



Focus on 5

5 insights on technology disruption in government eDiscovery

eDiscovery has evolved considerably in the several decades since paper documents first morphed into TIFFs and PDFs. Technology innovations and federal rule changes have helped transform the costly, labor-intensive review, redaction, and production of documents and records into streamlined, highly-automated processes.

While discovery management of traditional office files may be largely tamed, several developments are disrupting eDiscovery:

- The expanding variety and volume of discoverable audio/visual (A/V) content
- The proliferation of cloud computing
- Massive growth in all forms of discoverable data

Government agencies can effectively meet the eDiscovery demands of legal proceedings, congressional requests, investigations, and Freedom of Information Act (FOIA) requests if they better understand the impact of these disrupters and take several steps to implement sound information governance policies and practices. Here are five insights to assist government agencies and their counsel:



Audio/visual content is a whole new [and much bigger] ballgame

Smartphone users know how fast movies, TV, music, and videos can consume data. Government agencies are gaining similar insight into the impact of A/V on eDiscovery. Surveillance cameras, operations centers recordings, bodycams, online video streaming sites, and social media are all potential sources of discoverable content. With 300 hours of YouTube videos being uploaded *every minute*¹ and the creation of new content continuing nonstop worldwide, data volume alone can be a major factor.

Even more challenging than the size, however, is the diversity of audio and video formats that may appear, which creates another challenge. Numerous A/V file formats are dispersed through the market today, some of which are proprietary while others are open source. Today, there is not necessarily a common platform or set of tools that works across all formats, which presents challenges for the collection, analysis, review, and use of the files in a discovery environment.

A/V in its many forms is forever changing discovery as the volume of A/V-produced data continues to expand. However, technology is starting to address some of the challenges. Just as text analytics is becoming more common, cognitive engines are employing artificial intelligence to identify objects, faces, voices, and even the sentiment of speakers in video and audio recordings, as well as transcribing the findings. Application of face detection technology to security video, for example, can help identify who was where and when with unprecedented certainty in an investigation. Similarly, object detection can be used to “find more like this” or help streamline analysis and review of A/V data. Analytics in general and in specialized applications such as cognitive, face detection, and object detection are likely to play an increasingly vital role in eDiscovery in the coming years.



Cloud computing has important implications for eDiscovery

In response to the Federal Information Technology Acquisition Reform Act (FITARA),² government agencies are moving their IT environments to the cloud. They hope to consolidate data centers, replace legacy systems, and take advantage of cloud’s scalability, security, and cost savings.

Because of this shift, responding to eDiscovery requests will require locating and extracting data in new and different locations than in the traditional IT environment. With data no longer housed down the hall in the server room, the ease and speed of access, including the nature of agreements pertaining to data extraction, are important considerations. Challenges can arise in getting data to and from the cloud, including Internet connection issues and organizational restrictions on moving large amounts of data. The cloud service provider has become a de facto participant in the collection process, thereby potentially changing the dynamics of collection, retention, and access to the data.

Cloud migration and adoption, however, also promise many advantages to traditional on-premise operations. Cloud subscription services are integrating information governance and management tools that can help streamline identification, preservation, and collection of information. These tools are tightly interwoven into the applications as a suite and can become an extension of the general environment, thereby alleviating challenges associated with stringing together multiple competing third-party products.



Big data is overwhelming, so focus on the *right* data

A/V and cloud adoption have clearly added complexity and substantially more data to the eDiscovery equation. Regardless of what form data takes, responding to discovery requests requires retaining the necessary data, having knowledge of where it is kept, and knowing that it is managed and accessible according to legally accepted practices. Those abilities depend on the quality of an agency or department’s information governance plan and the corresponding tools and systems.

Sound information governance is built on adherence to records-retention policies and defensible disposition schedules across the agency. Still, fear of problems arising if something has not been preserved can foster over-retention of data and the attendant costs of retaining. Legal risks can also arise because data that could have been disposed of is still available and now must be considered in discovery.

