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**Electronic Records and Access to Information – Have We
Revolutionized the Process or Are We Simply Killing More Trees?**

INTRODUCTION

In 1775 the English poet, biographer, essayist and lexicographer Samuel Johnson said that “Knowledge is of two kinds. We know a subject ourselves, or we know where we can find information upon it.” At the time, Dr. Johnson was referring to the value of books rather than the usefulness of access to information legislation. However, his comment does illustrate the value inherent in the ability to seek out knowledge. Some 220 years later, the Supreme Court of Canada has clearly established the importance of this ability, specifically as it relates to access to information. In *Dagg v. Canada (Minister of Finance)*, 1997 2 S.C.R. 403, Justice Gerard LaForest said that

The overarching purpose of access to information legislation...is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process and secondly, that politicians and beauracrats remain accountable to the citizenry.

This paper will explore the advantages as well as the challenges inherent in an electronic environment as it relates to the access to information process. As technology advances at lightning speed, the modern workplace is becoming more and more digital and the rise of the electronic record is unprecedented. The use of word processing programs, spreadsheets, presentation programs, digital audio and video, electronic mail, etc. has become so commonplace that it is now hard to imagine how people managed just a decade ago, let alone 50 years ago. Along with the rise of the electronic record, we have also experienced a significant rise in the creation, recognition and use of modern access to information (freedom of information) legislation. As such, while technology facilitates and promotes the creation of more information, there is a corresponding desire to want access to more of that information. On its face, it may appear that the widespread use of electronic information should revolutionize the access to information process. However, the examples highlighted in this paper, particularly with respect to e-mail, emphasize the need for caution and the complexities involved in seeking access to information stored in electronic form.

RECORDS MANAGEMENT

Fundamental to the operation of an effective access to information regime is good records/information management. In fact, the ability of an individual to exercise his or her right to have access to information is directly affected by the quality of a government's records management practices. When the quality of such practices is less than appropriate, the accountability envisioned by the Supreme Court of Canada is threatened. It is for this reason that the importance of a reliable, effective, secure and accessible records management system cannot be overstated.

The process of managing records is often explained in terms of a life cycle. Records are created, distributed and used, stored and maintained, and then finally disposed of or archived. Records management provides the framework under which these actions are taken.¹ Whether records are in paper or electronic form, this life cycle provides the necessary guidance to an organization to ensure that it appropriately categorizes its records and applies specific policies to them accordingly. To be effective, however, these organizations must recognize each component of the life cycle, a task that is not always evident. For example, many organizations tend to be stuck in the storage and maintenance phase, failing to appropriately purge their records through disposition and

archives. This tendency to allow every record to survive will eventually have a significant adverse effect on any attempt to control those records. This in turn will prejudice the right of an individual to seek access to those records.

A crucial aspect of the modern records management system is the explosion over the last number of years of electronic information. The modern workplace has become more and more digital and our reliance on electronic records and databases is unprecedented. It is estimated that more than 90% of all records being created today are electronic.² There is no doubt that the advantages are numerous. We can search it, cut and paste it, update it in real time, e-mail it, automate it, audit it, secure it, and control it in ways that paper-based systems simply would not allow.³ Ultimately, this allows us to work faster, save money and accomplish much more with significantly less effort.

ACCESS TO INFORMATION

From an access to information perspective, the proliferation of the electronic record has had mixed results. On the positive side, technology has allowed organizations to create large volumes of recorded information simply and quickly, giving the public a glimpse into the culture and operation of these organizations in ways never experienced before. Nowhere is this more evident than in the use of electronic mail. Alasdair Roberts has said that e-mail provides “mother lodes” of revealing information about the internal life of organizations.⁴ The spontaneous nature of e-mail leads to the creation of records containing information that in the past would never have been committed to paper. Such information is often quite sensational to applicants, particularly journalists, who routinely seek out this type of “juicy” information. The results of these requests range from potential criminal charges to scandal to mere embarrassment. For example, our Office recommended the release of one particular e-mail from the head of a large public organization indicating that a particular female employee was “the reason blond jokes were invented.”

The U.S. based Reporters Committee for Freedom of the Press refers to the ability to access electronic records as a tool for reporters, allowing them to do original analysis on subject matter, rather than relying solely on anecdotal evidence. The Committee acknowledges that fees, privacy regulations and other laws may create barriers to the acquisition of electronic information, but they point to a number of successes. As an

example, the Committee refers to a 2002 story by the *Washington Post* dealing with the neglect and death of 229 children in protective care. Reporters used databases to show that the District of Columbia had a role in this neglect. The story led to an overhaul in the child welfare system and earned its authors the 2002 Pulitzer Prize for investigative reporting.⁵

While I in no way wish to detract from the usefulness and value of electronic record keeping (without it I would quite simply be lost), I do believe that from an access to information perspective, there are certain pitfalls. The continued growth in the creation and use of electronic records is no doubt inevitable, and in many respects necessary, but it is important to recognize the challenges and develop the ability and the capacity to meet these challenges.

