

# GLS Disclosure Webinar

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## CASE REFERENCE

### **Goodale v Ministry of Justice**

#### **Also known as:**

### **Opiate Dependent Prisoners Litigation Group Litigation Order (No.2), Re**

Queen's Bench Division

05 November 2009

Westlaw Case Analysis ..... 3 pages

Official Transcript ..... 20 pages

## Goodale v Ministry of Justice

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### Opiate Dependent Prisoners Litigation Group Litigation Order (No.2), Re

Queen's Bench Division

05 November 2009

### Case Analysis

#### Where Reported

[Official Transcript](#)

#### Case Digest

**Subject:** Civil procedure

**Keywords:** Disclosure; Duty of search; Electronic disclosure

**Summary:** The court directed that the defendant should make an initially limited search of its electronically stored information just to give an idea of the potential numbers of documents that might need reviewing.

**Abstract:** In proceedings brought by the claimant prisoners (G), the court was required to give directions concerning disclosure of documents by the defendant ministry. G were opiate dependent. Before their imprisonment, some had been treated with methadone while others were using illicit drugs such as heroin. After their imprisonment, the treatment of the ones on methadone was discontinued and that treatment was not offered to the others. Instead, the ministry's policy was to detoxify them quickly by using other proprietary drugs and painkillers such as di-hydrocodeine which, they alleged, caused them unnecessary pain and suffering, and in one case led to a prisoner's death. G brought a claim alleging breach of the ministry's duty of care, as well as of their rights under the European Convention on Human Rights 1950 art.2 and art.3. Whereas the disclosure of documents that existed in paper form had been largely agreed, there was no agreement concerning the ministry's documents which were electronically stored information. It was expected that the volume of such information would be immense because, as in the case of email, there would be huge quantities of documents created, including wide-scale duplication. Furthermore, the documents could exist in many different forms and locations so that they were not readily accessible except at significant cost. The ministry submitted that it should not be required to search the electronically stored information. G submitted that there should be an initial search of that information relating to just four people.

Directions given. The test for standard disclosure was that documents had to be produced which supported or harmed a party's case or its opponent's case. It appeared from the evidence, that there were four key witnesses who had advised or worked with the ministry or the other bodies that were involved in the formulation of the relevant prisoner detoxification policies, and who were critical or potentially critical of the ministry's approach or of the policies themselves. It was inevitable, therefore, that there were going to be many documents exchanged or created by those four people which were likely to damage the ministry's case and support G's case. Accordingly, it would be totally wrong to require G to accept only the disclosure of documents that existed in paper form because it was

not likely to reveal the actual communications containing the thoughts and opinions and evidential experience of those persons working for the ministry which were going to be the most helpful to G in revealing documents that damaged the ministry's case. So a limited amount of disclosure of electronically stored information had to be undertaken, but in a way that made it the least expensive and most proportionate exercise possible. Therefore, reconstruction and disclosure of back-up tapes would not be ordered at the present stage. A search in respect of the four witnesses' electronic documents would be made using a number of suggested keywords, just to give an idea of the potential numbers of documents. Thereafter, specialist software could be used which could de-duplicate material and cut it down to a more sensible size to produce a manageable corpus for human review, which was the most expensive part of the exercise.

**Judge:** Master Whitaker

**Counsel:** For the claimants: Richard Hermer QC. For the defendants: Robert Jay QC.

#### **All Cases Cited**

##### **Digicel (St Lucia) Ltd v Cable & Wireless Plc**

[\[2008\] EWHC 2522 \(Ch\)](#); [\[2009\] 2 All E.R. 1094](#); [Official Transcript](#); Ch D; 2008-10-23

#### **Significant Legislation Cited**

European Convention on Human Rights 1950 art.2

European Convention on Human Rights 1950 art.3

#### **Legislation Cited**

[Civil Procedure Rules \(SI 3132\)](#)

[Civil Procedure Rules \(SI 3132\) r.31.6](#)

[Civil Procedure Rules \(SI 3132\) r.31.7](#)

European Convention on Human Rights 1950 art.2

European Convention on Human Rights 1950 art.3

#### **Journal Articles**

##### **Predictive coding = proportionality**

Disclosure; Duty of search; Electronic disclosure; Electronic documents; Software; United States.

