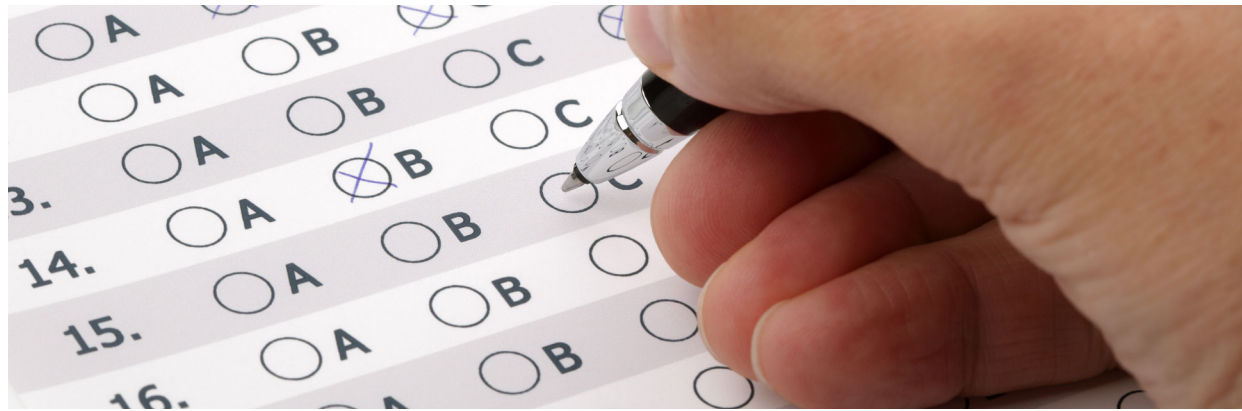


## Seventh Annual Benchmarking Study of Electronic Discovery Practices for Government Agencies



### Executive summary

Deloitte has surveyed federal government legal professionals since 2007 about their experiences with eDiscovery<sup>1</sup>. It has become increasingly apparent that as government legal professionals contend with increasing volumes of electronically stored information (ESI) during the discovery process, they recognize the value of eDiscovery technology to help manage that data volume. However, when it comes to the details associated with eDiscovery tools, processes, and human support, there are gaps that are causing increased concern among attorneys. Top findings of the 2013 survey<sup>2</sup> revealed that:

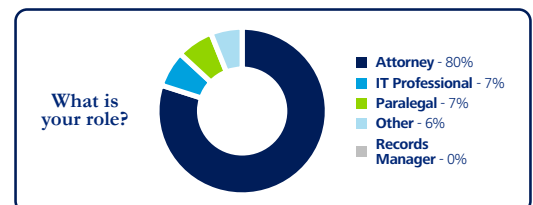
#### Confidence is all over the map when it comes to critical areas relating to eDiscovery:

- Fewer legal professionals feel “Less confident” in their ability to manage eDiscovery when compared to last year.
- However, when it comes to dealing with the challenges of eDiscovery today, far fewer attorneys feel that their agencies can do so effectively.
- Also, more than twice as many respondents expressed a lack of confidence that, if challenged, their agency can demonstrate the overall quality of the electronically stored information (ESI) used for eDiscovery.
- And, when dealing with opposing counsel, there was a significant decrease among respondents in 2013 who felt adequately prepared to discuss eDiscovery matters. There was a corresponding decrease in the percentage of respondents who felt they had adequate technical support for those discussions.

**Data issues became the top challenges in identifying relevant ESI**, a reflection of the importance and complexity that increased amounts of data, as well as its quality and availability, represent for eDiscovery and reinforcement of the concern about attorneys’ technical ability to address those growing data issues.

### Our survey respondents

This year, for the first time, Deloitte conducted the survey at the annual Electronic Discovery Symposium for Government Agencies. One hundred twenty-three professionals across multiple government agencies participated in the survey. Most (80 percent) were attorneys, followed by IT professionals and paralegals. Nearly all of the respondents said their roles involved handling, processing, and reviewing of electronically stored information (ESI).



<sup>1</sup> From 2007 to 2011, this survey was performed by IE Discovery, which was acquired by Deloitte in 2012.

<sup>2</sup> Data for this survey was collected during spring 2013.