A primary concern is the sheer volume and variety of electronic records. As I have indicated earlier, in some respects this volume can be an advantage for the access to information applicant. However, organizations often have difficulty cataloguing, organizing and preserving this information, while maintaining a reasonable ability to access it. This is in part due to the failure of many organizations to properly recognize and manage the records management life cycle. This life cycle is equally relevant to both paper records and electronic records, a fact often overlooked by these organizations. More importantly, however, many organizations appear to be overwhelmed by the volume and variety of electronic records. The technology has simply surpassed the capacity to react appropriately. In 2002, the National Archives and Records Administration in the United States concluded that most federal agencies are still baffled by electronic records.⁶ While Alasdair Roberts' concept of the "mother lode" is valid, I would also suggest that in many respects we may be experiencing information "overload." Notwithstanding the pros and cons of the electronic record, I believe there is still a long way to go before we have a clear handle on the management, storage and retrieval of those records.

Another area of concern is the fact that the nature of electronic records easily allows the creation and storage of many versions of the same record. Technology now allows us to create, edit, add, delete, revise and transfer in a matter of seconds with virtually no inconvenience and very little cost. Furthermore, we now have the capacity to save and store as many versions of as many records as we choose. In speaking to a number of

lawyers, for example, they indicate that as a matter of course, they keep every draft of every piece of correspondence they generate. Adding to this is the incredible speed and power of desktop and laptop computers as well as portable devices. For example, I use a USB flash drive with a 2 gigabyte storage capacity. A quick search of the internet reveals that 16 gigabyte flash drives are now available. One gigabyte can hold roughly 1000 novels or 18 hours of MP3 music.⁷ Large chunks of information, therefore, are not only being created within an organization, it is being stored on individual computers and on personal devices the size of a keychain. With so much information being stored in so many different places, how can an applicant be assured that all sources have been searched and whether or not the record eventually disclosed is the correct version? Alasdair Roberts has said that the “stockpile of government information has been liquified – broken down into a vast pool of elements whose significance, taken independently, is not easily grasped.”⁸

One issue that has been more of a concern in recent years is the speed at which hardware, software and storage media are developing. As these technologies become obsolete over a relatively short period of time, they often leave behind records that are no longer accessible, rendering them worthless.⁹ Remember the floppy? Throughout the 1980s and 1990s floppy disks, or diskettes, were quite ubiquitous and today we still have large amounts of information stored on these disks. As technology advanced, computer manufacturers were reluctant to remove the floppy drive from their computers, but more recently they have progressively reduced the availability of these drives, as well as the disks themselves. Today, the floppy is virtually obsolete, having been replaced by flash and optical storage devices, while e-mail has become the preferred method of exchanging digital files.¹⁰ More recent technologies are also being replaced at extraordinary rates. CDs have been overshadowed by DVDs and today the Blu-ray Disc technology is the next generation optical disc format with five times the storage capacity of traditional DVDs.¹¹

It is interesting to note that at the end of the 1990s the United States National Archives apparently had an entire warehouse full of obsolete equipment, which it hoped would some day allow them to read information that had been previously recorded in obsolete formats or media.¹² I suspect that most organizations are not taking similar action, but are instead allowing vast amounts of electronic information to lie dormant. Instead of making decisions about retention and destruction, obsolescence will render many records

technically or practically irretrievable. This will likely have a noticeable affect on access to information requests over the next several years and beyond.

THE “PAPERLESS OFFICE”

Electronic record-keeping has been supported in part by the desire to reduce the amount of paper used in the office. The concept was simple: store your information electronically, thereby drastically reducing the need to create paper records. Along with the development of computers and networks and in particular e-mail, came a widespread expectation of a paperless society. Ironically, however, we are using more paper than ever. The reason in large part can be attributed to a single device: the printer. While the technology allows us to easily create an electronic record, the printer allows us to simply press the print button and in seconds we have the same record in our hands in the form of good old-fashioned paper. The fact is, we like paper. We can feel it, mark on it, staple it, highlight it, spread it out on a desk, stack it in piles.¹³ In addition, we trust it. There is still a mentality among many of us that an electronic record can vanish into cyberspace, never to return, when we hit the wrong button, or the system crashes or the technology fails. Paper, on the other hand, is tangible and we can control it. We may misplace it or slip it into the wrong file, but we know it is there. It will always be there and it will always be accessible unless we make a conscious effort to physically destroy it. The apparently fleeting existence of electronic records (easily changed/deleted) is not like the concrete, physical existence of paper records. Certain applicants will always distrust certain public bodies, but requests for electronic records seem to sharpen that perception.

