

RIVERSIDE: AUDIT & ADVISORY SERVICES

December 22, 2010

To: Georgianne Carlson, Assistant Vice Chancellor
Finance & Business Operations

Michelle Coyle, Campus Counsel

Chuck Rowley, Associate Vice Chancellor
Computing & Communications

Subject: Internal Audit of E-Discovery

Ref: R2010-23

We have completed our audit of E-Discovery in accordance with the UC Riverside Audit Plan. Our report is attached for your review. We will perform audit follow-up procedures in the future to review the status of management action. This follow-up may take the form of a discussion or perhaps a limited review. Audit R2010-23 will remain open until we have evaluated the actions taken.

We appreciate the cooperation and assistance provided by personnel involved. Should you have any questions concerning the report, please do not hesitate to contact me.

Michael R. Jenson
Director

cc: Audit Committee Members
Risk Management Director La Shier
Materiel Management Director Lewis

UNIVERSITY OF CALIFORNIA AT RIVERSIDE
AUDIT & ADVISORY SERVICES
MEMBER OF ASSOCIATION OF COLLEGE & UNIVERSITY AUDITORS

INTERNAL AUDIT REPORT R2010-23

E-DISCOVERY

DECEMBER 2010

Approved by:

Noahn Montemayor
Principal Auditor

Michael R. Jenson
Director

**UC RIVERSIDE
E-DISCOVERY
INTERNAL AUDIT REPORT R2010-23
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I. MANAGEMENT SUMMARY

Based upon the results of work performed within the scope of the audit, it is our opinion that, overall, UCR has taken appropriate initial steps to develop a campus-wide strategy and plan of action to respond to e-discovery requests in federal and state court litigation.

Positive observations included:

- * The University of California Office of the General Counsel (OGC) and Campus Counsel offer legal advice and assistance to campuses to provide assurance that the University satisfies its discovery obligations in litigation.
- * UCR has evaluated offerings for a campus-wide enterprise content management system (ECMS) to facilitate the development of an information taxonomy and a methodology for information categorization. An ECMS that can manage all electronic information formats would aid in determining what information to capture, how it is used, where it is stored, who needs it, when it is relevant, and why it should be maintained. A robust enterprise content management program is a foundation of effective response to e-discovery.

We observed some areas that need enhancement to strengthen internal controls and/or effect compliance with University policy.

- 1) UCR records management policy and procedural guidelines need to be updated to adequately address requirements established by recent changes in Federal and State regulations relating to electronically stored information. (Observation III.A.)
- 2) In forming an e-discovery response team, a clear delineation of roles and responsibilities will benefit all, and help foster the collaboration that is essential to the e-discovery process. (Observation III.B.)
- 3) Achieving a well-defined, consistent, repeatable, and effective e-discovery response process may require project management discipline and quality measures. (Observation III.C.)

These items are discussed below. Minor items that were not of a magnitude to warrant inclusion in the report were discussed verbally with management.

II. PURPOSE, BACKGROUND, AND SCOPE

A. PURPOSE

UC Riverside Audit & Advisory Services (A&AS), as part of its Audit Plan, performed an e-discovery readiness assessment to evaluate progress made in developing a campus-wide strategy and plan of action to respond to e-discovery requests in federal and state court litigation.

The purpose of the review is to consider UCR's ability to respond to data discovery requests in a legally defensible and cost effective manner in concert with university operations. Our objective is to assist management in advancing policies, procedures, and adequate controls that prepare the campus for an organized response to e-discovery requests.

