
Coates' Canons Blog: Mayor Learns a Harsh E-Discovery Lesson

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The City of Prescott, Arizona, and its mayor, learned a harsh

lesson about the failure to preserve emails and other electronic records during (and in anticipation of) litigation. The lesson has cost the city well over \$100,000 in legal fees and \$35,000 in court-imposed sanctions to date. (And the parties are still litigating.) It is a lesson that all local government officials should heed about the perils of governing in the digital age.

What is E-Discovery?

Before turning to the specifics of the case, let's first define e-discovery. Discovery is the pre-trial phase in a lawsuit in which each party obtains evidence from the opposing party(ies). Generally, a party to civil litigation in both federal and state courts is required to produce, on request, all documents, records, information (collectively, information) and tangible things that are within a party's possession, custody, or control and that are relevant to the dispute. This includes information that is within the physical possession or custody of the party, or under the party's control; it also includes such information within the possession, custody, or control of the party's employees, officials, and contractors. Discovery is governed by the rules of civil procedure applicable in the particular court in which the case is litigated. E-discovery is simply the application of these rules to electronic information.

In order to satisfy its production obligation under both the federal and state rules, a litigant (or potential litigant) is under a common law duty to preserve all potentially relevant information for possible production once it reasonably anticipates litigation—defined as the point when an entity has actual or constructive knowledge of the likelihood of future litigation (and often referred to as the “trigger date”). Once the duty to preserve is triggered, an entity must retain all relevant information in existence at the time the duty to preserve commences and any relevant information created thereafter. This is commonly referred to as a “litigation hold.” Pursuant to a litigation hold any previously generated potentially relevant information must be preserved, as it existed on the trigger date. An entity must suspend its normal data/record deletion practices with respect to this information for the duration of the litigation.

Sanctions for Violations of Discovery Rules

A litigant may be subject to spoliation sanctions for failure to preserve or produce relevant information. (Spoliation is a term-of-art that refers to the loss or destruction of evidence relevant to litigation.) Court-ordered sanctions can vary significantly and are highly dependent on the facts and circumstances of each case. Many courts require a finding of a culpable state of mind, such as intentional or willful conduct, or gross negligence. Some courts, such as those in North Carolina, do not require a showing of bad faith or even negligence. See, e.g., *McLain v. Taco Bell Corp.*, 137 N.C. App. 179 (2000).

Riley v. City of Prescott

General Background

In *Riley v. City of Prescott*, 2014 WL 641632 (D. Arz. Feb. 19, 2014), the City of Prescott contracted with a local humane society, a private entity, to operate its animal shelter. Kay Anne Riley (Riley) worked as a marketing manager for the humane society. In October 2010, Riley formed a group, Prescott Citizens Against Bullies, whose purported purpose was to raise community awareness of an alleged injustice against a former city employee. Among other things, Riley issued a press release in late October announcing a planned protest against several city officials, including the mayor. The mayor was not pleased. He, along with other city officials, sent emails expressing their displeasure with Riley and her planned protest to both a board member and the executive director of the humane society where Riley was employed. Shortly thereafter the humane society's executive director placed Riley on administrative leave without pay through November 1. Records indicate that the mayor and city officials continued to communicate with humane society officials about Riley.

Riley participated in the November 1 protest (actual protest pictured above). She additionally posted several negative comments about the mayor and other city officials on Facebook and other social media sites.

On November 2, the humane society's executive director extended Riley's administrative leave indefinitely. On November 4, Riley met with the executive director who expressed concern that the city might terminate the humane society's contract as a result of Riley's behavior. On November 12, the humane society terminated Riley's employment.

Feeling that she had been unlawfully terminated for exercising her First Amendment rights, Riley served a Notice of Claim on the city and mayor on March 1, 2011, and filed a Section 1983 claim against the city, the mayor, and the mayor's wife on August 10, 2011, alleging that the city officials retaliated against Riley for exercising her free speech rights by threatening economic harm to the humane society (termination of the city contract) unless the humane society terminated her employment.

Discovery

Once litigation commenced, the parties engaged in an extensive discovery period. The following summarizes the rough timeline of requests for information made by Riley on the city and mayor.