A 2006 report by Statistics Canada demonstrates that any notion of a paperless society is clearly defeated. From 1983 to 2003 the consumption of paper in Canada more than doubled from 1,198,100 tonnes to 2,867,442 tonnes. As the growth rate of consumption outstripped population growth during this period, per capita consumption of paper for printing and writing increased by a staggering 93.6% to nearly 20,000 pages per person.¹⁴ In the United States the numbers are also revealing. In 2004 the U.S. federal government used about 109,000 tons of office paper, up from 97,000 tons in 1996. It is estimated that this will rise to 114,360 tons by 2008, roughly the weight of 72,000 Toyota Camrys.¹⁵

The younger generation that is following in our footsteps is no doubt more comfortable with computer screens and more trusting of the technology and, as such, may not share the same level of commitment to the printed word as we do. However, I would not recommend getting out of the paper making industry anytime soon.

E-MAIL

I believe that the dramatic increase in paper consumption over the last number of years is in large part correlated with the worldwide explosion in e-mail usage. E-mail is quick, easy and efficient, and has become the preferred method of communication, replacing the more traditional memo, letter or telephone call. In 2002, Canada's Chief Information Officer estimated that government employees were exchanging 6 million e-mails every day.¹⁶ It is fairly commonplace for co-workers to now send e-mail messages to each other rather than walk down the hall, or next door or even to the next cubicle. In many cases, we have lost that face-to-face interaction which I believe to be essential to the respectful and enjoyable workplace. Be that as it may, there is no doubt that e-mail is, and will continue to be, essential to the modern office setting.

Notwithstanding the many advantages of e-mail, the proliferation of its use has created a number of challenges in terms of access to information. In order to best illustrate these challenges I will use a case study from the Office of the Information and Privacy Commissioner for Newfoundland and Labrador. Before doing so, however, I would like to address the question of whether an e-mail is a record for purposes of access to information requests.

In Canada, the federal *Access to Information Act*, R.S. 1985, c. A-1 defines a "record" as any "documentary material, regardless of medium or form." The Newfoundland and Labrador *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1 defines a "record" as "a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium." These definitions clearly anticipate that electronic records, including e-mails, are records for the purpose of access to information legislation.

In addition, the Government of Newfoundland and Labrador has clearly established in policy that any e-mail created or received in connection with the transaction of government business is a public record and is subject to all pertinent legislation including the *Access to Information and Protection of Privacy Act*.¹⁷ E-mail policies normally make accommodation, however, for copies of convenience. These documents are often referred to as transitory records and include, for example, an e-mail to confirm the time of a meeting, non-business related communications and duplicate copies of documents circulated for reference purposes only. According to such policies, all other e-mails received in the course of normal business operations are records and, in this regard, should be treated no differently than any traditional paper record. This is evident in the number and variety of e-mail resources produced by the Office of the Chief Information Officer for Newfoundland and Labrador. These include an e-mail policy, e-mail guidelines, a quick reference guide for managing e-mail, a guide for using e-mail effectively, acceptable use practices for e-mail and a series of frequently asked questions.¹⁸

In the United States, a recent decision of a federal judge deals directly with the preservation of e-mail records. In response to lawsuits brought by the Citizens for Responsibility and Ethics in Washington (CREW) and the National Security Archive, U.S. District Judge Henry Kennedy ordered the White House to preserve backup tapes containing copies of White House e-mails. CREW and the National Security Archive allege that 5 million White House e-mails have disappeared.¹⁹

As another interesting example of the seriousness with which e-mails should be considered, in December of 2002 the investment firms Deutsche Bank Securities Inc., Goldman Sachs & Co., Morgan Stanley, Salomon Smith Barney Inc. and U.S. Bancorp Piper Jaffray Inc. were each fined \$1.65 million U.S. by securities regulators for failing to properly store e-mail.²⁰

CASE STUDY

This case study involves an individual who had been terminated from his position with a large public body. This individual, along with his spouse (who was also an employee with the same public body but had not been terminated) began submitting a series of access to information requests. The majority of these requests sought access to e-mails

sent, received and copied among a number of other employees within the organization. Each request would name particular employees and would specify a date range. In other words, the applicant would ask for, among other things, access to all e-mails referencing him or his spouse that had been sent, received and copied to each of a specified number of individuals within a specified period of time. They also sought access to their own e-mail archives. The majority of these access requests resulted in Requests for Review being filed with the Office of the Information and Privacy Commissioner. The Commissioner's Office has been investigating these Requests for nearly three years and there are currently 25 ongoing investigations involving this applicant or his spouse. In a small office with only two Investigators, this represents a large proportion of our work.