B. BACKGROUND

Discovery is the process of identifying, locating, securing and producing information and materials for the purpose of obtaining evidence for utilization in the legal process. The term is also used to describe the process of reviewing all materials that may be potentially relevant to the issues at hand and/or that may need to be disclosed to other parties, and of evaluating evidence to prove or disprove facts, theories or allegations. There are several ways to conduct discovery, the most common of which are interrogatories, requests for production of documents and depositions.¹

Electronic Discovery ("E-Discovery") is the process of collecting, preparing, reviewing, and producing electronically stored information ("ESI") in the context of the legal process.² ESI is different from paper information because of its intangible form, volume, transience, and persistence. ESI is usually accompanied by metadata, which is not present in paper documents. Metadata is defined as data providing information about one or more other pieces of data, such as the means of creation of the data, purpose of the data, time and date of creation, creator or author of data, and placement on a computer network where the data was created. However, paper documents can be scanned into electronic format and then manually coded with metadata. The preservation of metadata from electronic documents creates special challenges to prevent spoliation.

E-Discovery was the subject of amendments to the Federal Rules of Civil Procedure, effective December 1, 2006. The California E-Discovery Act, which parallels the federal rules, took effect on June 29, 2009. Examples of the types of data included in e-discovery are e-mail, instant messaging

¹ The Sedona Conference Glossary: E-Discovery & Digital Information Management (Second Edition), December 2007

² Ibid.

chats, documents (such as MS Office files), enterprise and departmental databases, web pages and web sites, voicemail, digital photos, and any other ESI which could be relevant evidence in a law suit. Also included in e-discovery is "raw data" which forensic investigators can review for hidden evidence. The original file format is known as the "native" format. Litigators may review material from e-discovery in one of several formats: printed paper, native file, PDF format, or as single-page graphic images.

The volume of University information is growing by leaps and bounds and is compounded by the amount of data being retained for research, compliance, business intelligence, intellectual property, and information security purposes.

The significant volume of data would not be much of an issue for UCR if it were all located in one place. However, information is highly decentralized and data can be found in data centers, on employee personal computers (PCs), on backup tapes at offsite facilities, and anywhere in between. Also, there are primary application servers, web servers, and storage and personal archives often saved on file shares or PCs, as well as local and remote backup copies. When a discovery request arrives, Finance & Business Operations (F&BO), Campus Counsel, and Computing & Communications (C&C) must work collaboratively to find all of the relevant information in the vast UCR data sprawl.

ESI will continue to be requested, and the campus response may require significant levels of information technology (IT) involvement. When the frequency of such requests increases and overlaps, business operations and the legal side rely heavily on IT support, and IT does all the heavy lifting, including document collection, data loading, and data processing. Campus counsel, outside attorneys, and business staff work to implement all litigation holds and direct IT and records management on what to collect and when to collect it. The problem manifests when IT and legal support have to increase staffing levels to address the increase in e-discovery requests.

Inadequate and/or underdeveloped e-discovery processes increase the risks of failing to provide relevant information, risking loss of defensibility, unnecessarily providing privileged or damaging information, and incurring excessive e-discovery costs.

C. SCOPE

The e-discovery response readiness assessment was limited to reviewing the present combination of people, process, technology, policy, and procedures that helps UCR manage the growing amount of University information as well as the legal and regulatory requirements that draw on that information.

A&AS reviewed the following areas:

- Records management and e-discovery policy and procedures
- Alignment of academic, business/administrative, IT, legal, and compliance information and records management processes
- Content management systems/capabilities that support e-discovery
- E-discovery team formation, assignments, and responsibilities
- Staff education and training
- Third party service provider arrangements

D. INTERNAL CONTROLS AND COMPLIANCE

As part of the review, internal controls were examined within the scope of the audit.

Internal control is a process designed to provide reasonable, but not absolute, assurance regarding the achievement of objectives in the following categories:

- * effectiveness and efficiency of operations
- * reliability of financial reporting
- * compliance with applicable laws and regulations

Substantive audit procedures were performed during April through June 2010. Accordingly, this evaluation of internal controls is based on our knowledge as of that time and should be read with that understanding.

III. OBSERVATIONS, COMMENTS, AND RECOMMENDATIONS

A. Records Management Policy

UCR records management policy and procedural guidelines need to be updated to adequately address requirements established by recent changes in Federal and State regulations relating to ESI.