[Comps. & Law 2012, 23\(2\), 39-40](#)

#### **Books**

##### **Documentary Evidence 11th Ed.**

Chapter: Chapter 9 - Electronic Disclosure

Documents: [Section D. - Case Law](#)

##### **Encyclopedia of Information Technology Law**

Chapter: Chapter 13 - The Management of Technology Related Risks

Documents: [13.642/4 Approving Budgets and the New Proportionality Test](#)

##### **Encyclopedia of Information Technology Law**

Chapter: Chapter 13 - The Management of Technology Related Risks

Documents: [13.651/1 Technology Assisted Review](#)

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Case No: HQ06X03876

**Neutral Citation Number: [2010] EWHC B40 (QB)**  
**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

**Error! Reference source not found.** Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Thursday, 5 November 2009

BEFORE:

**THE SENIOR MASTER**  
**MASTER WHITAKER**

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BETWEEN:

**GAVIN GOODALE & ORS**

Claimants

- and -

**THE MINISTRY OF JUSTICE & ORS**

Defendants

**THE OPIATE DEPENDENT PRISONERS LITIGATION**  
**GROUP LITIGATION ORDER (NO. 2)**

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(Official Shorthand Writers to the Court)

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MR RICHARD HERMER QC appeared on behalf of the Claimants

MR ROBERT JAY QC appeared on behalf of the Defendants

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**Judgment**

THE SENIOR MASTER  
MASTER WHITAKER:

**The problem**

1. This judgment concerns a serious practical problem for the case management of disclosure which is now occurring on a regular basis. The reason is that, since certainly the beginning of this decade, increasing numbers of public bodies and private businesses, not to mention individuals, have gone over to creating, exchanging and storing their documentation and communicating with each other entirely by electronic means. The end result is that an enormous volume of information is now created, exchanged and stored only electronically. Email communication, word processed documents, spreadsheets and ever increasing numbers of other forms of electronically stored information (“ESI”) now often form the entire corpus of the documentation held by companies and individuals who become involved in litigation. So the incidence of paper disclosure is becoming less and less prevalent though in some cases it may still be critical. and the incidence of the disclosure of electronically stored information, or ESI as it is known, is becoming more and more so.
2. What is more, the volume of the ESI, even in small organisations is immense, often, as in the case of email, because of the huge quantities of documents created (including wide-scale duplication) and the fact that the documents can exist in many different forms and locations so that they are not readily accessible except at significant cost. It is also commonplace for many individuals to have more than one email account – business, personal, web-mail (for example, Yahoo, Gmail, Hotmail etc.) When ESI is available, metadata (literally data about data) associated with it can easily be unintentionally altered by the very act of collection, which in some circumstances can have a detrimental effect on the document’s evidential integrity. What is more, ESI can be moved about nationally and internationally, indiscriminately and at lightening speed

3. What is the problem with this in litigation? Disclosure is a tripartite exercise of search, disclosure, and inspection, and the problem, when it comes to ESI is often for a party to gauge the scope of a reasonable search for ESI under CPR Rule 31.7 and PD31(2). The problem is how the parties and (if disputed) the court determines what the scope of that search of ESI should be, how it is going to be made proportionate and how it is going to be carried out correctly first time, without the court having to order it to be done again, as has occurred, for example, in **Digicel (St Lucia) Ltd and others v. Cable and Wireless Plc and Others** 2008 EWHC 2522 (Ch) in which case Morgan J ordered the defendants re-do their ESI search exercise at an additional cost of something like £2 million.
4. By contrast, except in unusual cases, in the case of paper disclosure, parties usually know what paper they have. Often the problem is merely locating it physically and going through it to produce the documents required by the standard disclosure test. The problem with ESI is that, because of the matters mentioned above in paragraph 1, parties often do not know how much ESI they have, or where it is. They might have a idea as to which servers it is on or which personal computers it is on, or which back-up tapes it is on, but without a great deal more information, it is very difficult for them to know how much documentation will be revealed by searches of the media on which their ESI is stored and how much it is going to cost to search it and what the end result is going to be. A further issue might be that not all forms of ESI are searchable. Therefore, it has to be accepted that any search is not necessarily conclusive as to whether a particular document exists. Equally often the parties do not know where to begin their searches. In the case, for example, of email, the relevant servers are often not in their possession and sometimes not even in the jurisdiction. An ill considered search for ESI may produce far too few documents for review but more likely will produce such volumes that human review of every document is neither proportionate nor practical. Because of this a substantial industry has developed to handle the identification, collection, reduction and organisation for review of ESI. Often, this is carried out electronically, with technology aiding and supplementing human review.

