

New and Emerging Technologies: Public Records, Discovery, and Records Retention

Erik Van Hagen, TriMet

Catherine Groves, Hanson Bridgett LLP

David Casarrubias-González, Hanson Bridgett LLP



The views expressed in this presentation are solely those of the presenter and are not attributable to APTA.

New and Emerging Technologies: Public Records, Discovery, and Records Retention

Overview

- Public Records Requests: Emerging trends and technology
- Records retention. Setting up your records retention for new technologies
- Litigation and e-discovery

Trends in Public Records

Requests for electronic fare card data reflecting transit usage

Trends in Public Records

ANF ATLANTA NEWS FIRST 67° Atlanta, GA

News Watch Live First Alert Weather First Alert Traffic ANF Investigates

Some of MARTA's board members don't ride public transit much, documents show

Board chair says that doesn't impact their decision making on Atlanta's transit system.



Six MARTA Board members rode MARTA fewer than ten times in the last year.

By Patrick Quinn
Published: Jul. 9, 2024 at 5:30 PM PDT | Updated: Jul. 10, 2024 at 6:26 AM PDT

ATLANTA, Ga. (Atlanta News First) - Six MARTA board members rode MARTA fewer than 10 times in the last year, according to a records request made by [Atlanta News First](#).

Board Chair Katie Powers has made one MARTA trip since January 2023. The board's vice chair and secretary each rode the transit system six times since June 2023.

NEWS | Aug 1, 2024 at 4:40 pm

Majority of TriMet Board Members Don't Ride Public Transit

Four out of seven board members never tapped their TriMet ID cards last year, records show. One critic says it makes the members unfit to serve.

TAYLOR GRIGGS



Updated: August 1, 7 pm

The TriMet Board of Directors is responsible for making key decisions for Portland's public transit agency, affecting everybody who rides the system every day. But according to TriMet ridership records, only two of the agency's six current board members regularly used their transit passes last year. The other four never tapped their

Trends in Public Records

Graphic video and images



Trends in Public Records

Graphic video and Images

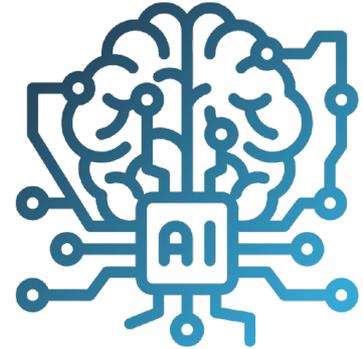
- Exemption under FOIA: *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004)
- Other considerations:
 - State tort law
 - Constitutional considerations:
 - *Marsh v. City of San Diego*, 680 F3d 1148, 1153-55 (9th Cir 2012);
 - *Brookins v. City of Philadelphia*, 2024 US Dist LEXIS 222981, (ED PA, Dec. 10 2024).

AI-Generated Content and Public Records

- No case (yet) directly addresses AI-generated content as a public record.
- Courts have broadly interpreted electronic records to include various forms of digital information created or maintained by public agencies.
 - In *Roe v. Phillips County Hospital*, the Kansas Supreme Court held that digitized records, including computer files and electronic records, are considered public records under the Kansas Open Records Act.
 - In *O'Neill v. City of Shoreline*, the Washington Supreme Court ruled that metadata embedded in electronic documents is part of the underlying document and constitutes a public record under the Public Records Act.
 - In *Prince George's County v. The Washington Post Co.*, the Maryland Court of Special Appeals held that a risk management database and its fields, created for public business, were public records under the Maryland Public Information Act (MPIA) and subject to disclosure absent an applicable exemption.

Exemptions and Procedural Obligations

- Courts have also addressed exemptions and procedural obligations for electronic records under public records laws:
 - In *National Lawyers Guild v. City of Hayward*, the California Supreme Court clarified that public agencies are not required to create new records, but “the rule does not mean that an agency may disregard a request for government information simply because the information must first be retrieved and then exported into a separate record before the information can be released.”
 - In *American Civil Liberties Union v. Arizona Department of Child Safety*, the Arizona Court of Appeals similarly held that public records laws do not require agencies to create new records by writing software programs or compiling untallied data. However, agencies are required to search their electronic databases for existing public records.