- **March 1, 2011:** Riley filed notice of claim on the city and mayor.
- **May 18, 2011:** Riley served a public records request on the city, requesting all emails between the mayor and humane society board members and employees. (Under Arizona law, the mayor had a responsibility to locate and produce records responsive to the public records request.)
- **August 15, 2011:** Riley sent the city and mayor a notice of request to preserve documents and electronically stored information relevant to the litigation.
- **May 15, 2012:** Riley made a discovery request for emails between the mayor and humane society board members and employees.
- **July 16, 2012:** Google, Inc. searched the mayor's private Gmail account and identified twenty-four potentially responsive emails. Riley had compelled the search by subpoena. The search only revealed the "to," "from," and "date" fields, not the subject lines or bodies of the emails. (The mayor did not produce any of the emails to Riley.)
- **July 30, 2012:** Armed with this new information, Riley made another discovery request for emails between the mayor and humane society officials.
- **August 16, 2012:** The city and mayor searched the mayor's home computer and personal email account. They did not produce any of the twenty-four emails previously identified by Google, Inc.
- **Oct. 30, 2012:** Five responsive e-mails to or from the mayor and employees of the humane society were discovered through a third-party subpoena served on a humane society board member. The city or mayor had not produced the emails previously.
- **March 25, 2013:** Pursuant to a court order obtained by Riley, Google, Inc. searched its servers to identify and produce copies of the twenty-four emails it previously identified. Google could not locate any of the emails. Google submitted a declaration confirming that, on July 16, 2012, the twenty-four emails existed in the mayor's Gmail account, but that the emails subsequently had been deleted and were not accessible to Google.

Motion for Discovery Sanctions

Riley filed a motion for discovery sanctions against the city and mayor for failure to preserve and produce responsive emails. At issue were emails sent to and from the mayor's city-issued email account and to and from the mayor's private Gmail account.

Mayor's City-Issued Email Account

With respect to the city-issued email account, the mayor argued that he did not use email regularly. He claimed that it was his assistant, not him, who accessed and used his city email account. He also claimed that due to city IT limitations, the emails on his city account were not archived and, according to "normal city practice" were regularly deleted by his assistant after approximately two weeks. The city's server only stored user-deleted email for thirty days. Thus, he argued, any of his city-emails relevant to the litigation would have been deleted long before Riley sent her notice of claim.

The court found this argument incredulous. Holding that the duty to preserve was triggered at the latest when the mayor and city received the notice of claim on March 1, 2011, the court acknowledged that under the "normal city practice" for deleting email, all responsive emails would have been destroyed before the duty to preserve attached. However, the "normal city practice" violated Arizona's public record retention laws. According to the court, employing a document deletion practice that was not compliant with state law was "at best, grossly negligent and, at worst, willful." Failure to follow state law factored heavily in the court's determination that "the totality of the facts presented show[ed] that Defendants deleted emails related to this lawsuit, and did so with sufficient culpability to warrant sanctions."

Mayor's Gmail Account

As to his private Gmail account, the mayor claimed that it was his wife who accessed and used the account. He argued that he had insufficient technical knowledge to permanently delete emails and that he did not direct anyone to do so on his behalf.

The court was not convinced. It found no reasonable excuse for the mayor's failure to produce the twenty-four emails that were discovered by Google, Inc. in July 2012. The fact that all the emails subsequently were deleted clearly demonstrated to the court that the mayor acted willfully and in bad faith.

Sanctions

The court levied two different sanctions on the city and mayor for failure to preserve and produce the relevant emails. The court directed that the jurors be given instructions allowing them to infer that the lost emails were damaging to the defendant. In a separate order, the court awarded \$35,000 in attorneys' fees and costs to Riley as a sanction for the spoliated evidence.

Lessons for North Carolina Officials

The facts of *Riley v. City of Prescott* may be unique, but the outcome should serve as a warning to all public officials to take their public records retention obligations seriously. A public entity may be held to a higher standard for records preservation during litigation if the information is also subject to retention under applicable public records laws. It is very difficult to argue that a document was destroyed inadvertently or in the normal course of business if the document was subject to public records retention requirements. (A public official also could face sanctions under state law for failure to retain public records. See **G.S. 132-3**; **G.S. 132-9**.)

The ability to comply with public records retention requirements (and litigation hold requirements) is exponentially more difficult in the digital age. Technological advances allow public officials to create or receive information anywhere, anytime, on almost any device. Increasingly public officials are conducting public business (and thus creating or receiving public records) on personal devices or even on social media sites that are hosted by third parties. It is imperative that local entities understand how/where information is created, received, and stored by public officials and adopt policies and practices to capture and retain public records as required by law. It is equally important for local units to educate their employees and officials on these policies and practices and on the potential consequences for non-compliance.



To aid public officials in North Carolina, the Government Records Branch of the State Archives has published **helpful guidance** on how to capture and retain electronic information that is generated or received by officials remotely.

Links

- canons.sog.unc.edu/wp-content/uploads/2014/12/prescott.png
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_132/GS_132-3.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_132/GS_132-9.html
- www.ncdcr.gov/archives/ForGovernment/DigitalRecords/DigitalRecordsPoliciesandGuidelines.aspx#tutorials