COMMENTS

The amendments to the Federal Rules of Civil Procedure and the California E-Discovery Act make it imperative for the University to develop enterprise-wide policy and strategies to manage electronic information. Existing record management policy and procedures that were created when the regulatory environment was less rigorous may no longer be adequate and may have to be revised to support UCR information management and litigation-oriented responsibilities under current law.

“Organizations should adopt policies and programs that provide rational and defensible guidelines for managing ESI. These guidelines should be created after considering the business, regulatory, tax, information

management, and infrastructure needs of the organization, including the need to conserve electronic storage space on email and other servers. Thus, a company that determines it only needs to retain email with business record significance should set forth such a practice in its document retention policy. Employees would then be responsible for implementing the policy, neither destroying documents and ESI prematurely, nor retaining them beyond their useful life.”³

RECOMMENDATIONS

In view of the present regulatory environment, management should consider revising records management policy and document backup, retention, and disposition procedures to include specific language to prepare for and manage the e-discovery process.

Records management policy and procedures that apply to both paper and electronic information should support the goals of preserving university records while they have a useful purpose, providing a legitimate explanation as to why certain documents may no longer exist, and limiting the number of potential "data repositories" which must be searched in order to prepare a response to a discovery request.

“An organization’s policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with preservation obligations related to actual or reasonably anticipated litigation, government investigation or audit.”⁴

Policy should include litigation hold procedures to preserve documents, guidelines regarding the use of portable storage media to conduct University business, policy regarding the use of “other computers” (i.e., employee-owned computers) to conduct University business, and policy or standard regarding electronic messaging (email).

Well implemented records management policy and procedures present a defensible position in a court of law for effectively responding to e-discovery requests. They demonstrate that the University is managing its information according to established guidelines and disposing of appropriate information within the normal course of business. Documents requested by opposing counsel need not be produced if they were disposed of based on well defined retention periods prior to hold orders.

³ The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (Second edition), June 2007

⁴ The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age (Second Edition), November 2007

MANAGEMENT RESPONSE

F&BO/Materiel Management Response – We concur with the recommendation. UC Riverside’s (UCR) Records Management Policy mirrors the University of California Office of the President’s (UCOP) Records Management and Privacy Policy; however, local implementation procedures must be developed to address electronic as well as paper records. We will take action to update UCR’s Materiel Management / Records Management website to reference applicable UCOP policy and to specify local implementation procedures, including information concerning the roles of individuals with regard to administering the policy. Applicable UCR policies, under Section 800 Records, will be updated to reflect this information, as necessary. Anticipated completion date for the website to be updated to reference applicable UCOP policy is March 31, 2011. Anticipated completion date for local implementation procedures, including administrative roles, is July 1, 2012.

Computing & Communications Department Response – Although there are no specific technical policy changes required from this recommendation, C&C will nevertheless prepare a “best practices” document for campus department and units that will provide input and advice on the TECHNICAL steps that should be followed to comply with preservation obligations.

B. Roles and Responsibilities

In forming an e-discovery response team, a clear delineation of roles and responsibilities will benefit all, and help foster the collaboration that is essential to the e-discovery process.

COMMENTS

Although e-discovery is a process primarily driven by legal requirements and not technology, effective e-discovery response requires a team approach from risk management, campus counsel, and IT.

Risk management, legal counsel, and IT, must work together to enhance knowledge of data repositories and develop appropriate e-discovery processes to apply to the content in those repositories. This requires ongoing communication, written policies and procedures, training, and education. Records management and IT should be involved in data classification and retention policy enforcement. Education and training should extend to all relevant personnel and periodic reviews should be performed to monitor compliance.

RECOMMENDATIONS

Management should clearly define delegations of authority and assignment of roles and responsibilities for ensuring compliance with records management and e-discovery policy and procedures and for responding to e-discovery requests.

In all cases, the e-discovery response teams should be led by a person(s) who will be responsible for assuring that the process demonstrates a reasonable good-faith effort to be compliant, consistent, complete, and accurate.

