



E-DISCOVERY

*An Electronic Discovery Guide for Connecticut State
Colleges and Universities*

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E-DISCOVERY PROCESS FOR LITIGATION AND ADMINISTRATIVE AGENCY MATTERS

Introduction:

Electronically Stored Information (ESI) relating to litigation and administrative agency matters must be handled in a manner that will withstand legal challenge by an opposing party. A substantial body of case law exists relating to the handling of ESI, particularly as to preservation and production. Accordingly, when litigation occurs, or is “reasonably anticipated,” steps must be taken to preserve potentially relevant ESI.

The steps for handling ESI in litigation are grouped in these phases:

1. Identification and preservation of ESI
2. Collection of ESI
3. Processing of ESI
4. Review of ESI
5. Production of ESI to another party
6. Presentation of ESI at trial
7. Post-trial handling of ESI

Connecticut State Colleges and Universities (CSCU) institutions will be primarily involved with steps 1, 2, and 4, although all of these steps are detailed below to fully provide the context of this workflow.

The steps are detailed below along with the role played by the following individuals:

1. CSCU Office of Legal Affairs (OLA) staff
2. CSCU and/or Institution IT
3. Assistant Attorney General (AAG) (or outside counsel who are providing representation)
4. eDiscovery AAG

“... affirmative steps [must be taken] to monitor compliance so that all sources of discoverable information are identified and searched [and in this case, preserved.]”

- *Swafford v. Eslinger*, 671 F.Supp.2d 1274, 1281 (M.D. Fla. 2009).

Identification and Preservation of ESI		
	Short Description of Task	Full Description of Task
1.	Identify key custodians who may have documents and ESI.	When litigation occurs, or is “reasonably anticipated,” the Institution identifies key custodians who may have documents and ESI. When the AG is providing representation, CSCU’s Legal Counsel (OLA) and the Assistant Attorney General (AAG) may identify key custodians collaboratively.
2.	Generate litigation hold memos; give to CSCU Institution for distribution to key custodians.	When the AG provides representation in a case, the AG’s office generates a case-specific litigation hold memo using the standard AG template and gives it to CSCU’s OLA or other Institution key contact for distribution to key custodians. When the AG’s office is not providing representation (in the early stages of a CHRO matter or where CSCU OLA is providing representation, for example), the Institution uses the template to generate the litigation hold notice. The written litigation hold memo may be in addition to or may supplement oral or e-mail communications regarding the preservation obligation.
3.	Send litigation hold memos to key custodians.	CSCU OLA staff or Institution key contact distributes the litigation hold notices to identified key custodians with a copy to CSCU and/or Institution IT.
4.	Put in-place hold on e-mail of key custodians.	At a time determined by the AAG in consultation with CSCU OLA, CSCU OLA provides custodian and a date criteria to CSCU and/or Institution IT, which then puts in-place hold on e-mail accounts of key custodians using available and appropriate search technology. (Search terms are generally not used at this early stage because request for production have not yet been received.) Criteria are collaboratively agreed upon by CSCU OLA and AAG (where AG is providing representation), and where appropriate, the eDiscovery AAG.
5.	Notify third parties of litigation and possible duty to preserve.	Notify third parties including cloud providers who may have documents and ESI in their custody or control that litigation has occurred or will occur, and that they may receive a request for production or a subpoena from one of the parties. Decision regarding contracting third parties will be made by AAG and CSCU OLA.

6.	Implement other preservation steps if appropriate.	Consider whether additional preservation steps are necessary if the in-place e-mail hold and litigation hold memo are not deemed to be sufficient. (Normally, collecting to preserve is not required and is not a standard best practice, but should only be used in unusual circumstances involving a concern of deletion or spoliation.)
7.	Identify ESI that is “not reasonably accessible.”	AAG and CSCU OLA will work with CSCU and/or Institution IT to determine whether any sources of ESI are “not reasonably accessible” ¹ to acquire because of undue burden or cost. See #11 below for later steps.
8.	Repeat steps 2, 3, and 4 for additional custodians.	If additional custodians are identified, complete steps 2, 3, and 4 above in relation to those custodians.
Collection of Responsive ESI		
9.	Evaluate RFPs or other production requirements and prepare objections.	When the AAG receives discovery requests such as Request for Production (RFPs) or when initial disclosures are due, AAG and CSCU OLA will evaluate the requests to identify what ESI and documents will be collected and produced. AAG will prepare objections, collaborating as needed with CSCU OLA and eDiscovery AAG.
10.	More fully identify ESI responsive to RFPs beyond what has been identified for preservation.	If necessary, AAG and CSCU OLA conduct a more in-depth identification process in light of the RFPs, such as non-e-mail. Questionnaires, interviews, and discussions with CSCU and/or Institution IT may be used at this stage.
11.	Assess costs and burdens of producing ESI that is “not reasonably accessible” under FRCP 34.	If (1) requests for production ask for ESI that CSCU and/or Institution IT, in consultation with AAG and eDiscovery AAG where appropriate, deems “not reasonably accessible”; and (2) if the requesting party seeks a ruling that the ESI must be produced over objection, determine the cost and burden of production, which may include preparation of an affidavit or other submission to the court. The AAG, CSCU OLA, CSCU and/or Institution IT, and the eDiscovery AAG may all be involved in this effort.

