



Sent on May 16, 2022 by First Class Mail and electronic mail to [gearlloden@nixaschools.net](mailto:gearlloden@nixaschools.net) and [zacrantz@nixaschools.net](mailto:zacrantz@nixaschools.net)

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***Subject: Demand for Preservation of Electronic & Other Discoverable Items***

Dr. Loden:

**I. Formal Demand for Preservation of Tangible & Electronic Evidence**

The ACLU of Missouri Foundation is investigating potential claims related to the review and removal of books and other written material from school libraries within Nixa Public Schools. We are examining legal options on behalf of potential clients and, therefore, demand that you preserve all documents, videos, tangible things, and electronically stored information (“ESI”) that relates to the district’s processes, procedures, and criteria for reviewing library and curricular materials; all communications concerning the review and removal of any book or other written material from any school library (including emails, text messages from any app or platform, and social-media postings and messages from any app or platform), including any statement in support of or in opposition to removal of a particular book or other written material. This demand explicitly includes but is not limited to all materials relating to school board meetings, review committee meetings, and informal meetings at which *The Handmaid’s Tale*, *Looking for Alaska*, *The Glass Castle*, *The Bluest Eye*, *Fun Home: A Family Tragicomic*, *Black Girl Unlimited*, *The Perks of Being a Wallflower*, *All Boys Aren’t Blue: A Memoir-Manifesto*, *Blankets*, *Homegoing*, *Out of Darkness*, *Beyond Magenta: Transgender Teens Speak Out*, *The Infinite Moment of Us*, *The Windup Girl*, *13 Reasons Why*, *Crank*, *Stamped*, and *What Lane?* were discussed, considered for removal, and/or determined to be removed or at which any person commented on the foregoing books, **This preservation demand is limited to materials created or retained beginning on January 1, 2021, and is ongoing in nature.**

Under Eighth Circuit precedent, the duty to preserve documents, attaches when a party “knew or should have known that the documents would become material” and “should have preserved them.” *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004).

This letter is intended to formally make clear that you should anticipate legal action against you.

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This pre-litigation correspondence is intended to make clear your legal obligations with respect to protecting and preserving all discoverable things. “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.” *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 431 (S.D.N.Y. 2004).

You should anticipate that much of the information subject to disclosure or responsive to discovery in this matter is stored on your current and former computer systems and other media and devices (such as: personal digital assistants, voice-messaging systems, online repositories and cell phones, video disks, etc.).

ESI should be afforded the broadest possible definition and includes (by way of example and not as an exclusive list) potentially relevant information electronically, magnetically or optically stored as:

- Digital communications (e.g., e-mail, voice mail, text messaging);
- Digital Phone or VOIP Records;
- Word processed documents (e.g., Word or WordPerfect documents and drafts);
- Spreadsheets and tables (e.g., Excel or Lotus 123 worksheets);
- Accounting Application Data (e.g., QuickBooks, Money, Peachtree data files);
- Image and Facsimile Files (e.g., .PDF, .TIFF, .JPG, .GIF images);
- Sound Recordings (e.g., .WAV and .MP3 files);
- Video and Animation (e.g., .AVI and .MOV files);
- Databases (e.g., Access, Oracle, SQL Server data, SAP);
- Contact and Relationship Management Data (e.g., Outlook, ACT!);
- Calendar and Diary Application Data (e.g., Outlook PST, Yahoo, blog tools);
- Online Access Data (e.g., Temporary Internet Files, History, Cookies);
- Presentations (e.g., PowerPoint, Corel Presentations)
- Network Access and Server Activity Logs;
- Project Management Application Data;
- Computer Aided Design/Drawing Files; and,
- Back Up and Archival Files (e.g., Zip, .GHO)

ESI resides not only in areas of electronic, magnetic and optical storage media reasonably accessible to you, but also in areas you may deem not reasonably accessible. You are obliged to preserve potentially relevant evidence from both these sources of ESI, even if you do not anticipate producing such ESI.

The demand that you preserve both accessible and inaccessible ESI relevant to this matter is limited, reasonable, and necessary. State and federal laws require that you preserve and at the appropriate time produce all sources of ESI.

For good cause shown, the court may order production of the ESI, even if it finds that it is not reasonably accessible. Accordingly, even ESI that you deem reasonably inaccessible must be preserved in the interim so as not to deprive the ACLU of Missouri's potential clients their right to secure the evidence or the Court of its right to adjudicate the issue.

## **II. Preservation Requires Your Immediate Intervention**

**You must act immediately** to preserve potentially relevant ESI created or retained beginning on January 1, 2021, that falls within the definition set forth in Part I.

Adequate preservation of ESI requires more than simply refraining from efforts to destroy or dispose of such evidence. **You must also intervene to prevent loss due to routine operations and employ proper techniques and protocols suited to protection of ESI.** Be advised that sources of ESI are altered and erased by continued use of your computers and other devices. Booting a drive, examining its contents or running any application will irretrievably alter the evidence it contains and may constitute unlawful spoliation of evidence. Consequently, alteration and erasure may result from your failure to act diligently and responsibly to prevent loss or corruption of ESI.

