantime, OGC would like to confirm that the following steps must be taken when federal litigation has commenced or is anticipated:¹

¹ Although these requirements presently apply only in federal lawsuits, state legislation is not far behind; indeed, state courts have already begun to apply similar principles regarding discovery of electronic information.

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(1) Determination of Trigger Point for Duty to Preserve Information.

Personnel administrators on the staff or academic side should notify their campus/medical center counsel promptly upon becoming aware of a dispute that seems likely to lead to a lawsuit. Campus Counsel will determine, on their own or in consultation with this office, whether litigation is reasonably anticipated so as to trigger the ESI preservation rules. While there is no hard and fast rule, and each matter must be viewed on its own, certain communications should always trigger ESI. These include receipt of a demand letter and most EEOC/DFEH charges.

(2) Identification of "Key Players" and Sources of Information.

Promptly upon the filing of a lawsuit or determination that litigation is reasonably anticipated, the campus/medical center should identify the principal individuals with knowledge of the claims/defenses relating to the dispute (the "key players") and locate all sources of relevant information, whether in hard copy or electronic form. This effort should be coordinated with Risk Management and outside counsel, if applicable.

(3) Issuance of "Litigation Hold" Notice.

A "litigation hold" notice must be sent to each of the key players and any other custodian of relevant information. The notice must instruct the person to preserve all relevant information in his or her possession, whether in hard copy or electronic form, until further notice. Most campus/medical center counsel and risk managers already have a standard litigation hold notice; if anyone would like assistance, they should contact Cynthia Vroom. The notice should be signed by a University attorney, whether it be campus/medical center counsel, outside counsel or an attorney from this office. A reminder notice should then be sent every few months until the case has ended or (in the case of anticipated litigation) the statute of limitations has expired.

(4) Preservation of Electronically Stored Information.

Campuses/medical centers must also take steps to preserve relevant ESI that the individual user may not have access to. Local IT should be contacted in order to identify the systems administrator(s) with jurisdiction over the sources of electronic information, and asked to preserve all such information. That information may include e-mail, which raises privacy issues under the University's Electronic Communications Policy. All decisions regarding the preservation of e-mails and other electronic information should be made in consultation with campus/medical center counsel or outside counsel and, if necessary, this office. The federal rules anticipate that IT personnel may eventually testify regarding preservation actions taken; campuses/medical centers should ensure that all efforts made to preserve electronic information are well documented.

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All information must be preserved until the lawsuit has concluded or (in the case of anticipated litigation) the statute of limitations has expired.

(5) Suspension of Normal Document Destruction Policy.

Where the duty to preserve information has been triggered, the federal rules require that normal document destruction policies be suspended for systems where relevant information is located so that it is not deleted or overwritten. A particularly vexing issue is that of backup tapes. The decision on whether backup tapes must be taken out of circulation and preserved depends on the particular situation, and should be made in consultation with campus/medical center counsel or outside counsel and, if necessary, this office.

Complying with the amended federal rules will require a partnership among campus/medical center counsel, Risk Management and IT administrators on each campus. The fragmentation of the IT landscape at the University and within each campus complicates the task of formulating system-wide policies; nevertheless our goal is to provide appropriate guidelines as soon as possible. To that end, we ask that you provide a copy of this letter to others on your campus/medical center who are likely to be informed of disputes at an early stage. These might include your Affirmative Action, Title IX, ADA and/or other similar officers.

Cynthia Vroom has recently resumed her task of consulting with campus /medical center counsel, risk managers and IT coordinators at individual campuses/medical centers to address their ESI situation and develop consistent models for complying with the electronic discovery rules. You should expect that she will be in touch with the appropriate personnel on your campus in the near future. This work will be completed before the end of the year. In the meantime, if anyone has questions regarding the foregoing or a specific situation, they should contact Cynthia at (510) 987-9773 or cynthia.vroom@ucop.edu.

Thanks to all for your cooperation in this important matter.

Sincerely



Jeffrey A. Blair
Interim Team Leader,
Litigation, Employment and Labor

