

Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EDGE, et al.,

Plaintiffs,

v.

CITY OF EVERETT,

Defendant.

No. 2:17-cv-01361-MJP

**AGREEMENT REGARDING
DISCOVERY OF
ELECTRONICALLY STORED
INFORMATION AND ORDER**

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information (“ESI”) in this matter:

A. General Principles

1. An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan and when producing documents and ESI. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as possible.

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1 **B. ESI Disclosures**

2 Within 30 days after the Rule 26(f) conference, or at a later time if agreed to by the parties,
3 each party shall disclose:

4 1. Custodians. The five custodians most likely to have discoverable ESI in their possession,
5 custody or control. The custodians shall be identified by name, title, connection to the instant
6 litigation, and the type of the information under his/her control.

7 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared drives,
8 servers, etc.), if any, likely to contain discoverable ESI.

9 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to contain
10 discoverable ESI (e.g. third-party email and/or mobile device providers, “cloud” storage, etc.)
11 and, for each such source, the extent to which a party is (or is not) able to preserve information
12 stored in the third-party data source.

13 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
14 (by type, date, custodian, electronic system or other criteria sufficient to specifically
15 identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ.
16 P. 26(b)(2)(B).

17 **C. Preservation of ESI**

18 The parties acknowledge that they have a common law obligation to take reasonable and
19 proportional steps to preserve discoverable information in the party’s possession, custody or
20 control. With respect to preservation of ESI, the parties agree as follows:

21 1. Absent a showing of good cause by the requesting party, the parties shall not be
22 required to modify the procedures used by them in the ordinary course of business to back-up
23 and archive data; provided, however, that the parties shall preserve all discoverable ESI in their
24 possession, custody or control.

25 2. All parties shall supplement their disclosures in accordance with Rule 26(e) with
26 discoverable ESI responsive to a particular discovery request or mandatory disclosure where that

1 data is created after a disclosure or response is made (unless excluded under (C)(3) or (G)
2 below).

3 3. Absent a showing of good cause by the requesting party, the following categories of
4 ESI need not be preserved:

- 5 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 6 b. Random access memory (RAM), temporary files, or other ephemeral data
7 that are difficult to preserve without disabling the operating system.
- 8 c. On-line access data such as temporary internet files, history, cache, cookies, and
9 the like.
- 10 d. Data in metadata fields that are frequently updated automatically, such as last-
11 opened dates (see also Section (E)(5)).
- 12 e. Back-up data that are substantially duplicative of data that are more
13 accessible elsewhere.
- 14 f. Server, system or network logs.
- 15 g. Data remaining from systems no longer in use that is unintelligible on the systems
16 in use.
- 17 h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or from
18 mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided
19 that a copy of all such electronic data is routinely saved elsewhere (such as on a
20 server, laptop, desktop computer, or “cloud” storage).

21 4. Nothing in this section relieves any obligation to preserve, protect, archive, recover and / or
22 maintain copies of any images, videos, and all other responsive information that is currently or was
23 previously posted to any social media platform, including but not limited to, Facebook, Twitter,
24 Instagram, and the like.

25 **D. ESI Discovery Procedures**

26 1. On-site inspection of electronic media. Such an inspection shall not be permitted
27 absent a demonstration by the requesting party of specific need and good cause or by agreement
of the parties.

2. Search methodology. The parties shall timely attempt to reach agreement on
appropriate search terms, or an appropriate computer- or technology-aided methodology, before

1 any such effort is undertaken. The parties shall continue to cooperate in revising the
2 appropriateness of the search terms or computer- or technology-aided methodology.

3 In the absence of agreement on appropriate search terms, or an appropriate computer- or
4 technology-aided methodology, the following procedures shall apply:

5 a. A producing party shall disclose the search terms or queries, if any, and
6 methodology that it proposes to use to locate ESI likely to contain discoverable information. The
7 parties shall meet and confer to attempt to reach an agreement on the producing party's search
8 terms and/or other methodology.

9 b. If search terms or queries are used to locate ESI likely to contain
10 discoverable information, a requesting party is entitled to no more than 5 additional terms or
11 queries to be used in connection with further electronic searches absent a showing of good cause
12 or agreement of the parties. The 5 additional terms or queries, if any, must be provided by the
13 requesting party within 14 days of receipt of the producing party's production.

14 c. Focused terms and queries should be employed; broad terms or queries,
15 such as product and company names, generally should be avoided. Absent a showing of good
16 cause, each search term or query returning more than 250 megabytes of data are presumed to be
17 overbroad, excluding Microsoft PowerPoint files, image and audio files, and similarly large file
18 types.

19 d. The producing party shall search both non-custodial data sources and ESI
20 maintained by the custodians identified above.

21 3. Format.

