

# Disclosure: avoiding the pitfalls



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## Introduction

This guide provides you with a general introduction to the obligations of disclosure in Court proceedings\*. The rules governing disclosure are found in the Civil Procedure Rules Part 31 and the surrounding case law. This guide will highlight the main points you need to know, consider the problems often encountered and offer some practical tips.

\*The Civil Procedure Rule Committee has approved a new Practice Direction which sets down different rules for a mandatory disclosure pilot scheme to run for two years in the Business and Property Courts (the Chancery Division, the Commercial Court and the Technology and Construction Court) in England and Wales, starting on 1 January 2019. The changes under the pilot are explained in our separate guide, "*The Disclosure Pilot Scheme*".

## What is disclosure?

Disclosure is the process by which parties to proceedings disclose to each other certain documents which are relevant to the proceedings. The court has the power to decide the nature and scope of the disclosure to be given including (although rarely) the power to dispense with it altogether. Before any order is made the court will usually expect the parties to discuss and where possible agree the nature and extent of the disclosure exercise appropriate to the claim.

## Can I destroy relevant documents?

No. Once the litigation has commenced or, indeed, once you become aware of the possibility of litigation, you are under a duty to preserve all documents which may become disclosable in that action.

## What are "documents"?

Documents are defined by the Court Rules as "anything in which information of any description is recorded". This includes (regardless of how confidential they are or whether they are originals, drafts or copies): letters; e-mails (including those copied or forwarded to the recipients), faxes (hard copy and electronic), notes (however rough), diary entries, audio or video recordings, photographs, drawings, spreadsheets, presentations, databases and computer files (on any type of storage media e.g. PDAs, mobile phones, voicemail facilities, printer histories). The definition of "document" extends to metadata (which is the additional information stored and associated with electronic documents), "deleted" documents and those stored on back up tapes and servers.

The courts have introduced special rules and a questionnaire in respect of documents which are created or stored electronically. The rules deal with the definition of and the preservation of electronic documents as well as encouraging the parties to discuss where possible the nature and extent of the searches to be undertaken.

## What documents must be disclosed?

The court may well order you to provide "standard disclosure". This is limited to the following categories:

- the documents on which you rely;
- the documents which adversely affect your case;
- the documents which adversely affect another party's case; and
- the documents which support another party's case.

The parties' Statements of Case help define what are the relevant documents.

However, changes to the court rules mean that standard disclosure is no longer the automatic starting point, although it is likely to be ordered in many cases. The courts now have powers in most commercial cases to pick from a menu of options ranging from dispensing with disclosure altogether to issue based disclosure or a wider order in fraud cases.

## Disclosure Report

In order to assist the court in deciding what order to make the parties have to prepare a disclosure report which must:

- contain a brief description of what documents exist or may exist;
- state the location(s) of the relevant documents;
- state how electronic documents are stored;
- provide the likely costs of giving standard disclosure including using a service provider to assist; and
- state what order for disclosure the party proposes together with the likely cost of the exercise proposed.

This will be an important exercise in preparing for disclosure and it is important that the report is accurate. It will therefore require detailed input from the parties. It is also important to keep a complete record of the searches carried out within your organisation.

## Documents in your control

You need only give disclosure of documents which are or have been in your control. A document is or has been in your control if:

- it is or was in your physical possession; or
- you have or had a right to possession of it; or you have or had a right to inspect or take copies of it.



In addition, when giving standard disclosure, you are only required to disclose those documents which have been identified after conducting a “reasonable search”.

### What is a reasonable search?

The factors relevant to deciding reasonableness include:

- the number of documents involved;
- the nature and complexity of the proceedings;
- the ease and expense of retrieval of any particular document. This includes the accessibility of the document or data, its location and the likelihood of locating relevant documents or data, plus the cost of its recovery; and
- the significance to the case of any document likely to be located during the search.

As the search must include a search for electronic documents, the appropriate scope for the search will vary from case to case.

At an early stage of the proceedings, the parties should discuss any issues that may arise regarding searches for and the preservation of electronic documents.

Where you have not searched for a category or class of documents on the grounds that to do so would be unreasonable (say, for example, the ease and expense of retrieving documents is disproportionate to the nature and complexity of the proceedings), you will need to expressly state this in your “Disclosure Statement” which appears at the end of the “Disclosure List” (as to which see below).

When considering the ambit of the parties’ duty of disclosure, the courts will apply the “Overriding Objective”, which is that all cases must be tried justly. This means that it will take into account questions relating expense, speed and proportionality.

### Paper documents

A “reasonable search” for relevant paper documents will usually include at least the following steps:

- identifying all individuals within the organisation who worked on the subject matter giving rise to the dispute in question;

- asking those individuals to locate their files and to supply them;
- where individuals work from home or away from the organisation, ensuring that all material retained at home is returned to an appropriate person;
- asking those involved with the matter to review their paper diaries (if any) for details of events relating to the matter; and
- ensuring that all individuals involved know your document retention policy and that the destruction of any potentially relevant documents is stopped as soon as litigation becomes a possibility.

