

**ELECTRONIC RECORDS ARE DISCOVERABLE,  
EVEN AFTER THEY ARE DELETED**

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On July 31, 2006 Chief Judge Donetta Ambrose of the United States District Court for the Western District of Pennsylvania ordered a local municipality to allow a plaintiff's attorney, who is also a forensic computer expert, access to its computer files. The purpose of the search was to see whether municipal officials destroyed or deleted computer records to hide them from a discovery request. The order came after the attorney alleged that municipal officials had failed to turn over and then destroyed evidence in a lawsuit filed by his client, a disabled former road crew worker. As part of the normal discovery process, the attorney alleged that he had repeatedly requested various computer records, but the municipality never produced them. He also alleged that a court order to produce the records was also ignored.

Shortly after the dispute over the requested computer records began, a resident who lives next door to two municipal officials informed the Plaintiff's attorney that he had seen various computer equipment placed out with the weekly trash, and other computers being taken away from their home in trucks. The attorney also spoke with a municipal employee who claimed that an official directed him to destroy electronic files on municipal computers or face disciplinary action. The Plaintiff's attorney asked the Court to intervene, prompting Judge Ambrose's order granting him access to municipal computers, and requiring municipal officials to explain why they should not be held in contempt of court.

It is not clear whether the Plaintiff's attorney was able to discover further evidence that computer files were destroyed by municipal officials or employees, but the case highlights several points that should be taken as an important lesson by all municipal officials. First, in situations where it appears that a municipality is not being cooperative with discovery, the "truth" of allegations of destroyed or hidden evidence matters less than the perception of uncooperativeness. While it is never beneficial to try to hide records or other evidence that is legitimately requested in discovery, it is also important to take steps to avoid the appearance of having done so. Nothing contained in a municipal file is ever so damaging to a legal case that it justifies risking a contempt order, or leaving the impression that there is "something to hide." More importantly, however, this case highlights the fact that electronic files are a legitimate source of discovery practice, and even a deleted computer file can be found by a resourceful plaintiff's attorney.

As a federal district court in New York explained more than ten years ago: "It is now beyond question that electronic information is discoverable. Today it is black letter law that computerized data is discoverable if relevant." Anti-Monopoly, inc. v. Hasbro, Inc., 1995 WL 649934. More recently, the United States Supreme Court approved new rules of civil procedure, which take effect in December, that create a new category for "electronically stored

information.” These new rules specifically set forth the required treatment of electronic information in the discovery process. The federal courts in Pennsylvania have also recently moved to a new electronic filing system, and they are increasingly requiring attorneys to make use of computer technology in every aspect of their practice, including in the courtroom.

As legal professionals become more comfortable with computer technology, the opportunities for clients to encounter problems associated with electronic record keeping increase. All municipalities and other public entities should have internet and technology policies in place that govern employee use of computers. Employees should be made aware that anything written in an email, and any document produced or stored on a computer is likely to be seen by “outsiders” at some point in the future. Most importantly, everyone should be made aware that merely deleting email or other electronic records does not permanently destroy the information it contains. Moreover, once you know that a claim may be filed, you will have an obligation to preserve material, including electronic communications.

The best defense against a discovery request for electronic records or email is to disclose that material fully to your attorney. When a discovery request is received that asks for email that may be relevant to a particular case, for example, it is essential to have an employee who is educated in the use of computer technology perform a thorough search of all computers that may contain those records.

PELRAS members should take the opportunity to review their technology policies and practices, and to update them if that is necessary.