# PRACTICE DIRECTION

# GUIDELINES FOR THE USE OF TECHNOLOGY IN CIVIL LITIGATION

# Preamble

This Practice Direction is intended to provide guidance to parties and counsel regarding the use of technology in civil litigation. It was developed by a committee composed of judges and lawyers who studied issues relating to both discovery of Electronic Documents and the use of technology in litigation, and the approaches being taken in other Canadian jurisdictions.

Much of this Practice Direction addresses the problem of the exchange of Discoverable Documents in incompatible electronic formats. Incompatible formats result in increased costs and duplication of effort as receiving parties are required to manipulate documents before being able to use them. This Practice Direction establishes a Default Standard or framework for document exchange in electronic format. The purpose of the Default Standard is to provide a basic protocol that should be adequate in the majority of cases and which should guide parties when addressing and attempting to agree on a format for electronic delivery of documents. In the event the parties do not agree on a protocol for exchange, they are expected to comply with the Default Standard unless the court orders otherwise.

By encouraging parties and counsel to consider and address the use of technology, including issues related to exchange of Discoverable Documents in electronic format, as early in the litigation process as possible, it is hoped that they will avoid, as much as possible, duplication of effort and unnecessary motions, both of which delay proceedings and add to the cost of litigation.

# 1. Introduction

- 1.1 Definitions
  - 1.1.1 Technical terms used in this Practice Direction are defined in Appendix 4 Glossary of Terms.
  - 1.1.2 In this Practice Direction, "the Rules" refers to the *Queen's Bench Rules.*
  - 1.1.3 In this Practice Direction, a reference to "the court" includes the master.

1.2 Appendices

Attached to and forming part of this Practice Direction are:

- Appendix 1 A checklist of technology matters which parties may use to identify technical options and issues that may arise at various stages of the proceedings.
- Appendix 2 A sample discoverable Hard Copy document which identifies the type of information to be captured in the fields to be used for the description of documents in accordance with the Default Standard for a schedule to an affidavit of documents.
- Appendix 3 Guidelines showing how the Default Fields should be populated and suggesting possible additional fields for the description of Discoverable Documents in a database; and

Appendix 4 Glossary of Terms

# 2. Application

- 2.1 This Practice Direction applies to all civil and family proceedings, except proceedings governed by *The Court of Queen's Bench Small Claims Practices Act.*
- 2.2 In the event of a conflict between this Practice Direction and the Rules, the Rules apply.

# 3. General

- 3.1 Parties should, as early as possible, consider the ways in which the use of technology might lead to the more efficient conduct of the litigation and, in particular, its application and use in:
  - 3.1.1 Delivering Court Documents to another party;
  - 3.1.2 Communicating with another party;
  - 3.1.3 Providing copies of Discoverable Documents to another party; and
  - 3.1.4 Preparing an electronic book of documents for trial or hearing of a proceeding.
- 3.2 The court may, on motion by a party:

- 3.2.1 Order that any step before trial in the proceeding be conducted using technology, and give directions accordingly;
- 3.2.2 Where a party is not reasonably able to access Discoverable Documents produced by another party, order that such other party take steps to enable access to those documents;
- 3.2.3 Resolve disputes between the parties as to matters which are the subject of this Practice Direction other than those matters referred to in section 3.5 and give directions accordingly;
- 3.2.4 Amend, vary or revoke any order previously made under this Practice Direction; and
- 3.2.5 Make any other order that it considers appropriate.
- 3.3 On any motion brought relating to matters that might be expected to be governed by an agreed protocol as referenced in section 6, the court may take into consideration whether the moving party has made reasonable efforts to reach agreement with the other parties on an agreed protocol. Where it is apparent that the moving party has not made such reasonable efforts, the court may direct that party to take such steps to reach an agreement as the court considers reasonable, and may adjourn the motion until the moving party demonstrates that it has done so.
- 3.4 If the parties intend to use any document in electronic format at trial, they should so advise the pre-trial judge at the Pre-Trial Conference to ensure that the proposed formats and media are appropriate for the software and hardware that will be available in the courtroom.
- 3.5 A judge may, on motion by a party, order that a trial or any part of a trial be conducted using technology and make such further orders in connection therewith as the judge deems appropriate.

# 4. Court Documents

4.1 Parties are encouraged to serve and accept service of Court Documents by e-mail as permitted by Rules 16.05(1) (e) and 16.05(6), whenever it might lead to the more efficient conduct of the litigation.

# 5. Discovery of Documents

- 5.1 For guidance with respect to discovery of Electronic Documents, parties should refer to the Practice Direction entitled: "Guidelines regarding Discovery of Electronic Documents", which can be located on the court's website at <u>www.manitobacourts.mb.ca/notices.ntml#qb</u>.
- 5.2 Parties are encouraged to agree to exchange Discoverable Documents in electronic format whenever it might lead to the more efficient conduct of the litigation, including where:
  - 5.2.1 A substantial portion of the Discoverable Documents consist of Electronic Documents; or
  - 5.2.2 The total number of Discoverable Documents exceeds 1,000 documents or 3,000 pages.

