

Calculating the Costs of E-Discovery

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The new electronic discovery rule requires organizations to calculate the costs associated with disclosing information that may not be readily accessible or, in the language of the rule, “reasonably accessible.” Determining those costs requires a thorough inventory of data stored throughout the organization as well as sampling the time required to retrieve data from specified systems.

Determining “Reasonably Accessible”

During the pretrial and pre-subpoena stages of the litigation process, healthcare organization attorneys and risk managers may meet with the plaintiff’s attorney to determine what documents and information will be requested during the discovery phase or for the trial. This information may include health information stored in online repositories, electronic data stored as field contents used to create reports, paper records, images, performance improvement reports, and off-site records.

The HIM director’s task is to determine the cost of compiling this data should he or she receive a judge-issued court order for any and all information pertaining to a particular patient. The HIM and IT directors will need to work closely to assemble the data in an understandable format.

First, an organization must determine what data are reasonably accessible. Reasonably accessible data likely will include records, in either electronic or paper format, that are available and accessible by caregivers. These records are typically considered “business records” because they are routinely accessed and serve a business purpose of treating the patient, supporting claims issued as a result of services rendered, and meeting various regulatory and accreditation requirements. They include the same documents that are printed or reproduced for valid requests for release of information. These records should be those documents defined as part of an organization’s legal health record.

Calculating the Costs

The cost for discovery may be defined by state law. If not, then a cost analysis should be prepared similar to what was used to define the cost for disclosure to patients after HIPAA was implemented. Costs would include:

- Copying costs (labor and supplies)
- Postage
- Time to prepare summaries

For disclosures to individuals or entities other than the patient, organizations may attempt to recover retrieval and other related costs. Most of the costs discussed thus far are relatively easy to calculate.

However, more effort is required if an organization is asked to produce any and all e-mail about a specific patient prior to and after the plaintiff engaged an attorney or to identify all databases in which the patient’s data may be stored, including performance improvement and quality databases.

To assess these costs, it is best to:

1. **Identify all places that could store patient information**, both patient-identifiable and non-identifiable. These include data stored in electronic form in equipment (e.g., echocardiogram, EKG, fetal monitoring equipment) and information transmission systems (e-mail, primarily). Electronically stored information was probably catalogued during the facility’s efforts to define its designated record set.

2. **Determine how patient-specific data can be extracted** from these other locations. In the case of cancer registry or core measures reporting, these databases often have report generation functions that allow patient-specific data to be printed or exported to an electronic file. However, data in quality assurance or performance improvement and infection control databases may be more difficult to extract.
3. **Determine the time and other resources required to extract data** from these files and how long data are stored in them. You will need assistance from your IT department to capture data stored electronically in both equipment and transmission vehicles. Many organizations have established retention techniques that pool or store e-mail and other digital data for a period of time to protect against spoliation.
4. **Inventory this information** to address disclosure costs. An example of an inventory is given in the table above.
5. **Document inventorying effort.** Completely document the initial and ongoing efforts to maintain a current inventory, including the time involved, memoranda used, educational efforts, et cetera. This will help demonstrate that the organization has performed its due diligence in relation to the Federal Rules of Civil Procedure, which applies primarily to data maintained in an electronic format. Outlining files maintained electronically will be important in appealing unreasonable demands in front of the judge.
6. **Apply labor and supply factors.** In the example above, assume that the plaintiff's attorney requires all information from any electronic system and wants it on a CD. The labor cost would be multiplied by 0.5 hours (0.25 for each of the two electronic systems). Supplies include the CD, the current cost of which is easily determined. The time to save the files to a CD would be minimal; however, if multiple documents must be saved, it may be worth inventorying the approximate time to write a document to a CD and then applying that factor to the number of documents requested.

Tips for Sampling

Organizations must also conduct time sampling similar to the example above on systems specified by rule 34 of the Federal Rules of Civil Procedure. This sample should include picture archiving and communication system, cardiology, fetal monitoring, operating room documentation systems (e.g., endoscopy procedures), PDAs or cell phones that may have been used to receive or send e-mail or text messages, home systems that connect to the organization's network, and possibly even dictation systems. This prospective analysis will take time, but it is worth the effort.