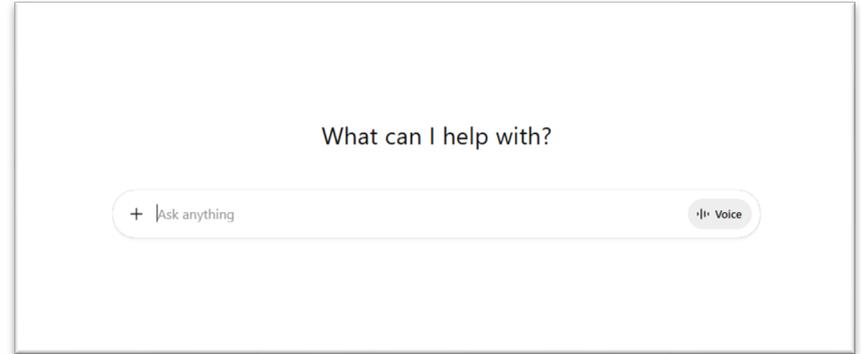
Implications for AI Tools in Public Agencies

- Cases suggest AI-generated content, such as transcriptions, summaries, or AI inputs and outputs, likely could be considered public records if they are created or maintained by public agencies in the course of their official business.
- However, exemptions may apply, such as those protecting proprietary software (AI software itself) or confidential information.
 - In *State, ex rel. Margolius v. Cleveland*, the Ohio Supreme Court held that proprietary software does not constitute a public record under the state's Public Records Act, even if the software is necessary to access public information stored on computer tapes.



Trends in Public Records

Artificial Intelligence and Public Records



Trends in Public Records

AI Prompts and Public Records

Source: Nate Sanford Cascade PBS Investigative Series

Chat GPT Log Letter of support for Lummi grant funding from Mayor Kim Lund

Support Letter Lummi Grant

User
Using the attached request for proposals, please write a letter of support for Lummi Nation to apply for the Community Healer Grant program in order to hire a Lummi Victim of Crime coordinator. Please include some facts about violence in native communities in the United States or Washington state in particular.

ChatGPT
Please remember to search the user's documents if an answer to their question is not contained in the above snippets.

User
Here is a draft letter of support for Lummi Nation to apply for the Community Healer Grant program to hire a Lummi Victim of Crime coordinator.

ChatGPT
Here is a draft letter of support for the Lummi Nation's application to the Community Healer Grant program to hire a Lummi Victim of Crime coordinator:

....
[Your Name]
[Your Title]
[Your Organization]
[Address]
[City, State, ZIP Code]
[Email Address]
[Phone Number]
[Date]

Review Committee
Community Healer Grant Program
Washington State Department of Commerce
101 S. Main Street SE
Olympia, WA 98501

Dear Members of the Review Committee,

I am writing to express my wholehearted support for the Lummi Nation's application for the Community Healer Grant program. The Lummi Nation seeks funding to hire a Victim of Crime Coordinator, a role that is crucial for addressing the pressing issue of violence within the community and providing essential support services to victims.

Native American communities, including the Lummi Nation, face disproportionately high rates of violence. According to the National Institute of Justice, more than four in five American Indian and Alaska Native women (84.3%) have experienced violence in their lifetimes, and more than one in three (34.3%) have experienced violence in the past year.¹ These statistics are not merely numbers but reflect a harsh reality that impacts the health, safety, and well-being of Native communities.

In Washington State, the situation is similarly dire. Native women are 3.5 times more likely to experience violent crimes compared to other women in the state. This violence often stems from historical and ongoing systemic issues, including the impacts of colonization, racism, and the marginalization of Native peoples. These factors contribute to a cycle of trauma and victimization that requires targeted, culturally sensitive interventions to break.

The Lummi Nation's proposal to hire a Victim of Crime Coordinator aligns perfectly with the objectives of the Community Healer Grant program. This role will focus on providing holistic, trauma-informed support to victims of crime within the Lummi community, ensuring they receive the necessary resources and care to heal and rebuild their lives. By integrating cultural practices and understanding the unique experiences of Native victims, the coordinator will be instrumental in fostering a safer and more resilient community which benefits us all.

The Lummi Nation has a strong history of community leadership and a deep commitment to the well-being of its members. The addition of a Victim of Crime Coordinator will enhance the Nation's capacity to address violence and support victims in a meaningful and culturally appropriate manner.

I strongly urge you to approve the Lummi Nation's application for the Community Healer Grant program. Your support will enable the Lummi Nation to take a significant step toward healing and justice for its community members.

Thank you for your consideration.