¹ Federal Rules of Civil Procedure allow parties to object to production when ESI is “not reasonably accessible.”

12.	Identify collection criteria for documents and ESI.	The AAG and CSCU OLA staff will develop specifications for collection: Key custodians, search terms, dates, and other criteria. This can be a collaborative process with a requesting or opposing party, especially as to the development of search terms. EDiscovery AAG may contribute.
13.	Collect e-mail.	CSCU and/or Institution IT collects e-mail in accordance with the provided search specifications.
14.	Collect non-e-mail ESI.	CSCU and/or Institution IT collects non-e-mail ESI in accordance with the developed specifications.
15.	Evaluate, identify, negotiate and collect database ESI.	If RFPs ask for database ESI, evaluate and negotiate scope and production format with requesting party, including determining whether reports can be run to satisfy the request. The AAG, the eDiscovery AAG, and CSCU OLA, and CSCU and/or Institution IT may participate in the negotiation.
16.	Acquire third party documents and ESI.	Where necessary, communicate with third parties (including cloud providers) who have custody or control of documents or ESI. Request their relevant documents and ESI.
17.	Deliver collected ESI to designated recipient.	Using agreed-upon methods and documenting the process, ESI is delivered to designated recipient such as AAG, CSCU OLA, or vendor. EDiscovery AAG may be engaged regarding the form of delivery of ESI.
18.	Decide whether specialized software ("review platform") will be used for review of documents and ESI.	The AAG determines how the document review will be conducted, with input from CSCU OLA and the eDiscovery AAG. Options include using Concordance (free, used in the AG's office); a web-based platform managed by an outside vendor (both AAGs and CSCU institution personnel have access; incurs a cost that must be paid by the Institution); or some other way.
19.	Determine form of production.	AAG (with input from eDiscovery AAG as needed) decides the form of production, ideally reaching agreement with opposing party regarding the form in which each side will produce documents and ESI.
20.	Get quote for vendor to host ESI on review platform and provide eDiscovery project management services.	If documents will be reviewed on a vendor's web-based review platform, eDiscovery AAG or designee develops quote and submits to Institution for funding approval for processing, hosting, running productions and project management.

21.	Get quote for processing only.	If documents and ESI will be reviewed in Concordance (within the AG's office), eDiscovery AAG or designee develops quote for services required to create a Concordance databased file (referred to as "processing") and obtains approval from Institution.
22.	Decide on processing criteria, whether hosting on Concordance or web-based platform.	eDiscovery AAG or designee collaborates with external vendor and AAG to decide on processing criteria: Deduplication of e-mails, date ranges and other search criteria.
23.	Process ESI for review in review platform.	Vendor processes ESI for review in review platform and ESI is loaded into the platform.
Review of Documents and ESI		
24.	Set up database in review platform.	If review is being conducted on Concordance or a web-based platform, database will be set up and installed by AG IT.
25.	Design review (no review platform).	If no review program is used, AAG will determine method of review and document as necessary to assure consistency, defensibility and uniformity.
26.	Design review (review platform, either Concordance or web-based).	Work with review team to create review workflow and coding panel.
27.	Use culling criteria to streamline review (web-based platform).	Work with vendor's project manager to use word searches and other techniques to streamline the review.
28.	Decide how privileged documents will be identified and coded.	Determine and implement privilege review criteria in order to identify and withhold documents that are subject to the attorney client privilege or work product doctrine or other doctrine.
29.	Review documents.	AAG and CSCU OLA allocate responsibilities for review of documents for responsiveness, privilege, and content.
Production of ESI		
30.	Decide on and provide production specifications to whomever is creating the production.	Once the review is complete, plan and execute the production. If vendor is involved, provide production specifications to vendor project manager. (AAG and eDiscovery AAG) If production is being created within the AG's office, either through Concordance or some other way (PDF, etc.), decide on production criteria.

