

Defendants' discovery requests before finishing by discussing Wisconsin's legal standard for imposition of sanctions for spoliation — an issue not yet raised by Defendants.

At bottom, the State's response does not dispute what *is* relevant to Defendants' motion: (1) it has a legal duty to preserve relevant documents; (2) it knows where those relevant documents exist; and (3) it has taken virtually no steps to preserve them.

Accordingly, the Court should order the State, at a minimum, to preserve those documents it already knows are relevant to this litigation.¹

I. THE STATE DOES NOT DISPUTE THAT IT HAS A DUTY TO PRESERVE RELEVANT DOCUMENTS AND THAT IT HAS FAILED TO DO SO.

The State has either admitted or failed to contest each of the following core facts presented in Defendants' motion:

- As a party to this lawsuit, the State has a legal duty to preserve relevant documents.²
- Relevant documents are likely to be found both within and outside of the Department of Health and Family Services ("DHFS").³
- The State has not ordered all pertinent areas *within DHFS* to preserve their documents, including taking steps to preserve documents of pertinent State employees upon their departure from government employment.⁴
- The State has not ordered those State entities *outside DHFS* with relevant documents to refrain from "processing" their documents "in the ordinary course of business."⁵

In an attempt to justify its failings, the State argues that *Defendants* are obliged to identify relevant documents, and that this obligation extends not only to identifying the

¹ See Wisconsin Practice, Civil Procedure Form § 58:93 (example preservation order attached).

² See State's Brief in Response to "Defendants' Motion to Require Plaintiff to Preserve Potentially Relevant Documents" ("Response Brief") at 10; Defendants' Motion to Require Plaintiff to Preserve Potentially Relevant Documents ("Motion") at 5.

³ See Response Brief at 10; Motion at 3.

⁴ See Response Brief at 9; Motion at 3-4.

⁵ See Response Brief at 13; Motion at 4.

present location of such documents but also to the scope of the order necessary to ensure that all such documents are preserved.⁶ The State confuses its obligations with that of Defendants. It is not Defendants' burden to tell the State where it keeps its relevant and responsive documents – indeed, the Defendants could not possibly know exactly which departments or entities within the State possess these documents.

Furthermore, despite its protestations to the contrary, the State should have no trouble ascertaining where responsive documents exist and issuing a hold order. Indeed, the State's own designee, Mr. Vavra, testified under oath to numerous areas within State government likely to possess responsive documents, and the types of documents likely responsive to Defendants' discovery requests.⁷ At a minimum, the State should start there, but for reasons known only to it, it has declined to do so. Nor is it Defendants' obligation to draft a preservation order for the State. The burden of crafting and defining the scope of a preservation order to ensure compliance with the law — as well as determining to whom this order must be issued — is squarely on the State.⁸

The State also attempts to justify its failure to comply with its duties by arguing that the scope of certain definitions contained in Defendants' discovery requests are overly

⁶ See Response Brief at 4.

⁷ See Motion at 3-4.

⁸ See General Records Schedule for Budget and Budget Related Records at 5 (March 2002) (“It is the responsibility of the office holding the record to determine if an audit, litigation, or an open record request is pending, before disposing of that record.”), attached to Motion as Exhibit F; Wisconsin Department of Administration (“DOA”), Primer, *Electronic Records Management: Guidance on ADM 12* (Nov. 19, 2001) (“Under unusual circumstances, such as pending litigation, open audit, or a request for the records under Open Records laws, government agencies must delay disposition of records until the circumstance is resolved.”)(emphasis added); DOA, Division of Technology Management, *Statewide Enterprise E-mail Policy & Guidance Updated Draft*, at 15 (Oct. 19, 1999) (“If an agency program determines that e-mail communications may be required as evidence...it should develop policies and procedures to ensure consistent and reliable management of e-mail. All e-mail messages, including personal communications, may be subject to discovery in legal actions.”). See also, *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217-218, 92 Fair Empl.Prac.Cas. (BNA) 1539 (S.D.N.Y. 2003) (holding that “[o]nce 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.”).

broad. This is a misdirection play. Arguing about whether former legislators are properly subject to the duty to preserve documents or whether the State needs to retain documents at the Veteran's Home in King, Wisconsin, ignores the simple fact that the State is aware of the location of many responsive documents and has not taken adequate steps to preserve them. The State's hand-selected witness on the subject of the location of responsive documents, Mr. Vavra, had no trouble identifying numerous areas within State government in possession of potentially responsive documents. The State has done little or nothing to preserve those documents.

