



# RE-TOOLING *FOR* **E-DISCOVERY** TECHNOLOGIES, TRAINING, AND PROCESSES

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## By following five government practices for managing vendors, training employees, and using technology, organizations can better manage their e-discovery process.

**T**he U.S. federal government rarely gets credit for being ahead of the curve when it comes to efficiency and innovation. Instead, it is often seen as the embodiment of outdated processes and bureaucracy – trailing behind advances in the private sector rather than leading the charge. In reality, this reputation is largely undeserved, especially in the areas of records management and e-discovery.

As the nation's largest employer and its largest buyer of goods and services, it is no surprise the government continuously faces litigation concerning employment, contracts, environment, and other general matters too countless to list. In most legal matters, the government shoulders the largest part, if not all, of the burden of responding to discovery requests, as it is usually the custodian for many of the paper and electronic records involved in a suit. Because the government spends so much time and so many resources on litigation, it is at the forefront of developing new and better approaches to managing the challenges associated with e-discovery.

Private corporations face many of the same e-discovery challenges as federal agencies, including stringent statutory and regulatory recordkeeping requirements, workforces spread across wide geographic areas, and inconsistent technology platforms. As such, other organizations can learn a lot from the government's approach to e-discovery, especially in the areas in which the government really shines: vendor management, employee training, and technology.

Here are five government practices other organizations can emulate to better manage the e-discovery process.

### 1. Establish Long-Term Vendor Relationships

Many private corporations avoid longer-term e-discovery and litigation support contracts, preferring instead to engage vendors on a case-by-case basis as new matters arise – an approach that is not only inefficient but also expensive.

When an e-discovery vendor establishes a relationship with a new client, it inevitably must spend time and resources familiarizing itself with the organization's culture, processes, and litigation history and transferring the client's data into its own data management platform – the vendor charges for these services as part of its unit-based or hourly bill rate. But, the expense doesn't stop there. In addition, the client must also devote its own employee resources to sharing data with the vendor, as well as learning the vendor's approach and platform.

The question isn't how to avoid these start-up costs – there is, quite simply, a learning curve for the organization and the vendor when a new business relationship begins. The real question is: Why lose this investment with each new matter? Why not spread start-up expenses over multiple matters to drive e-discovery costs down?

The federal government generally takes a long-term view of vendor relationships, signing contracts that last between three and five years. These long-term contracts benefit the government by:

#### ■ Leveraging historical data to lower litigation costs

Collecting and processing data is expensive, but, when possible, you can drive costs down by taking advantage of data used in previous cases. Also, vendors can use histori-

cal data to forecast future litigation volume and issues, including the overall volume of data an organization will create in a given time period, the percentage of data that must be processed and reviewed, and how long the discovery lifecycle is likely to take for a specific matter.

#### ■ Enabling the vendor to hire and train staff as efficiently as possible

A long-term relationship can allow a vendor to better predict personnel needs and to quickly and efficiently bring in experts as needed. Workers who are engaged on an ongoing basis carry a client's institutional knowledge forward to subsequent projects, enabling them to implement best practices that are refined specifically for the organization.

#### ■ Enabling vendors to implement best practices across multiple cases

The longer a vendor works with an organization, the more it can familiarize itself with the organization's data, processes, and litigation history. Thus, the vendor becomes more accurate and efficient with each subsequent case, as it better understands the types of matters in which the organization tends to be involved and the approaches common to the organization's culture.

For example, after reviewing the document collection processes of one government client, a vendor realized that custodians frequently turned over huge amounts of files without regard to relevance. Knowing the client could save a significant amount of time and money if custodians would take care to collect only relevant files in response to requests for production, the vendor recom-

mended the agency provide some additional upfront guidance and background data and ask its custodians to more thoroughly review and cull through e-mail and files instead of just turning over what sometimes amounted to their entire hard drive.

By following this recommendation, the client recognized significant savings, as it no longer had to process nonresponsive documents. This approach also allowed the document custodians to have a better idea of what they should be searching for to provide to the attorneys.

It is important to note this approach to collecting documents is not always appropriate – custodians are not always able to make judgment calls about document relevance, as they may not have the background or experience to exercise proper diligence. The point here is that the vendor's long-term relationship with the client gave the vendor an understanding of the client's processes and culture enabling the vendor to identify an area in which the client could easily realize time and cost savings.

## 2. Conduct Vendor Performance Evaluations

Just because the government is willing to sign long-term contracts doesn't mean it obligates itself to continue working with a vendor that performs below expectations. Government agencies are careful to write periodic performance reviews and renewal clauses into vendor contracts, so they can terminate unsatisfactory vendor relationships as needed.

Additionally, before establishing a relationship with a new vendor, the government performs a thorough evaluation that includes contacting three to five past clients to check the vendor's references. The reference checking process is pretty transparent – before submitting a proposal, vendors know the categories on which they will be rated. The crite-

ria are weighted in terms of importance and include issues such as:

### ■ Price

Did the vendor charge fair market prices for its services? Also, was the vendor's initial estimate accurate or did prices unexpectedly climb as the project progressed?

### ■ Management

Was the vendor proactive and responsive to client needs? Was senior management available to resolve ur-

gent issues? How did the vendor respond when mistakes were identified?