Agencies and departments have historically justified over-retention on the premise that the huge data volumes involved are simply ungovernable. However, retention’s rising costs and legal risks are compelling agencies to consider “defensible deletion” as an alternative and highly important approach. *The Sedona Conference Commentary on Information Governance* affirms and provides guidance for this approach. Principle 1 of the commentary describes the importance of a sound information governance program.” Principle 6 asserts that “The effective, timely, and consistent disposal of physical and electronic information that no longer needs to be retained should be a core component of any Information Governance program.” Finally, Principles 9 and 10 address the maintenance, integrity, and availability of long-term information assets and their “useful life,” as well as the role of technologies to support effective information governance.³

¹ “YouTube Company Statistics,” Statistic Brain, <http://www.statisticbrain.com/youtube-statistics/>

² <https://management.cio.gov/>

³ “The Sedona Conference Commentary on Information Governance,” *The Sedona Conference Journal*, Volume 15, Fall 2014,

<https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Information%20Governance>

Similarly, the US National Archives and Records Administration (NARA) has developed specific guidance around e-mail management to help agencies and departments address the growing volumes of e-mail and their impacts on information governance. The “Capstone” records management guidance from NARA, effective December 31, 2016, is intended to help address the limitations of traditional management approaches in dealing with the government’s huge e-mail volumes.

As agencies and departments incorporate the guidance from organizations like the Sedona Conference and begin to meet the requirements of Capstone and other NARA guidance, teams involved in discovery need to factor these policies, tools, and systems into their overall workflow and understanding.



The business imperative: Bring all relevant stakeholders to the table

Agencies and departments can take different approaches to discovery and information governance based on organizational priorities. Creating a symbiotic relationship between these two activities can benefit both. To capture this value, stakeholders from legal, records management, IT, information security and other relevant functions should all be at the table to understand and contribute to initiatives addressing explosive data growth and evolving discovery and governance requirements.

For example, as an agency moves IT applications to the cloud, the IT executives are no doubt concerned about making a smooth migration, meeting service levels, and managing costs. Attorneys should also be involved to review processes and services agreements so they understand how data will be stored, managed, and if needed for discovery purposes, accessed. Other stakeholders can contribute to and learn from those discussion and related decisions.

When stakeholders are in sync this way, discovery requests and collection of data for discovery can efficiently allow an agency’s legal team to respond quickly and potentially with less impact on and disruption to the business. Business personnel can stay focused on the agency mission and activities, and the legal personnel can address legal activities.



Keep your eye on the ball and don’t go it alone

Because eDiscovery continues to increase in technical complexity, stakeholders will need to dedicate internal and external resources to keeping pace. Beyond improving information governance and replacing stale records retention policies, personnel will need to continuously monitor technology trends, both within the agency and across government and industry, so proactive improvement of eDiscovery processes becomes routine. There is no silver bullet in terms of technology or tools, so ongoing access to and collaboration with external resources can help agency stakeholders understand the latest developments in the market and stay abreast of emerging opportunities.

To that point, it is important for agencies and departments to know they do not have to make the journey alone. Although every organization has a different starting point, the common challenge is to avoid inertia that comes from uncertainty and get started. Assess the current state, envision the future state, determine where gaps exist, and build a road map to guide the agency toward that end state. Other agencies and even private-sector corporations face similar challenges and decisions. Many are willing to share lessons learned and effective practices. The key for agency executives is to stay vigilant, commit adequate resources, and keep moving forward.



Our take: Understand disruptive forces now and build a framework to guide stakeholders in the months and years ahead

Both keeping information and disposing of it can have dramatic cost and risk ramifications. The information that agencies have to deal with is evolving continually, and the most relevant datasets and data sources can change quickly and dramatically. A/V, cloud adoption, and big data are merely today’s disrupters, already being challenged in volume by the Internet of Things and other emerging technologies. It is vitally important to learn about these disrupters as they emerge and to stay on top of how they impact eDiscovery.

At the same time, too much focus on technology as both a disrupter of and solution to eDiscovery can be myopic. Before technology decisions are made, agencies and departments should consider a framework for information governance that guides stakeholders as they deal with data and manage eDiscovery responses both now and in the future. Analytics will surely play an important role, but sound governance should also address the people element of the equation, policies and procedures, and the processes that surround data management.



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