## **This litigation**

5. This is Group Litigation which is about very important public issues. It involves the complaints of several convicted prisoners admitted into the prison system in England and Wales over a period of time since 2000, who were, at the time they were admitted, dependent on opiates, either because they were being weaned off them in the community by being administered doses of Methadone or because when admitted they were dependent on illicit 'street' drugs such as heroin. The complaint is that, because of systemic failures by the defendant in the prisons to which these defendants were admitted, there was a policy to submit them to a 'one size fits all' detoxification regime rather than, in the case of those already on Methadone, to continue them on that treatment or, in the case of those dependant on street drugs, to offer them Methadone treatment. The said policy, it is alleged, was to detoxify them quickly by using other proprietary drugs and painkillers such as dihydrocodeine which caused them unnecessary pain and suffering and in one case a prisoner died.
6. It is alleged, that by this course of action the prisoners' human rights under Article 3 and in one case (there having been a death) under Article 2 were infringed, and a duty of care was breached.
7. The defendants say first, that they have no liability because the decisions that were taken and the treatment that was given were matters of clinical discretion for which they are not liable. The other main plank of the defence is that in any event the treatment that was given in the prisons which imposed it on the prisoners was reasonable and there are Bolam issues to be raised in that respect. The defendants submit that there were policies in relation to treatment agreed between the defendants and the PCTs in these prisons. It is likely that some of these policies vary, but it is said that the policies were reasonable given the monetary constraints and various other matters set out in the Defence as to why it was impractical to offer any other treatment.



8. There is one other factor to be mentioned and that is this. At the very same time in a number of other prisons, different regimes could be found which, for example, did offer Methadone or other forms of treatment which are said by the claimants to be good practice. The claimants pose the question as to why it was possible and practical to have a treatment regime that did not cause pain and suffering in some prisons but not in others.

## **Disclosure**

9. Disclosure is a fundamental and necessary obligation in a case like this, particularly when important allegations about the mis-treatment of prisoners arise. For example, the Defence does have in places a flavour of the suggestion that perhaps prisoners do not come quite into the same category as other members of the public in terms of the way that it is permissible to treat them. Whether that view is legitimate or not is a very important issue.
10. Although the damages that are likely to be awarded in these cases on an individual basis are likely to be quite small, in my judgment that is not a factor to be given great weight when considering the proportionality of the disclosure to be given by the defendants. Neither is the size of the group. Whether it will be 250 or 500 prisoners it seems to me is not really the issue here. What is alleged in this case against a department of the government is a deliberate failure, against the background of alleged knowledge that the 'one size fits all' treatment was going to cause pain and suffering, to provide a humane regime for the maintenance of these opiate dependant prisoners. It may well be that there is a complete and proper defence, but it is a very serious allegation indeed. It seems to me that standard disclosure (as defined by CPR Rule 31.6) is appropriate in this case and consequently the defendants (since all the documentation, broadly speaking, is in their hands) must undertake a reasonable search for documents according to CPR Rule 31.7 including documents contained in ESI.
11. That does not mean to say, however, that the extent of disclosure and in particular the extent of the search to be carried out in the case should be

regarded as something that is entirely open. One of the obligations of the court in these cases is to make use of its case management powers to control disclosure so as to make it proportionate to the issues at stake. It seems to me that there are ways in which disclosure in cases of this sort can be kept under restraint. For example, once the issues are defined, as they have been in the GLO I made in this case, the search and disclosure should be carried out in relation first of all to categories of documents relevant to the issues and in relation to the key 'custodians' of those documents, who are known to hold documents which are likely to be relevant to the issues. I say "relevant". The test of course for standard disclosure is in simple terms that documents must be produced which support or harm a party's case or support or harm their opponent's case. When I use the word "relevant" I mean relevant to be searched for and subjected to review in the context of standard disclosure. The parties also need to consider whether there is a sensible date range for the search that can be applied, outside of which it is unlikely that relevant documents will be found.

