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Amendments to the Federal Rules of Civil Procedure

Dear Reader:

The following document was created from the MTAS website (mtas.tennessee.edu). This website is maintained daily by MTAS staff and seeks to represent the most current information regarding issues relative to Tennessee municipal government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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Amendments to the Federal Rules of Civil Procedure

Reference Number: MTAS-1429

Amendments to the Federal Rules of Civil Procedure and Their Effects Upon Records Retention

Most cities in Tennessee use e-mail and other electronic means for all types of correspondence. Like its paper counterpart, electronic communication can be important legal discovery in litigation. This notion has now been codified in recent amendments to the Federal Rules of Civil Procedure, effective December 1, 2006, which specifically require employers to retain electronic communications, including e-mail, that would become discoverable in litigation. Under the amended Rule 26 (a) (1) (A)(ii), parties "shall, without awaiting a discovery request, provide to the other parties…a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;." This places cities and other potential parties to litigation on notice that pertinent communications must be saved.

In the unfortunate occurrence of a legal action, notice should be given to all city department personnel to put a litigation hold on documents, meaning that no documents or electronic documents should be destroyed, altered or otherwise disposed without the consent of the attorney representing the city. Because of the short time frame, the departments should start to think about all places where this information may be kept and begin to be collected. The parties will meet and provide descriptions and locations of all relevant correspondence at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by the rules, such as late-added defendants. (See Rule 26 for information about those deadlines and procedures.). With the often voluminous amount of e-mails cities produce, an organized system for locating and retrieving relevant e-mails is crucial. Many software systems have such features. Check with your information technology (IT) department to ensure that your city has the technical ability to comply with the short deadlines set by the Rules of Civil Procedure.

The amendments also provide an exception to this required disclosure if such disclosure would place an undue burden or cost on the disclosing party. However, even if such a showing is made, the court may nonetheless order discovery if the requesting party shows good cause. Rule 26(b)(2). The amended Rule 34 further expands the scope of discovery to allow parties the opportunity to test or inspect electronic information, even to the point of allowing entry upon land or premises. Rule 37 (f) provides a safeguard for parties who fail to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic system. Note that the rule specifically mentions the operation of an electronic system, implying that one must be in place and that this exception would not apply to cities that fail to enact one.

Under Rule 45(d), cities receiving a subpoena to produce documents or electronically stored information must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms, but a person responding need not produce the same electronically stored information in more than one form. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery for good cause and may place conditions upon the release.

The underlying importance of these amendments is that electronic communications must be added to every city's current retention schedule. The subject matter, not the format, is the decisive factor in retention. For further information on records retention and a model retention schedule, see Records Management for Municipal Governments [1].

Links:
[1] https://www.mtas.tennessee.edu/reference/records-management-municipal-governments


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