

Intergovernmental Solutions Newsletter

Transparency and Open Government

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Transparency in Government

By Darlene Meskell
 Director, Intergovernmental Solutions
 GSA Office of Citizen Services and Communications

Newly elected President Barack Obama has taken bold steps to inaugurate an era of government openness and transparency. In one of his first official acts, the President issued a **Memorandum on Transparency and Open Government**, affirming his commitment to achieving an “unprecedented level of openness in government.” Making known his belief that transparency is a fundamental responsibility of a democratic government, he called for the creation of an Open Government Directive that would require agencies to reveal their inner workings and make their data public.

A commitment to government accountability is at the heart of this message. By allowing citizens to “see through” its workings and investigate whether or not their leaders and organizations have met their expectations, the government brings the public into its inner circles and empowers citizens to contribute to decision-making. As citizens gain knowledge and understanding, their trust in government begins to grow.

Providing government data to citizens in a meaningful way will require a culture change, away from one where data are stored away for internal purposes to one that looks broadly at how data can be made accessible for re-use by the public. The federal website **Recovery.gov Reveals Details of the Stimulus Spending** on the \$787 billion American Recovery and Reinvestment Act. It will put the data out in useable form so that people can slice, dice and mash it up to gain meaningful information about how government is working.

These data feeds create opportunities to look at government programs in new ways that could never have been imagined by the data collectors. The District of Columbia’s *Apps for Democracy* Contest drew upon the public’s imagination to make D.C. data more useful to constituents. Under the leadership of then-CTO Vivek Kundra, the District sponsored a contest seeking creative applications that use D.C. government data. The results were astonishing. The 47 entries submitted to *Apps for Democracy* within only 30 days “produced more savings for the D.C. government than any other initiative,” according to Kundra, who has since been named federal CIO.

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E-discovery, Transparency and Culture Change

By Jason R. Baron, Esq.

The December 2006 changes to the Federal Rules of Civil Procedure, which introduced the term “electronically stored information,” are transforming the way federal court litigation is being practiced in the United States. In literally hundreds of published decisions, courts are applying greater scrutiny to electronically stored information, concentrating on how electronic forms of documents and records will be preserved, formatted, searched, and produced in the context of the particular case. For the public sector, this is not just the sound of distant thunder. Increasingly, federal agencies are being required to confront how their electronic records will be produced in litigation.

Brave New World, Part 1: In a decision dated January 6, 2009, the U.S. Court of Appeals for the District of Columbia affirmed a finding of contempt against The Office of Federal Housing Enterprise Oversight, in large part due to the agency's failure to meet stipulated-to deadlines in e-discovery. The agency had committed to undertaking an “appropriate search” of disaster-recovery backup tapes for documents. It was an agreement to produce non-privileged documents found responsive to 400 overly-broad keyword search terms, where the production set consisted of 660,000 recovered documents that needed to be, but could not be, reviewed in time. The Court of Appeals was not moved to relieve the agency of its contempt citation, despite the fact that it had spent \$ 6 million, or more than 9percent of its total annual budget in connection with conducting the search. See *In re Fannie Mae Litigation*, 2009 WL 21528 (D.C. Cir.), available at <http://pacer.cad.c.uscourts.gov/commo n/opinions/ 200901.htm>.

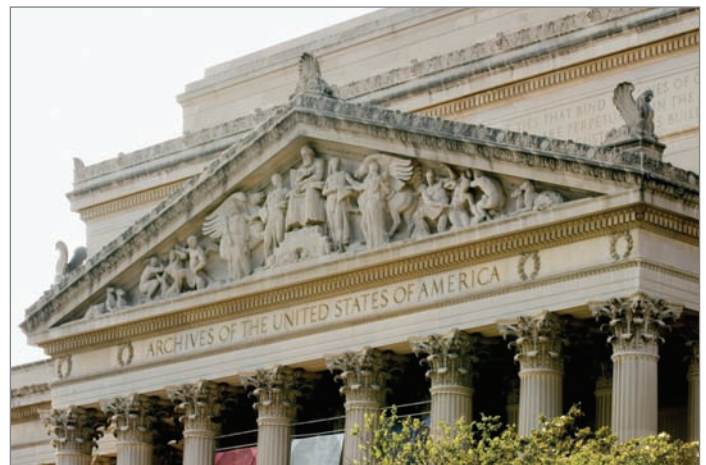
Brave New World, Part 2: In a civil rights class action brought against the Immigration and Customs Enforcement (ICE) Division of the U.S. Department of Homeland Security, a federal district court in Manhattan considered at length the discoverability of at least three types of “metadata” associated with ICE records.

These are: “substantive” metadata consisting of textual modifications to documents and editorial comments embedded within documents that are retained by the proprietary software and retrievable by end users; “system” metadata, consisting of date and time of creation of

documents or when documents were modified, including material that might have been deleted by the creator of the document; and “embedded” metadata, consisting of spreadsheet formulas, hidden columns, and hyperlinks. The government largely prevailed on a technicality, due to plaintiffs’ failure to timely raise the metadata issue: although the next set of class action plaintiffs almost assuredly won’t be making that same mistake. See *Aguilar v. ICE Division of the U.S. Dep’t of Homeland Security*, 2008 WL 5062700 (S.D.N.Y. Nov. 21, 2008).