Our experience with this situation has raised a number of issues with respect to an individual's right to seek access to electronic records, the public body's ability to appropriately respond and the ability of the Commissioner's Office to accurately and efficiently investigate within a reasonable time frame. I will deal with each of these issues individually.

Volume of Electronic Records

I have already alluded to the ability to generate significant numbers of electronic records quickly and easily. While this in many cases may create "mother lodes" of information, it also creates capacity issues for public bodies and for Commissioners. Many of the e-mail programs in use today by public bodies were developed purely as communication tools, rather than records management systems. As a result, the volume of e-mail generated by such bodies is far in excess of the amount of paper correspondence being sent and received, which now tends to be used for more formal communications. In fact, I would hazard a guess that many of the communications which take place over e-mail would at one time have been accomplished on the telephone or in person, perhaps never leading to the creation of a record.²¹ It is also interesting to note that the volume of e-mails in the United States surpassed the number of letters delivered by the postal service for the first time in 1996.²²

In this case, the applicant was seeking access to all e-mails which reference him or his spouse in any way. This resulted in the generation of large volumes of responsive records which had to be searched and severed by the public body. Once the applicant filed a Request for Review with the Commissioner, these records then had to be printed and sent

to the Commissioner's Office for review. In one particular investigation, the Commissioner's Office received printed copies of over 4,300 e-mails and attachments, sent to the Office in approximately 35 4-inch ring binders. It is interesting to note here that the public body in question originally sent these records to the Commissioner's Office in electronic format. However, the public body was using an e-mail system that was not compatible with the Commissioner's system and it was not possible to open the files. Once again, paper was the most feasible solution.

The potential capacity problems associated with electronic records is partially dealt with in some jurisdictions in Canada by the access to information statute itself. For example, section 10 of Newfoundland and Labrador's *Access to Information and Protection of Privacy Act* provides as follows:

10. (1) Where the requested information is in electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant where

(a) it can be produced using the normal computer hardware and software and technical expertise of the public body; and

(b) producing it would not interfere unreasonably with the operations of the public body.

(2) Where a record exists, but not in the form requested by the applicant, the head of the public body may create a record in the form requested where the head is of the opinion that it would be simpler or less costly for the public body to do so.

This provision obviously provides a public body with the ability to limit its efforts in responding to access requests for electronic records which "unreasonably" interfere with its operations. I think it is understood that the whole concept of access to information involves some degree of interference with the normal operations of public bodies, but that this interference is warranted and justified in the name of the higher public good which is established as the basis for legislation such as the *Access to Information and Protection of Privacy Act*. For this reason, I would see the bar as being set fairly high in

order to prove that responding fully to a request for electronic records would constitute an unreasonable level of interference. It is therefore important that public bodies are aware of and can utilize the full extent of capabilities of the “normal computer hardware, software and technical expertise” at their disposal.²³

The Commissioner in this jurisdiction has in certain limited cases accepted a public body’s reliance on section 10. In each of these cases, the applicant was seeking access to significant numbers of e-mail records and the Commissioner felt that the test of unreasonable interference warranted denial of the records. One particular request by the applicant in this situation was one of those cases. However, the applicant did an interesting thing in order to limit the effect of section 10. He began splitting his requests into smaller “chunks” and submitting numerous access to information requests. The public body, therefore, was required to respond to each of these requests on an individual basis such that it could not rely on section 10. The public body argued that the result was effectively the same, but the Commissioner did not accept that a public body could treat all requests from a single applicant collectively and, as such, each request must be treated on its own merits. As a result, the public body ended up with significantly more access to information requests and the Commissioner with significantly more investigations. This was considered a more acceptable alternative to singling out an applicant and prejudicing his or her statutory right of access.

Once again, the importance of good records management practices must be emphasized. As I have previously indicated, the growth of electronic records has created challenges in this area, but it is important from an access to information perspective to address and overcome these challenges. If organizations fail to do so, should an applicant be the one to suffer the consequences? I for one do not believe that a poor records management protocol is an appropriate enough reason to deny an applicant access to information that he or she is rightfully entitled to. This highlights the importance of handling all records, both electronic and paper, in a manner that is conducive to appropriate access, security and conservation.

