Technology Law Section Meeting

IMLA
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Agenda

- Encryption?
- BYOD Policies
- Proportionality in eDiscovery
- Your Topics

Encryption?

- Ethics
- Practicality
- Impact on efficiency
- Impact on eDiscovery
- Conclusion??

BYOD Flavors [BYOx]
Accessing Enterprise Data re Personal Devices

- BYOD personal smartphones or tablet, laptops, even desktops computers using VPN
- BYOA (Bring Your Own Access) - employees use their mobile hotspots for wireless access to a employer's systems
- BYOE (Bring Your Own Encryption) - employees use their own encryption software and encryption keys to access cloud-based employer data
- BYOI (Bring Your Own Identity) - employees use third-party credentials (usually for social networking sites) as their credentials for other systems—e.g. "login using Facebook"), to access, disseminate, and acquire data for employer
- BYON (Bring Your Own Network) where employees create their own personal network instead of utilizing the company network
- BYOW (Bring Your Own Wearable) - where employees use wearable technology such as Apple watches to access employer systems or data

BYOD - WHY

- Employees will use BYOD anyway so we had better establish policies or lock down our systems
- Efficiency (but overtime risk for hourly employees) - Conform to worker mobility – not tethered to desks
- Employees like to keep up with newest technology while local gov’ts lag

BYOD POLICY FACTORS
Practical Factors

Local government should consider:

- security risk tolerance,
- financial resources
- technical infrastructure & support resources
- Organization culture
- user sophistication

DO YOU NEED IT? WILL IT WORK?

BYOD POLICY FACTORS
Legal Obligations

A local government should consider its legal and compliance obligations, e.g.,

1. Open records (and sometimes open meetings if state law extends to voice and data communications)
2. Records preservation
3. Privacy (including Fourth Amendment)*
4. Data security including encryption requirements (e.g., HIPAA, NCIC)
5. Pretrial discovery (ARRrrgggghhh!!!!!)

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*BYOD CAN RESULT IN EMPLOYEE AS WELL AS EMPLOYEES' FAMILY & FRIENDS' DATA ENDING UP ON GOV'T SYSTEMS

BYOD POLICY FACTORS

Departments must be able to coordinate or it won't work (DO YOU NEED TO OUTSOURCE? CAN YOU AFFORD TO? CAN YOU AFFORD NOT TO?)

Information Technology

Human Resources

Legal

Compliance

Finance

BYOD Policies & Data Management

1. **TENSION: GOV'T DATA SECURITY v. PERSONAL PRIVACY**. BYOD policies should facilitate efficiency and protection of government information while simultaneously attempting to protect personal information
2. **eDiscovery**: BYOD devices that contain unique, relevant must ESI be considered sources for preservation and discovery in response to litigation, investigations and open records procedures. ***This is Sedona Conference position and some courts agree. State laws and some judges may not. Federal grand jury: no practical limit on discovery.***
3. ***TO EXTENT #2 IS ACCEPTED:***
   - Governments should implement BYOD usage policies and practices that facilitate preservation and collection of unique, relevant BYOD ESI.
   - An entity's efforts to manage proactively BYOD usage should inform application of the Proportionality Principle in eDiscovery. **IF STATE LAW WON'T LET YOU – TOUGH LUCK**
   - Where an organization has adopted and implemented BYOD policies and technology controls that would **prevent** unique, relevant ESI from being stored on BYOD devices, the organization normally should **not** be required to preserve or collect ESI from the devices to meet its discovery obligations.

Proportionality Now in Discovery Scope Amendments to Fed. R. Civ. P. 26(b)(1)

Fed. R. Civ. P. 26. **Duty to Disclose; General Provisions Governing Discovery** * * *
(b) Discovery Scope and Limits.
(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense **and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.** ~~—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

Proportionality no Longer in Undue Burden Amendment to Fed. R. Civ. P. 26(b)(2)(C)(iii)

Fed. R. Civ. P. 26. **Duty to Disclose; General Provisions Governing Discovery** * * *

(b) Discovery Scope and Limits. * * *

(2) *Limitations on Frequency and Extent*. * * *

(B) *Specific Limitations on Electronically Stored Information*. [SEE NEXT SLIDE for "not reasonably accessible"] * * *

(C) *When Required*. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the ~~burden or expense of~~ **proposed discovery** **is outside the scope permitted by Rule 26(b)(1)**.~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

Proportionality

Fed. R. Civ. P. 26. **Duty to Disclose; General Provisions Governing Discovery** * * *

(b) Discovery Scope and Limits. * * *

(2) *Limitations on Frequency and Extent*

(B) *Specific Limitations on Electronically Stored Information*. 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. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

PROPORTIONALITY TAKE-AWAY

- Proportionality now clearly a basis for objection grounded on scope of discovery, not just undue burden standard

- Party resisting discovery can still identify “not reasonably accessible” ESI & try to prevent production or at least get cost-shifting

BUT LOCAL GOVERNMENTS MAY BE AT DISADVANTAGE IN LITIGATING PROPORTIONALITY AND UNDUE BURDEN

- STATE LAW DUTY TO PRESERVE ESI
- STATE LAW DUTY PROMPTLY TO RESPOND TO OPEN RECORDS REQUESTS (WHICH SOMETIMES COMPEL ABILITY TO ACCESS BACKUPS & SUBSTANTIVELY NON-UNIQUE ESI (different metadata makes different record)
- Preexisting duties could impose higher threshold for establishing disproportionality or undue burden (but courts haven't yet grocked?)

Online Discussion Groups

- IMLA eDiscovery/Legal Hold Working Group ListServ:

  To Join: email Chuck Thompson (cthompson@imla.org) or Jennifer Ruhe (jruhe@imla.org) expressing interest.

- CityAttorneyTech Discussion Group: https://groups.yahoo.com/neo/groups/CityAttorneyTech/info

  To Join: Email to cityattorneytech-subscribe@yahoogroups.com from address you want to use for the group