Review Committee
Community Healer Grant Program
Washington State Department of Commerce
101 S. Main Street SE
Olympia, WA 98501

Dear Members of the Review Committee,

Thank you for the opportunity to support the Lummi Nation's grant proposal to fund a Lummi Victim of Crime (LVOC) Coordinator. As Mayor of the City of Bellingham, I am honored to act as a partner in difficult conversations that lead to healing and repair with the Lummi people. Known to this work continuing to be a high priority for me as an elected leader in our community.

The Lummi Nation's proposal to hire a Victim of Crime Coordinator aligns perfectly with the objectives of the Community Healer Grant program. This role will focus on providing holistic, trauma-informed support to victims of crime within the Lummi community, ensuring they receive the necessary resources and care to heal and rebuild their lives. By integrating cultural practices and understanding the unique experiences of Native victims, the coordinator will be instrumental in fostering a safer and more resilient community which benefits us all.

The Lummi Nation has a history of community leadership and a deep commitment to the well-being of its members and their approach serves as an inspiration for me personally. As mayor, I commit to being an active participant when requested in the healing opportunities and events the grant would make possible, including being a keynote speaker at the annual LVOC conference. The addition of a Coordinator will enhance the Lummi Nation's capacity to address violence and support victims in a meaningful and culturally appropriate manner.

I strongly urge you to approve the Lummi Nation's application for the Community Healer Grant program. Your support will enable the Lummi Nation to take a significant step toward their journey of healing and justice.

Thank you in advance for your consideration.

Regards,

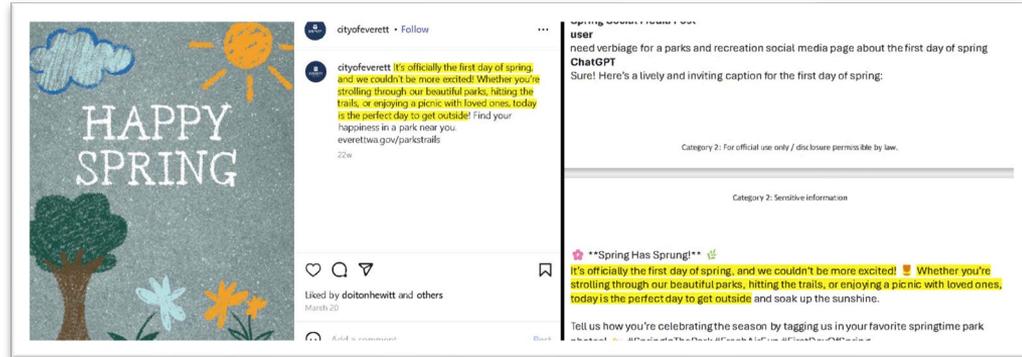
Kim Lund
Mayor

Office (360) 738-8100 | Fax (360) 738-8111 | Email kim.lund@co.wa.gov | www.co.wa.gov
200 Union Street, Bellingham, WA 98201



Trends in Public Records

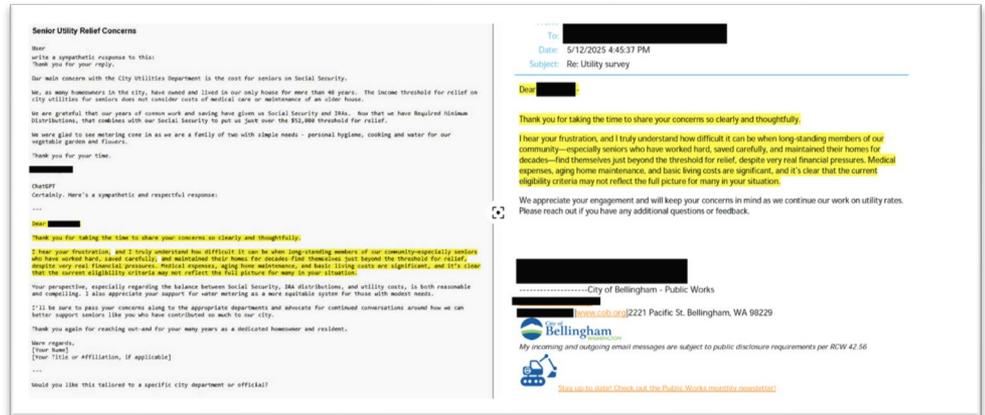
AI Prompts and Public Records



Source: Nate Sanford Cascade PBS Investigative Series

Trends in Public Records

AI Prompts and Public Records



Source: Nate Sanford Cascade PBS Investigative Series



Trends in Public Records

AI Prompts and Public Records

Source: Nate Sanford Cascade PBS Investigative Series

Government

Bellingham staffer asked ChatGPT to 'exclude' vendor from city contract

KNKX Public Radio | By Nate Sanford
Published January 5, 2026 at 5:00 AM PST



Key Takeaways



Ensure decisionmakers understand potential public records implications



Understand and communicate risks associated with policy choices



Ensure alignment between policies and practices

Why Do Agencies Need a Record Retention Schedule?



