

Records, Records, Records

The growth of large volumes of electronic records

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On construction projects we are frequently advised to prepare records, records, and more records – often referred to as Max Abrahamson’s mantra¹. These could include records prescribed by the terms and conditions of the contract, for example, early warning notices, applications for payment, or a notice of a party’s intention to refer a dispute to adjudication. They can also include allocation sheets, diaries, programmes, site measurements, photographs, as-built drawings, videos, etc.

Often we are asked, “why do we need to prepare records?”. Typically, records are required to notify a party of an event, or likely event, that they need to be aware of and address. Other records are required so that a delay analysis, or a 4D model, can be produced (the 3D model overlaid with an as-planned and as-built programme) and a report prepared to demonstrate an entitlement to an extension of time. Other records are required to substantiate claims for loss and expense, to support a valuation of a variation, or an assessment of a compensation event. Similarly, the same records are required to defend a claim or to support an alternative assessment. They are also required if these claims, assessments, etc. are disputed and are referred to arbitration or litigation. In these circumstances the parties will need to provide certain records as part of the disclosure process.

In the past, records were often prepared by hand, or on typewriters, prior to being



sent out by post or circulated internally in an internal post envelope, with a copy kept in the central filing cabinets. These days, many records are produced electronically by using different types of software packages and devices including computers, tablets, and smart phones. These documents are then circulated at the touch of a button by email or via the internet, with a copy held on a server or in ‘the cloud’. Documents that are received as a hard copy are often scanned and saved onto servers, to minimise the need for physical storage cabinets and archives or to create paper free offices. Either way, be it hard copy or electronic, it is not uncommon to see increasing volumes of different types and quality of records being produced, issued, and used on construction projects.

As the volume of records have increased, so has the need to create and store records that can be easily and quickly accessed, used, shared, and searched. As a result of this, the use of document management systems and trial management systems are becoming more

common. In the event that any matter is referred to litigation or arbitration, you will find that practice directions and protocols have been prepared, and electronic disclosure systems have been designed, for managing the disclosure of electronic documents (e-disclosure).

Disclosure of electronic documents

Due to the advent of electronic documents and electronically stored information, some courts are now providing practice directions for disclosing electronic documents. This includes Practice Direction Part 31B – ‘Disclosure of Electronic Documents’ of the Civil Procedure Rules which are used in civil cases (including construction disputes) in England and Wales. According to clause 5(3) of the practice direction, ‘Electronic Documents’ are defined as ‘any document held in electronic form’. This includes email, text messages, voicemail, word processed documents and databases, and documents stored on portable devices such as memory sticks, mobile

phones, etc. It includes documents that are stored on servers and back-up systems and documents that have been deleted. It also includes meta-data (the date the file was created, etc.) and other embedded data which is not typically visible on screen or a print out.

The practice direction requires the parties to discuss the disclosure of electronic documents at an early stage in all cases which are (or are likely to be) allocated to the multi-track, i.e. claims over £25,000. These discussions will include the need to preserve documents, the scope of the search for electronic documents, the format in which they will be provided to the other side for inspection, and where required questionnaires will be completed.

To assist the parties and their representatives in this process various protocols have been prepared including the Technology and Construction Solicitors’ Association (TeCSA), the Society of Construction Law (SCL), and the Technology and Construction Bar Association (TECBA)

e-disclosure protocol which is supported by the judges of the Technology and Construction Court (TCC).

Electronic disclosure systems

These systems and software packages tend to follow the electronic discovery reference model (EDRM) which is a process of identifying, preserving, collecting, processing, reviewing, and producing the electronic documents. They have been designed to:

- Handle mass volumes of electronic documents and data that have been distributed to various people and stored on different types of hardware or equipment in numerous locations.
- Collect electronic documents without causing the meta-data such as the creation, modified, or last access dates to be changed.
- Strip out duplication and email threads.
- Reduce the volume of data that needs to be reviewed for relevance and privilege.
- Provide an efficient and economic way of managing disclosure which helps to achieve the overriding objective set out in Part 1 of the Civil Procedure Rules, namely to enable the court to deal with cases justly and at proportionate cost.
- Provide predictive coding tools, which is an automated way of scanning data for clusters of words and phrases and scoring them for relevance to the issues in the case (traditionally a very time consuming and expensive exercise that lawyers would do by reviewing one document after another until all the records had been reviewed).

