

## **DISCLOSURE RULES UNDER ENGLISH LAW**

The Rules on disclosure of documents are set out in the Civil Procedure Rules 1998. They detail at Part 31, what disclosure is, what documents have to be disclosed and the disclosure statement that has to be signed. Taking each of those in turn:

### ***31.2 Meaning of disclosure***

*A party discloses a document by stating that the document exists or has existed.*

The first notable part is that, disclosure is stating the document exists, not the physical handing over of the document.

### ***31.3 Right of inspection of a disclosed document***

*(1) A party to whom a document has been disclosed has a right to inspect that document except where –*

there is then a list of reasons where the need to permit inspection is not required

### ***31.4 Meaning of document***

*In this Part –*

*‘document’ means anything in which information of any description is recorded; and*

*‘copy’, in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly.*

### ***31.6 Standard disclosure – what documents are to be disclosed***

*Standard disclosure requires a party to disclose only –*

*(a) the documents on which he relies; and*

*(b) the documents which –*

*(i) adversely affect his own case;*

*(ii) adversely affect another party’s case; or*

*(iii) support another party’s case; and*

*(c) the documents which he is required to disclose by a relevant practice direction.*

Standard disclosure, as stated above, can be followed by a request for specific disclosure, where the party to whom disclosure is to be made can identify specific documents [or, but unlikely] a group of documents which he believes should be disclosed.

You will note that ‘document’ as defined above, is not limited to the written text. To ensure there was no doubt about this, the definition of ‘document’ has been widened. This took effect on 1<sup>st</sup> October 2005, and principally concerns electronic documents.

A new paragraph dealing with electronic documents has been added to the rules as guidance. The provisions of this paragraph read as follows:

*2A.1 Rule 31.4 contains a broad definition of a document. This extends to electronic documents, including e-mail and other electronic communications, word processed documents and databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media, the definition covers those documents that are stored on servers and back-up systems and electronic documents that have been 'deleted'. It also extends to additional information stored and associated with electronic documents known as metadata.*

Paragraph 2A.1 extends the broad definition of 'documents' to electronic documents such as emails, word processed documents and databases. However, the definition also extends to additional information of the documents, referred to as metadata (known as data about data) which is information such as cc, bcc etc in emails or signs of who has accessed and altered a word document.

Data fall into four categories: active, replicant (automatic temporary files created by a computer for back-up purposes), back-up and residual (data that have been 'deleted' but is still recoverable). As seen in Para 2A.1 of the new Rule, the definition includes all of these categories.

*2A.2 The parties should, prior to the first Case Management Conference, discuss any issues that may arise regarding searches for and the preservation of electronic documents. This may involve the parties providing information about the categories of electronic documents within their control, the computer systems, electronic devices and media on which any relevant documents may be held, the storage systems maintained by the parties and their document retention policies. In the case of difficulty or disagreement, the matter should be referred to a judge for directions at the earliest practical date, if possible at the first Case Management Conference.*

*2A.3 The parties should co-operate at an early stage as to the format in which electronic copy documents are to be provided on inspection. In the case of difficulty or disagreement, the matter should be referred to a Judge for directions at the earliest practical date, if possible at the first Case Management Conference.*

The Case Management Conference is the first occasion where the parties' solicitors and their counsel attend before the Court to agree a timetable for the progress of the case through to trial and deal with any procedural matters that cannot be agreed.

The difficulty in compatibility of computer programs (Para 2A.3) and the fear of disclosing too much information (Para 2A.4/5) is addressed by inviting the parties prior

to the first Case Management Conference, to discuss any issues that may arise regarding the nature of the search, the key words to be used and the preservation of as well as the format of those electronic documents.

Disclosure occurs after Particulars of Claim, the Defence and the Reply have been served. So, there has to be discussion and agreement on the preservation of documents and their format shortly after the Claim Form has been served (that is the document that starts the Court proceedings). However it may be necessary to agree this earlier where notice of a claim is given and the parties are trying to resolve the dispute by negotiation.