12. The disclosure of documents that exist in paper form has been largely agreed and it seems to me that the categories of documents that have been agreed are sensible ones and ones which it will be necessary to consider for review and disclosure. The unusual feature of this case is that there is no agreement by the Defendants at all for the production of documents which are stored electronically. They simply do not want to carry out a search for ESI. They argue that it will be disproportionate to carry out the exercise and they have produced some provisional statistics as to the quantity of documents that they may need to search. Given that the issues in this case range over a period from 2000 to 2009, I was not surprised to be told that a very large proportion of documents which potentially come within the standard disclosure test will be held by the defendants electronically. There is no legal difference in the disclosure test to be applied to documents that are held electronically and paper documents. The difference, of course, is that electronic documents (as pointed out above) have a habit of being of far greater volume, they are far more easily created, there are many duplicates and they are difficult to find, so

the cost of search for and disclosure of them can be much higher, if sensible provisions for management of the ESI disclosure exercise are not put in place.

13. That does not mean to say, however, that the exercise of search for and disclosure of electronic documents should not be carried out at all. That is not an answer. Particularly in this case in which, in my judgment, it has to be admitted that there is high probability that important disclosable documents, in accordance with the standard disclosure test, are held in electronic form. It would have to be totally disproportionate to make **any** search of electronically stored documents in terms of PD31 2A(4) to be able to avoid doing so altogether. I do not see in this case any reason arising out of the volume of documents to be searched, for not ordering that the defendants disclose electronically stored documents in this case and I will order them so to do. What is important, however, is that they should not be required to conduct a review of documents which is unnecessarily wide at this stage. What is called for in this case as in many others is a considered and staged approach so that the volume of documents that respond to the search will not be too wide. . With search for disclosure of paper documents, every document has to be reviewed, with ESI, electronic searches can be applied to reduce the volume of documents to be reviewed

### **Case management**

14. In this case the first problem is that there is no agreement about the extent of search to be carried out between the parties because the defendants have taken the extreme view that they should not be required to search ESI. There has certainly not been the production of a great deal of information about the location of ESI, its custodians and the systems or media on which it would be found. There is some rudimentary information in statements from the defendants about documents contained on the MEDS system (as it is known – a structured database) and on the personal computers and on the shared drives of some of the key people making decisions at the relevant time. What has not been done is any exercise to estimate what the cost of collecting documents for human review will be, what the best ways of searching for

them will be, whether it is key words, concept searches or various other methods of search that are now available because of the improvement in technology over the last five years. I have no idea how many documents would be produced if such an exercise is undertaken. If the relevant expertise is not available within the defendant organisation, there are experts in the various ESI disciplines who could be engaged to assist with the process

15. The claimants have tried to narrow the disclosure that they seek of ESI, although they argue that in the end there should be full disclosure in respect of certain people and certain subjects throughout the emails that were generated in the relevant period, whether they are on the MEDS system or whether they are on the normal email systems and therefore inevitably on back-up tapes. Back up tapes are notoriously more expensive to restore for search and contain very often millions of emails and other ESI that have to be reduced down to a number which it is practical to search and review and that are most likely to produce documents required by the standard disclosure test.
16. The first point is this. If the email accounts of the four key witnesses for the defendants that are nominated by the claimants whose documents should be searched, were to be searched in their entirety, that would probably include reconstructing them as far as it was possible from back-up tapes. At the moment we have no idea whether the back-up tapes are available in sufficient quantity to take their email accounts back to where they need to be reconstructed. We do not know whether in fact the necessary tapes have after a certain period of time been recorded over, as is common practice for public bodies and within industry and therefore no longer exist. We have no idea what the cost of the exercise of restoring them is going to be if they do exist and we have no idea whether the simple and slightly now old-fashioned way of dealing with searching by key words is going to be appropriate or not. We need to know what the practices were of each of the key witnesses and of the central systems. For example, if for the relevant period, all e-mails are likely to either have remained on the live servers or on local laptops/desktops, it may not be necessary, or proportionate to interrogate the back-up tapes at all.

