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FEDERAL E-DISCOVERY

Court Provides Guidance on Impact Of Document Retention Policies


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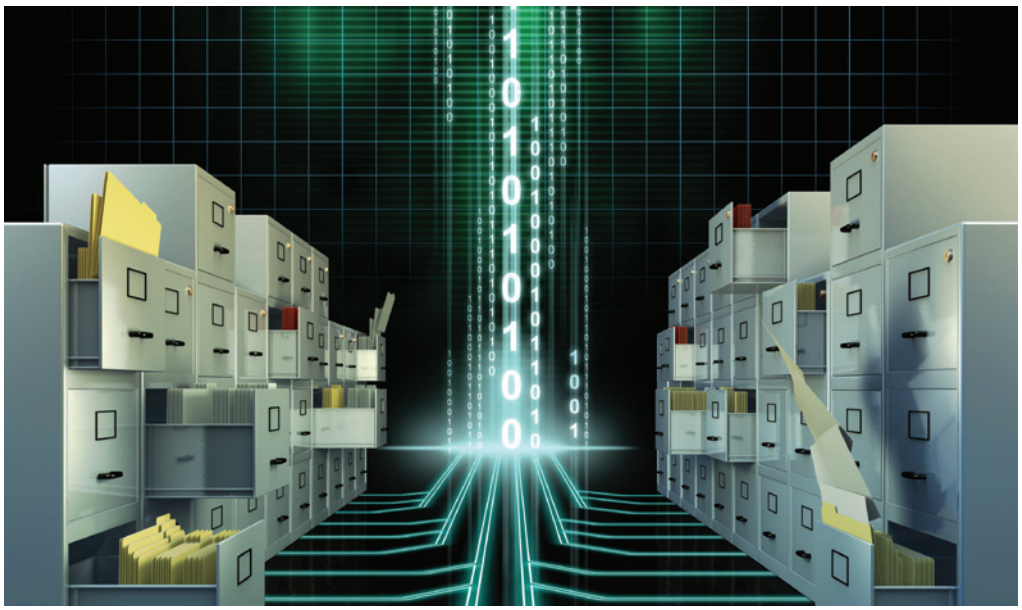
Document retention policies are a critical part of information governance for organizations, setting forth expectations and requirements around the retention and destruction of information. And, it is generally accepted that when an organization is subject to a legal data preservation obligation, it is expected to take reasonable steps to suspend aspects of such a policy that might lead to the destruction of potentially relevant information. Even so, little direction has been provided by courts on whether organizations can be held accountable for lack of compliance with their own document retention policies when information otherwise not subject to a legal data preservation requirement has been lost in contravention of such policies.



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'Performance Food Group'

A recent decision from the District of Maryland, however, provides some guidance on this issue. In the employment action *Equal Emp't Opportunity Comm'n v. Performance Food Grp.*, 2019 WL 1057385 (D. Md. March 6, 2019), the EEOC alleged that Performance Food Group (Performance), a food distributor, engaged in a company-wide pattern of sex-based discrimination against female applicants and employees in hiring and promotion. The EEOC ultimately moved for sanctions for Performance's supposed spoliation of both paper files and electronically stored information (ESI).

The common-law duty to preserve requires that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." Id. at *3 (citations omitted). Organizations may also be subject to document preservation and retention obligations arising from other legal or regulatory requirements. Here, the EEOC alleged that Performance had failed to produce almost 24,000 hard copy application files from 2004 to 2009. In support of its sanctions motion, it argued that had Performance followed its own policy requiring retention of such documents for several years, it would have preserved and produced all relevant documents from this entire time period.

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The EEOC served Performance on June 11, 2007 with "three charges alleging discrimination based on sex" at its Carroll County Foods (CCF) operating company (OpCo) and on Aug. 7, 2008 notified Performance of its investigation of all its facilities. See id. at *1, *3. The court determined that "[w]hile plaintiff argues that defendant should be charged with failing to preserve applications in accordance with its document retention policy [], defendant's document retention policy does not have the force of law. Rather, defendant was only required by law to retain applications for one year after an applicant was not selected or an employee was terminated. See 24 C.F.R. §1602.14[.]" Id. at *4. Thus, the court ruled that instead of being required to preserve all hard copy applications from 2004 to 2009, "by law, defendant was only required to keep applications dating from June 11, 2006 for CCF OpCos and from Aug. 7, 2007 for all other OpCos." Id.

Interestingly, as part of its spoliation analysis, the court noted that Performance's compliance with its retention policy as to departing employees justified its failing to produce ESI for certain custodians. As the court noted, "[a]ctive email accounts of employees are purged after they separate from the company pursuant to regular business practices." Id. at *14 (citation omitted). Given that certain custodians "were no longer employed by defendant as of [the preservation notice] date, and, pursuant to defendant's standard policy, these custodians' email accounts would have been purged upon termination." Id. at *15. Thus, the plaintiff did not "establish[] that defendant failed to preserve relevant emails from accounts that it had a duty to preserve." Id. Ultimately, upon completing its full analysis and finding spoliation in some instances, the court nevertheless declined to issue any of the plaintiff's requested sanctions.

Commentary on Defensible Disposition

Performance Food Group supports the notion that a party's legal obligation to preserve relevant information is not dictated by or predicated on its internal data retention policies. The Sedona Conference's recent *Commentary on Defensible Disposition* speaks to the issue faced by the defendant in *Performance Food Group*, that organizations still grapple with to what extent they may "be forced to 'defend' their disposition actions if they later become involved in litigation. Indeed, the phrase 'defensible disposition' suggests that organizations have a duty to defend their information disposition actions." 20 Sedona Conf. J. 179, 186 (forthcoming 2019).

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However, organizations concerned with such issues may take comfort in the position taken in the *Commentary* that "organizations should not be required to 'defend' their disposition of any information that takes place before that duty arises. Indeed, information about the organization's Information Governance program and the organization's disposition practices *before* the duty to preserve arises are typically not discoverable." Id. at 188.

The *Commentary* was drafted by The Sedona Conference in response to what the group saw as "a need for guidance for organizations and counsel on the adequate and proper disposition of information that is no longer subject to a legal hold and has exceeded the applicable legal, regulatory, and business retention requirements." Id. at 181. Such guidance includes the position that "[o]rganizations should not be sanctioned in litigation for failing to produce information that was properly disposed of before litigation was reasonably anticipated, and an organization should not be found to have obstructed justice for failing to produce information properly disposed of before an investigation commenced." Id. at 209. However, perhaps prescient of the situation in *Performance Food Group,* the *Commentary* does warn that "[a]lthough Information Governance programs do not create a preservation duty where it does not already exist, they may come under judicial scrutiny if an organization fails to meet its obligations to preserve ESI for pending or anticipated litigation." Id. at 190.

Conclusion

A robust information governance program—including document retention policies—can be invaluable to an organization. Both *Performance Food Group* and The Sedona Conference's *Commentary* provide crucial guidance that while this may be the case, data retention policies do not have the force of law. Moreover, an organization should not have to defend its document retention policies in the context of allegations that it failed to preserve relevant information. Instead, the focus should be on an organization's legal obligations to preserve information and its actions—or inaction—in that context.