TIP JAR

Hold On: Litigation Holds and Electronic Records

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You may have experienced the following situation working for a local public agency. You open your mail and you see a document entitled "Litigation Hold." An attorney wants your employer to preserve records for discovery in a legal dispute, including emails and other electronic data. Initially, you have no idea where relevant emails and data might be kept, whether they are even being saved or what policies are in place regarding the retention of emails and other electronically stored information. How can such a situation be avoided?

A request for a litigation hold often arises before the filing of a lawsuit in order to ensure that information relevant to the case is preserved. Such requests are normally made by an attorney representing an individual who intends to sue the public agency. In other instances, public agencies receive litigation hold letters from their own legal counsel, based upon either existing or anticipated litigation. In general, a party receiving a litigation hold has a duty to preserve evidence that it reasonably should know is relevant to litigation. The clock may start from the moment a public agency reasonably anticipates litigation, before a plaintiff ever files a lawsuit. This is especially true for public agencies, as a would-be litigant cannot file a lawsuit until after they have already presented a claim for damages administratively, and that claim has been acted upon.

While the cost of locating and storing electronic data for lawsuit discovery purposes can be high, failure to do so may be higher: Sanctions for destroying evidence can include monetary penalties, adverse jury instructions or a default judgment against your agency. Unfortunately, while courts have found certain broad requests by litigants for electronically stored information overly burdensome, public agencies generally cannot use budget issues as a defense against costly "e-discovery" requests.

The California Supreme Court's opinion in *City of San Jose v. Superior Court* added a new layer of complexity and cost for public agencies facing records requests under the California Public Records Act (CPRA): Electronic communications sent by or stored in an employee or official's personal device or account may now be subject to disclosure under the CPRA. The court's decision was not expressly prospective, so if a search was pending at the time the decision was issued, a public agency may be obligated to expand it. The decision will likely also have implications for public agencies involved in lawsuits and related litigation holds. With our ever-changing technologies, it is best that public agencies are knowledgeable about what electronic data they possess, in what form, and where and how long it is stored, so they are poised to properly respond to such requests when received.

How can public agencies adequately prepare for litigation holds? The key is proactive readiness, as opposed to a reactive response. An updated records retention policy that covers email and other electronic data is essential. Such a policy would relate to records in all management systems. For municipal agencies, certain records are subject to special retention requirements; otherwise, the general rule is that such agencies retain records for two years. School districts are subject to a different set of rules and record retention

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timelines, which are discussed in detail in a separate article in this issue of the TIP Jar. Therefore, it is important for a public agency to have the ability to archive and retrieve electronic communications that they are required to maintain under applicable laws, as well as delineated processes and schedules for the maintenance and destruction of records. Such a policy may also address the timeline or cycle on which emails are regularly purged, subject to any litigation hold that requires their retention. It may also address how the maintenance and destruction of such emails interact with any backup system the public agency has in place for such electronically stored information.

Public agencies should also work with their IT department staff or consultant before a lawsuit or CPRA request comes to pass to find out who has electronic data and where it is stored–especially if data is stored in private devices or accounts. If a plaintiff files a lawsuit, a public agency's IT experts can guide other public agency employees regarding the methods and costs of storage and retrieval of electronically stored information, documents, and data where preservation requirements apply.

Another proactive step is to preserve potential evidence for incidents that have generated an administrative claim. Once a claim has been presented, a public agency is on notice it may face a lawsuit so a litigation hold has already, in essence, been submitted. This is a great opportunity for the agency's risk managers to work in conjunction with counsel to gather records relevant to the claim. The claimant is required to set forth all of the facts and circumstances related to the claim, so the public agency is justified in using the claim as a guide for records retention. Under these circumstances, a public agency should identify all possible custodians of relevant records. If a public agency is not diligent about having its employees preserve agency communications made through personal accounts and devices, then the job of the custodians may prove more difficult and time consuming.

Certain types of events generate litigation so often that it may be in a public agency's best interest to preserve records before a claim is even made. For example, employee disciplinary matters are often highly contested, and may generate a large amount of email traffic that is subject to preservation if the case ultimately makes its way to court. Law enforcement actions, especially those involving the alleged use of force, often generate lawsuits. In such cases, the policies, practices, and customs of the agency are a likely issue in the case, and a litigant is apt to ask for information about the agency's involvement in similar incidents. A litigant may also request items like videos from body cameras worn by law enforcement officers. If a plaintiff claims civil rights violations under federal law, he or she is not required to present an administrative claim to the public agency before filing a lawsuit. In fact, such a plaintiff may not file suit until up to two years after the event. Therefore, public agency evidence preservation is ideally taking place much sooner.

In any situation involving potential litigation, it is important for a public agency to confer with counsel to identify the best steps to take with respect to evidence preservation, and then take those steps. If the public agency is able to produce favorable evidence prior to the initiation of formal litigation, it is quite possible that potential litigants will be convinced not to pursue litigation at all. Even if litigation is unavoidable, work on the front end will help the public agency achieve a better result.