Management of Electronic Records

As the volume of electronic records has increased dramatically, so has the power and capacity of personal computers and other storage devices, such as flash drives. This has provided individual office workers with virtually unlimited storage capacity on their

computers. In the recent past, capacity limitations often restricted the amount of information that employees could store thereby forcing them to control the amount of information stored on their individual hard drives. In today's computing environment, however, where 160 gigabyte hard drives are standard and portable hard drives have moved into terabyte territory, capacity is quickly moving into the stratosphere. Also, most office environments are networking, such that large amounts of data are now stored on shared servers. People now tend to store more and more information because they can. Not surprisingly, the ability to control and manage this information is a significant challenge.

With respect to electronic mail, employees are responsible for their own account and, as such, have full control over the number of records they create and the content of those records. In many cases, these employees are also responsible for managing their own e-mail records, which inevitably leads to inconsistencies in records management within a particular organization. For example, some employees create an e-mail archive, some employees simply keep them in their e-mail accounts, while other employees print their e-mails and then delete the electronic version. Still others use some combination of these options.

There is also considerable inconsistency in the treatment of transitory e-mails. While some people have no difficulty in deleting particular e-mails that have no business or organizational value, my experience has shown that many of us simply cannot delete anything. In the case at hand, the applicant worded his request in such a way as to ensure that the entire record was responsive, even if most of the record did not appear to be relevant to him. As such, the Commissioner's Office ended up sifting through numerous e-mails dealing with meeting dates, social events, and other issues completely unrelated to the applicant's original request.

On a similar note, there is also a tendency for many of us to combine an organization related e-mail with a personal e-mail. When dealing with an access to information request, the organization is then forced to spend more time reviewing and severing. Again, in the case at hand, the Commissioner's Office had to determine which portions of numerous e-mails were responsive and which portions were not, whenever the public body failed to do so accurately.

Another significant issue with the management of e-mail records is the considerable duplication inherent in an electronic environment. E-mail allows a single sender to instantaneously send a message, often including one or more attachments, to multiple receivers, thereby creating several electronic copies in numerous locations. These receivers can then forward these records on to others creating a snowball effect that can easily spiral out of control. In this case, the Commissioner's staff spent a significant amount of time cross-referencing the records in order to identify and remove duplicate copies of the same record. This involved quite literally spreading the printed copies of the e-mails on a boardroom table and identifying all of the duplication. Further complicating this process is the tendency, again inherent in e-mail, to reply to the sender thereby creating threads of e-mail messages. I will discuss the issue of e-mail threads later.

Notwithstanding the convenience and necessity of e-mail, it is important for organizations to recognize that e-mails, like any other record, must be categorized and filed in a manner that is conducive to a proper records management protocol. If an organization fails to appropriately address this issue, it will quickly lose control and will be faced with considerable challenges when responding to an access to information request or dealing with the Commissioner's Office. In the case at hand, the public body was required to extensively search the electronic records of each employee named in the request, as well as archives stored on servers. This included thousands of e-mail messages stored in various locations. Not surprisingly, errors were made and records were missed resulting in several recommendations from the Commissioner's Office. The public body in this particular case decided that these challenges warranted the implementation of new technology to help in its ability to search e-mail archives, including a trained computer support person.

Search Criteria

I had earlier indicated that one of the advantages of electronic records is the searching capability. Large amounts of information can be electronically searched in a very short period of time. On its face, this appears to be a significant advantage in terms of an access to information request. A public body is able to easily scan large volumes of records electronically and quickly identify information responsive to an applicant's request. In this jurisdiction, a large portion of our work has been about how a public body searches for electronic records, rather than decisions made by public bodies about

disclosure of the records. Despite the apparent advantages, our experiences in this regard have raised some concern, the most important being the actual criteria used in these electronic searches.

Conducting an electronic search, in its most simplistic form, involves the input of a key word or combination of key words. The system then scans the target database and identifies records or portions of records containing those key words. Unlike a manual search by an individual who is able to think, the output of an electronic search is directly dependent on those specific key words. For example, if I were to submit an access to information request for all e-mails which reference me, as did the applicant in this case, the public body may electronically search the e-mail archives using the key words "Sandy" and "Hounsell." However, the search would not likely return documents wherein I may have been referred to as the "Assistant Commissioner," as "Alexander" (Sandy is an abbreviated version of Alexander), or terms like "him" or "his." In addition, the search may not return documents wherein my name was misspelled. In the case I am reviewing here, the applicant had a surname that was often misspelled and, as a result, a number of records that were clearly responsive were not identified originally, leading to much frustration on the part of the applicant and embarrassment on the part of the public body.