### ■ Past Responsibilities

What types of projects did the vendor complete for you? What volume of data did they ultimately process, review, and produce? Did the vendor perform project management functions and develop a strategy for each individual project, or did they simply carry out functions as directed?

### ■ Security

What was the vendor's data security plan? Did you experience any breaches in data security while working with the vendor?

### ■ Past Performance

How would you rate the vendor's overall performance? Would you work with the vendor again?

Generally, the reference check accounts for 25-40% of the government's evaluation of a new vendor. The government takes evidence of past performance very seriously when considering a new vendor.

## 3. Use Full-Service Vendors

Organizations often engage a different vendor for each stage of the e-discovery lifecycle: one vendor to collect documents, another to process those documents, and yet another to review and produce those same documents. To promote efficiency and lower costs, the federal government takes the opposite approach, typically relying on a single full-service vendor to collect, process, review, and produce all of the data for a case. In fact, agencies often go a step further and require their full-service vendors to manage any necessary subcontractors, as well.

A key benefit of full-service vendors is their ability to re-use knowledge, processes, and data, rather than developing new processes and

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shifting data between platforms for each step of the discovery process. A full-service vendor starts by interviewing a client's employees to collect pertinent data. Then, it moves that data seamlessly throughout the discovery lifecycle: as soon as collection is complete the vendor begins processing data, and when processing is complete, the vendor immediately begins document review.

Often, a full-service vendor can go a step further and speed the discovery lifecycle by working multiple phases at once – for example, while the collection team is still gathering data, the processing team begins working with the data that is already available. This streamlined approach is usually faster and less expensive than coordinating multiple vendors, and it leaves the client with fewer project management responsibilities.

#### **4. Use Web-Based Data Management Solutions**

Like many companies these days, government agencies are often spread across wide geographic areas. In fact, some agencies, such as the USDA, have branches in every state. Due to rapid globalization, even those agencies with only a single office often conduct business nationally and even internationally, meaning even regional agencies can get caught up in legal matters that require collaboration over long physical distances.

As organizations tighten their financial belts in this tough economy, the prospect of paying for travel is less attractive. Instead, organizations are increasingly using technology to enable remote teams to collaborate as if they were in the same location. For years, the federal government has used web-based data management solutions to enable long-distance teams to share data. These solutions have included web-based records management systems, document management systems,



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and litigation support systems. Also, some web-based litigation support repositories have calendaring tools teams can use to track case dockets, depositions, and other important dates.

Many agencies focus resources on creating their own web-based solutions, but they also use vendors that offer similar solutions in secure, hosted environments. Web-based data repositories allow anyone who requires access to information to get it quickly, easily, inexpensively, and

securely. If a legal matter starts as a local issue, but then balloons to include more branches, agencies, or geographic areas, the government is ready to respond with relatively little expenditure or effort.

#### **5. Conduct Mandatory Employee Training**

Corporations often see training programs as little more than operational overhead to be avoided when possible. The government takes a different view, recognizing that it is far less expensive to train employees to proactively maintain accurate records from the outset than it is to retroactively fix bad processes and breaches in data security.

Typically, a government employee receives 50-100 hours of online and classroom-based training on issues associated with their job function, including effective data management and security practices. Much of this training is mandatory, requiring employees to maintain certificates of completion that prove they have met their training obligations.

The topics that internal training programs cover are diverse, ranging from simple concepts, such as how to use records management software, to complex concepts, such as how to design an effective data security program.

Clearly, data security is critical to many federal agencies, as the information they store is often highly confidential and sensitive. Employees who know how to avoid common security breaches, such as phishing schemes and viruses, don't just save the government money, they also help protect national security and limit legal liability.

While the federal government has admittedly experienced some data security breaches, its track record is much better than that of private corporations, arguably because their employees are better trained.

## How to Begin Re-Tooling Your E-Discovery Process

The federal government isn't usually the first organization that comes to mind when people think about efficiency and innovation. But, while many private corporations are still scrambling to bring their records management strategies and retention policies into the 21st century, the government is at the forefront of implementing efficient, low-cost, and proactive solutions.

If you want to overhaul your e-discovery processes, set your preconceived notions aside and examine the federal government's approach:

- **Start by considering your organization's attitude toward employee training.**

If training is low on the priority list, do what you can to move it up a few notches. If you meet with resist-

ance, remind your organization's decision makers that proactively training employees is far less expensive than retroactively changing entrenched processes and cleaning up data security breaches.

- **Appraise your organization's approach to vendor management.**

If, in the past, you didn't thoroughly vet your vendors before hiring them, including verifying past performance, start now. Also, don't be afraid to engage your vendors in long-term relationships, but don't think a contract obligates you to tolerate poor performance. Make sure your agreements include periodic performance evaluations and renewal clauses.

- **Leverage web-based technology to help remote teams collaborate.**

If your organization doesn't currently have a web-based data repository, it's time to implement one now. You don't need to start from scratch—secure and robust web platforms hosted internally or by a provider are very common.

Retooling your organization's approach to vendor management, employee training, and data management won't turn your legal and records management departments from cost centers into profit centers. It will, however, reduce your organization's spend on these critical, and often expensive, operational functions—a worthy objective in today's tough economic environment. **ENR**

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