



Drew Macaulay

# ELECTRONIC DISCOVERY

## SUBJECT ACCESS

Continuing our feature looking at electronic discovery, *Lawyer Monthly* speaks to Drew Macaulay, Managing Director of Consilio. Drew is based in London and has overall responsibility for service delivery for all projects in Europe and Asia. Consilio provides electronic disclosure and managed document review services to corporations and law firms involved in litigation, arbitration and regulatory or internal investigation matters. The company was founded in the U.S. in 2002 and has grown over time to become one of the most international electronic disclosure service providers with offices across the US, EU and Asia. Key specialisms include projects related to financial services compliance, anti-bribery and competition/antitrust. In essence, our focus is on reducing cost and creating efficiencies through appropriate outsourcing of review tasks and the use of innovative technology.

*“Subject Access Requests are frequently used by existing or former employees in an impending employment dispute”*

Drew has been involved with legal technology for over ten years and started his career specialising in courtroom technology for Civil and Criminal litigation as well as Public Inquiries and high profile Inquests. Eventually, the business for which he was working was acquired by a US-based electronic discovery company and the focus of his work shifted from courtroom technology to pre-trial disclosure consulting. In 2010 he joined Consilio and was initially responsible for Consulting Services and Business Development in the UK. Over time Drew's role has changed to meet the needs of the business but he is still regularly involved in hands on project work, particularly for larger and more complex engagements. In one such matter for a large UK bank Drew is directing the work of 30 technical staff and more than 100 Consilio contract lawyers on a multi-billion pound High Court litigation, so there is plenty to keep him busy!

**Please tell me a little about the typical types of cases you work on related to Electronic Discovery?**

Consilio specialises in large scale and international projects involving the collection, processing, searching and review of electronic documents for litigation, arbitration and regulatory or internal investigations. A typical matter will involve a multinational corporate client which is involved in a dispute or

investigation and needs to undertake a disclosure exercise. The disclosure exercise will usually involve a number of different stages, including collection of electronic data from corporate IT systems and mobile devices, processing and searching the electronic data to identify documents of potential relevance, the review of those documents using purpose-built disclosure software and the production of relevant documents following review.

In recent years, much of our work has been for clients in the financial services sector. In addition to the litigation matters common to many large corporations, financial services entities are highly regulated and are often the subject of investigations into conduct of business. These investigations may be internally or externally initiated and can involve the review of millions of documents over months and sometimes even years. At the end of the process huge fines can be levied by the regulator, and follow-on litigation is becoming ever more commonplace, so in-house legal and compliance teams are under significant pressure to resolve these investigations quickly and effectively, even though they may involve searching and review of emails, audio files and chat room transcripts for hundreds of employees.

We are increasingly involved in supporting Subject Access Requests which, while they

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The proliferation of electronic data in terms of volume and type has added further complexity to the process, with the majority of our projects now involving the processing of millions of documents in a range of formats from email and MS Office to Bloomberg chatroom transcripts, telephone recordings and data from social media applications.

do not usually involve significant volumes of data from large numbers of employees, can be challenging for corporate Legal and HR teams due to the very short deadlines involved. A Subject Access Request is a demand made by a person under section seven of the Data Protection Act 1998 for any data an organisation holds about them. The organisation must

produce the information within 40 days of the request, and given the complexity and scale of some corporate IT systems this can be a daunting task. The company must first identify the locations and formats in which relevant information is stored, collect the documents that mention the subject in question then perform a

been within this context that Consilio has been engaged. While we do not provide any legal advice in relation to the dispute itself, the technology and workflow techniques used in investigations and litigation disclosure exercises lend themselves very well to reducing the cost and time taken to respond to a SAR.

according to instructions agreed with the client. While you would perhaps expect that the instructions would be fairly consistent between clients, the reality is that in practice the amount of information that needs to be redacted to satisfy personal data or other confidentiality undertakings varies according to client-specific policies, so careful training, management and quality control is required to produce consistently high-quality results.



review and redaction exercise to confirm the relevance of the information to be disclosed. The company must also excise from the disclosable material any information that may be legally privileged or that may reference other employees (whose data the organisation is bound to protect!). In practice, this redaction exercise can be quite time consuming, as the amount of data involved can be significant – it is not uncommon for more than 80% of the documents reviewed to be redacted.

In the early stages, our consultants and forensic experts will assist with the identification and collection of the sources of potentially relevant documents before the resulting data is “processed” or converted into a searchable database against which keyword, date range or other more complex searches can be performed. Once the potentially relevant documents have been identified they are loaded into a specialist eDisclosure platform to enable our teams of contract lawyers undertake a review exercise

### **What common challenges do you face within this subject area and how do you navigate them?**

We typically act for clients who, on receipt of a SAR, are faced with a substantial review exercise. Therefore, our experience is that the main challenges are reviewing and producing the SAR documents within the 40 calendar day timescale, and carrying out the work as cost-effectively as possible, as clearly the nominal £10 fee paid by the subject for a SAR does not stretch very far! Thankfully over the years we have built up a large pool of experienced and screened contract lawyers, which allows us to put together large review teams of 30-40 lawyers in just a couple of days.

### **Have there been any major legislative changes that have affected this sector recently? Can you tell me about them?**

There have been no legislative changes in relation to the Data Protection Act (section 7 of which creates the right to subject

### **Can you tell me specifically about your work in relation to Subject Access Requests?**

Subject Access Requests are frequently used by existing or former employees in an impending employment dispute as an inexpensive method by which to obtain relevant documents, and it has generally

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access). However, potentially wide-ranging changes to the data protection sector are on the horizon as a result of the proposed EU Data Protection Regulation. This is currently expected to come into being at the end of this year. Rather than individual EU member states setting (subject to the minimum protection required by the EU Data Protection Directive of 1995) and policing their own data protection laws, the law would become harmonised across the EU and enforcement centralised in a single body. There is too much detail to go into here, but one of the aims of the Regulation is to give individuals easier access to their own data. The burden of complying will inevitably to be shouldered by the organisations holding that data.

**How would you change the regulatory framework surrounding this area, if you had the power? Why?**

The difficulty here is balancing the protection of individual rights against the administrative burden protecting those rights creates on organisations. Whether you think that the SAR process needs changing will very much depend on your personal and political views of where the balance should lie. For example, the owners of businesses are likely to be in favour of relaxing the rules when (in their minds) it comes to onerous or nuisance SAR requests, whilst individual customers are no doubt in favour of the status quo. Similarly,

those citizens in countries with a history of the invasion of personal rights (for example, Germany) are more likely to be in favour than those who come from countries who have not had a similar experience (for example, the UK).

**What do you think the next 12 months holds for Electronic Discovery?**

I expect that the volume and variety of data that needs to be collected, reviewed and produced for litigation and especially investigations will continue to rise, so the use of machine learning technologies such as predictive coding to identify and categorise relevant material will become more and more common, and will be used on a wider range of source data types. I would also expect to see fewer law firms running large internal eDisclosure departments as the requirement to invest regularly in up-to-date processing and review technology or expensive information security provisions makes it less attractive from a profitability standpoint. **LM**

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