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MEMORANDUM OF LAW

DATE: July 20, 2012

TO: Jeffrey Leveroni, Director, Department of Information Technology

FROM: City Attorney

SUBJECT: Record Retention Requirement Applicable to Backup Copies of Email
Made for Disaster Recovery Purposes

INTRODUCTION

The Department of Information Technology (Dept. of IT), through the contracted services of the San Diego Data Processing Corporation, maintains¹ backup copies of emails (backups) for disaster recovery purposes. Backups provide a means of restoring individual accounts which may have become corrupted or are lost, for example, as a result of hardware failure. Such backups are not maintained for the purpose of preserving the informational content of the subject emails.

In a March 7, 2005 memo, then City Manager Lamont Ewell suspended the retention periods described in the City's Records Disposition Schedule.² Dept. of IT has retained all backups, including GroupWise Post Office backups, since the issuance of the 2005 memo. These backups are now obsolete because the City's enterprise messaging system migrated from GroupWise to Microsoft Exchange in December 2007.

QUESTION PRESENTED

Does the City's Records Disposition Schedule require Dept. of IT to retain the GroupWise backups for the period from the date of the 2005 memo to the 2007 replacement of GroupWise with Microsoft Exchange?

¹ Dept. of IT retains the backups for two weeks and the tapes are then overwritten.

² The suspension occurred in response to a subpoena by the U.S. Attorney. The City revoked the 2005 memo on June 4, 2010, and the City's records disposition schedules are again in effect.

SHORT ANSWER

Generally no. Backups generated for disaster recovery purposes may be deleted in accordance with operational requirements and disaster recovery needs. While the backups may contain copies of emails considered to be records subject to records disposition schedules, the contents of the disaster recovery backups are not themselves records and need not be retained.

However, any backups specifically created for the purpose of preserving the informational content of emails for future reference, and with an expectation that the backups would be preserved for that purpose, must be retained for the time period described in the City's Records Disposition Schedule. For example, a backup may be a record if a department had requested Dept. of IT to deviate from its normal practice and permanently preserve a backup for future reference.

Additionally, state law requires the City to preserve emails relevant to current or reasonably anticipated potential litigation. Intentional or negligent destruction of such emails may result in the imposition of sanctions against the City.

ANALYSIS

I. THE DISASTER RECOVERY BACKUP TAPES ARE NOT "RECORDS" FOR PURPOSES OF RECORD RETENTION AND DESTRUCTION POLICIES.

With the exception of specific types of records,³ public records must be maintained for a minimum of two years. Cal. Gov't Code § 34090.⁴ Duplicates of records less than two years old may be destroyed if the City has established procedures for doing so, and a custodian may destroy records if, in addition to other requirements, they have been reproduced in a "trusted system" or other medium in compliance with § 12168.7.⁵ *See also* §§ 34090.7, 34090.5.

The City's Records Disposition Schedule is the basis for the City's Records Management Program. SDMC § 22.2605. City records may only be destroyed after being "inventoried, appraised, and entered in the Records Disposition Schedule." SDMC § 22.2607(a). Additionally, the head of the department responsible for maintaining the record must make certain determinations before a record may be destroyed, including the determination that the "record is no longer required to fulfill any administrative, fiscal, legal, or historical interests of the City or the public." *Id.* *See also* SDMC § 22.2607(b)(1).

³ For example, citizen complaints against police personnel must be retained for five years. Cal. Penal Code § 832.5(b).

⁴ Unless otherwise indicated, all section references hereafter are to the California Government Code.

⁵ A trusted system is defined as a combination of techniques, policies, and procedures for which there is no plausible scenario under which the records could be deleted or altered. § 12168.7(c). The Secretary of State is in the process of approving standards for trusted systems pursuant to section 12168.7(a).

A. To Be “Records,” the Backups Must Have Been Made and Retained for the Purpose of Preserving Their Informational Content For Future Reference.

The San Diego Municipal Code (SDMC) defines a “record” as any document produced, received, owned, or used by a City department, regardless of physical form, that is “*preserved because of the informational value of data* in them or as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the City.” SDMC §22.2604 (emphasis added). A “nonrecord” is any “material which is not retained in the regular course of business or is a temporary aid, *not created for the purpose of preserving its own documentary or informational content for future reference.*” *Id.* (emphasis added).⁶

The contents of the backups are not records subject to the City’s Records Disposition Schedule because they are not intended to preserve any specific “informational content for future reference.” By their nature, backups are indiscriminate and include all data regardless of informational content. When disaster recovery backups have been employed to restore an individual account, all emails are restored without regard to the content or informational value of any specific email. Indeed, San Diego Administrative Regulation 90.62 section 5.5 specifically states that emails “are not backed up by [Dept. of IT] on permanent basis.” Email backups are retained “only to the degree that allows the City to restore current E-Mail in the event of a system failure,” and are “not intended to be a permanent storage medium.” San Diego Admin. Reg. 90.62 § 5.5(a) and (b). Emails that are official records as described above should be saved outside of the email system. *Id.* Backup tapes are not intended to serve as a records management system for the City of San Diego and are considered “non-records.”

In limited instances, where backup tapes were generated by individual departments, the answer remains the same. In those instances where the backups were generated as part of a routine backup process, with tapes regularly overwritten, the contents of the tapes would not be considered “records.” It is conceivable that a backup tape might have been generated with the intent of “preserving its informational content for future reference.” In such cases, to be considered “records,” the department must have expressed an intent to preserve the email backups and exempt them from the routine process of deletion. Where such an intent is expressed, backups must be retained and only disposed of in accordance with the applicable records disposition schedules. However, in the absence of an expressed intent to preserve a backup, the contents of the backup are not “records” and are not subject to any records disposition schedules.