17. I am certainly not at this stage going to sanction a reconstruction of key witnesses email accounts in their entirety without that sort of information, and I think if we are going to go to that stage, then the parties are going to have to look seriously at the type of information that the defendants must disclose about their systems and the location of the relevant ESI. One way that this can be done is by using the ESI disclosure questionnaire, which is presently being considered by the Civil Procedure Rules Committee for national use together with a dedicated Practice Direction perhaps by October 2010. I have set it out at the foot of this judgment as a schedule.
18. The claimants are suggesting for the moment a narrow requirement of search under CPR 31.7 relating to four people. Having seen the evidence, it seems to me that there are indeed four key witnesses on the defendant's side who were advising or working with the defendant or the other bodies that were involved in the formulation of the relevant prisoner detoxification policies. It also seems to me from the odd snippets of documentation that the claimants have been able to produce by their own researches that these four, were people who were critical or potentially critical of the defendant's approach to these policies or the policies themselves and, in the circumstances, it seems to me absolutely inevitable that there are going to be many documents exchanged by or created by those four people which are likely to damage the defendant's case and support the claimants' case. In fact, there are some sparse examples of such documents even now in the papers before me and there must be others. It may in the future be necessary to look at the documents held on their behalfs by other persons, for example secretaries or other team members, but not at this point in time.
19. By exercising sensible case management at this point, the court may avoid putting the parties to an expensive application for specific disclosure of other documents, at a later stage of the proceedings.
20. In my judgment it would be totally wrong to require the claimants to accept only the disclosure of documents that exist in paper form because it is not going to reveal, or the chances are quite strong it is not going to reveal the

actual communications containing the thoughts and opinions and evidential experience of those persons working for the defendant which are going to be the most helpful to the claimant in revealing documents that damage the defendant's case.

21. One has to bear in mind in this case that the documentation which is going to assist the court in reaching a just decision at trial is virtually entirely in the custody of the defendants. In my judgment it would not be right to say that there should be no disclosure of ESI at this stage. We certainly cannot wait until next spring, or possibly later, to find out what comes out in the paper disclosure. It seems to me that a limited amount of disclosure of ESI has to be undertaken at this stage but it has to be undertaken in a way that makes it the least expensive and most proportionate exercise possible. So I will not order reconstruction and disclosure of back up tapes at this stage.
22. I am quite content that the four key witnesses that have been named by the claimants are the right people whose ESI needs to be searched. Numerous other witnesses and custodians of documents have been mentioned but in a case like this, I do not think that searching the ESI of all of them immediately is the right way to go about this exercise. In terms of a search one should always start with the most important people at the top of the pyramid, that is, adopt a staged or incremental approach. Very often an opposing party will get everything they want from that without having to go down the pyramid any further, often into duplicate material. If necessary we can go on to consider other documents such as minutes of meetings etc that may be held centrally which might show what, if any, discussions took place as to what the policy and practice of the defendant should be. Any other potential sources of material likely to be relevant will very likely come to light when the questionnaire referred to in paragraph 14 above is completed.
23. What we need to look at in the first place is the material that is most readily accessible from those four witnesses' ESI. The problem is, again, we do not actually know the full position. We know in respect of Mr Marteau that a search of his computer and shared drive would be fruitful; because it turns out

that he does not put anything on the MEDS central system. Therefore everything that he has, that is still in existence, if it has not been deleted (we are not going to get into reviving deleted material at this stage - I am only going to order search of that which can be actually be searched and found undeleted on his computer) is available. No doubt, procedures will have been put in place by the defendants to ensure that potentially relevant material has been and will continue to be preserved.

