

Making and responding to electronic discovery requests

By Martin Felsky and Peg Duncan

One of the significant impacts of electronic discovery on litigation is the way in which it reconfigures the adversarial nature of the discovery process. When parties are producing paper to each other, they rarely need to collaborate on their methods of collecting, reviewing and producing client documents. Requests and responses for paper discovery are generally created in an atmosphere of strict competition, unless some overture for joint productions is warranted.

In the world of electronic discovery however, it is rarely beneficial for a party to go its own way and draft an affidavit without any dialogue. The volume of information and the cost of e-Discovery, the lack of guidance from Canadian jurisprudence, not to mention the critical need for compatibility and standardization in the way electronic evidence is produced, have all demanded a new level of co-operation between counsel.

One of the outcomes of these changes is that counsel are starting to exchange discovery requests, and then meet, either on their own, with their respective clients,

and even with the case management judge or master. These processes – the discovery request and the “meet and confer” – are based on the American model, in which parties are only required under the Rules to produce documents on which they intend to rely, and documents which are specifically requested by the other side.

What follows is an edited, annotated discovery request letter from plaintiff’s counsel to defendant’s counsel in a contract dispute.



Peg Duncan

Dear Sirs:

Re: Linobyte Inc.

At our recent case management meeting, Justice Vernon directed the Parties to provide each other with proposed protocols for the discovery of electronic documents.

[Planning for e-Discovery at the earliest possible phase is a hallmark of a successful exchange of documents.]

We have advised the Court that our Client (“LINOBYTE”) believes it can meet a deadline of DATE. To comply with the court’s direction and to facilitate timely production we are pleased to provide you with LINOBYTE’s proposed protocol.

[Given the newness, volume and potential difficulty associated with e-Discovery, some defendants may find a fruitful source of added delay. Effective advocacy, an understanding of e-Discovery concepts, and basic litigation readiness ensures against unwarranted delays.]

LINOBYTE’s Information Technology and Records units have been consulted in the development of this plan and we believe our proposal to be both reasonable and practicable.

[Involving the client’s IT and Records units is essential for the identification and collection of the information in the client’s possession. If the client has little experience with litigation involving electronic sources of information, it is useful to retain an experienced e-Discovery advisor to help manage this

increasingly technical and strategically important area of practice. With experts on both sides or with one independent advisor appointed by the court, the lawyers can focus on law and strategy, leaving the technical issues to the experts.]

This proposal deals with the identification, preservation, restoration, processing, review and production of e-mail, e-mail attachments, and other electronic documents such as word processing, spreadsheet, PowerPoint, html, and text files.

[Most lawyers handling e-Discovery are concerned at first with e-mail, spreadsheets and word processing documents. However, a growing area and a major aspect of e-Discovery is structured data – in other words, accounting applications, customer databases, enterprise resource programs that may contain millions of records not easily converted to a “document.”]

While each party must ensure it has conducted its own search for producible documents, we believe it will benefit both parties to attempt to reach agreement, or obtain Court direction, on several critical issues, including:

- the preservation of relevant information;
- the designation of key custodians and their readily identifiable electronic documents;
- the identification of shared server folders to which the designated custodians had access;

[See following.]

- the acceptable scope for the collection of electronic files;
- record culling procedures, including de-duplication, key word search strategies, the determination of relevant date ranges, procedures for dealing with private records, etc.;
- the identification of and agreement as to producible metadata (information available related to e-mails (such as date sent, date received, subject) and other electronic files (such as file name, file type, date last modified); and
- the form of production.

We believe all these items can be resolved at the next case management meeting. We look forward to receipt of your proposed protocol as soon as possible.

[Eventually those who use e-Discovery as a weapon might find their own weapon pointed at them. Even if one party has the preponderance of evidence, the receiving party will still have to go to the trouble of organizing and reviewing all the data. When making an e-Discovery request, it is usually in everyone's interest to maintain an approach that is reasonable and proportional to the matters in dispute.]

PLAINTIFF'S PROPOSAL

LINOBYTE's electronic documents are of two types:

- (1) files that are known to be linked to a designated custodian, because they have been saved in designated user directories on servers, on individual's hard drives, home and laptop computers or other personal storage devices or labeled media ("Identifiable Data");
- (2) files that cannot readily be linked to a particular custodian ("Unidentifiable Data"). For example, LINOBYTE servers contain shared folders accessed by hundreds of users including the designated custodians. These folders are organized by project, not by custodian.