B. State Record Management Guidelines Explicitly Declare That Backup Tapes Are Not Records.

Various departments within the State of California have likewise determined backup tapes to be non-records. The State Records Management Act (SRMA) (sections 14740-14769), for instance, requires the Director of the Department of General Services (DGS) to “[e]stablish and administer in the executive branch of state government a records management program”

⁶ Government Code sections related to document retention and destruction do not define “record.” 64 Cal. Op. Att’y Gen. 317, 321 (1981). The California Attorney General has concluded that to be a record for purposes of record retention and destruction a document “must have been made or retained by the public officer for the purpose of preserving its informational content for future reference.” *Id.* at 325-26.

§ 14745. DGS has produced the Electronic Records Management Handbook (Handbook) “to provide guidance for managing electronic records and electronic recordkeeping systems for California State government to meet current and emerging record management responsibilities and the many challenges of e-government.” Department of General Services, California Records & Information Management (CalRIM), *Electronic Records Management Handbook*, preface (February 2002). The Handbook provides several guidelines for determining whether a document is a “record.” Although it describes email as a “document,” “[i]t is also a record if it meets the recordkeeping criteria established within an organizations (sic) records management plan.” *Id* at p. 2. “Computer back-up tapes and other duplicate computer files are non-records.” *Id*.

Similarly, the Secretary of State has established the Local Government Records Program and prepared guidelines for local government records retention. § 12236; Secretary of State, *Local Government Records Management Guidelines*, § 2-1030 (February 2006). The Secretary’s guidelines employ the definition of “records” as provided in the SRMA. See § 14741.⁷ It defines non-records as

[m]aterials not usually included within the definition of records, such as unofficial copies of documents kept only for convenience or reference, working papers, appointment logs, stocks of publications and processed documents, and library or museum material intended solely for reference or exhibition. Also, documents such as rough notes, calculations or drafts assembled or created and used in the preparation or analysis of other documents.

Secretary of State, *Local Government Records Management Guidelines*, § 2-1030 (February 2006).

The Secretary’s use of the same definition and close coordination with DGS⁸ suggests that they would reach the same conclusion regarding computer backup tapes.

II. ANY EMAILS RELEVANT TO CURRENT OR ANTICIPATED LITIGATION MUST BE PRESERVED.

Where the City is a party to a lawsuit or reasonably anticipates becoming a party, the City is required to preserve all relevant documents, including emails. Cal. Civ. Proc. Code § 2031.060(a). If any documents are destroyed, the City could be subject to court sanctions. *See* Cal. Civ. Proc. Code §§ 2023.010, 2023.020, 2023.030. There is a limited “safe harbor” from sanctions for electronically stored information (ESI) “that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.” Cal. Civ. Proc. Code § 2031.060(i)(1). *See also* Cal. Civ. Proc. Code § 2031.300(d)(1). However, the safe harbor does not apply to the destruction of ESI that could reasonably be preserved. *See* Cal. Civ. Proc.

⁷“As used in this chapter ‘record’ or ‘records’ means all ... documents produced, received, owned or used by an agency, regardless of physical form or characteristics. Library and museum materials made or acquired and preserved solely for reference or exhibition purposes, and stocks of publications and of processed documents are not included within the definition of the term ‘record’ or ‘records’ as used in this chapter.” § 14741.

⁸ For example, the Secretary is to consult with DGS in adopting statewide standards established by the American National Standards Institute or the Association for Information and Image Management. § 12168.7.

Code §§ 2031.060(i)(2) and 2031.300(d)(2). “Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (SDNY, 2003) (applying federal electronic discovery rules upon which California’s rules are based). Generally, “inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery)” are not subject to a litigation hold. *Id.*

However, if the information contained on the backup tapes is not otherwise available and the City “can identify where particular employee documents are stored on backup tapes,” then even inaccessible backups should be preserved. *Id.*

Failure to cease the deletion of email or other routine destruction of business records may be considered gross negligence and result in the imposition of sanctions. *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456 (SDNY 2010). Sanctions may include an evidentiary inference that the destroyed evidence was unfavorable to the party that caused its destruction, monetary sanctions, contempt sanctions, or even granting a default judgment against the offending party. *Cedars-Sinai Medical Center v. Superior Court*, 18 Cal. 4th 1, 11-13 (1998) (citing Evidence Code § 413, Cal. Civ. Proc. Code § 2023 (now §§ 2023.010, 2023.020, 2023.030), and Penal Code § 135).

Therefore any data related to current or reasonably anticipated litigation that is contained in backups scheduled to be deleted should be preserved until the litigation resolves.

CONCLUSION

Backups specifically created for the purpose of preserving the informational content of emails for future reference, and with an expectation that the backups would be preserved for that purpose, must be retained for the time period described in the City’s Records Disposition Schedule. Backups created solely for disaster recovery purposes are not “records” and may be deleted based upon operational requirements and disaster recovery needs. However, any emails in the backups that are relevant to any existing or reasonably anticipated litigation should be preserved. Intentional or negligent destruction of such emails may result in the imposition of sanctions against the City.

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By /s/
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cc: Elizabeth Maland, City Clerk