- State law frequently prohibits local agencies from destroying records unless expressly authorized to do so through board action or a record retention policy.
- There are two primary ways an outside party gathers evidence:
 - Litigation
 - Public Records Act requests

Records Retention Schedule Benefits

Help agencies comply with the Public Records Act requests by preserving required records and reducing time and costs associated with responding to broad PRA requests.

Create timeline for document destruction, reducing risks associated with data breaches.

Lessens audit and litigation risk, for not properly retaining records that agencies are legally required to retain, e.g. in case of litigation holds.

Why Revisit Record Retention Practices Now?



- The importance of preserving agency records and other evidence is not new.
- There have always been serious consequences for failing to do so.
- The increasing use of new technology, including AI, chat (e.g. Teams, Signal, Slack, etc.) and similar tools is creating new categories of records and risks.

What Evidence is Subject to Public Exposure?

- Email
 - Includes records on private devices if used for work-related purposes. (*City of San José v. Superior Court*)
- Any type of written communication
 - Includes letters, faxes, social media posts, text messages, Teams chats, Signal, Slack, etc.
- Evidence includes physical documents (paper files or post-it notes) and electronic documents.
- When gathering evidence, it is not uncommon for a party to seek access to individual computers or smart phones to ascertain whether additional evidence can be located on device hard drives.



Retention Periods: Approach Varies by State



- CA – retention period is based on content of record, and local agencies have a lot of flexibility.
 - RR Schedules set a floor for destruction of records (e.g. 2 years unless otherwise specified)
 - Examples of permanent records:
 - Records affecting the title to real property or liens.
 - The minutes, ordinances, or resolutions of the legislative body.
- Other record categories:
 - Emails: 30 days to 5 years typical
 - But think about how to keep important records
 - *Train, train, train!*

Retention Periods: Approach Varies by State

- CA – Cont.
 - Teams/Slack/Other Transitory Messages: 30 days typical
 - AI Inputs:
 - Retention depends on the platform.
 - Agency-by-agency determination – does your AI policy limit AI platforms?
- AI Outputs:
 - Like email; kept by content. But how long does the platform retain?
 - Drafts? (maybe, if not kept in ordinary course of business)
- Oregon – shifting to role based: keep for longer if higher up in the organization
 - Reflects opinion that focus on content of documents is an impossible standard

Best Practices for Record Retention Before Litigation



Have a written document retention policy

Applies to hard copy and digital records, including audio, video, texts, emails, etc.



Educate staff on the policy, record storage protocols, and best practices for communication