A. IDENTIFICATION PHASE

Identifiable data

LINOBYTE proposes that the parties exchange, by next week, lists of employees and former employees who would be likely to have relevant electronic documents.

LINOBYTE's Identifiable Data is currently located on:

- two active Microsoft Exchange e-mail servers;

[In this context, "active" means currently available to and being used by employees of the company]

- user "Home Drives", which are folders located on one of several servers allocated specifically to a user for their personal files. Home Drives will often include e-mail archived by the user and saved in a Microsoft Outlook "PST" file;

["Home" or personal server drives are readily identifiable by surname or employee number, for example, F:\users\j.smith.]

- tapes containing disaster/recovery backups of e-mail servers and Home Drives. LINOBYTE has monthly backup tapes of these e-mail servers, on the current technology used by LINOBYTE, available back to January 1, 2003. LINOBYTE also has approximately 275 backup tapes on obsolete technology, and which may contain backups of its e-mail servers from March 1998.

[In this case Linobyte has backup tapes that it claims are "not readily accessible." While an e-Discovery service bureau could be retained to restore the data from the drives, the expense could be unnecessary if the bulk of the relevant material is to be found on the active server or in e-mail archive files. Although pricing changes and varies according to many factors, expect to pay anywhere from \$450 to \$3,000 per tape just to restore data.]

- CD-ROMs containing archives of e-mail and Home Drives for some former LINOBYTE users burned upon their departure from LINOBYTE;
- personal computers, home computers, laptops, handhelds, or other electronic storage devices. LINOBYTE expects that there will be few, if any, relevant records in these locations.

[The prospect of capturing hard drives from employees' home computers is not attractive, mainly given the privacy concerns of those involved. If a party is certain that there is unique and relevant data on home computers, it may be worth considering retaining an independent third party to perform the extraction and review.]

LINOBYTE currently estimates that it has approximately 60 GB of reviewable electronic documents. A substantial portion of this data would not be relevant to this litigation and would contain many duplicate files. A substantial portion of this data would consist of large Microsoft Excel spreadsheets.

[Spreadsheets are in fact databases, not text documents, and often present challenges not only for production but for review. Opening thousands of spreadsheets in Excel and reading all the tabbed worksheets is very cumbersome. Converting to TIFF often introduces formatting inconsistencies and creates very large files, because any cell with any content – for example highlighting, or a hidden formula – must be "printed" to image format for the sake of completeness. In this letter, the author is providing a warning that the parties must come to grips with how to produce large spreadsheets containing only a small fragment of relevant data.]

Unidentifiable data

LINOBYTE estimates that there are approximately 260GB of reviewable Unidentifiable Data. We propose using agreed-upon search terms to assist in the review process.

[A collection of 260GB of reviewable data is not insignificant. Printed out, on average 260GB would translate into 15 million pages or 5,000 tightly packed bankers' boxes of documents. Only with the aid of effective culling and review techniques can the plaintiff here assure the defendant that production deadlines can be met.]



B. PRESERVATION

LINOBYTE has already put the following in place to preserve relevant information:

- (a) The CEO of LINOBYTE has instructed the IT and Records departments to cease automatic destruction of records until the company can isolate and copy the relevant material.
- (b) In addition, a letter has been sent to key custodians, including their assistants, directing them not to delete any e-mail or documents in their personal accounts or on the “shared drives.”
- (c) LINOBYTE will capture an image of all drives, such as those on personal computers, laptops, home computers or other storage devices, containing potentially producible files.

[Although a party will not necessarily process all backup tapes, laptop computers, CDs or other materials in the course of the discovery, it is important to put in place a plan to prevent destruction of relevant information. All sources must then be reviewed to see if they might contain relevant material, and, if not, they can be released back into production.

There are costs associated with preservation. Most IT departments rotate their disaster/recovery backup tapes, with the older tapes being returned to the pool. If the first preservation order requires a suspension of tape rotation, the IT department must purchase additional tapes to replace those removed from the pool. Identifying which servers might have contained relevant material reduces the cost of preservation.

For “active data” on desktop computers in regular use, there must be clear direction to custodians about the obligation to preserve the information. Some companies have a policy of deleting e-mail older than six months, or have restricted e-mail inbox sizes. Deletion practices have to be suspended until copies are made of the mailboxes and accounts of key custodians.]

