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NEW AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THEIR EFFECTS UPON RECORDS RETENTION

Josh Jones, Legal Consultant

As we are now well into the 21st century, 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) (B), parties “shall, without awaiting a discovery request, provide to the opposing party a description and location of all electronically stored information in their possession that may be used to support any legal claims.” 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, parties must now meet and provide descriptions and locations of all relevant correspondence within 90 days of a defendant’s appearance or 120 days after a complaint has been served. With the often voluminous amount of e-mails cities produce, a 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 90- and 120-day rules.

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. 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.

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 the MTAS publication *Records Management for Municipal Governments*.

For more information about the amended rules, contact your MTAS municipal management consultant.

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MTAS OFFICES

Knoxville (Headquarters) . . . (865) 974-0411	Jackson (731) 423-3710
Johnson City (423) 854-9882	Nashville (615) 532-6827
(423) 282-0416	Martin (731) 881-7057

The Municipal Technical Advisory Service (MTAS) is a statewide agency of the University of Tennessee Institute for Public Service. MTAS operates in cooperation with the Tennessee Municipal League to provide technical assistance services to officials of Tennessee's incorporated municipalities. Assistance is offered in areas such as accounting, administration, finance, public works, ordinance codification, and water and wastewater management.

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