24. The next question that arises is: is it going to be a question of simply running the 31 suggested 'key words' across his system and across those of the other three? We do not know at the moment what the likely result of that is going to be, because we do not know enough yet about Palmer, Bradshaw and Piper as to whether they kept anything on their systems and on their shared drives.
25. It seems to me that the proper way of going about this in respect of the individuals is that the limited searches that could be run on the MEDS system should be run but without the actual physical review and production of those documents in the first place. We need to know how many documents each of the 31 terms are going to turn up to establish whether any may require a degree of fine-tuning. We also need to know the total number of documents that respond to this collection of search terms (acknowledging that the same documents may respond to more than one search term in many cases). There is probably going to be some question over whether all the 31 key words are necessary, because what little bit of sampling that has been done seems to reveal, that quite a few of them produce nil returns anyway. We shall see whether that is the case in respect of Palmer, Bradshaw and Piper as well as Marteau when those searches are run.
26. That searching, because it is going to be done in a comparatively simple way, without using specialist software at this stage, is just going to give us the potential numbers of documents. Similarly, doing the same type of search in respect of the MEDS system for the 31 terms but only in respect of each of the key witnesses, will give us the potential number of documents in respect of that as well. It is at that stage, when that crude way of finding out what

documents might be in existence is completed, that a service provider will have to be agreed between the parties, and will have to be instructed to look at what the next stage of the exercise should involve and how much it is going to cost, in order to produce a corpus of documents which is reviewable by both parties.

27. At the moment we are just staring into open space as to what the volume of the documents produced by a search is going to be. I suspect that in the long run this crude search will not throw up more than a few hundred thousand documents. If that is the case, then this is a prime candidate for the application of software that providers now have, which can de-duplicate that material and render it down to a more sensible size and search it by computer to produce a manageable corpus for human review – which is of course the most expensive part of the exercise. Indeed, when it comes to review, I am aware of software that will effectively score each document as to its likely relevance and which will enable a prioritisation of categories within the entire document set.
28. It is also possibly going to be necessary to look at whether we should in fact be running all of these key words at this stage. In my judgment, that is what the exercise should be. There should be disclosure of electronically stored information. It is clear that documents created by these four witnesses exist which are likely to support the claimants' case and damage the defendant's. The only question is how we go about finding them. I think the proper thing to do is to start with a fairly crude search and then, if the numbers are within reason, to work with experts to render the corpus of documents down and de-duplicate them and then move on to the review stage. The parties should consider their obligations under PD 31 2A to “... *discuss any issues that may arise regarding searches for and the preservation of electronic documents. This may involve the parties providing information about the categories of electronic documents within their control, the computer systems, electronic devices and media on which any relevant documents may be held, the storage systems maintained by the parties and their document retention policies.*” And further discuss the defendants' proposed search methodology, once they have



absorbed my views in this judgment and the defendants must also complete the questionnaire in the schedule below as a means of providing the claimant and the court with the necessary information in a structured manner, should there be any further application for directions on disclosure.

Master Whitaker

The Senior Master

## **SCHEDULE**

### **ESI QUESTIONNAIRE<sup>1</sup>**

#### **Part 1 – Your disclosure**

##### **Extent of a reasonable search**

##### **Date range and custodians**

1. What date range do you consider that your searches for documents should cover ("the date range")?
2. Identify the custodians or creators of your documents whose repositories of documents you consider should be searched.<sup>2</sup>

##### **Communications**

3. Which forms of electronic communication were in use during the date range (so far as is relevant to these proceedings)?

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<sup>1</sup> See **Schedule 3** of the Practice Direction Governing Disclosure Of Electronically Stored Information (**CPR PD 31 B**) for guidance on answering this Questionnaire and the Glossary of technical expressions in Schedule 1 of PD 31 B.

<sup>2</sup> Include names of all those who may have or have had custody of disclosable documents, including secretaries, personal assistants, former employees and/or former participants. It may be helpful to identify different dates for particular custodians.

<b>A</b> <b>Communication</b>	<b>B</b> <b>In use during the date range? (yes/no)</b>	<b>C</b> <b>Are you searching for relevant documents in this category? (yes/no)</b>	<b>D</b> <b>Where and on what type of software/equipment/media is this information stored?<sup>3</sup></b>	<b>E</b> <b>(a) Are back-ups or archives of this information available, and (b) if so, are you searching the back-ups or archives?</b>
i) E-mail <sup>4</sup>				
ii) Other (provide details for each type <sup>5</sup> )  .....				

