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LEGAL OBLIGATION TO PROPERLY MANAGE ELECTRONIC PUBLIC RECORDS

Local and state public offices have an affirmative legal obligation to manage their electronic records. Not only should records be properly managed for the sake of efficiency, productivity and reductions in storage costs; they should be properly managed as part of a systematic and continuous records management program in compliance with both state and federal laws. Failure to properly manage records can lead to civil fines, criminal penalties and sanctions.

This section is intended to explain the sources of the legal obligation to manage records -- specifically electronic records. This section will also explain the legal consequences of a failure to comply. Hopefully, by understanding the sources and consequences of the legal obligation, public offices will better appreciate the ERC and what the guidelines have to offer. Further, public offices should understand that proper records management is not only good practice, it is the law.

Ohio's Public Records Act

Section 149.43(B) of the Ohio revised Code requires every state and local public office to organize, maintain, and understand its public records. The law states that the office must "organize and maintain public records in a manner that they can be made available for inspection or copying." The law also states that the public office must "have available a copy of its current records retention schedule." Last, if a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records, the office must inform the requester "of the manner in which records are maintained by the public office and accessed in the ordinary course of [business]."

If a public office fails to satisfy its recordkeeping obligation under state law, the Ohio Public Records Act allows an aggrieved party to sue the public office in court. The party may request an order directing the public office to manage its records, explain its system or process of management or provide access to public records. In addition



to obtaining the court order, an aggrieved party may be awarded fines, attorney fees and court costs.

On the other hand, if a public office has control of its records and recordkeeping practices, not only will it be in compliance with the Public Records Act, it will be better equipped to locate and retrieve records. Thus, the office will become more productive and efficient and will reduce risk of future non-compliance with the law.

For more detail regarding recordkeeping obligations under Ohio's Public Records Act, visit: http://ag.state.oh.us/legal/pubs/Ohio_Sunshine_Laws_2008.pdf. [Dead link - Now visit: <http://www.ohioattorneygeneral.gov/yellowbook>]

Federal and State Rules of Civil Procedure

Federal and state rules of governing litigation are another source of a public office's obligation to organize, maintain and understand its records and recordkeeping processes. The Federal Rules of Civil Procedure is law governing litigation filed in the federal courts. Similarly, the Ohio Rules of Civil Procedure is law governing litigation files in state courts. Each time your public office sues or is sued in court, it is subject to these rules.

The rules of civil procedure dictate how the parties obtain information from each other during lawsuits. In the past these court rules were behind in addressing technology. However, in 2006 the U.S. Supreme Court adopted changes in the federal rules specifically to address management and disclosure of electronic records. The Ohio Supreme Court currently following suite by considering a proposal to update the state rules consistent with the federal rules [[subsequently amended July 1, 2008](#)].

Both the federal rules and the proposed Ohio rules specifically address electronic records. Under Federal Rule 26(f), shortly after a lawsuit is filed, counsel for both parties must "meet & confer" on electronic records. Parties have an obligation to disclose to each other, prior to any requests for records from each other, a copy or description by category of all documents and electronically stored information that the disclosing party may use to support its claims or defenses. In addition, both parties have an obligation to evaluate their capacity to comply with document or information demands from the other party.



The amended rules also provide two protections for public offices in litigation for those public offices who already appropriately manage their records. First, Federal Rule 26(f) and 16(b) clarify that a responding party may specify the form or forms that would be necessary to properly comply with an electronic discovery demand by a requesting party. Also, under Federal Rule 26(b)(2)(B), a producing party does not have an obligation to produce information identified ahead of time as inaccessible due to undue burden or cost. As a result, by identifying the electronic records early in the process and identifying those that are inaccessible, the responding party can avoid unnecessary expenses and delays in providing records in difficult forms and formats. Second, Federal Rule 37(f) contains a potential "safe harbor" for electronic records that are destroyed in good faith as part of a routine electronic recordkeeping system before the responding party could reasonably have suspended the process or preserves the records, then the court may forgive the otherwise inappropriate destruction.

Unlike the Ohio Public records Act, the federal and state rules of civil procedures are enforced fairly quickly by the judge overseeing the case. If a party is unprepared to explain its management of records, cannot identify the form or formats in which the information is available, or cannot suspend the destruction of relevant information in a timely good faith manner, then the judge has the discretion to impose additional obligations, adverse references, or other sanctions against the unprepared party.

For more information regarding the Federal Rules of Civil procedures visit:

http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf [Dead Link - Now visit

<http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/CivilRules.aspx>]

And for more information regarding pending proposed changes to the Ohio Rules of Civil Procedure visit:

http://www.sconet.state.oh.us/Comunnications_Office/Press_Releases/2007/proceduralAmendments_101207.asp [Dead link; subsequently amended July 1, 2008 - Now

visit: <http://www.sconet.state.oh.us/LegalResources/Rules/civil/CivilProcedure.pdf>]