#### About Deloitte

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### Confidence varies in critical areas

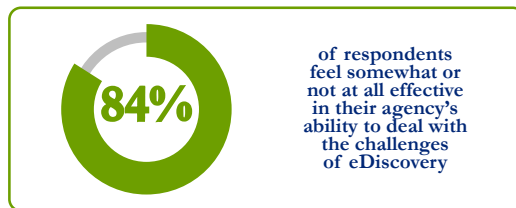
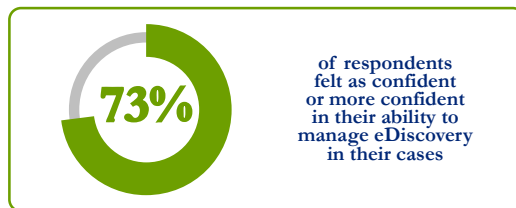
Respondents' confidence in managing eDiscovery has leveled off this past year after dipping precipitously from 90 percent in 2011 to 74 percent in 2012. In 2013, 73 percent of respondents felt "About the same" or "More confident" while only 20 percent expressed that they were "Less confident."

However, they didn't feel the same way about their agencies: Only 59 percent of respondents this year felt their agencies were "Very effective" or "Somewhat effective" in dealing with the challenges of eDiscovery, as opposed to 73 percent of respondents last year – a marked decline.

Similarly, far fewer attorneys felt confident that, if challenged, their agency can demonstrate that their ESI is accurate, accessible, complete and trustworthy. In fact, "Somewhat confident" responses dropped steeply from 68 percent in 2012 to 38 percent in 2013, while "Not at all confident" responses jumped from 23 percent in 2012 to 42 percent in 2013.

The survey does not attempt to correlate confidence levels with other influences. But it is likely that increasing scrutiny of eDiscovery processes and pressure on attorneys to adhere to ethics standards for competence may be raising concerns about attorneys' and agencies' ability to withstand scrutiny in this area.

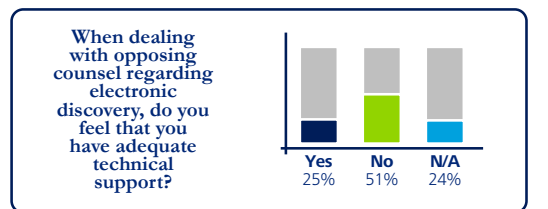
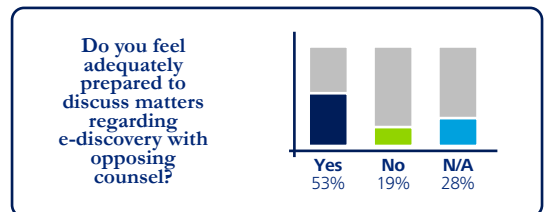
As reported in last year's findings, another influence could be the industry push toward more advanced analytical tools. Data volumes continue to increase across cases, as well. While government attorneys acknowledge that technology can help them digest and filter this information faster, the new technology often requires updated processes and technical skills that may be missing in agencies today.



### Less prepared to address eDiscovery matters with opposing counsel

In another significant change from 2012, only 53 percent of respondents said they felt *adequately prepared* to discuss matters regarding eDiscovery with opposing counsel, a sharp decline from the 90 percent who answered that way last year. Moreover, the percentage of respondents who felt they have adequate technical support when dealing with opposing counsel dropped by more than half, from 53 percent in 2012 to 25 percent in 2013.

These findings support the notion that awareness is growing among attorneys about the challenges they face with regard to eDiscovery tools, processes, and skills. Agencies that simply purchase and implement technology often realize months, even years, later that their internal processes and skill-sets aren't aligned with the capabilities of that technology. As a result, well-intentioned procurement of eDiscovery technology ends up hobbling attempts to streamline and improve discovery processes.



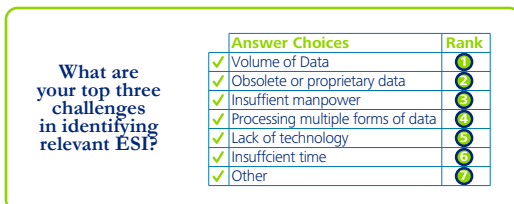
<sup>4</sup>Patricia Dees, "Putting the "Dash" in Dashboards," American Society of Military Comptrollers, January 2009.

<sup>5</sup>Gabriel Fuchs, "Dashboard Best Practices," LogiXML White Paper, 2010: 3.

<sup>6</sup>City of Oxnard, California, AssetWorks Case Study, 2009: 3.