*2A.4 The existence of electronic documents impacts upon the extent of the reasonable search required by Rule 31.7 for the purposes of standard disclosure. The factors that may be relevant in deciding the reasonableness of a search for electronic documents include (but are not limited to) the following:–*

- (a) The number of documents involved.*
- (b) The nature and complexity of the proceedings*
- (c) The ease and expense of retrieval of any particular document. This includes:
  - (i) The accessibility of electronic documents or data including e-mail communications on computer systems, servers, back-up systems and other electronic devices or media that may contain such documents taking into account alterations or developments in hardware or software systems used by the disclosing party and/or available to enable access to such documents.*
  - (ii) The location of relevant electronic documents, data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents.*
  - (iii) The likelihood of locating relevant data.*
  - (iv) The cost of recovering any electronic documents.*
  - (v) The cost of disclosing and providing inspection of any relevant electronic documents.*
  - (vi) The likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection.**

- (d) *The significance of any document which is likely to be located during the search.*

2A.5 2A.5 *It may be reasonable to search some or all of the parties' electronic storage systems. In some circumstances, it may be reasonable to search for electronic documents by means of keyword searches (agreed as far as possible between the parties) even where a full review of each and every document would be unreasonable. There may be other forms of electronic search that may be appropriate in particular circumstances.*

When discussing the format and nature of documents to be disclosed, the parties will need to provide information about the type of documents that are stored either centrally or individually on computer hard drives, the computer system network itself, any other electronic devices and media on which documents may be held, and the storage systems for either active or back-up data. Moreover, the document retention policies that each company has will need to be discussed. Where there is a dispute, a party can apply to the Court for an Order requiring the preservation of documents so as to avoid their 'accidental' deletion, e.g. by an automatic, computer-controlled deletion program.

## **The Search**

How comprehensive does the search need to be to comply with Rule 31.7 for the purposes of standard disclosure? The limitation on documents required (discussed with Rule 31.6 above) carries with it a test for determining how much searching must be done. Rule 31.7 states:

### **31.7 Duty of search**

(1) *When giving standard disclosure, a party is required to make a reasonable search for documents falling within rule 31.6(b) or (c).*

(2) *The factors relevant in deciding the reasonableness of a search include the following –*

- (a) the number of documents involved;*
- (b) the nature and complexity of the proceedings;*
- (c) the ease and expense of retrieval of any particular document; and*
- (d) the significance of any document which is likely to be located during the search.*

(3) *Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document.*

Paragraph 2A.4 of the guidance addresses this problem and sets out the factors (though not an exclusive list) that should be taken into account in deciding the reasonableness of a specific search for electronic documents. The problem that is immediately apparent is that for a large organisation, the search procedure may be extremely difficult. Also, what may be a large and important claim for one party may be considered small and of little

importance to another. E.g. a multi national company being sued by a single ship operator. Obviously the Court can resolve any issues that there may be between the parties on disclosure, but their guiding principle will be “*what is reasonable in the interests of both parties, for justice and the fair resolution of the dispute*”.

A Disclosure Statement has to be provided which has to conform with the draft below .

## **DISCLOSURE STATEMENT**

I, the above named claimant [or defendant] [if party making disclosure is a company, firm or other organisation identify here who the person making the disclosure statement is and why he is the appropriate person to make it] state that I have carried out a reasonable and proportionate search to locate all the documents which I am required to disclose under the order made by the court on day of . I did not search:

- (1) for documents predating .....
- (2) for documents located elsewhere than .....
- (3) for documents in categories other than .....
- (4) for electronic documents

I carried out a search for electronic documents contained on or created by the following:

[list what was searched and extent of search]

I did not search for the following:

- (1) documents created before.....,
- (2) documents contained on or created by the  
Claimant's/Defendant's PCs/portable data storage  
media/databases/servers/back-up tapes/off-site storage/mobile  
phones/laptops/notebooks/handheld devices/PDA devices  
(delete as appropriate),
- (3) documents contained on or created by the  
Claimant's/Defendant's mail files/document files/calendar  
files/spreadsheet files/graphic and presentation files/web-based  
applications (delete as appropriate),
- (4) documents other than by reference to the following  
keyword(s)/concepts..... (delete if your search was not  
confined to specific keywords or concepts).

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I certify that I understand the duty of disclosure and to the best of my knowledge I have carried out that duty. I certify that the list above is a complete list of all documents which are or have been in my control and which I am obliged under the said order to disclose.

### **Making a False Declaration**

The disclosure of all relevant documents is extremely important to the fair resolution of a matter and failure to do so is taken seriously by the Court, to the extent that the party signing the Statement, usually an officer of the company, can be charged with contempt – a criminal offence. More often, a failure to disclose will be viewed adversely in respect of any documents that ought to have been disclosed, but were not.

#### *31.23 False disclosure statements*

*(1) Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false disclosure statement, without an honest belief in its truth.*

*(2) Proceedings under this rule may be brought only –*

*(a) by the Attorney General; or*

*(b) with the permission of the court.*

The above Rules detail the requirements for the disclosure of documents, whether the proceedings are in Court or before an Arbitration Tribunal.

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