22 a. The parties agree that ESI will be produced to the requesting party with searchable
23 text; to address any issues that may arise regarding searchable text, the parties agree to meet and
24 confer in good faith. Acceptable formats for production include, but are not limited to, native files,
25 multi-page TIFFs (with a companion OCR or extracted text file), single-page TIFFs (only with
26 load files for e-discovery software that includes metadata fields identifying natural document

1 breaks and also includes companion OCR and/or extracted text files), and searchable PDF. Files
2 that are not easily converted to image format, such as spreadsheet, database and drawing files,
3 may be produced in native format. See Appendix “A” for party specific load file requirements.
4 Each individual file will be renamed using a unique item identifier (similar to Bates number, but
5 on a file -by-file basis versus a page-by-page basis).

6 b. Metadata fields. The parties agree that, to the extent these fields are reasonably
7 available, and are not privileged, work product protected, or exempt, the metadata fields listed in
8 Attachment “B” will accompany ESI. To address any issues that may arise regarding metadata,
9 the parties agree to meet and confer in good faith.

10 c. Other documents. Files that are, in the ordinary course, maintained by custodians
11 in a specific format may be Bates labeled and produced in that format, as further described
12 below:

13 i. Readily paginated document types, such as Adobe PDFs, still images, and non-
14 animated Power Point files may be produced as Bates stamped Adobe PDF files,
15 with a file name that reflects the Bates number.

16 ii. File types that are not readily paginated such as most Excel spreadsheets,
17 video files, and the like, may be produced in native format, with a file name that
18 reflects the Bates number.

19 d. Hard copy originals. Hard copy documents will be scanned, Bates labeled, and
20 produced with an accompanying load file pursuant to this agreement. See Appendix “A” for
21 party specific load file requirements. To address any issues that may arise regarding the
22 production of hard copy originals, the parties agree to meet and confer in good faith.

23 e. Color. If documents such as photographs, charts, graphs, or spreadsheets require
24 color to have a clear understanding of the document content, the document will be produced in
25 color and not black and white, unless the parties previously agree to production of the document
26 in black and white.

1 f. De-duplication. The parties may de-duplicate their ESI production across
2 custodial and non-custodial data sources after disclosure to the requesting party.

3 **E. Third-Party / Non-Party Productions**

4 Upon request, a copy of any ESI or Documents produced by any non-party or third-party
5 in response to a subpoena from any party to this litigation will be provided to the other party in
6 the format in which it was received.

7 **F. Service of Productions**

8 The Parties agree that productions made available to the requesting party via Hightail or
9 another file transfer protocol service provider constitutes service, consistent with all applicable
10 Civil and Local Rules.

11 **G. Privilege**

12 1. With respect to privileged or work-product information generated after the filing
13 of the complaint, parties are not required to include any such information in privilege logs.

14 2. Activities undertaken in compliance with the duty to preserve information are
15 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

16 3. Information produced in discovery that is protected as privileged or work product
17 shall be immediately returned to the producing party, and its production shall not constitute a
18 waiver of such protection, if: (i) such information appears on its face to have been inadvertently
19 produced or (ii) the producing party provides notice within 15 days of discovery by the
20 producing party of the inadvertent production. The parties agree to follow the Civil and Local
21 Rules regarding inadvertent disclosures, including but not limited to, Fed. R. Civ. P. 26(b)(5).

22 4. The parties agree that privilege logs shall be provided within a reasonable time
23 after the date agreed upon for final production in this matter. Privilege logs shall include
24 information sufficient to comply with the Civil and Local Rules, including but not limited to Fed.
25 R. Civ. P. 26(b).

1 Respectfully submitted November 29, 2017

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27 **AGREEMENT REGARDING DISCOVERY OF
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ORDER

Based on the foregoing, IT IS SO ORDERED on this 14th day of December, 2017.



Marsha J. Pechman
United States District Judge

1 **APPENDIX A**

2 **TECHNICAL CONTACT INFORMATION**

3 **Party:** **Plaintiffs Jovanna Edge, Leah Humphrey, Liberty Ziska,**
4 **Amelia Powell, Natalie Bjerke, Matteson Hernandez**
5 Technical Liaison: Rachel Horvitz
6 Phone: (206) 274 - 2800
7 Email: rachel@newmanlaw.com

8 Preferred database load file format, image file format and any other specific requirements:

- 9
- 10 • Metadata load file: Concordance DAT
 - 11 • For Native Files: Exported file path + file name should be contained in metadata
12 load file.
 - 13 • For Image Files: ASCII comma delimited containing exported file path + file name
14 (.opt format).
 - 15 • OCR and/or Extracted Text should be contained as separate .txt files named
16 according to the corresponding native/image file. OCR/Extracted text should not be
17 included with the metadata load file as a field.

18 **Party:** **Defendant City of Everett**
19 Technical Liaison: Nicole DeNamur
20 Phone: (206) 245-1731
21 Email: nicole.denamur@pacificlawgroup.com

22 Preferred database load file format, image file format and any other specific requirements:

- 23
- 24 • Metadata load file: Concordance DAT
 - 25 • For Native Files: Exported file path + file name should be contained in metadata
26 load file.
 - 27 • For Image Files: ASCII comma delimited containing exported file path + file name
(.opt format).
 - OCR and/or Extracted Text should be contained as separate .txt files named
according to the corresponding native/image file. OCR/Extracted text should not be
included with the metadata load file as a field.