The City University of New York

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M E M O R A N D U M

To: The University Community

From: Frederick P. Schaffer
General Counsel & Senior Vice Chancellor for Legal Affairs

Re: E-Discovery

It has come to my attention that some faculty members are concerned about the University's electronic discovery (or E-Discovery) process. In an effort to clarify any misunderstandings, I am writing to explain the process and CUNY's legal obligations.

Introduction: Discovery

"Discovery" is the process by which relevant information is exchanged between parties in a lawsuit. As part of this process, parties exchange relevant documents and electronic records.

Federal and state courts have recognized that electronic data is subject to the same discovery rules as other evidence relevant to a lawsuit. Parties have a legal duty to preserve all evidence, whether hard copy or electronic, that might become relevant in a lawsuit. On December 1, 2006, the Federal Rules of Civil Procedure were amended to address the discovery of electronic records. Failure to properly preserve the records may result in the imposition of harsh sanctions by courts.

The new federal rules require a party to preserve electronic information and, therefore, to suspend routine or intentional purging, overwriting, reusing, deleting, or any other destruction of electronic information that may be relevant to a dispute. This requirement holds wherever such information is stored—at the office desktop, a laptop, a PDA or even a home computer if the employee works at home.

The law requires that the relevant records (electronic and hardcopy) be preserved as soon as the institution reasonably anticipates litigation of the matter. In most instances the complainant will have filed a litigation or formal complaint with an outside agency. When a formal complaint has not yet been filed, counsel must make an initial determination as to

whether a claim or dispute is reasonably likely to lead to litigation; for example, such a determination might result from a letter from a complainant's attorney threatening litigation. If, after reviewing the specific circumstances, counsel determines that the matter is reasonably likely to lead to litigation, the client must undertake the required process of preserving potentially relevant records. At this early state, it is difficult to ascertain which records might be relevant. Accordingly, the process of collecting and preserving potentially relevant records is necessarily over-inclusive so that relevant records are not erased or destroyed, even inadvertently.

The Discovery Process at CUNY

Each President or Dean of the educational units that comprise CUNY has designated an Information Technology Designee (IT Designee) to work with the Legal Affairs Designee (LAD) and his/her staff to manage discovery on campus. As an initial matter, when the Office of the General Counsel (OGC) has determined that a claim or dispute is likely to lead to litigation, it will identify the individuals who might have information required to be preserved. OGC will then send such individuals a "litigation hold notice" alerting them to preserve all electronic or hardcopy records relating to the matter. In addition, the college IT Designee will take steps to make sure that the employee's electronic records stored on the college's central system are not inadvertently deleted by preserving copies on a secure restricted-access encrypted server of that individual's e-mail mailbox from the official college e-mail address and computer files from the individual's network storage location. **These steps are to insure preservation and not to review the contents of any preserved files.**

After these initial preservation steps are taken, the LAD and IT Designee will meet with each individual to identify and collect any relevant electronic and hardcopy documents that are legally required to be preserved. These records will be held in a secure location until either OGC or CUNY's outside attorneys (the State Attorney General's office for senior colleges and the City Law Department for community colleges) direct that additional action be taken, including applying key-word searches or other methods to identify the electronic records that contain relevant information and, therefore, must be reviewed by attorneys. The intent is to limit the review of files to only those identified as containing information relevant to the litigation.

Confidential Materials and Faculty Research

The E-Discovery process includes several safeguards to protect any confidential materials and faculty research, including human subject research. Any information that is initially preserved from a college email account or individual user drive on the college server is preserved on a secure restricted access server and encrypted. The purpose of the meeting with the LAD, IT Designee and faculty member or other employee is to limit the collection as much as possible to those electronic files that are relevant to the litigation. In general, confidential information, including research and data related to research, will not be collected unless that information is somehow relevant to the claims in the litigation. If such information is collected, it will be stored on the secure server and encrypted and not reviewed unless OGC determines that such

review is legally required. In addition, even if it is determined that such review is legally required and the documents are relevant, CUNY has the legal right to object to the production of those documents or to seek a protective order from a court on the ground that they constitute confidential or privileged material.

Conclusion

All of the steps in the process conform to law and to CUNY's computer use policy, which, among other things, permits the monitoring or inspecting of activity and accounts of individual users of CUNY computer resources without notice as required by law and when reasonably necessary to protect CUNY from liability. The University is sensitive to the concern that information stored in electronic form is susceptible to disclosure and loss. Because of these concerns, the E-Discovery process includes safeguards such as restricted-access secure servers and encryption of electronic files to protect the information while satisfying CUNY's legal obligations.