# 6. Default Standard and Agreed Protocol

6.1 The following formats are the Default Standard for the delivery in electronic format of Court Documents to another party.

Document	Format
Court Documents other than those listed below	PDF – (Image only format)
Lists or schedules of Discoverable Documents	Tab Delimited text file
Trial Record	PDF – (Image only format)
Index for the Agreed Book of Documents and the Trial Record (if appropriate)	Tab Delimited text file

6.2 Where Discoverable Documents are exchanged in electronic format, parties are encouraged to agree on a protocol for the exchange.

- 6.3 Where the parties are unable to reach agreement on a protocol for the exchange of Discoverable Documents in electronic format, they will comply with the following Default Standard, unless the court orders otherwise:
  - 6.3.1 The following fields, as specified in Appendix 3, are the default fields for a list or schedule of Discoverable Documents: Document ID, Date, Partial Date, Document Type, Author/Organization, Recipient/Recipient Organization, Document Title, Document Description, Why Privileged.
  - 6.3.2 The following format is the default for black and white Imaged Discoverable Documents:

Single page TIFF (CCITT Group 4) with a resolution of 300 dpi

6.3.3 The following format is the default for black and white Printable Electronic Documents:

Single page TIFF (CCITT Group 4) with a resolution of 300 dpi

- 6.3.4 For all other Electronic Documents, please refer to Appendix 1.
- 6.4 Where the parties are unable to reach agreement on a protocol for the exchange of Discoverable Documents in electronic format and a party wishes or needs to depart from the Default Standard, it may, on motion, seek an order from the court permitting it to do so.
- 6.5 Any document tendered in court in electronic format shall either comply with the Default Standard or be in a format approved by the court.

# 7. Coming into Effect

7.1 This Practice Direction comes into effect on October 1, 2011.

# **ISSUED BY:**

Original signed by:

<u>"G.D. Joyal"</u> The Honourable Chief Justice Glenn D. Joyal Court of Queen's Bench (Manitoba)

DATE: June 20, 2011

### **APPENDIX 1**

## TECHNOLOGY CHECK LIST

Parties are encouraged to use this checklist to identify Technology options and issues that may arise during proceedings. Note that the Default Standard in Section 6 is applicable unless the parties have agreed to another Protocol or the Court otherwise orders.

\* Default

1. COURT DOCUMENTS – Pleadings, etc.

**Document Exchange** 

- Hard copy and electronic copy (\*)
- Electronic copy only
- Hard copy only

**Document Format** 

- PDF Image only (\*)
- PDF Text and Image
- Microsoft Word
- Word Perfect
- Text File
- XML
- RTF
- HTML
- Other

Note: When agreeing on a software format, a version number may have to be specified in order to ensure that all parties will be able to properly view the documents.

**Exchange Media** 

- CD R
- Email Attachments
- DVD R
- Internet (eg. ftp site)
- External Storage Device

2. COURT DOCUMENTS – Lists, Indices, etc.

### **Document Exchange**

- Hard copy and electronic copy (\*)
- Electronic copy only
- Hard copy only

#### **Document Format**

- Tab Delimited Text file (\*)
- CSV (comma separated values)
- Electronic Spreadsheet
- Word processing table
- HTML Table
- XML
- Other

**Exchange Media** 

- CD R
- Email Attachments
- DVD R
- Internet (e.g. ftp site)
- External Storage Device

In addition to the list the parties may wish to exchange the Data in an agreed proprietary Database format such as:

- Almost Paper Imaging xBinder or HTA Binder formats
- CT Summation format
- Dataflight Concordance
- Excel Spreadsheet
- Ringtail Casebook (aka Ringtail Legal 2005)
- Introspect
- Searchlight
- Other

## 3. DOCUMENTS PROVIDED TO A PARTY FOR INSPECTION

### **Document Exchange**

- Hard copy and electronic copy
- Electronic copy only (\*)
- Hard copy only

**Document Format – Black and White Imaged Documents** 

- Single Page TIFF (\*)
- Multi Page TIFF
- PDF
- JPG
- Other

Document Format – Black and White Printable Electronic Documents

- SINGLE PAGE TIFF (\*)
- PDF
- JPG
- Other

**Document Format – Color Printable Electronic Documents** 

If the parties agree, color documents can be exchanged in black and white in one of the above noted formats. Otherwise an appropriate color format will have to be agreed upon. This could include:

- Native File Format
- PDF
- JPG
- Other

**Document Format – Non Printable Documents** 

- Native File Format
- Text Delimited File (for databases, spreadsheets, etc.)
- Video/Audio tape
- Other