Also in this case, the applicant's spouse was named in many of the records. As such, the applicant was sometimes referred to as the "spouse" or "husband." All searches using the applicant's name as the search criteria, therefore, missed these references, whereas a person doing a manual search would have identified these as responsive records. The question then becomes how exhaustive should the search criteria be when responding to a request for access to electronic records? For example, there are other potential synonyms for spouse, such as "partner" or "mate," as well as more colloquial terms such as "significant other" or "better half." No matter how exhaustive the public body may be in attempting to utilize every synonym, some possible references to the applicant as the spouse of another individual may be missed.²⁴

Another important question posed by this issue is the manner in which the search criteria is originally set. In many cases, an electronic records search might be quite straightforward, but when there are a number of possible search terms and combinations of search terms, there should be a process of defining and limiting the search criteria

involving both the applicant and the public body. In an electronic records search such as in this case, where there is some question as to what search criteria to use, it is incumbent upon the public body to contact the applicant to try to fine-tune the search in question by clearly defining the search criteria. In my opinion, the legislators, in drafting the *Access to Information and Protection of Privacy Act*, envisioned some circumstances in which there was an onus on the applicant to cooperate in such a process. For example, the legislation allows a public body to extend the time limit for a response “if the applicant does not give sufficient details to enable the public body to identify the requested record.” Clearly, it is important that the applicant give sufficient details to enable the public body to perform a search for records, even if no extension of time is warranted.²⁵

The scenario here, however, is a two-way street. Applicants cannot be expected to determine the process used by a public body in undertaking a search, so it is not necessary for an Applicant to set out key words to be used in an electronic search when making the access request. Some searches can be conducted through either electronic or physical means, and it is the public body which must determine the most appropriate method. However, if the public body determines that an electronic search must be conducted, it should contact the applicant to explain what is involved, and that an electronic records search means that exact terms and combinations of terms must be used. Sometimes even alternate spellings can be necessary for commonly misspelled words and names. The public body should solicit the input of the Applicant in defining the search criteria and a record should be kept of the criteria used.²⁶

Based on our experiences in this regard, the quality of the input is crucial to the usefulness of the output. Searching for e-mail records can be as precise as a mathematical equation, but also can be as elusive as grains of sand slipping through your fingers. While electronic searching is very efficient in many respects, it is important to understand the limitations from an access to information perspective, even in situations where proper policies and procedures with respect to the management of electronic records are in place. In many cases, despite the best technological efforts of an organization, it may be necessary to conduct multiple searches using a variety of search criteria in order to ensure an accurate and complete response to an applicant. Otherwise, how can the Commissioner’s Office be assured that an appropriate search has been conducted and that all responsive records have been provided for the Commissioner’s review? Indeed, in this particular case, the Commissioner’s staff expended considerable

time and effort in dealing with situations where particular responsive records had been missed in the original search due in part to these types of limitations.

E-Mail Threads

During my discussion of the management of electronic records, I made reference to e-mail threads. The nature of e-mail is such that any message that is received can be replied to or forwarded with a simple click of the mouse. The simplicity and the convenience of this has had a significant impact on the manner in which we now communicate with co-workers and other colleagues. E-mail allows us to have a complete work-related conversation without ever speaking to each other. The result from a records management perspective is the creation of numerous e-mail threads, or strings, which essentially reproduce a conversation in a recorded electronic format, a process I refer to as the “reply phenomenon.” This phenomenon increases exponentially when more than one individual is involved in this electronic conversation. During the Commissioner’s review of e-mail records in this case, threads of e-mails involving numerous replies extending over several pages were not uncommon.

The reply phenomenon also creates a tendency to change the topic, thereby adding new and unrelated information to a particular thread of e-mails. Rather than create a separate e-mail, people often prefer to simply hit reply when they wish to raise a new issue with an individual or group of individuals which they previously communicated with. As a result, if an applicant were to submit a request for access to records associated with the new topic, the records search will return the information associated with the original topic. This raises an interesting question: When does a particular e-mail record become another record? For example, if an e-mail thread includes two completely unrelated issues, is it considered a single record or two separate records? In the case at hand, the applicant was seeking access to all e-mail records which reference him. The clear intent of the applicant was to seek access to the entire e-mail, given that it is a continuous record, despite the fact that it may include different topics which may not have anything to do with the applicant. The public body in this case sent all e-mail threads to the Commissioner’s Office for review. The Office, therefore, was forced to sift through long strings of e-mail exchanges (large portions of which the public body had wished to withhold under one or more exceptions), which in many cases were unrelated to the applicant. Further complicating the review process was the fact that many of these

exchanges were shared among several individuals within the public body, thereby creating numerous copies of the same e-mail threads.