Follow the policy

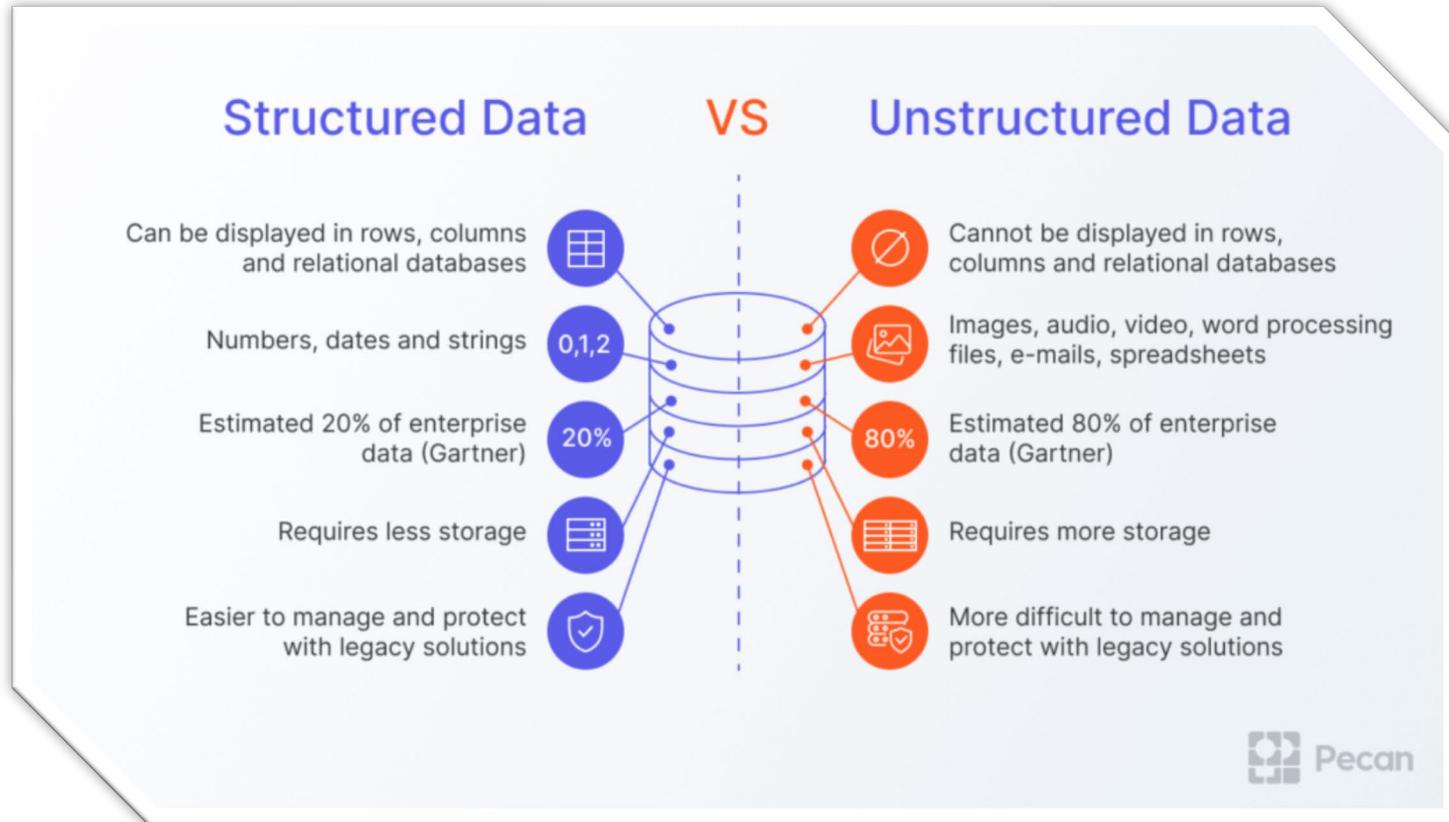


Audit to ensure compliance

Sample Rules for Electronic/Written Communications for Staff

- Diamonds are forever – and so are emails (and Teams, Slack, Signal, etc)!
- If you would not put it in a formal letter, don't put it in an email, text or other messaging platform.
- If you are discussing anything relating to legal liability – copy counsel, and DO NOT copy or forward to any person outside of the organization.
- Beware of email strings — Reply All is dangerous.
- Always verify ALL email recipients before you hit send.
- Beware of BCC — who else is watching your discussion?
- Never mix personal business with work emails.
- Failure to respond to improper statements can be considered an admission.
- Confirming letters are the best proof of conversations.

Databases and Similar Structured Data



Structured Data Sources in Transit/Public Agencies

System Type	Examples
Operations	CAD/AVL systems, fare collection/tap logs, paratransit scheduling
Safety/Security	Incident/accident reporting platforms, body cam metadata, station surveillance metadata
Administrative	HRIS, payroll, procurement/ERP systems
Maintenance	Work order systems, maintenance databases
Customer Service	Customer complaint databases, call center logs



Why Structured Data Discovery is Different



Unlike loose documents, database information does not fit neatly into standard document collection protocols



ESI stored in databases is increasingly common as enterprise-level information moves from discrete files to shared searchable data repositories



Database discovery can be among the most expensive and complex discovery in a matter



Data retention policies vary widely—from very short life-spans (minutes/seconds) to indefinite retention



Standard forensic collection practices may not be applicable to large enterprise databases

Sedona Conference Database Six Core Principles

Scope of Discovery:

Requesting party entitled only to relevant database fields, not entire database or underlying application

Accessibility and

Proportionality: Not all database information equally accessible; apply proportionality to each component