### Electronic documents

4. Apart from attachments to e-mails, which of the following other forms of electronic documents were created or stored by you during the date range?

<sup>3</sup> State the geographical location (if known). Consider (at least) servers, desktop PCs, laptops, notebooks, handheld devices, PDA devices, off-site storage, removable storage media (eg CD-ROMs, DVDs, USB drives, memory sticks) and databases.

<sup>4</sup> Consider all types of e-mail system (eg Outlook, Lotus Notes, web-based accounts), whether stored on personal computers/portable devices or in web-based accounts (e.g. Yahoo, Hotmail, Gmail etc.).

<sup>5</sup> For example, instant messaging, voicemail, VOIP (Voice Over Internet Protocol), recorded telephone lines, text messaging, audio files, video files etc.

<b>A</b> <b>Document Type</b>	<b>B</b> <b>In use during the date range? (yes/no)</b>	<b>C</b> <b>Are you searching for relevant documents in this category? (yes/no)</b>	<b>D</b> <b>Where and on what type of software/equipment/media is this information stored?<sup>6</sup></b>	<b>E</b> <b>(a) Are back-ups or archives of this information available, and (b) if so, are you searching the back-ups or archives?</b>
i) Word (or equivalent – state which)				
ii) Excel (or equivalent - state which)				
iii) Imaged documents <sup>7</sup>				
iv) Other <sup>8</sup> (state which)				

### **Databases of electronic records**

<sup>6</sup> State the geographical location (if known). Consider (at least) servers, desktops and laptops.

<sup>7</sup> For example, .pdf, .tif, .jpg.

<sup>8</sup> For example, Powerpoint or equivalent, specialist documents (such as CAD Drawings) etc.

5. In the following table identify database systems, including document management systems, which may contain data which may be disclosable and which were used by you during the date range.

<b>A</b> <b>Name</b>	<b>B</b> <b>Brief description</b>	<b>C</b> <b>Nature of data held</b>	<b>D</b> <b>Are you disclosing data held in this database? (yes/no)</b>	<b>E</b> <b>Proposals for provision of relevant data to or access by other parties to this litigation</b>
1.				
2. (etc)				

### **Method of search**

#### **Key words**

6. Do you consider that keyword searches should be used as part of the process of determining which documents you should disclose?

If yes, provide details of

- (1) the keywords used or to be used (by reference, if applicable, to individual custodians, creators, repositories, file types and/or date ranges),<sup>9</sup>
- (2) the extent to which the keyword searches have been or will be supplemented by a review of individual documents.

#### **Other types of automated searches**

7. Do you consider that automated searches or automated techniques other than keyword searches (eg concept searches or clustering) should be used as part of the process of determining which documents you should disclose?

If yes, provide details of

- (1) the process(es) used or to be used (by reference, if applicable, to individual custodians, creators, repositories, file types and/or date ranges),

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<sup>9</sup> Where keyword searches are used in order to identify irrelevant documents which are to be excluded from disclosure (for example a confidential name of a client or customer), a general description of the type of search may be given.

- (2) the extent to which the processes have been or will be supplemented by a review of individual documents, and
  - (3) how the methodology of automated searches will be made available for consideration by other parties.
8. If the answer to Question 6 or 7 is yes, state whether attachments to (a) e-mails (b) compressed files (c) embedded files and (d) imaged text will respond to your keyword or other automated search.
9. Are you using or intending to use computer software for other purposes in relation to disclosure (eg de-duplication)? If so, provide details of the software, processes and methods to be used.<sup>10</sup>

**Potential problems with the extent of search and accessibility of documents**

10. Do any of the sources and/or documents identified in this Questionnaire raise questions as to the reasonableness of the search which ought to be taken into account?<sup>11</sup> If so, give details.
11. Are any documents which may be disclosable encrypted, password-protected or for other reasons difficult to access, or do you have any reason to believe that they may be?<sup>12</sup> If so, state which of the categories identified at Questions 3, 4 and 5 above are affected, and your proposals for making them accessible.
12. Are you aware of any other points in relation to disclosure of your electronic documents which require discussion between the parties? If so, give details.