Each new e-discovery ruling consists of a wake up call to the federal agency involved. In these and similar cases, agencies come to realize (usually, after the fact), that they must get a better handle on the downside risk posed by a failure to be prepared for e-discovery. Today, federal courts seriously

entertaining requiring (a) the production of electronic versions of records with associated “metadata,” even if hard copies exist in “official” recordkeeping systems, and/or (b) expedited searches of hundreds of thousands or millions of e-mails, including from backup tapes, even if such media and systems are not set up to handle that kind of demand. Of course, the government retains viable affirmative defenses against truly unreasonable and burdensome litigation search and production demands, as well it should. But federal agencies are whistling past the graveyard if they believe that existing forms of recordkeeping remain



adequate in the face of these new external realities.

E-discovery places in sharp relief the present-day Achilles heel of “e-government,” namely: while virtually all desktop government records are born digital, only a small percentage end up being “preserved” in a electronic recordkeeping system approved by the National Archives and Records Administration (NARA), pursuant to the Federal Records Act. Few agencies have switched to managing information electronically in a manner consistent with the NARA-endorsed standard for electronic recordkeeping. The vast majority of agencies instead are still relying on legacy records schedules that assume hard copy printouts of e-mail, word processing, and other applications suffice as the official records of the agency. Little or

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no attention is being paid to preserving in a coherent, uniform, and consistent fashion potentially large numbers of electronic communications on otherwise highly networked systems that constitute long-term temporary or permanent federal records. As a consequence, government agencies are at least two steps behind when confronted with a serious and sophisticated e-discovery demand. They routinely have trouble collecting and preserving records in their native, proprietary form (with metadata), and they have trouble searching them in a reasonable way – especially if they must rely on the enormous expense of restoring disaster-recovery backup tapes to do so.

The “print-to-paper” world of government recordkeeping has continued to survive the Electronic Freedom of Information Act, the Government Paperwork Elimination Act, the E-Government Act, and a host of similar statutes. With limited exceptions, federal agencies generally have failed to adopt modern, efficient means of preserving e-mail and other forms of unstructured electronic records on the desktop, in a manner that upholds the highest ideals of the recordkeeping laws.

Ironically, the place in government generating the most public controversy for flaws in its recordkeeping system, namely the White House, actually has remained comparatively ahead of the curve. Notwithstanding allegations of “missing” e-mail, approximately 32 million Clinton e-mail records, and now on the order of ten times that amount of Bush 43 e-mail records, have been preserved in electronic form under the Presidential Records Act and the Federal Records Act.

No other place in government has so far approached this volume of wholesale e-mail capture under the public records laws, although some have begun to contemplate the idea of “e-mail archiving,” which holds out the promise of a “quick fix” to litigation risk, especially from an IT perspective, where the agency “just” saves everything. Such technologies remove

e-mail from the mail server to manage it in a central location, without much or any effort on the part of individual users. Agencies considering e-mail archiving without also thinking through its records management implications exchange short-term litigation risk in terms of deleted information, for the expense and attendant risk associated with building up huge, unstructured data collections that cannot be adequately managed or searched. The adoption of e-mail archiving combined with appropriate records management controls and filters may well be a constructive step forward, however. Agencies moving toward the adoption of such new technologies should, in my view, be applauded in thinking outside the present “only hard copies are official records” box. For additional guidance, see NARA Bulletin 2008-05 (Guidance concerning the use of e-mail archiving applications to store e-mail), available at <http://www.archives.gov/records-mgmt/bulletins/2008/2008-05.html>.

The business case for adopting electronic recordkeeping should be apparent. E-discovery increases risks exponentially for agencies that rely on paper, on backup tapes, and on end users to respond to discovery obligations. Agencies must begin to treat information as critical assets to be managed strategically, which increasingly will mean managing information electronically. They should be working to transform current business practices to truly embrace e-government in cradle-to-grave workflow processes, from record creation through ultimate disposition.

My six prescriptions for change include federal agencies:

- Committing to electronic recordkeeping and/or e-mail archiving with records management controls in place;
- Embracing preventive measures in the form of ad hoc, interdisciplinary groups of professionals (records officers, attorneys, CIOs and IT staff, and senior executives), meeting to discuss the future e-discovery risks

each agency faces;

- Improving their baseline knowledge management of their own information assets, starting with inventorying and/or data mapping all agency ESI repositories, applications, and platforms in anticipation of discovery about those very subjects;
- Changing workflow to support electronic business processes;
- Updating legacy records schedules and ensuring that unscheduled electronic records (in the form of databases or on network applications) are properly scheduled; and
- Appointing a “knowledge counsel” who will be the “go to” person in each headquarters and regional component of a General Counsel’s or Solicitor’s office, who would function as a clearinghouse and repository of information on the IT and recordkeeping practices of the agency.

Although agencies could probably continue to live in a world of paper recordkeeping practices absent e-discovery, e-discovery is and will most assuredly continue to be a driver of culture change. How many more litigation shocks to the system should the federal government take before agencies understand the value of better, more automated processes for the long-term maintenance of federal records, so as to ensure better transparency in the form of enhanced access? The world awaits our collective answer, and if none is forthcoming, parties certainly won’t be reticent about filing additional lawsuits demanding greater and more costly disclosures of the government’s electronic records. ■

Jason R. Baron is Director of Litigation at the National Archives and Records Administration. The statements expressed in this article are the author’s personal views and do not purport to represent the positions taken by NARA or any other component of the federal government. For additional information contact Jason.baron@nara.gov.