

**Palgut v. City of Colorado Springs**  
**2006 WL 3483442 (D.Colo., November 29, 2006)**

United States District Court, D. Colorado.  
Karyn S. PALGUT Plaintiff  
v.  
CITY OF COLORADO SPRINGS Defendant  
**No. CIVA 06CV01142 WDMMJ.**

Nov. 29, 2006.

WATANABE, Magistrate J.

**Electronic Discovery Plan and Order to Preserve Evidence**

**I. Purpose of the stipulation and order**

The purpose of this Order is to expedite discovery and reduce the costs of litigation to the parties and to the Court.

**II. Definitions**

“Relevant Information” refers to time and subject matter. Unless otherwise specified in a request for Relevant Information, the request covers the period of January 1, 1998 forward. Relevant Information is any information relating to the following subject matters:

- a. Operations of the CSFD, the Civil Service Commission, the City Human Resources Department, the City Managers' office, the Information Technology Department, and the City Attorney's office;
- b. Complaints and investigation of sex or age discrimination against employees of the CSFD;
- c. Richard Kramer's investigation of Plaintiff's complaint;
- d. Raw data necessary to conduct a statistical analysis of the age and gender distributions among applicants and sworn employees of the CSFD (including trainees); and

e. Compilations of statistical information regarding age and gender distributions among applicants and sworn employees of the CSFD.

Relevant Information is limited to information in the possession, custody, or control of Defendant that is, or has been, stored in a digital format (unless the information currently exists only in non-electronic form, in which case, the non-digital form is requested).

“Document,” “data,” “electronic information,” or synonyms thereof, mean documents or electronically stored information referred to in Fed.R.Civ.P. 34, as amended by the impending December 2006 amendments to that rule (including information stored in video and photographic devices), and the more detailed definition of same below. *See* Sec. VIII, *infra*.

Other important definitions are also located in Sec. VIII, *infra*.

### **III. Discovery protocols**

#### **A. Form of electronic information production**

During this case, if requested information is or has been stored or located in native (eg. .doc, .xls, .pst) formats (not .tiff images), any requests for “documents,” or “data” shall be deemed a request for information in *native format*. If either party objects to producing the requested information on the ground that production in that format is not reasonably accessible because of undue burden or cost, prior to asserting an objection, the responding party will inform the requesting party of the format in which it is willing to produce it, the nature and location of the information claimed to not be reasonably accessible, the reason(s) why the requested form of production would impose an undue burden or is unreasonably costly, and afford the requesting party 10 working days (calendar days minus weekends and state or federal holidays) from receipt of such notice to propose an alternative means of compliance with the request, including payment of all or part of the costs of retrieving the information.

If a responsive document was formerly in electronic form, but is no longer retrievable, or no longer retrievable in that form, the responding party shall explain where and when it was last retrievable in electronic format and why it is no longer retrievable in that format.

#### **B. Objections to producing electronic information**

If either party objects to producing electronic information on the ground that its content is not reasonably accessible because of undue burden or cost, prior to asserting an objection, the responding party will inform the requesting party of the electronic information it is willing to produce, the nature and location of the information claimed to not be reasonably accessible, the reason(s) why the requested production would impose

an undue burden or is unreasonably costly, and afford the requesting party 10 working days (calendar days minus weekends and state or federal holidays) to propose an alternative means of compliance with the request, including payment of all or part of the costs of retrieving the information.

### **C. Interrogatories, document requests, and requests for admissions**

Interrogatories, document requests, requests for admission, and responses thereto, shall be transmitted in a format that eliminates the need for the receiving party to retype the original request or response.

### **IV. Informal exchange of information**

To assist the Plaintiff in focusing future discovery of relevant electronic evidence, the “parties” computer experts will informally cooperate and discuss procedures or protocols to facilitate identification, retrieval and production of computerized information. This responsibility shall be continuing, unless otherwise ordered by the Court.

### **V. Order preserving evidence**

Neither party may alter, interlineate, destroy, or permit the destruction of any document, as defined herein, in its possession, custody, or control, without further order of court.

### **VI. Cost sharing**

The parties shall meet, confer and discuss cost allocation of production and preservation of electronic information and make a good faith effort to agree on a reasonable cost allocation. If the parties cannot agree, then the court will make the determination of cost allocation.