MANAGEMENT RESPONSE

Campus Counsel's Response – The Office of Campus Counsel agrees that the campus must take the steps necessary to identify and assess all sources of relevant electronically stored information, "ESI", in a particular matter. It is critical that the e-discovery response team be informed of relevant ESI sources so that it can do its work. The assistance of local information technology expertise is essential as is the coordination provided by Risk Management. Necessary resources must be provided and the person(s) responsible notified so that the team can function as envisioned.

F&BO Risk Management Response – We concur with the recommendation. Risk Management will serve a logistics coordination role, in the event of an e-discovery request. This will likely include coordinating meetings and other e-discovery activities and, possibly, overseeing paralegal staff charged with coordinating the collection of records requested via the legal process. The Risk Management Office currently consists of two professional staff positions, both of which are fully engaged in administering the Risk Management programs at UCR. Consequently, we do not have staff available to fully support a case involving e-discovery. In the event of an e-discovery request, we would need to acquire additional staff resources on an ad-hoc basis. This could entail hiring temporary paralegal staff or engaging an outside firm to support the effort. If UCR experiences a recurring need for e-discovery support, we would consider creating a career staff position, which could conceivably be tasked with e-discovery, Public Information Act requests and Conflict of Interest policy coordination.

Computing and Communications (C&C) Department Response – C&C concurs with the recommendation. In the event of an e-discovery request, the university will engage an external firm specializing in electronic data capture and archival, as C&C does not have the resources in house to provide this service. C&C's role with regard to the external firm would entail providing access to the various systems involved or to provide large data sets for further analysis and archiving by the external firm.

C. Process Quality and Maturity

Achieving a well-defined, consistent, repeatable, and effective e-discovery response process may require project management discipline and quality measures.

COMMENTS

To be effective, the e-discovery response process must become repeatable and consistent, enabling UCR to be compliant with applicable regulation and to manage the risks and costs associated with e-discovery.

“The ultimate goal in discovery is to identify, collect and cull documents and ESI from a larger corporate or institutional data universe and then search for and retrieve the relevant or responsive non-privileged materials with whatever tools or methods have been made available. Where appropriate, the process should incorporate some form of useful metrics to quantify the accuracy of the resulting output.” Achieving consistency requires sound project-planning oversight and can often be enhanced by use of measurements of the quality of the outcome integrated into the overall e-discovery process.⁵

RECOMMENDATIONS

To enhance the quality and effectiveness of e-discovery efforts, the e-discovery team should consider employing project management processes to organize and manage resources in such a way that e-discovery projects are completed within defined scope, quality, time and cost constraints.

“Project management is the application of knowledge, skills, tools, and techniques to project activities to meet project requirements. Project management is accomplished through the application and integration of the project management processes of initiating, planning, executing, monitoring and controlling, and closing. The project manager is the person responsible for accomplishing the project objectives.”⁶

MANAGEMENT RESPONSE

Campus Counsel’s Response – The Office of Campus Counsel agrees that the campus must take the steps necessary to identify and assess all sources of relevant electronically stored information, “ESI”, in a particular matter. It is critical that the e-discovery response team be informed of relevant ESI sources so that it can do its work. The assistance of local information

⁵ The Sedona Conference: Commentary on Achieving Quality in the E-Discovery Process (Public Comment Version), May 2009

⁶ A Guide to the Project Management Body of Knowledge (PMBOK Guide) Third Edition, 2004 Project Management Institute, Newtown Square, PA USA

technology expertise is essential as is the coordination provided by Risk Management. Necessary resources must be provided and the person(s) responsible notified so that the team can function as envisioned.

F&BO Risk Management Response – We agree with the recommendation. As discussed above, Risk Management's role is that of logistical coordinator. As such, we will look to the university's legal counsel to determine the legal requirements concerning e-discovery and to ensure that scope, quality, time and cost constraints are understood by all offices involved in the e-discovery process, e.g., Campus Counsel, Risk Management and Computing & Communications. Based on direction provided by legal counsel, we will initiate, plan, execute, monitor, control and close activities within our charge by applying contemporary project management tools and principles.