Similarly, quibbling about the definition of "documents" or other terms in discovery requests misses entirely the point of the motion. Definitions in the discovery requests have no bearing on the State's legal duty to preserve documents relevant to this litigation.⁹ More to the point, the State's belief that certain definitions in the Defendants' discovery requests are overly inclusive does not relieve the State from its obligation to take affirmative steps to preserve documents, much less give the State carte blanche to do nothing to preserve them, as it argues.

The State intermittently argues that it should not be required to preserve documents because Defendants' discovery requests are wide-ranging. Putting aside that one would expect the Defendants' requests to be extensive given the size, scope and timeframe of the case the State has chosen to pursue, the State's claim of overly broad discovery does not give it the right to unilaterally determine it will not take steps to preserve any documents responsive to those requests.

⁹ Defendants presented these definitions to the State more than a year after the State's legal duty to preserve documents arose. The State failed to object to at least one of these definitions in its previous discovery responses and uses a very similar definition of the term "document" in its First Request for Production. This brief is an inappropriate procedural forum in which to raise such objections, which are better left to a motion for protective order.

II. THE STATE MISCHARACTERIZES ITS LEGAL OBLIGATIONS AND ARGUES ISSUES NOT RAISED IN THE DEFENDANTS' MOTION

Curiously, the State argues that Defendants lack the requisite proof for the imposition of sanctions for spoliation of evidence.¹⁰ Whether the State is correct about this or not is irrelevant to the motion currently before the Court. Defendants have not yet asked for the imposition of sanctions for the spoliation of evidence, but rather are moving for an order requiring Plaintiff to preserve potentially relevant documents. The State can save these arguments for its response to any future motion relating to the State's spoliation of documents.

If this Court has the power to impose sanctions for the destruction of evidence - as the State admits - the Court surely has the inherent power to order a party to take steps to preserve documents in advance of their destruction. The scope of such an order must be broader than the standard for punishing the destruction of documents, as it is still unclear precisely what documents are "essential or crucial" at this point in the litigation.¹¹

Finally, the State displays evident disregard for its obligations as a litigant in its high-handed proclamations that the Defendants' discovery requests are "annoying" and that it has "given the defendants all the evidence necessary, essential, or even crucial to the claims being made and the defenses tendered."¹² Not only is this blatantly factually

¹⁰ See Response Brief pp. 8-9.

¹¹ Because the State cannot know at this point in time what documents are "essential or crucial" to this litigation, it must cast a wide enough net to capture and preserve all relevant documents because any of those documents potentially are "essential or crucial" to this litigation. The State's claim that preserving all "potentially" relevant documents is unduly burdensome is undermined by the fact that the State already is aware of the existence of certain relevant documents in certain areas of the government but has done nothing to preserve these documents.

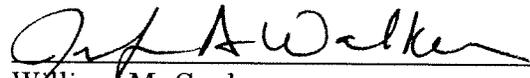
¹² See Response Brief at 2, 9.

incorrect,¹³ it again is irrelevant to the issue directly before the Court. It is not up to the State to decide what documents are “necessary, essential, or even crucial” to the defenses asserted in this litigation **and**, moreover, that is not the standard for discovery.¹⁴ Whether the State has destroyed documents “necessary, essential or even crucial” or whether the Defendants’ requests are “annoying” perhaps are issues for another motion. The issue here is whether the State is taking adequate steps to ensure documents responsive to the Defendants’ requests are being preserved. Clearly, it is not.

CONCLUSION

For all the foregoing reasons, the State should be ordered to do what all litigants must do and what it has not done: take appropriate steps to preserve all potentially relevant documents.

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¹³ The State is still producing documents, and has to date failed to produce certain types of responsive documents (i.e., e-mails).

¹⁴ Wis. Stat. § 804.01.

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