

# CLAIMS BRIEF

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## **New State And Federal Procedural Rules Require Local Governments To Maintain Electronically Stored Information After They Become Aware Of A Claim.**

*By Matthew Peter, Staff Attorney*

*Both the Maryland and Federal Rules of Civil Procedure have recently been amended to impose new requirements on litigants pertaining to the production of electronically stored information. Failure to comply with these requirements could result in the imposition of sanctions which could have a detrimental effect on the ability of a litigant to present its case. All LGIT members should review the following information and develop policies and procedures to ensure that electronically stored information is properly maintained and is not destroyed after you become aware of a claim.*

In today's fast-paced, technologically advanced world, an ever-increasing amount of information is being stored electronically. For litigants, gaining access to electronically stored information has become imperative. Information stored in an electronic format, including e-mails, letters, memoranda and reports, can "make or break" a litigant's case.

In response to an increasing number of disputes between litigants relating to the production of electronically stored information, both the Maryland and Federal Rules of Civil Procedure have been amended to impose new obligations on litigants with regard to the retention and production of electronically stored information.

The new rules do not establish a bright line rule for when a prospective plaintiff or defendant must initiate measures to preserve electronically stored information. We believe, however, that the following events constitute knowledge of a claim sufficient to trigger the retention requirements of the State or federal rules:

- receipt by the governing body or a public official of an oral or written communication concerning a claim from a claimant or the claimant's attorney;
- receipt by the governing body or designated public official of a written notice of claim under the Local Government Tort Claims Act;
- receipt by the governing body of a notice that a charge of discrimination has been filed with the Equal Employment Opportunity Commission and/or the Maryland Commission on Human Relations;
- receipt by the governing body or a public official of a courtesy copy of a Complaint or Amended Complaint from a plaintiff or plaintiff's counsel; and
- actual service of process of a lawsuit.

In the event that you become aware of a claim against an individual not employed by your local government or against an agency that is not a part of the local government (an example would be receipt by a local government of a claim against State personnel or against a State department, office, or agency), you should contact your municipal or county attorney immediately to determine how to proceed.

Under the new rules, electronically stored information is treated like an ordinary business record.<sup>1</sup> However, a litigant cannot merely provide an opposing party with a paper copy of electronically stored information. A litigant must be able to identify the location of all electronically stored information and then be able to produce that information, if requested, in either its original electronic format or in a format which the opposing party can reasonably use.<sup>2</sup>

The new rules recognize that electronically stored information, just like paper documents, is routinely destroyed. In order to avoid possible sanctions for destroying electronically stored information, you should develop and implement written policies regarding the retention and destruction of electronic information. These policies should complement existing policies regarding the retention and destruction of paper files. These policies should cover information stored on myriad electronic devices including, but not limited to:

• Network servers	• Back-up drives	• Hard-drives
• Disks	• Zip drives	• Memory cards
• Flash drives	• Pen drives	• Desk-top computers
• Lap-top computers	• PDAs	• Blackberry devices
• Text messaging devices	• Voice message systems	• Surveillance systems

Litigants are now required to identify each location where electronic information is stored.<sup>3</sup> Therefore, in conjunction with adopting a written policy regarding the retention of electronically stored information, you should prepare an inventory of all devices upon which local government officers, officials, employees and agents store electronic information. You should also identify the format in which each device stores information and determine whether such information will be easily accessible if requested.<sup>4</sup>

In order to ensure compliance with the new rules, all electronically stored information in existence on the day you become aware of the claim must be maintained. Therefore, you must also adopt a written policy and procedure which enables you to suspend your ordinary practices for retaining and destroying electronically stored information. After you become aware of a claim, your information technology staff must be immediately told to preserve all electronically stored information that has not been destroyed as of that date. Swift action at the outset can prevent problems later on.

Although these rules may seem burdensome, they are not completely unforgiving. The rules include a “safe harbor” provision for electronic information that is lost as a result of the routine, good faith operation of an electronic information system.<sup>5</sup> This is why it is imperative to adopt and implement written policies regarding the retention of electronically stored information. The rules also recognize that some electronically stored information may be difficult to locate and retrieve. In circumstances in which a litigant can show that locating and retrieving electronically stored information would impose a substantial burden and cost, the court can issue a protective order saving a litigant from the burden of retrieving and producing the information requested.<sup>6</sup>

By creating and implementing appropriate policies, local governments may avoid the adverse consequences that can result from a failure to produce electronically stored information. These adverse consequences take the form of sanctions that can be imposed by State or federal courts. If a party destroys electronic information after becoming aware of a claim, a court may impose any of the following sanctions:

- an order preventing a party from raising certain defenses;
- an order deeming certain facts admitted;
- an order of default or summary judgment; and/or
- financial sanctions, including attorney's fees.<sup>7</sup>

We encourage all of our members to take the necessary steps to adopt and implement the policies and procedures made necessary by the changes in the procedural rules of our State and federal courts.

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<sup>1</sup> Federal Rules of Civil Procedure, Rule 33 and Maryland Rules of Civil Procedure 2-421.

<sup>2</sup> Federal Rules of Civil Procedure, Rule 26 & 34 and Maryland Rules of Civil Procedure, Rule 2-422.

<sup>3</sup> Federal Rules of Civil Procedure, Rule 26.

<sup>4</sup> Federal Rules of Civil Procedure, Rule 26 and Maryland Rules of Civil Procedure, Rule 2-402.

<sup>5</sup> Federal Rules of Civil Procedure, Rule 37 and Maryland Rules of Civil Procedure, Rule 2-433.

<sup>6</sup> Federal Rules of Civil Procedure, Rule 26 and Maryland Rules of Civil Procedure, Rule 2-402.

<sup>7</sup> Federal Rules of Civil Procedure, Rule 37 and Maryland Rules of Civil Procedure, Rule 2-433.

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