As predictive coding is relatively new, it was considered by the judge, Master Matthews, in February 2016, in the case of Pyrrho Investments Limited and MWB Business Exchange Limited [2016] EWHC 256 (Ch). This was a multi-million pound dispute where there were some 17.6 million documents to be considered as part of the disclosure process. Following a process of electronic de-duplication, the number was then reduced to some 3.1 million documents. Nevertheless, these had to be reviewed for relevance and possible disclosure. After considering the cost benefit of using predictive coding software, and the experience gained in other jurisdictions, Master Matthews approved the use of predictive coding in this case. In the judgment, Master Matthews listed ten factors in favour of approving the use of predictive coding software in the disclosure process and none against. Those factors in favour included:

1. There is no evidence to show that the use of predictive coding software leads to a less accurate disclosure being given than, say, manual review alone or keyword searches and manual review combined.
2. There will be a greater consistency in using the computer to apply the approach of a senior lawyer towards the initial sample (as refined) to the whole document set, than in using dozens, perhaps hundreds, of lower-grade fee-earners, each seeking independently to apply the relevant criteria in relation to individual documents.
3. The number of electronic documents

which must be considered for relevance and possible disclosure in the present case is huge.

4. The cost of manually searching these documents would be enormous.
5. The cost of using predictive coding software would be less expensive.
6. The value of the claims in this litigation is in the tens of millions of pounds and therefore the estimated cost of using the software is proportionate.

In this judgment, Master Matthews referred to the US Federal Case of Moore v Publicis Groupe, 11 Civ 1279 (ALC) (AJP), where the magistrate judge in that case described the use of predictive coding as, "...relatively easy..." whilst noting it may not be appropriate for all cases. Therefore, at this time it will probably be used for large cases where the quantity of data is huge. However, as with all such developments, it may not be long before this becomes standard, given Master Matthews' view at bullet point two above.

Record Management Generally

As the number of electronic records grow, the need to manage them in an efficient, effective, and cost proportionate manner becomes even more important. Failure to do so can result in parties spending unnecessary time and money due to wasted effort in:

- Locating key evidence buried in endless chains of emails.
- Locating evidence that cannot be found due to, for example, staff leaving.
- Filling in gaps in evidence due to elec-

WHAT IS A DOCUMENT MANAGEMENT SYSTEM?

In summary, a document management system is an electronic filing cabinet that allows you to organise and securely store electronic documents and scans of paper documents. These can be searched by using sophisticated character recognition search engines. They can be server or cloud based and have various functions that allow the access to certain documents to be restricted; it monitors who and when documents are viewed, tracks edits being made to documents, and controls and regulates when out-of-date documents can be deleted. In essence these systems and electronic platforms are designed to assist organisations to manage the creation and flow of documents through the provision of a centralised repository.

tronic records being lost as a result of lap-tops being stolen or poor, or non-existent, back-up systems.

- Working out which version of an electronic document was actually sent following numerous revisions and edits.
- Gaining access to portals containing shared folders where the owner has subsequently denied you access, etc.

Furthermore, poor record management can, as it has been found in the past, detrimentally weaken your chances to demonstrate an entitlement or defend a claim.

As the construction industry continues to see the volume of electronic records increase, and changes to the way we produce, store, and share records; it is humbly suggested that the importance for good records, good records, and more good records will become even greater. ■

¹ "A party to a dispute, particularly if there is an arbitration will learn three lessons (often too late) the importance of records, the importance of records and the importance of records". Max Abrahamson in his book Engineering Law and The ICE Contract.

WHY USE A TRIAL MANAGEMENT SYSTEM?

Trial management systems also exist that allow large volumes of documents to be accessed, managed, and used during trials. For example, in the case between Berezovsky v Abramovich [2012] EWHC 2463 (Comm), a decision was taken to use a cloud based trial management system, instead of preparing a trial bundle for the litigation that ran to some 280 A4 volumes of paper. This allowed Mrs Justice Gloster,

in the Commercial Court, to effectively conduct a paperless trial within the allotted timetable and with the maximum efficiency, as stated at paragraph 94 of the executive summary of the judgment:

"...Perhaps most importantly, the extensive documentation was presented in a highly organised and easily accessible web-based electronic format, with the

result that, apart from reliance, to a limited extent, on hardcopy versions of the written arguments, and the expert statements, I was able to conduct what, at least so far as I was concerned, was a paperless trial. There can be no doubt that this enabled the trial to be concluded within the allotted timetable, and with the maximum efficiency..."