### Electronic documents

A “reasonable search” in relation to electronic documents will usually include at least the following minimum steps:

- identifying the relevant network directories and email accounts on which information about the matter has been stored;
- copying documents on those directories and in those mailboxes and loading them onto a review platform; and
- carrying out searches for documents relating to the matter (specific search criteria will usually need to be devised on the basis of key words, relevant dates, particular people being involved in exchanges, etc).

### Disclosure List

The court will also decide whether it is necessary to prepare a disclosure list. The List describes the relevant documents, is supported by a Disclosure Statement, and offers to provide facilities to inspect the originals or provide copies requested by the other party.

### What is a Disclosure Statement?

At the foot of the List of Documents will be a Disclosure Statement which you will need to sign, confirming that you have given proper disclosure. It must include:

- details of the extent of the search that has been made to locate the documents;
- a statement that you understand the duty to disclose documents and that to the best of

your knowledge you have carried out that duty; and

- details of and reasons why any category or class of documents has not been searched for. The grounds can include that it would be unreasonable or disproportionate to do so, given the time and expense involved and the likely level of significance of any documents found.

To enable you to sign a Disclosure Statement, you should keep a complete record of the steps that have been taken to search for the categories of documents set out above. This will include details from the individuals in the organisation who conducted the search, recording the steps which have been taken to locate the documents. If the reasonableness or completeness of the search is called into question, your records should enable you to show the extent of the efforts made.

### The importance of disclosure

The court takes disclosure very seriously and you may be in contempt of Court if you wrongly sign a Disclosure Statement. A failure to preserve documents may also result in judicial criticism, cost penalties or adverse inferences which may be harmful to your case.

### Inspection

Your opponents in litigation will be entitled to inspect the documents you disclose unless they fall within one of the limited exceptions where a document is disclosed but cannot be inspected (see below). In respect of electronic documents, the parties should co-operate at an early stage to agree the format in which the documents are to be provided on inspection. If the parties fail to reach an agreement as to the format for inspection of electronic documents then the matter will be referred to the court.

### Is there anything which need not be disclosed?

The answer is that, generally speaking, everything which fits in the categories listed above must be disclosed, but some documentation may be “privileged”. If a document is privileged, this will mean that although the document (or the category to which it belongs) must still be described in very general detail in the List, it need not be shown to your opponent.

The possible grounds of privilege include:

- legal advice privilege (which covers communications between you and your lawyers prepared for the dominant purpose of obtaining or giving legal advice);
- litigation privilege (which covers documents which come into existence for the dominant purpose of pursuing or defending actual or potential litigation). This ground of privilege is not restricted only to communications between you and your lawyers, but also covers communications with third parties; and
- “without prejudice” communications with other parties to the litigation, where either party is seeking to find a way to resolve the dispute.

As a general rule, there is no entitlement to withhold inspection merely because relevant documents are regarded as “sensitive” or “confidential”. Also, documents created in connection with your normal business affairs, such as board minutes, may not be covered by litigation privilege. However, steps can be taken to try to restrict who has the right to inspect them.

Documents which contain a mixture of relevant and non-relevant information which you may not wish the other side to see can be disclosed in part (e.g. by blanking out the irrelevant text) so that the other party only sees the relevant disclosable information.

### Specific disclosure

If, after standard disclosure has been given, a party considers that further disclosure should be given by another party, an application for specific disclosure may be made to the court. The application must specify what documents the court is being asked to require the other party to

disclose and be supported by evidence setting out why such disclosure should be ordered.

### Confidentiality in disclosed documents

Confidentiality is preserved by the Court Rules which provide that no ancillary or collateral use should be made of any disclosed documents without the permission of the party who disclosed the document, unless and until they come into the “public domain” or the court gives permission. This protects a party against wrongful use or disclosure of the documents at any stage up to trial or often earlier in a public hearing. A reference to a document in a public hearing e.g. trial brings it into the public domain.

In some cases where the confidentiality of the documents goes to the root of the case, the court may order that evidence relating to those documents is not given in open Court, thereby protecting their confidentiality.

### Continuing obligation

There is a continuing obligation on parties to litigation to disclose, usually by way of supplemental lists, any relevant documents which later come to their attention during the course of the proceedings. As a result, you should think carefully before creating any new relevant documents or annotating any existing documents which may become disclosable when proceedings are under way.

### Practical Tips

To reduce the risk of criticism or challenge, you should:

- Carefully preserve all documents relevant to the case including those stored electronically. Original files should not be disturbed or re-arranged.
- Keep full notes of any searches made to locate relevant documents.
- Remember that documents of a confidential or sensitive nature may well have to be disclosed.
- Stop all document destruction (including of electronic documents) as soon as litigation becomes a possibility.
- Remember that the obligation to disclose extends to copies of originals with comments or annotations on them. Inappropriate comments may have serious consequences.
- Avoid creating new documents referring to the case without speaking to us first.

**For further information on this subject please contact:**

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