Attachments

Attachments are a common feature of many e-mails. This too has created some challenges for the Commissioner's Office. First, there is no question that attachments are records under the legislation and must be searched along with the e-mail message itself. I believe it is fair to assume that a reasonable person, in requesting a search of e-mail records, would intend that attachments to those e-mails are part of the request.

In this case, the e-mail system in use by the public body (Microsoft Outlook) was configured in such a way that would allow electronic searching, but was technically unable to search the text contained within an attachment, making it impossible to conduct a complete search of e-mail records using purely electronic means. The public body acknowledged that it was technically possible to reconfigure the Microsoft Outlook system to allow more thorough searching capability, but the risk to its current system and the cost involved has meant a significant delay in the implementation of this feature.

In the meantime, in order to account for this technical complication, the public body conducted a key word search of the e-mails themselves and then manually checked each of the e-mails containing one or more of the key words to determine if it contained an attachment. If so, the attachments were searched manually to determine if they were responsive. While this method proved fairly effective, it was not foolproof. As I indicated, the electronic search would only identify the key word in the e-mail message itself and not in the attachment. As such, if an e-mail message did not contain a key word, yet the attachment did, that attachment would be completely overlooked by the search. For example, if the e-mail message read simply "see attached" and the attachment was in fact responsive, that record would not be identified.

This situation has proven to be a barrier to the applicant's right of access, but has also proven to be a significant difficulty for the public body, not only in performing difficult and time consuming manual searches, but in dealing with displeased applicants, analyzing and diagnosing the problems and capabilities of its e-mail system, and also absorbing significant time and energy in responding to Reviews by the Commissioner's Office.

During our analysis of this particular issue, we were advised by the provincial Office of the Chief Information Officer that the Microsoft Exchange/Outlook system does have full attachment searching functionality for all “recognized document formats.” As such, any document that has been attached to an e-mail message that does not fall within Microsoft’s definition of a “recognized document format” may not be searchable. While most common file formats will likely be recognizable, there will be others that may not be identified by an electronic search. It is important, therefore, that governments and other organizations develop a strategy for accommodating requests for these types of records.²⁷

It has also been suggested that public bodies which lack the ability to search attachments electronically may be inclined to use this specific technical deficiency to intentionally shield records from an applicant. For example, by creating a record in the form of an attachment while at the same time ensuring that any key word that would likely be used in a search, such as a name, did not appear in the e-mail message, this record may not be identified during the normal searching process. While the Commissioner’s Office has not encountered any clear evidence to suggest that this is indeed happening on an intentional basis, we did receive a copy of one particular e-mail with an attachment containing the personal information of a particular individual. The e-mail message itself continuously referred to the individual as “he,” “his” or “the author.” While the individual was identified in the attachment, his name did not appear anywhere in the message. An electronic search using the name of the applicant, therefore, would not have identified this record.

Another issue encountered by this Office involves the review of the records. During the course of an investigation by the Commissioner’s Office, all responsive records are printed and forwarded to the Office in a hard copy format. When forwarding printed versions of e-mail and attachment records, however, the attachment is sometimes separated from its accompanying e-mail. This creates considerable difficulty in determining which attachment goes with which e-mail. As such, this Office has tended to treat the attachments as separate records.

Severing (Electronic v. Manual)

When responding to an access to information request for electronic records, searching is simply the first step in a process. Searching only identifies potentially responsive records. These records must then be reviewed to determine whether they can or should be released to the applicant. Reviews of this nature are normally done on a line-by-line basis in order to identify words, sentences, paragraphs or pages of information that may fall within one of the exceptions set out in the access to information legislation. While programs exist that allow you to sever electronically, the vast majority of public bodies in this jurisdiction are still relying on the “black marker.” As such, all electronic documents that are identified as responsive must be printed, reviewed line-by-line and then severed appropriately. Hard copies of the severed records are then provided to the applicant.

In the event that an applicant is not satisfied with the severed documents, they have the option of filing a Request for Review with the Commissioner’s Office. In response, this Office will require a hard copy of all records, both in an unsevered format and in the same format as provided to the applicant. The records are again reviewed by the Commissioner’s Office on a line-by-line basis to determine whether or not the exceptions to access were appropriately applied by the public body.

