

Day 4 – Thursday, 29 November 2007
Parallel Sessions – Session 4C 1.30pm-3.30pm

Speaker: Thomas Susman

Position: Senior Partner

Organisation: Ropes & Gray, U.S.A

Presentation Title: Information in Electronic Form

It took over a decade and the enactment of specific legislation in 1996 (the Electronic Freedom of Information Act) before the US government fully acknowledged that all electronic information held by the government would be subject to disclosure under the Freedom of Information Act (FOIA) and that the requester should have a right to obtain information in a desired format. The principle of “reasonableness” was to be applied to the search and retrieval of electronic data. Even with this progress, many issues still remain. This paper will examine four specific areas involving application of the FOIA to electronic information and will identify both settled and open questions under the US experience (both federal and state).

The areas to be covered include:

1. **Access To Entire Databases**—What is the agency’s responsibility to provide the requester with the search parameters used, audit trails for the actual searches, and instructions/manuals for the database? Must all searched fields, whether or not produced, be fully labeled and identified? Is any information too trivial to disclose, especially where it may assist in linking data and revealing gaps in data? How far must an agency go to mask or segregate exempt information while still adequately disclosing the database? Is the agency obligated to have appropriate procedures and competent personnel in place to properly respond to an eFOIA database request? What are the privacy implications and concerns when dealing with eFOIA database requests?
2. **Software As “Information”**—Software is a valuable tool, often protected by intellectual property rights. But, it can also be indispensable to a requester wanting to make meaningful use of disclosed information. What questions arise when a request implicates the disclosure of proprietary software?
3. **Electronic Mail**—Clearly, e-mail is subject to disclosure under FOIA, if it can be reasonably retrieved. For what length and in what format should an agency archive e-mails? What procedures and personnel should the agency involve in responding to an eFOIA e-mail request? Do traditional interpretations of exemptions (*i.e.*, privacy, internal deliberations) apply as clearly to e-mail? What is the implication of use by government officials of private e-mail accounts for official business?
4. **Metadata**—When documents are maintained electronically, does a requester have a right to obtain electronic copies revealing embedded metadata? What helpful information might metadata reveal? Will metadata usually be protected by a deliberative process privilege?

In the US, the two biggest obstacles to disclosure of electronic information under FOIA remain: (1) the lack of training and compliance that leaves government officials unable or unwilling to

produce electronic information and (2) the absence of either mandate or incentive to organize and maintain electronic information so that it will be amenable to public disclosure.