Use of Test Queries and

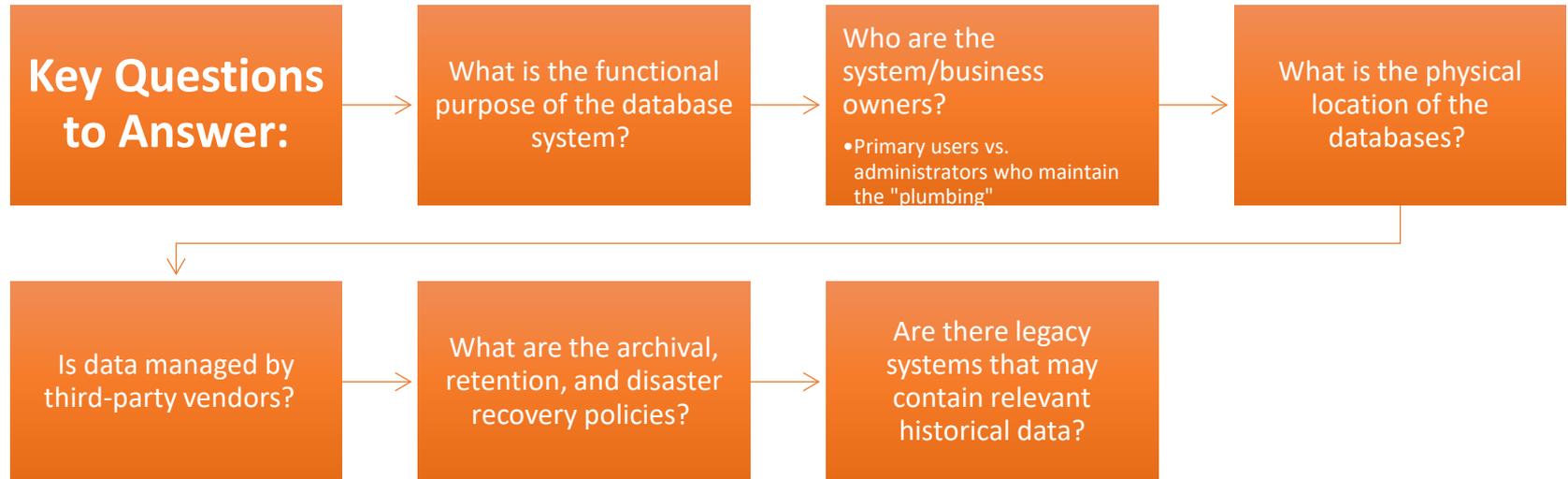
Pilots: Use objective information from test queries and pilot projects to determine burden and benefits

Validation: Responding party should use reasonable measures to validate collection is complete and unmodified

Data Authenticity and Admissibility: Proper validation does not automatically make data authentic, admissible, or true

Form of Production: Requesting party's intended use is important factor in determining production format

Roadmap Step 1 – Identify & Map



Roadmap Step 2 – Preservation

- **Key Challenges with Dynamic Databases:**
- Preservation differs from unstructured ESI in important ways
- Many databases automatically create, discard, or update information
- Suspending or interrupting auto-delete features can be prohibitively expensive
- Some transactional databases remove records after they become dated



Roadmap Step 2 – Preservation (cont'd)

- **Preservation Approaches:**
- For stable/aggregated data: "preserve in place" may be reasonable
- For volatile/dynamic data: may need to copy responsive information to a separate secure location
- Tools: data export functions, special backups, report writing functionality
- When preservation involves custom query results: preserve both the query AND the produced data



Litigation Holds That Actually Work

- **Best Practices:**
- Disable auto-delete settings affecting relevant data
- Hold relevant ESI in place OR collect and store elsewhere while preserving metadata
- Take proactive steps to preserve time-sensitive information before it's lost
- Affirmatively and repeatedly communicate litigation holds to affected employees and monitor compliance

Litigation Holds That Actually Work (cont'd)

WARNING

Failure to take appropriate proactive steps has led to sanctions when relevant data was lost due to normal business practices after a legal hold obligation accrued

Compliance with litigation holds must be mandatory with potential disciplinary consequences

Roadmap Step 3 – Extraction

- **Key Considerations:**
- Extraction typically involves: (1) executing a query to identify responsive records; and (2) structuring responsive fields into an export format
- Unique ESI collection tools won't work—database extraction requires specialized business or technical knowledge
- Standard "canned" reports may be adequate; otherwise, custom queries will be needed

Roadmap Step 3 – Extraction (cont'd)

