

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## eDiscoveryUPDATE

# Transparency the key to successful e-discovery

“Transparency is indeed expensive, but it pales in comparison to the cost to a democracy of operating behind a veil of secrecy.” Judge Scheindlin wrote that line in a recent opinion out of the Southern District of New York.

The case, *Nat'l Day Laborer Org. Network v. United States Immigration & Customs Enforcement Agency*, which was filed over two years ago, has now engendered five judicial opinions.

On paper, the matters seems relatively straightforward. The plaintiff, an organization that seeks to protect the civil and labor rights of day laborers, filed a Freedom of Information Act request seeking information from multiple federal agencies who were involved in a program called Secure Communities. Secure Communities is a federal immigration enforcement program that was launched in 2008. The plaintiffs want to end this program. Seems clear-cut, right?

So what are the issues that led to five opinions being rendered? Electronic discovery issues, of course, or as the plaintiff contends, lack thereof.

The plaintiff asserts that the defendant's efforts to identify relevant records were woefully inadequate. The court agreed in part with the plaintiff and used the opinion as a forum to opine on the spirit of the FOIA. The judge wrote “[t]he act is intended to facilitate transparency about the government's policies even — or perhaps especially — when members of the public are disturbed by those policies and are fighting to end them. The act calls on government employees to diligently and honestly respond to requests even from people with whom they disagree. And it calls upon the federal courts and the attorneys who are officers of those courts to cooperate so that the public will have access to information in an efficient, effective and timely manner.”

The agencies involved in this matter include the United States Immigration and Customs Enforcement Agency (ICE), United States Department of Homeland Security (DHS), the Executive Office for Immigration Review (EOIR), the Federal Bureau of

Investigation and the Office of Legal Counsel (OLC).

Judge Scheindlin found that only one agency conducted an adequate search and production of relevant documents to the plaintiff. The other agencies completely neglected to search for documents, ignored key employees, or did not fully document their electronic discovery efforts, documentation that might have been used to support their position of compliance. Instead of focusing on the agencies that missed the mark let's explore the one that nailed it.

Drum roll please ... the winner is ... the Office of Legal Counsel. According to the opinion, “OLC, which assists the attorney general in his role as legal advisor to the president, is a small office that employs approximately 20 attorneys at any one time.” So what miracles did this agency perform? “OLC:

- 1) searched the office's shared drive, which contains all final OLC advice;
- 2) ran searches of the email files of attorneys who had departed the office;
- 3) asked two long-time career attorneys familiar with the office's work whether anybody had worked on Secure Communities and;
- 4) sent an email to all current attorneys asking if they had worked on Secure Communities or on law enforcement information sharing.”

They also documented the keywords used in the search. “First, the 17 search terms used to search the shared drive — which included ‘ICE’ and ‘secure communities’ — were reasonable” according the court. Basically, OLC was in compliance because they documented the process, used documented and reasonable keywords, searched current and departed employees' files, and asked whether anyone had worked on this program. In my humble opinion, that is a low hurdle to jump.

So why in 2012 with all the buzz around e-discovery did the

*Continued ...*



By **PETER COONS**

Daily Record  
Columnist

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## *Continued ...*

other agencies fail? Maybe it's apathy, ignorance, or maybe it was intentional. I don't know and I am sure the answer varies from agency to agency. What I do know is that it sounds like the OLC got it right.

I have some personal experience with FOIA requests and government agencies. In 2003 I was working with the New York City Law Department. I was a consultant at the time and assisting that entity with the collection of electronic records related to the Sept. 11 terrorist attacks.

From time to time I would also assist the attorneys who were responsible for responding to FOIA requests. Our process included notifying the agency that was the target of the request, identifying electronic sources to search, testing keywords, identifying past and present custodians and, last but not least, fully documenting the process. That was nine years ago and what we did sounds eerily similar to what the OLC did.

The court has set the bar at a reasonable height. The court is not requiring agencies to go to Herculean efforts to identify every electronic record. Instead the court essentially is stating that an entity must take reasonable and adequate steps in an effort to comply with a discovery or FOIA request. This case involves federal agencies but the same lessons can be used by any organization responding to a discovery request.

The following list should make the discovery ride a bit less bumpy:

1. Send out a litigation hold memo;
2. Select custodians and secure their ESI;
3. Search documents of key custodians who are current and former employees;
4. Specify keywords to identify documents — test your terms and get help from employees;
5. Seek answers by interviewing employees about where relevant data may exist (servers, social media sites, email, backup tapes, etc.);
6. Scribe — document the entire process and don't hold back on the details. Include dates, custodian interviews and

responses, keyword selection process, results of searches, and the names of the people involved in the endeavor. There is no such thing as too much documentation.

The six S's to electronic discovery success. At least it was for the OLC.

Also important to note was that Judge Scheindlin raised the issue of using technology beyond keywords to identify relevant information. "And beyond the use of keyword search, parties can (and frequently should) rely on latent semantic indexing, statistical probability models, and machine learning tools to find responsive documents.

"Through iterative learning, these methods (known as "computer-assisted" or "predictive" coding) allow humans to teach computers what documents are and are not responsive to a particular FOIA or discovery request and they can significantly increase the effectiveness and efficiency of searches."

Predictive coding is a hot topic right now in the e-discovery community and if you are an attorney responding to discovery requests you need to be aware of it. Judge Scheindlin is one of the most progressive advocates for utilizing technology in the discovery process but it is only a matter of time until it comes to a courthouse near you!

So maybe there is another S for success in discovery and that S is "Strive." Strive and seek-out new technologies that can assist with searching and handling the deluge of electronic information that exists in most organizations. At the end of the day, most agencies and organizations sincerely want to comply with FOIA and discovery requests. However, it can be intimidating and overwhelming to the uninitiated and as a result mistakes occur, details are overlooked and people take shortcuts.

If you find yourself in this position, breathe deeply and remember the six, I mean seven, steps for e-discovery success.

*Peter Coons is a senior vice president at D4, providing eDiscovery consulting services to clients. He is an EnCase Certified Examiner, an Access Data Certified Examiner, a Certified Computer Examiner (computer forensic certificates) and is a member of the High Technology Crime Investigation Association, the professional organization for people involved in computer forensics.*