### **VII. Definitions**

“Application” means a collection of one or more related software programs that enable a user to enter, store, view, modify or extract information from files or databases. The term is commonly used in place of “program,” or “software.” Applications may include word processors, Internet browsing tools and spreadsheets.

“Backup” means to create a copy of data as a precaution against the loss or damage of the original data. Most users backup some of their files, and many computer networks utilize automatic backup software to make regular copies of some or all of the data on the network. Some backup systems use digital audio tape (DAT) as a storage medium.

Backup Data is information that is not presently in use by an organization and is routinely stored separately upon portable media, to free up space and permit data recovery in the event of disaster.

“Deleted Data” is data that, in the past, existed on the computer as live data and which has been deleted by the computer system or end-user activity. Deleted data remains on storage media in whole or in part until it is overwritten by ongoing usage or “wiped” with a software program specifically designed to remove deleted data. Even after the data itself has been wiped, directory entries, pointers, or other metadata relating to the deleted data may remain on the computer.

“Document,” “data,” “electronic information,” or synonyms thereof, means documents or electronically stored information referred to in Fed.R.Civ.P. 34, as amended by the impending December 2006 amendments to that rule, including information pertaining to video and photographic devices. These terms also include:

- All digital or analog electronic files, including “deleted” files and file fragments, stored in machine-readable format on magnetic, optical or other storage media, including the hard drives or floppy disks used by your clients' computers and their backup media (e.g., other hard drives, backup tapes, floppies, Jaz cartridges, CD-ROMs) or otherwise, whether such files have been reduced to paper printouts or not.

“Electronic device” means, but is not limited to: computer systems, including servers, networks, e-mail systems, voice mail systems, mobile or cell phones, data bases, desktop or laptop computers, telephone message records or logs; computer and network activity logs; electronic calendars; scheduling and rolodex systems; electronic messaging (text or instant messages) systems, PDAs, MP3 players (including i-Pods), digital cameras, digital video; or other digital recordings or transcripts thereof; any devices with memory cards and flash drives (also known as thumb drives or key chain drives), CD's, DVD's and backup or archival tapes or other similar storage media, including but, not limited to, computerized files, storage media (including but not limited to floppy disks, hard drives, CD-ROMS, zip disks, punch cards, magnetic tape, backup tapes, and computer chips) on which information has been saved, and any and all equipment needed to read any such material.

“Hard Drive” means the primary storage unit on PCs, consisting of one or more magnetic media platters on which digital data can be written and erased magnetically.

“Identify,” “describe,” or “explain,” mean to provide enough information so that the other party obtains the information requested. If you are unsure of the nature or scope of the request, ask the requesting party to clarify. If documents will answer the question, produce the documents instead of answering the question. You must use good faith in identifying information requested by the requesting party.

“Mirror Image” is a sector-by-sector copy of a computer hard drive that ensures the operating system is not altered during the forensic examination.

“Native format” means all documents that are created in digital format (word processing files, spreadsheets, presentations, and E-mail) have a native file format-that is, a format designed specifically for the most efficient use of the information in which this kind of software specializes. *Judge's Guide*, supra at 73.

“Network” is a group of computers or devices that is connected together for the exchange of data and sharing of resources.

“Operating system (OS)” is the software that the rest of the software depends on to make the computer functional. On most PCs this is Windows or the Macintosh OS. Unix and Linux are other operating systems often found in scientific and technical environments. “Possession, custody, or control” includes any information in the possession of others which can be obtained through a request, order or direction, including information which the party has a legal right, authority, or ability to obtain upon demand in the possession of another, as well as information in the possession or control of its agents, attorneys, and contract health care providers. *See generally, Klesch & Co. Ltd. v. Liberty Media Corp.*, 217 F.R.D. 517, 520 (D.Colo.2003).

“Software” is the coded instructions (programs) that make a computer do useful work.

Ordered this 29<sup>th</sup> day of November, 2006, *nunc pro tunc* to November 21, 2006.

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Craig M. Cornish, Ian David Kalmanowitz, Cornish & Dell’Olio, Colorado Springs, CO, for Plaintiff.

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