

## ELECTRONIC DISCOVERY (E-DISCOVERY) CHECKLIST

Paragraph 28 of PD1/2022 encourages practitioners to agree a discovery plan which focuses on a collaborative and proportionate approach to discovery which is both time efficient and cost-effective - this includes consideration of e-discovery within the principles of Order 1, Rule 1(A) and Order 24 to the [Rules of the Court of Judicature \(NI\) 1980](#) (as amended).

*Matters for early discussion between parties (non-exhaustive)*

- The type, and need for preservation, of electronic documents together with details of their electronic storage, and any issues arising from same;
- The scope of searching that the parties intend to apply for electronically stored information (ESI)<sup>1</sup> - to include any technology assisted review (TAR)<sup>2</sup> keyword searches and/or date range filtering intended for use, or any proposed approach to phased or limited discovery or document sampling<sup>3</sup>;
- The software, tools and techniques that will be used and management of costs;
- The approach to manage duplicate, privileged or non-discoverable material;
- The form of e-discovery and to include where possible any agreed metadata<sup>4</sup> fields which will be provided;
- Any possible sharing or apportionment of e-discovery costs to include whether it may be appropriate for one or more parties to employ the services of the same e-discovery software provider.

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<sup>1</sup> Data or documents that are created, altered, communicated and/or stored in electronic format.

<sup>2</sup> The process of reviewing discovery data using software-assisted review techniques. May also be referred to by other terms such as continuous active learning (CAL), or predictive coding.

<sup>3</sup> The process of reviewing discovery data / documents by checking a representative sample of the total data/document set.

<sup>4</sup> Metadata is described as “data about data” - for example the author of a document, the date/time of a document’s creation, the date/time that a document was last modified, the file-type or format of a document (PDF, Word, Excel, etc). Metadata is typically not visible to a reader when reading a document on-screen and is not normally captured when a document is printed to hard-copy or converted to another format.

### Format of e-discovery

- E-discovery documents should be provided/made available for inspection in a form which allows the recipient to review them adequately and without the use of specialist technology.
- If specialist technology is required in order to review all or part of the discovery set, the party providing discovery must co-operate reasonably with the recipient(s) in order to facilitate the inspection of documents using such technology.
- E-discovery documents must be capable of e-bundling in accordance with [Practice Direction No 2 of 2022](#).

### The e-discovery list

Unless otherwise ordered or directed by the court, parties utilising e-discovery should provide to the other parties:

- A list of each individual document to be provided together with all required/agreed metadata fields, unless the volume is unduly burdensome to be of little or no use by the receiving party (and then as agreed between the parties or directed by the court).
- A native<sup>5</sup> version of the documents listed. Native<sup>5</sup> format discovery will be the default requirement for all documents unless there is good reason for providing a document/documents in another format, for example:
  - (i) Where documents contain redactions;
  - (ii) Where the native<sup>5</sup> format of a document would render it unreviewable or unduly difficult to review by the receiving party for any technical/logistical reason.
- Where the receiving party/parties have indicated their intention to use e-discovery software/techniques to manage the material received, the disclosing party will provide a suitable load file format in order to enable the recipient to process the discovery documents without unreasonable impediment.

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<sup>5</sup> The format of a document as it was when it was created by the user/software that originally created it.

Case Management Conference (PD1/22 Paragraph 33 refers)

One of the documents to be uploaded with Form COM1, not less than 7 days in advance of the Case Management Conference, is 'Any agreement in writing made by the parties as to discovery, or disputes as to the level of discovery'. Any list of disputed issues should:

- Include only those key issues in dispute which the parties consider will need to be determined by the court, with some reference to relevant documents;
- Be recorded in summary form after discussions between the parties - the inclusion of extensive correspondence is unlikely to be efficient or helpful;
- Briefly summarise each party's position in respect of each disputed issue.
- Seek to avoid any duplication of issues, by consolidated wording for any overlapping issues, where possible;
- Include any information that will assist the court in determining the issue;
- Be appended to Form COM1 when uploaded into Box.

*Failure to Comply*

Where the court, on the application of a party to the proceedings, is of the view that any other party has not approached the e-discovery process in a collaborative manner and/or failed to comply with the provisions of the relevant Practice Direction and/or this guidance, then those factors may be taken into account in the court determining whether the party in default should pay any additional costs occasioned by that party's actions.