Forewarned is forearmed

Martin Baldock of **Stroz Friedberg** reviews the state of the art technology that is being deployed in court cases. Mobile phones and satnavs are among the sources of electronic evidence that is finding its way into court.

KEY POINTS

- **Information can be retrieved from a wide range of sources in an e-disclosure investigation from emails, word documents, project and Gantt charts to evidence from mobile phones, laptops and satnavs**
- **Files that someone may have overwritten or attempted to delete can still be retrieved, restored and used as evidence**
- **It is important for a company to know where and how its information is stored. Investment in well-managed and robust IT systems, even on site, can save money and embarrassment**
- **Not all data is relevant to a case. Time, effort and costs can be saved by agreeing the scope of an investigation upfront at a case management conference**
- **Multinational companies with construction sites around the world will have to address different jurisdictional rules affecting the release of information that may become evidence in a court case**

The construction industry is pretty battle-hardened when it comes to disputes but fast-developing technology means companies may need to review their armoury to be in shape to face the next contest.

Disputes today that cannot be settled by negotiation and find their way through to the courts rely more and more on evidence held electronically – and the term 'electronically' embraces a wealth of material that site managers might unwittingly overlook.

A building site, for example, may not be the usual scene one would imagine as a source of documents for e-disclosure. Indeed once documents have been to site or retrieved from site they pose challenges for any kind of electronic review. Increasingly the sources of evidence are growing from the world of emails, word documents, project and Gantt charts to encompass diverse document types such as weigh bridge tickets, timesheets and quantity surveyors' reports.

The 'evidence landscape' becomes more challenging by the day with more and more litigation now relying on the retrieval and examination of electronic evidence, not just from static computers and laptops, but also mobile devices such as phones, PDAs and satellite navigation systems (satnavs). Construction sites often do not have an IT infrastructure, meaning that communications are usually established via mobile devices.

This electronic evidence is important for the facts it contains and the story it tells about how deals may have been done, including the true nature of terms agreed and the like. The scope of what can be recovered and produced in court and the potential costs involved in such investigations has made electronic evidence a tactical card that may be played by lawyers to influence the course of a piece of litigation. One side arguing successfully that the cost of discovery far outweighs the sum in dispute may be able to cut short proceedings and thus limit the impact on the client company's bottom line – unless their opponent can prove them wrong.

Over the past year there have been several cases where one side attempted to focus on the quality of the other side's e-disclosure (or lack thereof) in an attempt to get their case thrown out. Companies, now more than ever, need both to be familiar with e-disclosure terminology and employ advisers with the proficiency to assess their use of electronic evidence and the processes which have been used to gather the evidence.

There are three defined phases in any e-disclosure collection. We are now seeing distinct challenges in each. Often these challenges are used as a confusion tactic attached to claims of proportionality.

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Phase 1 – identification

Understanding the evidence landscape is a massive and increasingly complex task, particularly if overseas sites are to be included. It is therefore essential for an investigator to be able to engage with local IT staff; on a construction site this could be an un-experienced junior or the forensic examiner's worse nightmare, the 'helpful enthusiast'. Often the IT staff feel threatened by the intervention of external specialists and may seek to over complicate the IT infrastructure. It is of paramount importance to be sensitive to local laws, customs and feelings.

Another tactic is to attempt to limit collection and any subsequent disclosure to the topics or custodians that are 'easy' to address. The key decision is quite simple in that parties are required to disclose only documents on which they intend to rely and those which adversely affect their own case or which support or adversely affect the another party's case. Claims for 'relevant', and 'proportional' (often meaning 'easy'), whilst important, should not be the sole deciding factors; quite often 'easy' collections result in vast amounts of data that is totally irrelevant!

Phase 2 – preservation and collection

In the past 12 months there has been a slow shift from a limited focus on email and standard office documents to increased awareness that mobile phones, satnavs, deleted documents and even fragments of overwritten documents need to be considered, extracted and formatted for review by non-technical but legal experts. Likewise there is a need to consider the more traditional forms of evidence such as timesheets and weigh bills which can often only exist in paper form. In a recent case we had to consider paper documents that had been badly stored for many months and how we could get these rapidly degrading documents into an electronic form for the legal team to consider. This new appetite for previously 'too complicated' evidence has created additional problems. The challenge with these new forms of evidence is how to make them look and behave like an A4 page when they enter the processing stage as most processing and hosting platforms are designed around the old paper review methods, as such they are expecting something that represents that form factor.