**Preservation of ESI**

13. Do you have a document retention policy?
14. Have you given an instruction to preserve ESI, and if so, when?

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<sup>10</sup> Eg how de-duplication is to be carried out.

<sup>11</sup> See Practice Direction, which refers to the following matters which may be relevant: (a) the number of documents involved, (b) the nature and complexity of the proceedings, (c) the ease and expense of retrieval of any particular document, and (d) the significance of any document which is likely to be located during the search.

<sup>12</sup> Eg back-ups, archives, off-site or outsourced document storage, documents created by former employees, documents stored in other jurisdictions, documents in foreign languages.

## **Inspection**

15. Subject to re-consideration after receiving the responses of other parties to this Questionnaire, (a) in what format and (b) on what media do you intend to provide to other parties copies of disclosed documents which are or will be available in electronic form?
16. Subject to re-consideration after receiving the responses of other parties to this Questionnaire, do you intend to provide other parties with disclosure data<sup>13</sup> electronically, and if so, (a) in what format (eg CSV, MS Word, MS Excel) and (b) on what media?
17. Insofar as you have available or will have available searchable OCR versions of electronic documents, do you intend to provide the searchable OCR version to other parties?<sup>14</sup> If not, why not?

## **Part 2 – The disclosure of other parties**

### **The extent and content of their search**

18. Do you at this stage have any proposals as to the date ranges which should be searched by other parties to the action? If so, provide details.
19. Do you at this stage have any proposals as to the custodians or creators whose repositories of documents should be searched for disclosable documents by other parties to the action? If so, provide details.<sup>15</sup>
20. Do you consider that the other party(ies) should disclose all available metadata<sup>16</sup> attaching to any documents? If yes, provide details of the documents or categories of documents.

### **Proposals for the method to be adopted for their searches**

21. Do you at this stage have any proposals as to the keyword searches, or other automated searches, which should be applied by other parties to their document sets? If so, provide details.

## **Inspection**

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<sup>13</sup> Disclosure data is data relating to disclosed documents, including for example the type of document, the date of the document, the names of the author/sender and the recipient, and the party disclosing the document.

<sup>14</sup> There is no requirement that you should obtain OCR versions of documents, and this question is directed only to OCR versions which you have available or expect to have available to you. If you do provide OCR versions to another party, they will be provided by you on an "as is" basis, with no assurance to the other party that the OCR versions are complete or accurate. You may wish to exclude provision of OCR versions of documents which have been redacted.

<sup>15</sup> Include names of all those who may have or have had custody of disclosable documents, including secretaries, personal assistants, former employees and/or former participants. It may be helpful to identify different dates for particular custodians.

<sup>16</sup> "Metadata" is information about the document or file which is recorded in the computer, such as the date and time of creation or modification of a word-processing file, or the author and the date and time of sending of an e-mail. The question is directed to the more extensive metadata which may be relevant where for example authenticity is disputed.

22. Subject to re-consideration after receiving the responses of other parties to this Questionnaire, (a) in what format and (b) on what media do you wish to receive copies of disclosed documents which are or will be available in electronic form?
23. Subject to re-consideration after receiving the responses of other parties to this Questionnaire, do you wish to receive disclosure data<sup>17</sup> electronically, and if so, (a) in what format (eg .CSV, MS Word, MS Excel) and (b) on what media?

### STATEMENT OF TRUTH

The [ ] believes that the facts stated in the answers to this questionnaire are true and I am duly authorised by the [ ] to sign this statement

Signed: .....

Name: .....

Position held: [Claimant] [Defendant] [Claimant's / Defendant's Solicitor] *delete as appropriate*

Date: .....

**WARNING:** Unless the Court makes some other order, the answers given in this document may only be used for the purposes of the proceedings in which the document is produced unless it has been read to or by the court or referred to at a hearing which has been held in public or the Court gives permission or the party who has completed this questionnaire agrees.

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<sup>17</sup> See footnote to Question 16.