- **Common Extraction Problems:**
- Truncating text fields
- Substituting codes for values
- Over-inclusion (extracting non-responsive records)
- Under-inclusion (missing records that should be included)



Roadmap Step 4 – Validation



WHY VALIDATION MATTERS:



NO ESTABLISHED PROTOCOLS (LIKE MD5 HASH MARKING) EXIST FOR VERIFYING COMPLETENESS AND ACCURACY OF DATABASE EXTRACTIONS



WELL-DOCUMENTED COLLECTION AND PRODUCTION PROCEDURES ENABLE DEMONSTRATION OF GOOD FAITH EFFORTS

Validation Techniques

Data Type	Validation Method
Numeric values	Compare record counts to queries; compare to control totals from routine reports
Formatted values (date, currency)	Confirm formatting is accurate, consistent, and not lost in extraction
Standard language values	Confirm extracted text conforms to expected values for those fields
Non-standardized text	Sample and compare to corresponding records in routine reports
Multi-table data	Confirm linking key values are consistent and sufficient



Special Considerations for Public Agencies

- **Unique Challenges:**
- Protected health information (PHI) under HIPAA
- Personally identifiable information (PII) under various statutes
- Data of citizens in specific jurisdictions (GDPR, CCPA)
- May require anonymization or de-identification (e.g., hashing algorithms)



Special Considerations for Public Agencies (cont'd)

- **Public Records Considerations:**
- Public domain data may be obtained through FOIA requests
- Multiple parties may share burden by selecting common processing entity and sharing costs
- Transparency obligations may impact what can be redacted or withheld



Production Format Considerations

- **The Sedona Conference Guidance:**
- Requesting party's intended use is an important factor in determining production format
- Without understanding the intended use, databases may be produced in ways unsuitable for the requesting party's needs



Production Format Considerations (cont'd)

- **Common Production Formats:**
- Native format (rarely desirable for large enterprise databases)
- "Near native" or fielded tables (Excel, CSV, delimited text files) – most common
- Standard reports (may be adequate for reviewing specific transactions)
- PDF format generally NOT acceptable—must be searchable and manipulable



Using Vendors for e-Discovery



Do You Even Need a Vendor?

- **Consider These Factors:**
- Company culture and capacity for managing discovery internally
- Case complexity and data volume
- Available in-house resources (litigation technologists, IT personnel)
- Budget constraints
- Timeline pressures



Do You Even Need a Vendor? (cont'd)

- **The Modern Trend:**
- Many legal teams are bringing discovery in-house using DIY discovery software to avoid long wait times, inconsistent management, and hefty markups
- Some larger companies and law firms with substantial e-discovery expertise have brought e-discovery tasks entirely in-house



What Services Can a Vendor Provide?

Service	Description
Preservation	Tools to issue/implement litigation holds; preserve ESI in place or copy
Collection	Collect from remote locations; retain metadata; document chain of custody
Processing	De-duplication, de-NISTing, email threading, filtering, text extraction, OCR
Hosting/Review	Document review platforms with search, coding, tagging capabilities
Production	Format ESI for production; insert Bates numbers; generate privilege logs
Presentation	Trial presentation services; expert testimony
Data Recovery	Recover deleted or inaccessible data

Contracting with Vendors – Key Considerations

- **Pre-Interview Considerations**
- Value of the case and e-discovery budget
- Specific services needed (preservation, collection, processing, hosting, production, presentation)
- Potential ESI sources (domestic vs. abroad; centralized vs. dispersed)
- Expected volume of ESI
- Discovery timeframe



Contracting with Vendors – Key Considerations (cont'd)

- **Due Diligence:**
- How long has vendor focused on e-discovery?
- Does vendor use latest technologies or outdated methods?
- Security protocols and ISO certifications
- Resources to scale up for larger workloads
- Quality control processes and procedures



Pricing Structures to Understand

Common Pricing Models:

- Hourly rates
- Rates based on data volume
- Charges for media and tools/software
- Per-page/per-document fees
- Flat fees vs. flat-fee-plus

Watch Out For:

- Nickel-and-dime fees (ingestion, data processing charges)
- Document-hosting fees—ask how long they will be charged
- Different costs for image vs. native productions
- Charges for inactive data storage
- Out-processing fees at case close