Any formatting or changes made to evidence during the collection phase should be avoided if possible; sometimes this is simply not possible due to time, resources and other overriding factors. In these cases it is vital to have a properly trained expert who can testify, if necessary, as to what has changed, why it was impossible to avoid this controlled spoliation and what the implications are. Despite the complexity and often unhelpful stance of some data owners, either for or against the case, the following points should be considered by any expert in this field: minimise disruption to client operations. A common mistake is to seize back-up tapes which are then urgently needed for a business continuity issue; be able to prove that the right sources of data were copied forensically avoiding any spoliation if possible. A full chain of custody including 'hash values' and signed documentation is demonstrable; avoidance of excessive preservation that could significantly increase costs and slow the disclosure process; be able to give assurance to all parties, which could include government bodies and the court, of the integrity and completeness of the forensic collection process.

Phase 3 – processing, review and analysis

Once the data is collected and preserved the crucial next step is to 'harvest' the user-created data. This is not the same as filtering. Harvesting is yet another area that the unprepared decision maker can fall foul of. Decisions here can be as simple as just to exclude the known operating system files or as complex as only including agreed file types but searching for these by a variety of means such as file header and file signature.

Image files (TIFF, PDFs, jpg etc) all pose unique challenges. In a recent case one suspect had all emails from a previous system printed out, then scanned and stored on his computer system as TIFF documents; had the case strategy been to look at just electronic email, these would have all been missed. Many construction documents have their own format with plans and designs often being written by proprietary software and outputting in file formats that cannot be read without the original software. Data duplication can sometimes make the original data set seem much larger than it actually is with mobile and static devices often replicating each other. The processing of data from multiple sources must take this into account and a robust de-duplication strategy or identification process must be in place. It is important to remember that probably 80 per cent of the available data will not be important to addressing the issues of the case.

With increasing instances of overseas litigation coming to UK courts, foreign language processing

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is another avenue of confusion and debate for the decision maker. To engage a review team capable of quickly working through multiple languages is costly; the latest review platforms are introducing 'on the fly' translations which, although machine-based, give the English-speaking reviewer enough of an understanding of the document to make informed decisions.

Historically, if the majority of evidence was believed to be in overwritten data fragments or even deleted files then e-disclosure review platforms would be discounted and the pure computer forensic examiner would be called in. This is no longer a simple decision. Many systems now have the ability to take fragments of overwritten files and convert (or carve) those vital evidence pieces into text documents to upload to the review platform.

As already mentioned certain European jurisdictions interpret the European data protection laws in different ways. Another objection often put forward is that data cannot leave a particular jurisdiction and therefore cannot be part of the review and disclosure process. This is no longer a realistic argument. As technology advances, review platforms can be built or shipped to sites anywhere in the world; data doesn't have to leave the country – the review tool can come to the data as mobile processing is now a reality

Managing the cost

An early case management conference is an essential business meeting to focus attention on the expense of retrieval. If lawyers are not able to address these things themselves then they must take advice from someone who can and is prepared to be challenged. Lawyers are naturally concerned that they might get sued because they did not search some source or advise their client to do so. However it is important to do what any reasonable person would do including considering cost and proportionality to narrow the scope as early as possible in the process. The potential conflicts that can be set up between broad collection, a narrow disclosure, cost and proportionality can be managed by splitting the exercise into stages. By agreement of simple identification, collection and review strategies, agreed at the case management conference, parties can know their sources, discuss them in advance and only involve the court in case of disagreement. Additionally, many e-disclosure platforms are now offering Early Case Assessment (ECA) technology which clusters, visualises or searches for concepts automatically, thus cutting review time and allowing the investigation and legal teams to focus or only review key documents. Court rules expressly state proportionality must limit the search process. You do not have to review documents if it is reasonably likely that the cost of doing so will be out of proportion to the value of the claim or the significance of what will be discovered.

In his recent report looking at containing costs in litigation, 'Review of Civil Litigation Costs: Final Report', Lord Justice Jackson expressly identifies the case management conference as the point where common sense should prevail and where 'proportionality' should be the watchword. Adopting such an approach, he believes, should result in a much better understanding of the likely costs involved on a case-by-case basis.

The US factor

An awareness of the idiosyncrasies of different countries and their legal systems is vital for major construction companies operating around the world. Any dispute with a US connection may have the added complication of the scale of e-disclosure demanded by the US courts. US authorities are among the most demanding and companies must be prepared to deal with 'requests' to look into the dealings of subsidiaries and any related organisations. Again, this can be best managed by early case management conferences. The *Foreign and Corrupt Practices Act of 1977 (FCPA)* is an area of the law that overseas construction contractors need to be particularly wary of, penalties are severe and litigation complex and costly.

Conclusion

Several companies have now changed the way they manage their electronic documents as a result of litigation; this trend will continue. It is estimated that one in five businesses have settled lawsuits rather than face the cost of complying with court rules and e-disclosure estimates put forward by suppliers. Judges, counsel and board-level decision makers today may still be misled and fall victim to assertions that a piece of evidence either cannot be recovered or that the recovery cost is too high for a particular case. However there is growing recognition that everyone involved needs to become more technically savvy, meaning that this tactic will rapidly become less and less effective. **CL**

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