31.	QC privileged documents.	Perform quality control check of privileged documents. (AAG and CSCU OLA)
32.	Create and proof privilege log.	Create privilege log and review it for accuracy. (AAG, staff, and eDiscovery AAG)
33.	Produce documents (web based review platform).	If vendor is involved, vendor will run document production and produce documents to opposing or other receiving party. If vendor is not involved, create production within AG's office and produce to opposing counsel or other receiving party.
34.	Produce documents (no review platform).	If no vendor or review program is used, create production using method that identifies each document through a Bates or other unique number; maintain documentation of the production; retain copy of the production
35.	Provide privilege log.	Provide privilege log to opposing party.
Presentation of ESI at Trial		
36.	ESI may be used as evidence at trial.	ESI may become evidence at a trial or hearing, as determined by the AAG.
37.	Use trial presentation software.	Trial presentation software such as Trial Director may be used. The AG's office coordinates this use.
38.	Exhibit labeling, authentication, and admissibility must be addressed.	Exhibit labeling, authentication, and admissibility must be addressed and carried out. (AAG and staff)
39.	Form of exhibits must be addressed	Determine form of exhibits, including documents as Excel spreadsheets that should be exhibited in native form.
Post-Trial Handling of ESI		
40.	Close out litigation holds; notify custodians and CSCU and/or Institution IT to close out the in-place hold.	Litigation holds must be closed out. Notify CSCU and/or Institution IT that hold on e-mail can be lifted. AAG's office (or outside counsel when they are providing representation) will generate notices that Institution will give custodians notifying them that the hold can be lifted as to ESI they preserved for the case.

HANDLING ELECTRONICALLY STORED INFORMATION (ESI) FOR FOIA REQUESTS

Introduction:

The steps for handling ESI for Freedom of Information Act (FOIA) requests are detailed below along with the role played by one or more of the following individuals:

1. CSCU and/or Institution FOIA Officer
2. CSCU and/or Institution IT
3. Record Keeper
4. AAG if there is parallel litigation pending or outside counsel if the Office of the Attorney General is not handling parallel pending litigation.

Steps:

1. FOIA request is received and logged.
2. Responder is assigned.
3. Your Institution's normal FOI procedures should be followed for initial contact to requester and discussions with requester relating to breadth of searches and time to respond. (See CSCU FOIA Handbook)
4. Is there parallel litigation or is such litigation likely to occur?
 - a. If no:
 - i. Identify relevant record keepers.
 - ii. Ask the relevant record keepers whether they possess relevant documents and ESI.
 - iii. Collect relevant ESI using appropriate method.
 1. Relevant e-mail is collected using search criteria such as date range and search terms provided by requester. E-mail should be collected based on who can do so most efficiently or appropriately. In most cases this is likely the record keeper, but can also be by CSCU and/or Institution IT in certain circumstances or upon request. (Contact CSCU and/or Institution IT staff if assistance is required).
 2. Non-e-mail documents are collected, either by record keeper, CSCU and/or Institution IT.
 - b. If yes:
 - i. Identify relevant record keepers.
 - ii. Ask the relevant record keepers whether they possess relevant documents and ESI.
 - iii. Initiate preservation steps outlined in eDiscovery practices for litigation, steps 1 through 8.
 - iv. Collect relevant ESI using the appropriate method for each type of ESI.
 1. Ask record keepers to gather relevant ESI on their work stations.
 2. Relevant e-mail is collected, applying search criteria such as date range and search terms supplied by the requester. Collection performed by record keeper, or by CSCU and/or Institution IT. (Contact CSCU and/or Institution IT staff if assistance is required).
5. Once ESI is collected, process it for review by, e.g., assembling and organizing it. If necessary, convert it to a form that is easily reviewed and produced, such as PDF.

6. Is this request subject to repetition? If yes, initiate steps to preserve or otherwise discharge legal preservation obligation, such as collecting and holding the produced ESI for re-use, or making produced information publicly available.
7. Review the ESI to determine what documents are relevant and whether any are subject to privileges or exemptions.
8. Redact privileged or exempt information from records, where appropriate.
9. Produce documents and ESI to requester.

Contact Information

The purpose of this guide is to provide guidance to institution employees on how to respond to request for ESI for in relation to litigation, administrative agency matters, and FOIA requests. This compilation is unofficial and for the convenience of institution employees only. While every effort was made to attain complete accuracy herein, institution employees are advised to consult the Connecticut General Statutes for the official codification of the law, where applicable.

All inquiries concerning this handbook may be directed to the CSCU's Office of Legal Affairs at CSCU-Legal@ct.edu