Restoring e-mail can cost roughly \$2 per message, including cost of attorneys needed to review the documents.¹ Estimating the organization's time and costs must be accomplished to support an appeal. However, if a court order is issued and if e-mail contained information on patients other than the plaintiff, knowing the effort involved to segregate or redact the data will be equally important to comply with HIPAA and define the protections employed to the judge's satisfaction. One way to provide knowledgeable estimates is to conduct sampling in advance of this situation occurring. To do so, organizations should:

- **Speak with risk management** to identify difficult cases (e.g., patient or family expressed dissatisfaction with one or more clinician's approach(es) or delay in services, patient experienced complications or died unexpectedly not due to hospital error, patient experienced complications or died unexpectedly possibly due to hospital or clinician error).
- **Conduct e-mail investigations** for each scenario and determine time commitment and complexity of effort.
- **Prepare a mirror copy of any electronic file** that will be searched to demonstrate that the files have not been tampered with.
- **Document time and costs** for specialized software used to search metadata files, swap files, slack files, and unallocated space on each involved individual's hard drives and e-mail repositories; cost to engage electronic discovery consultants or computer forensic examiners; software or programming effort to collect the file information (date, time, originator, recipients, text of e-mail, etc.); time involved to read each message to determine if there is content unrelated to the patient involved; time to segregate or redact information that does not pertain to the patient; and time to store the patient-specific data in a format that is readable (CD, DVD, paper, etc.). Include any time involved retrieving media stored off site, restoration of files, and return of the media to its storage location.²

The documentation should provide sufficient detail for each step (labor and resource specific) and any supplies to demonstrate a thorough accounting of time and resources consumed. Consider involving an individual from the cost-accounting department.

Use the sample time and resource estimates to project time required to respond to an e-discovery request from an attorney and to demonstrate, if necessary, undue burden or cost.

Organizations should also include “opportunity costs.”³ Opportunity costs are the value of what staff could have been doing if they had not had to cope with the e-discovery request. This will be significant if others must work overtime or if temporary staffing will be hired during the time the employed individuals are working the request.

Advance preparation will take time. Consider this effort similar to preparing for HIPAA—budget it and document it accordingly.

Inventory of Information for Disclosure Costs

New federal e-discovery rules require organizations to calculate the cost of disclosing information that may not be “reasonably accessible.” One step in doing so is creating an inventory of patient information stored throughout the organization, including its format and how it is retrieved.

Data Location	Media	Format	Retention Info	How Info Obtained	Time/Costs to Obtain
Social services	Paper	Alpha order by month patient was discharged; stored in boxes	Two years; other years stored at XYZ Storage	Identify dates of service, retrieve box, pull data from boxes	1.25 hours on site; \$8 retrieval fee charged by XYZ
Performance improvement (core measures database)	Midas data system	Electronic	Currently permanent	Access Midas database, enter medical record number, search by date of service, print out or save to Word file	0.25 hours
Respiratory therapy	Paper	Services during month; no order	One year in cabinets; other years stored by month of charge at XYZ Storage	Identify dates of service for the patient, pull from file cabinet or recall box(es), sort through box to find documents for patient	2 hours on site; \$8 retrieval fee charged by XYZ
Open record review data (in HIM)	Paper	Monthly; no order	Stored until next Joint Commission visit; destroyed after visit	Identify dates of service for the patient, pull from cabinet, and review all open record review submissions	2 hours
Cancer registry	Electronic record system	Electronic	Currently permanent	Access system database, enter medical record number, search by date of service, print out or save to text file	0.25 hours

Notes

1. Sachdev, Ameet. “E-mails Become Trial for Courts: Costly Electronic Discovery ‘Part of Potentially Every Case in the 21st Century.’” *Chicago Tribune* on-line edition, April 10, 2005. Available online at www.discoveryresources.org/pdfFiles/chicagoTribune_041005.pdf.
2. Barsocchini, Albert. “Electronic Data Discovery Primer.” *Law Technology News*. August 28, 2002. Available online at www.law.com/jsp/article.jsp?id=1029171611801.
3. Morrison, Rees. “[Calculating Your ‘Total Cost of Electronic Discovery \(TCed\)’](#).” April 12, 2006.

Resource

Allman, Thomas Y. "The Impact of the Proposed Federal E-Discovery Rules." *Richmond Journal of Law & Technology* 12, no. 4 (2006). Available online at <http://law.richmond.edu/jolt/v12i4/article13.pdf>.

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