C. COLLECTION PHASE

LINOBYTE proposes to collect Identifiable Data for further processing as follows:

- (a) for existing relevant custodians, LINOBYTE intends to copy all Identifiable Data from the active servers and desktops. The e-mail archive folders containing older e-mail will also be included.
- (b) for custodians who are former employees, LINOBYTE will, where available, restore the CD-ROMs containing the archive of their e-mail and Home Drives taken at the time of their departure;
- (c) although LINOBYTE will preserve the relevant backup tapes from e-mail and file servers, LINOBYTE believes the complete record is available from the active servers.

[LINOBYTE must be able to demonstrate that the record is complete. If there have been restrictions on e-mail inbox sizes, or a policy requiring deletion of older e-mails, the opponents would have grounds for insisting on recovery of information from backup

tapes. Moreover, as the plaintiff in this action, LINOBYTE might be better advised to offer up those backup tapes if it has any reason to believe that the defendant's tapes will have relevant information not otherwise available.]

LINOBYTE's active Unidentifiable Data will be copied using ordinary file copy tools so that it can be further culled and reviewed.

[One way of connecting unidentifiable data with certain custodians is to use their surnames as a search term. It is not perfect but it provides a reasonable first phase in any review process and may be sufficient if the parties agree.]

D. CULLING PHASE

LINOBYTE proposes that, by next month, the parties exchange proposed key word search queries that will then be applied to the Identifiable and Unidentifiable Data of both parties.

LINOBYTE intends to further cull the records produced in the following ways:

- by limiting records related to each custodian to time periods in which that custodian was performing functions that are relevant to the litigation;

[Date range culling must be done by agreed-upon date fields, which are different for e-mail and non-e-mail files.]

- by excluding from searching, review and processing non-document and non-user files, such as program and system files; and

[A list of known executables is publicly available and may be compared with program files in hard drives if thought necessary, especially in forensic situations.]

- by "de-duplicating" files across the entire collection, flagging duplicates with a page marker and a cross-reference to the "original."

[De-duplication is not always recommended on certain types of collections. Although de-duping large collections of restored data saves time and money, lawyers should carefully consider whether or not to de-dupe every e-Discovery as a matter of course. Some lawyers now prefer to have access to the complete database for production purposes. For example, say Custodian A has an e-mail with an attachment and Custodian B received the same attachment. You have decided to produce all documents from Custodian B. But instead of the attachment, you now have a record that says "this is a duplicate" and it refers to a document belonging to Custodian A, whose documents are not being produced. Furthermore, if you divide collections into separate databases, full text searches will miss "duplicates" if the original is located elsewhere.]

E. EXTRACTION AND INDEXING OF DATABASE

In this phase, LINOBYTE's third party expert will extract full text data of all culled files into a review application, together with available and agreed-to metadata, to facilitate the review process. LINOBYTE proposes that the parties exchange by next month proposed lists of metadata to be produced.

[After all the culling is done, the responsive documents (together with non-responsive attachments) are processed into a litigation support review application for relevance and privilege review. At this point the processing usually includes extraction of metadata, searchable full text, Bates numbering, and an image of the document in TIFF format.]

F. REVIEW PHASE

Once the database is created, it will be reviewed by counsel for relevance and privilege. Based on LINOBYTE's estimates of the amount of data involved, we believe this review can be completed in three months.

[Given the size of many e-Discovery databases and the fact that multiple reviewers often require access from different locations, Web-enabled hosted review systems are very popular. The service bureau performing the e-Discovery processing hosts the database while reviewers use their Internet browser to establish a secure connection.]

G. PRODUCTION AND EXCHANGE PHASE

LINOBYTE proposes that its relevant and non-privileged electronic documents be produced in single-page TIFF format, except that producible Excel spreadsheets may be provided in native format. Producible metadata and images will be provided in tab-delimited or similar text format, as agreed by the parties. LINOBYTE proposes that, by DATE, the parties use their best efforts to reach agreement as to the form of production.

[Agreement between the parties is important to avoid waste and expense. Using a vendor-neutral format for production allows the opponents to use the software of their choice. Even if both sides use the same litigation software, it is better to export/import the information than to provide a copy of the litigation support database, to avoid the risk of inadvertent disclosure.]

LINOBYTE is willing to discuss the possibility that the parties may agree to provide each other with access to producible documents via a secure Web repository, in which case the costs of hosting might be shared.

[Production does not have to involve the physical exchange of CD-ROMs, DVDs or hard drives. Parties and their counsel can be provided with a password to a specially prepared, hosted database. Users rights can be restricted as desired.]

We look forward to your comments on this proposal before the next meeting.

Yours truly,
PLAINTIFF FIRM

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