CLIENT ALERT

April 3, 2007

NEW RULES FOR ELECTRONICALLY STORED INFORMATION

SUMMARY:

On December 1, 2006, the federal courts enacted new rules to address electronically stored information ("ESI") such as emails, reports, documents or excel files in federal court litigation. The new rules impose obligations on school systems with regard to retention and disclosure of such records. This memorandum summarizes our understanding of these rules to date. We will continue to monitor how these new rules are interpreted and enforced by the courts. As courts and litigants grapple with these rules, there may be additional guidance to offer.

As you know, the Freedom of Information Act[1] and the state record retention schedules[2] impose certain retention and access requirements for electronic documents. The amended Federal Rules of Civil Procedure that went into effect on December 1, 2006 dictate what electronic information a school district must maintain so that it could be provided to a party in a federal lawsuit, if the school district was either (1) engaged in federal litigation as a party to a lawsuit, (2) anticipating being engaged in federal litigation, or (3) issued a subpoena by a party to a federal lawsuit in a matter in which the school district was not a party. An example of an instance where a school district might receive such a subpoena would be the circumstance in which a parent was involved in a federal lawsuit and, as part of that lawsuit, the parent's attorney issued a subpoena to the school district seeking the student's records. The two amended rules of civil procedure that are most applicable to school districts are Rule 34 and Rule 45.

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1 Conn. Gen. Stat. § 1-200(5)

2 Public records are to be retained in accordance with a records retention schedule of the Public records Administrator. In 1998, the Public Records Administrator issued a Management and Retention Guide for Electronic and Voice Mail. General Letter 98-1 (Public Records Administrator, June 1, 1998)

APPLICABILITY OF RULE 34:

Federal Rule 34 would apply to a school district if the district is a party in a federal lawsuit. This Rule was amended to state that one party to a lawsuit may request that the other party provide "electronically stored information" to the requesting party. The rule also now states that, a party may request that electronically stored information be "translated, if necessary, into a reasonably usable form." In accordance with this rule, if a school district was engaged in litigation and the opposing party requested "all e-mails related to this matter" or "all e-mail or electronic communication between the parent and the school district," the school district would have to provide this information. Moreover, the school district could potentially be required to provide this information in a "reasonably usable form," such as in an electronic format that could be accessed. However, if a particular format was requested, the district could require the party seeking that particular format to demonstrate a necessity for that format.

APPLICABILITY OF RULE 45:

Rule 45 is the Rule that addresses the other situations where school districts could be subject to the Rules of Civil Procedure, such as being served with a subpoena for records. This rule also was expanded to cover "electronically stored information."

INFORMATION NOT REASONABLY ACCESSIBLE:

Although electronic information must be produced, both Rule 34 and 45 contain a limitation that dictates that "a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." For example, certain correspondence was deleted pursuant to the school district's normal operation system before it became apparent that it might be requested in a litigation matter, which deletes employee correspondence every few months. In this scenario, if the school determines that fragments of this correspondence could be recovered from the system at considerable expense, the school district could argue that the limitation relating to "undue burden or cost" would apply. If the school district tries to make this argument, the Court will consider the following:

1. the specificity of the discovery request pursuant to which the information is sought;
2. the quantity of information available from other and/or more easily accessed sources;
3. the failure to produce relevant information that seems likely to have existed but is no longer available from more easily accessed sources;
4. the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources (to determine that likelihood, courts often order samples to be taken from the recovery source);

5. predictions as to the importance and usefulness of the information;
6. the importance of the issues at stake in the litigation; and
7. the requesting parties' resources.

DUTY TO PRESERVE EVIDENCE:

The rules discussed above determine what documents must be provided during court litigation. However, a party's duty to preserve data and information does not begin with the onset of the litigation. Instead, courts have ruled that "[t]he duty to preserve material evidence arises not only during litigation, but also extends to that period before litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." Silvestri v. General Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001). Therefore, it is in the best interest of school districts to begin preserving information that may be relevant to a lawsuit as soon as the district can reasonably anticipate litigation. The repercussions for failing to preserve documents requested in litigation are very serious and include monetary sanctions. In addition to monetary sanctions, courts have the authority to issue adverse rulings of fact against the party who destroyed the records including electronically stored information. However, in the absence of "exceptional circumstances," a court may not sanction a party for failing to provide electronically stored information lost as a result of the "routine, good faith operation of an electronic information system." Although the rules do not define what would constitute "exceptional circumstances," it is generally understood that an instance of "electronic shredding" or intentional deletion of documents after the time when a party can reasonably expect litigation to occur could be such an "exceptional circumstance." As a result, school districts need to establish procedures to save any electronic documents that could potentially be subject to discovery in litigation. Hence, whenever a school has notice that it might be involved in litigation, it needs to take steps to gather and preserve documents that may be requested in such litigation. In many cases, litigants may wait months or years before filing a lawsuit. A school cannot wait until this occurs to take steps to preserve records but must take action when it first receives notice.

CONNECTICUT LAW REGARDING ELECTRONIC INFORMATION:

Connecticut's Freedom of Information Act and the state record retention schedules currently cover electronic documents. Therefore, school districts already have guidance regarding what electronic documents must be maintained in general (outside of the context of discovery for litigation). The Freedom of Information Act requires that the public have access to "public records" or files developed or maintained by public agencies, including boards of education. The definition of "public records or files" is very broad. It includes:

> any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, whether such data or information be handwritten, typed, tape-recorded, printed, photocopied, photographed or recorded by any other method.

Conn. Gen. Stat. § 1-200(5). From this definition, we see that any recorded information will fall within the definition of public records. This includes e-mail messages related to the public's business, even if created on one's home computer. *Goodenow and the Record-Journal v. Superintendent, Wallingford Public Schools,* Docket #FIC 2003-170 (October 22, 2003); *Pinette v. Town Manager, Town of Wethersfield*, Docket #FIC 20043-341 (September 8, 2004) (Mayor directed to search home computer for e-mails related to official business).

In addition, electronic public records are to be retained in accordance with a records retention schedule of the Public Records Administrator. In 1998, the Public Records Administrator issued a Management and Retention Guide for Electronic and Voice Mail. *General Letter 98-1* (Public Records Administrator, June 1, 1998). In *General Letter 98-1,* the Public Records Administrator also addressed the issue of e-mail. Boards of education (and other public agencies) are responsible for establishing guidelines for which of the following three categories apply to various e-mail messages received and sent:

Transitory	No retention requirement (may be deleted at will)
Less than permanent	Follow retention period for equivalent hard copy records as specified in an approved retention schedule (may be deleted only after making hard copy or retaining in accordance with schedule and receiving signed approval from the Public Records Administrator)
Permanent	Must be retained permanently (may be deleted when information is retained in the form of a hard-copy printout or approved microfilm)

The Records Administrator did not dictate how a school district should decide what category a record would belong in. Accordingly, the determination of the appropriate category for such records is generally based on function and common sense. Junk e-mail, or a casual communication between coworkers, for example, would be transitory. If technology advances so that parents register children or provide emergency student information by e-mail, for example, such e-mail records should be retained for the same period as such records would be retained in hard copy (unless they are converted to hard copy).

SUGGESTIONS TO ENSURE COMPLIANCE:

1. School districts should be aware that electronic documents are subject to disclosure and should counsel their employees to be conscious of this fact and careful about what they write in e-mails and other electronic documents.

2. As soon as a school district knows that litigation may occur, the district should save any electronic documents that could be subject to discovery. This obligation to maintain records applies to documents created or received previously as well as to documents made or received after the district has knowledge that litigation may occur. Discussion with the IT staff and the school district attorney will be necessary in order to define what documents must be maintained and to ensure their maintenance.

3. It is acceptable to have a system of periodically deleting or cleansing e-mails that the district does not reasonably expect to be the subject of discovery. However, the school district should have a clear, well delineated, written policy for maintaining and storing electronic documents. Having a consistent system is very important in showing that any deletion is not deliberate attempt to erase evidence, but was a routine matter, performed in the ordinary course of business. Where a party acts in good faith and without an existing business reason to retain information, no sanctions should issue for the deletion of that information.

4. Continue to adhere to rulings by the FOIA as well as to the record retention statutes.

QUESTIONS OR ASSISTANCE?

If you have any questions about New Rules For Electronically Stored Information, please contact Rebecca Rudnick Santiago at (860) 251-5164 or Gwen Goodman at (203) 324-8147.