

# TRILANTIC

Publication: Association of Litigation Support Professionals

Circulation: Web

Date: November 2007



## e-Disclosure and Privacy in the UK and EU

**By Nigel Murray, *Trilantic***

More and more disputes involve companies doing business in and generating documents, e-mail, and other records in the United Kingdom and European Union. Many of those cases involve U.S.-based disputes with companies that do business in or have subsidiaries in the EU, e.g., SEC or DOJ investigations into money laundering or Foreign Corrupt Practices. The laws in the UK and EU related to litigation costs, discovery (called “disclosure” in the UK), e-Disclosure, privacy and labor restrictions are substantially different from those in the U.S., and anyone involved in gathering or processing records originating in the UK or the EU will want to be aware of those differences.



Following are the principal differences between U.S. and UK legal systems.

**Barristers and Solicitors.** In the UK, solicitors prepare cases for trial and barristers present the case to the court.

**No Civil Juries.** There are no juries in civil cases, only in criminal matters. This practice has slowed the adoption of trial presentation technology in the UK, though there is some progress being made.

**Loser Pays.** One of the principal differences between the English and U.S. legal systems is that under the English system the loser pays the costs of both parties unless there has been a previous agreement.

**Woolf Reforms.** The UK’s New Civil Procedure Rules were introduced in April 2000, and are commonly known as the Woolf reforms named after the author of the reforms, Lord Justice Woolf.

**Disclosure.** “Discovery” is called “disclosure.” Unlike the U.S. system where the adversary requests documents from the other side, and the key difference is that disclosure is a “push” system rather than “pull.” The lawyer for a party is legally an officer of the court and he or she is obliged to hand over to the other party all documents that are relevant to the case — whether they are for or against their client’s case. So both parties disclose to the other the relevant documents to the case — different from the U.S. system where the producing party has to respond to requests.

# TRILANTIC

**Reasonable Efforts.** A producing party is expected to make a reasonable search for documents they are obligated to disclose, using these factors to define "reasonable":

- The number of documents involved
- The nature and complexity of the proceedings
- The ease and expense of retrieving any particular document and
- The significance of any document which is likely to be found during such a search

**Proportionality.** In deciding what has to be disclosed, courts are guided by the principal of proportionality — the efforts and costs involved should be proportionate to the amount in dispute. The attitude of some parties that any electronic disclosure is not proportionate is slowly changing as the realization sinks in that a document collection without electronic documents is less than complete.

**Disclosure Statement.** The disclosing party must sign a disclosure statement certifying as to the extent of the search both as to what was searched and using what search terms or concepts. There is somewhat of a trend to have the client sign this statement as opposed to the attorney. An example of a disclosure statement is:

I carried out a search for electronic documents contained on or created by the following:

- [list what was searched and extent of search]

I did not search for the following:

- Documents created before ...
- Documents contained on PCs/portable data storage media/databases/servers/back-up tapes/offsite storage/mobile phones/laptops notebooks/handheld devices/PDA devices [delete as appropriate]
- Documents contained on mail files/document files/calendar files/spreadsheet files/graphic and presentation files/web based applications [delete as appropriate]
- Documents other than by reference to the following keyword(s)/concepts ... [delete if your search was not confined to specific keywords or concepts]

I certify that the list ... is a complete list ...of all documents which I am obliged to disclose...

**The EU Legal Setting.** U.S. and UK legal systems are based on common law, but the European legal systems are based on Roman Law, which is dramatically different. For example:

**No Discovery.** Cases are tightly controlled by the presiding judge and there is no discovery or disclosure; there is no obligation to hand over documents to the other side. European companies are often shocked by U.S. and UK discovery obligations — not only the cost and burden, but also the very fact of having to hand over documents that could be detrimental to their case.

**EU Directive re: Personal Privacy.** The European Parliament has adopted EU Directive 1995/46/EU, which requires member states to protect the right to privacy of natural persons with respect to the processing of personal data which is rather broadly defined. Unless the individual has been informed and unambiguously gives his or her consent, the gathering and processing of

# TRILANTIC

personal data must satisfy the requirements of the directive. Each of the 26 member countries is supposed to have national laws enforcing the directive. One of the countries, Germany, is a federation with 16 lande (or states), 14 of which have their own data privacy laws.

U.S. residents are accustomed to the notion that company-provided computers or e-mail systems are the property of the employer can be surprised to find that an employee's e-mails may contain personal data that is covered by the directive and the laws of the EU country in which the data is located. They may also be surprised at the penalties that can be assessed for violations of privacy laws. For example, in Finland the CIO of a company received a six-month jail sentence for failing to protect personal data of the company's employees.

Record collections that include personal data are not supposed to be sent to countries that do not have privacy laws providing protections deemed comparable to the Directive. Though Canada does have such privacy protection, the U.S. does not.

**Safe Harbor Framework.** The U.S. Department of Commerce and the EU Commission established a so-called "Safe Harbor" framework under which companies desiring to be able to receive data from the EU could register and agree to provide protection for any personal data it receives or processes. Some discovery companies have registered under the safe harbor framework although there is not a unanimity of opinion that this offers full protection to those who handle personal data from the EU.

**Labor Laws.** Some European countries have strict labor laws that can present challenges when trying to gather documents or e-Discovery on a tight schedule. For example, in France they have very rigid working rules where the 35-hour work week is strictly enforced. You may not be able to collect records if your clients employees don't have hours available that week to supervise the effort. The idea of a 24-hour operation may be literally foreign to some countries.

**Languages.** In addition to the differences in legal environments, conducting discovery in Europe presents technical challenges in the form of the many languages that can be encountered. The systems that are used to harvest, search and produce records must be capable of handling many languages.

**CONCLUSION:** Be sure to perform thorough research before gathering or processing records from the EU that could contain personal data; it may be wise to obtain local counsel before proceeding.

**Note from the Editor:** This article is adapted from a presentation that Nigel Murray gave at the Masters Conference in Washington, D.C., in October, 2007, and supplemented with a telephone interview. The Masters Conference was, incidentally, one of the best conferences on e-Discovery I've had the pleasure to attend. For details about the upcoming 2008 conference, visit the [Masters Conference Web site](#).

## **For more information about EU and UK e-Disclosure and privacy laws:**

- [Text of EU Directive 1995/46/EC](#)
- [U.S. Department of Commerce's "Safe Harbor" Framework](#)
- [Site maintained by an informal group of litigation support managers in the UK.](#)  
An excellent resource.

# TRILANTIC

- **Free legal news** and guidance on EU and UK IT and e-commerce issues from Pinsent Masons.

## **About Nigel Murray**

Nigel Murray is the founder and managing director of Trilantic, a UK-based firm specializing in electronic document disclosure. In the early 1990s, he managed the litigation support department at Masons, which at the time was one of the largest UK law firms and has since merged with Pinsent to become one of the 100 largest global law firms. He founded the first British litigation support company in 1993 and has worked on hundreds of matters, ranging from the very large — BCCI and UK tobacco litigation — to a wide range of commercial disputes. His first experience of litigation using electronic documents was in 2001 when he developed the methodology and working practices to manage large volumes of electronic documents as part of the document collection. This matter was one of the first cases in the UK courts where electronic documents formed the main evidence.

**Contact information:** Contact Nigel Murray at [nigel.murray@trilantic.co.uk](mailto:nigel.murray@trilantic.co.uk) or +44 (0)20 7042 1000.