

### New Email Retention Policy for New York State Heightens the Need to Timely Serve Preservation Demands and Prevent Destruction of Key E-Mails in Litigation

According to recent media reports,<sup>1</sup> New York State has now implemented the 90-day email retention policy that was previously announced by the Cuomo Administration in June 2013.<sup>2</sup> The reports indicate that various state agencies' disparate email systems have been consolidated on a single cloud-based platform which will automatically delete emails 90 days after being sent or received, unless specifically retained by the employee in a special file folder. With the implementation of the new retention policy on February 23, 2015, the mass deletion of State emails currently older than 90 days is apparently underway.

The news is a timely reminder to private sector entities to review their own automatic retention policies – what's good for the goose is good for the gander – and consider the possibility for cost-savings by reducing lengthier retention periods, if practical, and thus eliminate unnecessary data storage expenses.

More important, the State's move should also catch the eye of companies and their in-house counsel that do business with New York and any of her agencies. In the unfortunate but all too common event that a dispute with the State arises and that litigation can be anticipated, the aggrieved business should immediately put the State on formal notice of its duty to preserve information, including any relevant emails. In the absence of a formal preservation demand, the State may contend that it could not have reasonably anticipated litigation at the time when any pertinent emails were automatically destroyed as a result of the new retention policy. Moreover, if a formal preservation demand is served and the State nonetheless fails to suspend its automatic deletion of emails, resulting in the loss of relevant evidence, the State could be subject to sanctions in the ensuing litigation, conferring a considerable tactical benefit to the plaintiff.

State and federal courts in New York have long held that as soon as a party can reasonably anticipate litigation, it is subject to a duty to preserve evidence, including electronic information and data that might be inadvertently destroyed as a result of automated network settings: "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents." *The Pension Committee of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC, et al.*, No. 05 Civ. 9016 (SAS), 2010 U.S. Dist. LEXIS 4546 at \*14-15 (S.D.N.Y., Jan. 15, 2010).

This duty applies equally to governmental entities. For instance, in a dispute with a private developer in federal court, the City of Peekskill was penalized for the loss of Common Councilors' emails resulting from the City's lack of a formal e-mail retention policy – it was instead "within the 'sole discretion' of the City's staff and elected officials to delete e-mails" – and the City's failure to implement a litigation hold. See *DMAC LLC v. City of Peekskill*, No. 09 Civ. 5093, 2012 U.S. Dist. LEXIS 138605 (S.D.N.Y. Sept. 17, 2012). The United States Magistrate Judge sanctioned the City by issuing an adverse inference instruction to the jury "that the City negligently destroyed e-mails...and that said e-mails would have been favorable to plaintiffs' case." The same standards apply to government entities in state court, as well. See, e.g., *County of Erie v. Abbott Labs., Inc.*, 30 Misc. 3d 837, 841 (N.Y. Sup. Ct., Erie Cty., 2010) (adverse inference charge against county for "failure to place any sort of 'litigation hold' on the routine destruction of documents which would be potentially relevant to [the] lawsuit [which was] grossly negligent").

In short, the need to serve a preservation demand in matters involving New York State will now be all the more urgent in light of the State's new 90-day destruction policy for emails. Please do not hesitate to contact [Clifford G. Tsan](mailto:Clifford.G.Tsan) (315.218.8252; [ctsan@bsk.com](mailto:ctsan@bsk.com)) or [Brian J. Butler](mailto:Brian.J.Butler) (315.218.8160; [bbutler@bsk.com](mailto:bbutler@bsk.com)), Co-Chairs of Bond's E-Discovery Practice Group, with any questions or for further assistance on these issues.

1 See, e.g., <http://www.capitalnewyork.com/article/albany/2015/02/8562835/cuomo-administration-begins-large-scale-email-purges>.

2 See <http://www.timesunion.com/local/article/Odato-Meter-s-running-on-email-4639539.php>.