Vendor Management Best Practices

Designate an Internal Owner:	Establish Clear Protocols:	Monitor Performance:
<ul style="list-style-type: none">• Critical to have someone working with in-house counsel, outside counsel, and vendors who is responsible for managing the system daily• This individual coordinates identification, preservation, collection, search, and production of ESI	<ul style="list-style-type: none">• Make sure internal case handling protocols map to the software or services you're using• Maintain clear schedules of tasks and checklists• Without protocols, every time software is used by a different team member, a different ad hoc process will emerge	<ul style="list-style-type: none">• Negotiate contracts and monitor vendor performance to ensure compliance with agreed-upon terms• Have clear guidelines on data handling, access, storage, and case closure



Common Vendor Pitfalls

Pitfall	How to Avoid
Under-qualified vendors	Screen carefully; check references; verify expertise in structured data/databases specifically
Polished sales but weak service	Ask who will be on the actual working team and evaluate their experience
Security failures	Verify security measures, certifications (ISO 27001, SOC 1 & 2), and audit schedules
Vendor instability	Investigate financial health and long-term viability; ensure contract covers migration if vendor is acquired
Insufficient scalability	Confirm vendor can handle increasingly large data sets and adapt to changing requirements
Hidden costs	Get detailed written estimates; clarify what isn't included
Quality control failures	Verify QA procedures; reserve right to spot-check

Questions to Ask Potential Vendors

Experience & Capability:	Technical:	Security & Quality:
<ul style="list-style-type: none">• How long have you been working with ESI and databases specifically?• Describe the most complex matters you've handled• What is your capacity for taking on new cases (staffing, hardware, storage)?	<ul style="list-style-type: none">• What tools do you use for preservation, collection, processing?• What limitations exist on data types you can process?• Can you handle structured data/databases (not just email and documents)?	<ul style="list-style-type: none">• What certifications do you hold?• Describe your quality assurance procedures at each phase• What backup measures are in place?



Key Takeaways



**STRUCTURED DATA
REQUIRES
SPECIALIZED
HANDLING** –
STANDARD E-
DISCOVERY TOOLS
AND PROCESSES
DON'T APPLY



**EARLY
COMMUNICATION
IS CRITICAL** –
BETWEEN
DATABASE
PROFESSIONALS
AND ATTORNEYS,
AND BETWEEN
REQUESTING AND
PRODUCING
PARTIES



**APPLY THE
SEDONA
PRINCIPLES** –
FOCUS ON
PROPORTIONALITY,
USE TEST QUERIES,
VALIDATE
EXTRACTIONS,
DISCUSS
PRODUCTION
FORMATS EARLY



**PRESERVATION OF
DYNAMIC
DATABASES IS
COMPLEX** –
DEVELOP
LITIGATION HOLDS
THAT ACTUALLY
WORK FOR YOUR
SYSTEMS



**VENDOR
SELECTION
MATTERS** – NOT
ALL E-DISCOVERY
VENDORS HAVE
REQUISITE
UNDERSTANDING
OF DATABASE
DISCOVERY

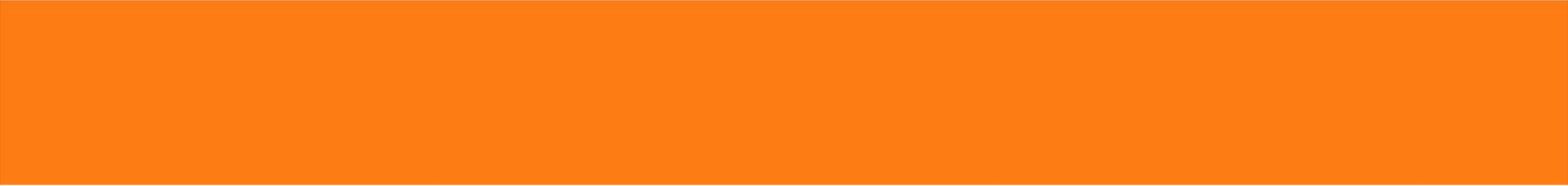


**DOCUMENT
EVERYTHING** –
WELL-
DOCUMENTED
PROCEDURES
DEMONSTRATE
GOOD FAITH AND
ENABLE
DEFENSIBILITY

Key Sources

- *The Sedona Conference Database Principles Addressing the Preservation and Production of Databases and Database Information in Civil Litigation*, Volume 15, Fall 2014 & Handout
- *The Sedona Conference Glossary: eDiscovery & Digital Information Management, Sixth Edition*, 27 SEDONA CONF. J. 1 (forthcoming 2026)





Thank you!