## Demand for personnel, technology remains high

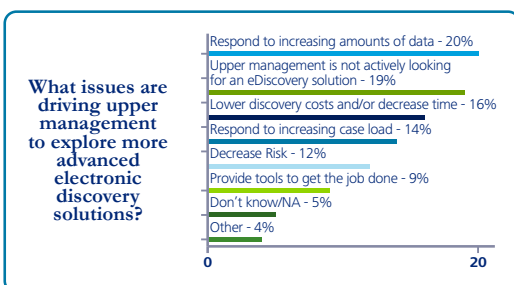
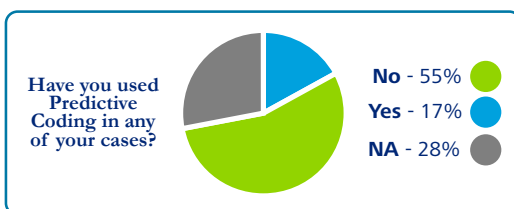
When asked about their top three challenges in identifying relevant ESI, respondents this year named *volume of data* and *obsolete or proprietary data* as their top two concerns, a significant change. This finding confirms the idea that even with technology; respondents are struggling to keep up with the constantly growing data volume and complexity of mining it that accompanies discovery today.



## Predictive coding still scarce

In 2013, 17% of respondents acknowledge use of predictive coding in their cases, same as in 2012. This continues to be far lower than in the private sector, where 35 percent of respondents use technology-assisted review<sup>3</sup>.

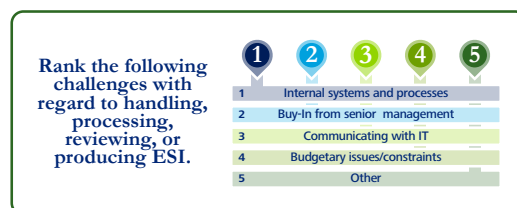
How likely is this to change? As with last year, the ability to *respond to increasing amounts of data* was the top issue and is still driving upper management to explore more advanced electronic discovery solutions. A close second this year was *lower discovery costs and/or decrease time*, and *respond to increasing case load* was third. Typically when agency leaders feel increasing pressure on their budgets, deadlines, and resources, their motivation increases to seek remedies. If this upward pressure continues, we may start to see more agencies employ technology-assisted review.



## Buy-in from senior management moves into the spotlight

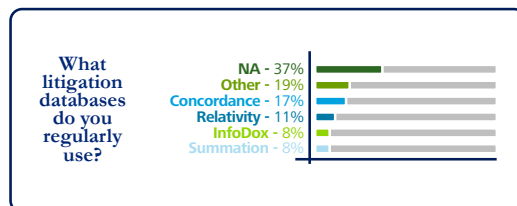
For the sixth year in a row, *internal systems and processes* remained the top challenge respondents had with handling, processing, reviewing, or producing ESI in compliance with the Federal Rules of Civil Procedure. However, for the first time *buy-in from senior management* rose to the second spot, supplanting *communicating with information technology (IT) departments and budgetary issues/constraints*.

This finding doesn't necessarily imply that the other two have diminished in importance for government agencies. Instead, growing pressure to address budget constraints, especially in the context of "sequestration cuts" imposed by Congress and the President in spring 2013<sup>4</sup>, may simply be a growing demand on the attention of agency leadership and staff alike.



## Concordance is the database of choice

*Concordance* litigation databases are regularly used by 17 percent of respondents, still significantly higher than those who use *Relativity* (11 percent) and *Summation* (8 percent). However, the gap has narrowed somewhat from last year, when more than twice as many respondents used *Concordance*. Given that *Concordance* is a desktop application, it can be easier for end-users to understand and use without additional enterprise-wide assistance from IT. However, larger hosted applications may offer increased functionality, capabilities, features, and consistency of deliverables.



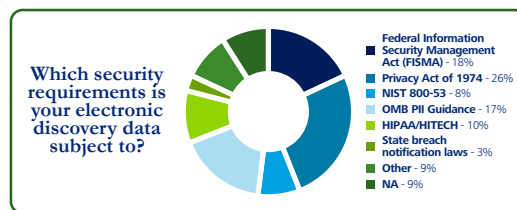
<sup>3</sup> "Fulbright's 9th Annual Litigation Trends Survey Report," Fulbright & Jaworski L.L.P., 2013.

<sup>4</sup> <http://www.whitehouse.gov/sites/default/files/2013sequestration-order-rel.pdf>.