The Commissioner’s Office has experimented with records in electronic format, but has not been able to justify any extensive use of such records. Due to the complexities of the review process, the sheer volume of records often submitted, the need to annotate the records, and the need to cross-reference, it is simply more effective to work with paper. Given the extensive creation and use of electronic records over the last few years, particularly e-mail records, the volume of printed records received at this Office is often extensive and the amount of time and effort necessary to appropriately review all of this information continues to grow significantly. This is particularly difficult in jurisdictions with relatively small oversight offices. For example, the Commissioner’s Office in Newfoundland and Labrador required nearly a full year to appropriately review and report on the 35 binders of e-mail records referenced earlier in this paper. It is also important to note that the review of these records resulted from a single disgruntled former employee and his spouse, who is a current employee. To date, we have dealt with similar requests from other current and former employees. As people become more familiar with the potential “mother lode” of information available, particularly from e-

mail exchanges, we are likely to see a continued growth in demand for the services of the Commissioner's Office.

CONCLUSION

There is no doubt that the explosive growth and proliferation of the electronic record has had a significant impact on the way we do business, nor is there any doubt that this impact will continue into the foreseeable future. This paper has explored both the advantages and the challenges posed by the electronic record and, in particular, the impact on the access to information process. There has been a particular focus on the creation, use and storage of e-mail records and the unique challenges both from a records management perspective and an access to information perspective.

Notwithstanding these challenges, continued advances in technology and continued growth in the use of electronic media is inevitable and, in many respects, necessary and beneficial. In today's technological environment it is essential that governments throughout the world continue to conduct business in an electronic forum. However, it is equally essential that the public have access to these electronic records in order to maintain any meaningful ability to participate in the modern democratic process and to ensure appropriate accountability, as envisioned by the Supreme Court of Canada.

This paper has also explored the ultimate irony in electronic records management. In the not so distant past there was considerable consensus that technological advances in this area would steadily decrease our reliance on paper. However, the statistics have clearly shown the complete opposite. Our consumption of paper has in fact dramatically increased over the last number of years. While we now have the ability to create, use and share records at unprecedented rates, our tendency to print is a hard habit to break. Organizations, therefore, are faced with increasing volumes of electronic records *and* paper records.

Regardless of the medium on which records are created and stored, all organizations subject to modern access to information legislation must recognize the importance of such legislation and must ensure, in general, that appropriate records management policies and procedures are in place and, in particular, that appropriate systems are in place to allow timely, accurate and complete responses to access to information requests,

including requests for e-mails and other electronic records. These organizations must be prepared to explore all reasonable methods of responding to such requests, whether electronically or through some combination of electronic and manual functionality. Failure to do so will in all likelihood lead to considerable difficulties in dealing with individuals legitimately seeking access to information and will ultimately result in more investigations by the Commissioner's Office.

In addition to the need for effective policies and procedures in this area, it has become increasingly evident that an evolution of laws and standards is necessary in today's electronic world to control the delicate balance between records management and access to information. These laws and standards must be designed to maximize completeness, accuracy, integrity and preservation of information.²⁸ While there is considerable value in organizational policy development, the issue has become far too complex and important to rely on self-governance alone. There are fundamental rights at stake here and for this, we must encourage and support fundamental laws and standards.

With respect to the case study, there has been considerable frustration on the part of both the applicant and the public body which has resulted in numerous access to information requests being filed and, almost without exception each of these requests results in a Request for Review being filed with the Commissioner's Office. The applicant continues to believe that he has not been treated in an appropriate manner and that he has not received all information to which he is entitled. In fact, the applicant has gone so far as to accuse the public body of willfully misleading both him and the Commissioner's Office. The public body, on the other hand, continues to be frustrated with the challenges of searching and identifying responsive records, particularly given the significant volume of electronic records, primarily e-mail records, captured by the applicant's requests. The public body has acknowledged a number of errors, but continues to express a commitment to the process and to the rights of applicants under the legislation. In this regard, it has taken considerable action, including the creation of an access to information office with two full-time staff, designation of a Wide Area Network Administrator to handle e-mail searches and the implementation of e-mail archiving and journaling technology aimed at improving its ability to conduct electronic searches.

While I fully support advances in technology and the continued growth of electronic media, I believe that it is crucial to recognize the limitations and the challenges from an

access to information perspective. As is evident from the case study, if we are not fully prepared for these challenges, the repercussions may be significant and may lead to turmoil within an otherwise functional organization. We must be proactive in our approach to technology and not only try to keep up, but try to get ahead. This will not be easy, but in the face of increasing gigabytes and terabytes of electronic information and increasing mounds of paper, we have little choice.

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Notes:

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