Nothing in this demand for preservation of ESI should be understood to diminish your concurrent obligation to preserve documents, tangible things and other potentially relevant evidence.

## **III. Suspension of Routine Destruction**

You are directed to immediately initiate a litigation hold for potentially relevant ESI, documents and tangible things, and to act diligently and in good faith to secure and audit compliance with such litigation hold. You are further directed to immediately identify and modify or suspend features of your information systems and devices that, in routine operation, operate to cause the loss of potentially relevant ESI.

Examples of such features and operations include:

- Purging the contents of e-mail repositories by age, capacity or other criteria;
- Using data or media wiping, disposal, erasure or encryption utilities or devices;
- Overwriting, erasing, destroying or discarding back up media;
- Re-assigning, re-imaging or disposing of systems, servers, devices or media;
- Running antivirus or other programs effecting wholesale metadata alteration;
- Releasing or purging online storage repositories;
- Using metadata stripper utilities;
- Disabling server or IM logging; and
- Executing drive or file defragmentation or compression programs.

#### **IV. Preservation in Native Form**

You should anticipate that certain ESI, including but not limited to spreadsheets and databases, will be sought in the form or forms in which it is ordinarily maintained. Accordingly, you should preserve ESI in such native forms, and you should not select methods to preserve ESI that remove or degrade the ability to search your ESI by electronic means or make it difficult or burdensome to access or use the information efficiently in the litigation.

You should additionally refrain from actions that shift ESI from reasonably accessible media and forms to less accessible media and forms if the effect of such actions is to make such ESI not reasonably accessible.

#### **V. Metadata**

You should further anticipate the need to disclose and produce system and application metadata and act to preserve it. System metadata is information describing the history and characteristics of other ESI. This information is typically associated with tracking or managing an electronic file and often includes data reflecting a file's name, size, custodian, location and dates of creation and last modification or access. Application metadata is information automatically included or embedded in electronic files but which may not be apparent to a user, including deleted content, draft language, commentary, collaboration and distribution data and dates of creation and printing. Be advised that metadata may be overwritten or corrupted by careless handling or improper steps to preserve ESI. For electronic mail, metadata includes all header routing data and Base 64 encoded attachment data, in addition to the To, From, Subject, Received Date, CC and BCC fields.

#### **VI. Servers**

With respect to servers like those used to manage electronic mail (e.g., Microsoft Exchange, Lotus Domino) or network storage (often called a user's "network share"), the complete contents of each user's network share and e-mail account should be preserved. There are several ways to preserve the contents of a server depending upon, e.g., its RAID configuration and whether it can be downed or must be online 24/7.

#### **VII. Home Systems, Laptops, Online Accounts and Other ESI Venues**

Though we expect that you will act swiftly to preserve data on office workstations and servers, you should also determine if any home or portable systems may contain potentially relevant data. To the extent that you have sent or received potentially relevant e-mails or created or reviewed potentially relevant documents away from the office, you must preserve the contents of systems, devices and media used for these purposes (including not only potentially relevant data from portable and home computers, but also from portable thumb drives, CD-R disks and the user's PDA, smart phone, voice mailbox or other forms of ESI storage.). Similarly, if you used online or browser-based email accounts or services (such as Facebook, Twitter, AOL, Gmail, Yahoo Mail or the like) to send or receive potentially relevant messages and attachments, the contents of these account mailboxes (including Sent, Deleted and Archived Message folders) should be preserved.

## VIII. Paper Preservation of ESI is Inadequate

As hard copies do not preserve electronic searchability or metadata, they are not an adequate substitute for, or cumulative of, electronically stored versions. If information exists in both electronic and paper forms, you should preserve both forms.

## IX. Agents, Attorneys and Third Parties

Your preservation obligation extends beyond ESI in your care, possession or custody and **includes ESI in the custody of others that is subject to your direction or control**. Accordingly, you must notify others in possession of potentially relevant ESI to preserve such ESI to the full extent of your obligation to do so, and you must take reasonable steps to secure their compliance.

## X. Do Not Delay Preservation

I am happy to discuss reasonable preservation steps; however, you should not defer preservation steps pending such discussions if ESI may be lost or corrupted as a consequence of delay. Should your failure to preserve potentially relevant evidence result in the corruption, loss or delay in production of evidence to which the ACLU of Missouri's potential clients are entitled, such failure would constitute spoliation of evidence, and could result in sanctions.

## XI. Confirmation of Compliance

Please confirm that you have taken the steps outlined in this letter to preserve ESI and tangible documents potentially relevant to this action. If you have not undertaken the steps outlined above, or have taken other actions, please describe what you have done to preserve potentially relevant evidence.

/s/ Gillian R. Wilcox

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