## Security-Privacy Act of 1974 still holds sway

The most widely recognized security requirement for ESI continues to be the Privacy Act of 1974, followed by the Federal Information Security Management Act (FISMA) and OMB Personally Identifiable Information (PII) Guidance. The focus on the Privacy Act is natural when many government agencies are sensitive to PII and safeguards surrounding PII. FISMA and NIST security requirements command attention because of federal cloud-computing and FedRAMP initiatives.

Attorneys tend to be more attuned to PII and the Privacy Act, while government IT professionals are more tuned into FISMA. So the area of focus for survey respondents influences their answers to this question.



## Conclusions

Increasingly, the cases taken on by government legal staffs today involve significant amounts of eDiscovery data. Recognizing this, and under pressure from sequestration cuts to reduce costs and improve efficiency, many government agencies are making investments in eDiscovery technology.

A growing challenge for these agencies in general, and legal staffs specifically, is the need to augment technology purchases with staff who have the experience and skills to support both the technology and the people relying on the technology, especially when data volumes continue to increase and technology changes so rapidly. Moreover, implementations in other areas of government agencies, as in private enterprises, have proven that technology isn't a cure for inefficient processes. Along with necessary skill sets, agencies may benefit from an overall assessment of their eDiscovery processes in the context of any new technology deployment.

Legal staff confidence in eDiscovery should continue to grow from a big picture perspective as they learn more about what is required of them and about the tools available to help. Where more attention may be needed is a better understanding of the details of their ethical obligations relating to, and more confidence in their handling of, the technology and processes associated with eDiscovery.

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### Predictive coding still scarce

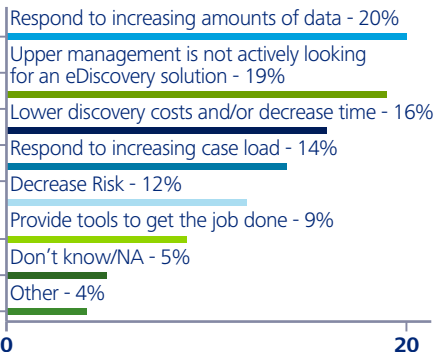
only **17%** have used it

Have you used Predictive Coding in any of your cases?



- No - 55%
- Yes - 17%
- Don't know/NA - 28%

What issues are driving upper management to explore more advanced electronic discovery solutions?



**One hundred twenty-three**

professionals across multiple government agencies participated in the survey



### Our Survey Respondents

What is your role?

- Attorney - 80%
- IT Professional - 7%
- Paralegal - 7%
- Other - 6%
- Records Manager - 0%



### Demand for personnel, technology remains high

What are your top three challenges in identifying relevant ESI?

2012

Answer Choices	Rank
✓ Insufficient manpower	1
✓ Lack of technology	2
✓ Volume of Data	3
✓ Insufficient time	4
✓ Processing multiple forms of data	5
✓ Obsolete or proprietary data	6
✓ Other	7

2013

Answer Choices	Rank
✓ Volume of Data	1
✓ Obsolete or proprietary data	2
✓ Insufficient manpower	3
✓ Processing multiple forms of data	4
✓ Lack of technology	5
✓ Insufficient time	6
✓ Other	7



### Buy-in moves into spotlight

Rank the following challenges with regard to handling, processing, reviewing, or producing ESI.



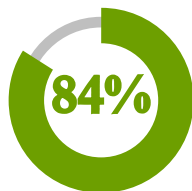
- Internal systems and processes
- Buy-In from senior management
- Communicating with IT
- Budgetary issues/constraints
- Other



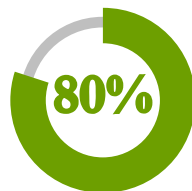
### Confidence varies in critical areas



of respondents felt as confident or more confident in their ability to manage eDiscovery in their cases



of respondents feel somewhat or not at all effective in their agency's ability to deal with the challenges of eDiscovery



of respondents feel somewhat or not at all confident that if challenged their agency could demonstrate that their ESI was "accurate, accessible, complete and trustworthy"



### Prepared to address eDiscovery

	YES	NO	N/A
Do you feel adequately prepared to discuss matters regarding eDiscovery with opposing counsel?	53%	19%	28%
When dealing with opposing counsel regarding electronic discovery, do you feel that you have adequate technical support?	25%	51%	24%