#### **Exchange Media**

- CD R
- Email Attachments
- DVD R
- Internet (e.g. ftp site)
- External Storage Device

## 4. SPECIAL CONSIDERATIONS

Redacting – Management of Redacted Documents Image Resolution Color Images (Compression) Unique Image Name (referenced by Document ID) Management of Host/Attachment Relationships Management of Oversized Documents Management of Unprintable Information (Databases) Management of Confidential Documents Management of Multi-Media Files (audio and video files) Management of Forensically Gathered Information

# Appendix 2

The following fields are the default fields referred to in Section 6.3.1:

- 1 Document\_ID AAA000000
- 2 Date (YYYY-MM-DD e.g., 2001-11-20)
- 3 Partial Date (e.g., 2001 or November, 2001)
- 4 Document Type
- 5 Author/[Author Organization]
- 6 Recipient/[Recipient Organization]
- 7 Document Title
- 8 Document Description
- 9 Why Privileged (left empty for non privileged documents)

Three sample letters are attached to this appendix. The table below represents the Schedule A from a sample Affidavit of Documents and shows how the default fields might be completed for the three sample letters.

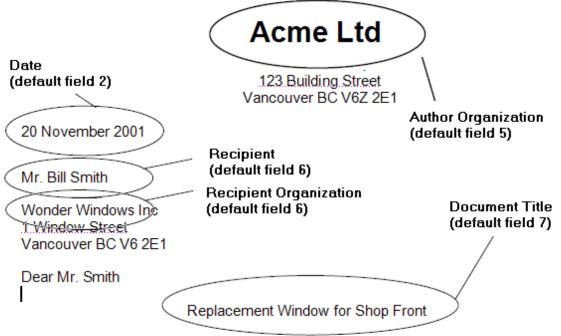
Document	Date	Partial	Doc	Author	Recipient	Title	Document
ID		Date	Туре	[Organization]	[Organization]		Description
ABC000001	20011120		Letter	Parker, Tom [Acme Ltd]	Smith, Bill [Wonder	Replacement Window for	Letter thanking Wonder Windows
					Windows Inc]	Shop Front	for its prompt service.
ABC000002	20011120		Letter	Parker, Tom [Acme Ltd]	Smith, Bill [Wonder Windows Inc]	Replacement Window for Shop Front	Letter complaining about Wonder Windows bill.
ABC000003		Dec, 2001	Letter	Parker, Tom [Acme Ltd]	Smith, Bill [Wonder Windows Inc]		Letter from Tom Parker refusing to pay interest.

## Notes:

Because this is Schedule "A", the Why Privileged field has not been shown. If it was included for this schedule, it would be left empty.

The Document Description field is used in documents ABC000001 and ABC000002 to distinguish between them.

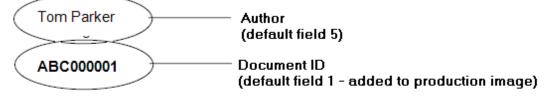
The third document (ABC000003) does not have a complete date and has no document title. The Partial Date and Document Description fields are therefore used to ensure that sufficient information to identify the documents is provided, as is required by Rule 30.

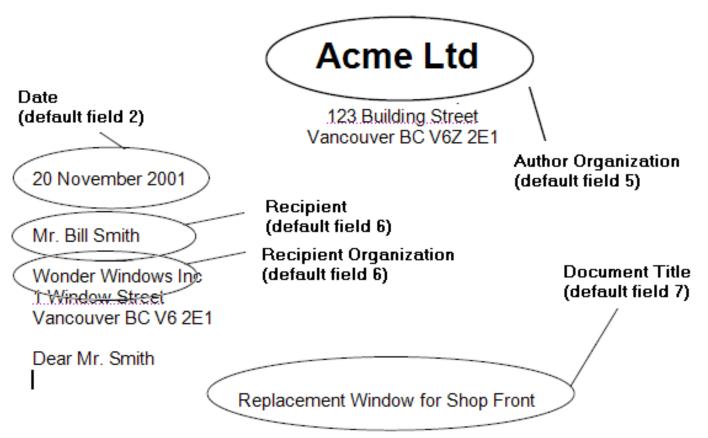


I am writing to you to thank you for your prompt action in replacing our broken shop window over the weekend. We were very surprised to find that we'd been broken into and all our stock had been stolen when we arrived at work on Saturday morning. However our sorrowful mood was quickly turned around when your cheerful contractor arrived and fixed the window.

Thank you for your assistance.

Kind regards

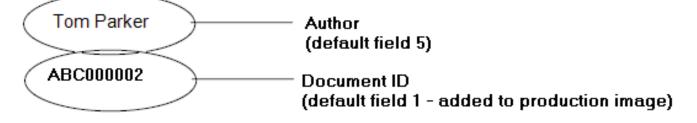


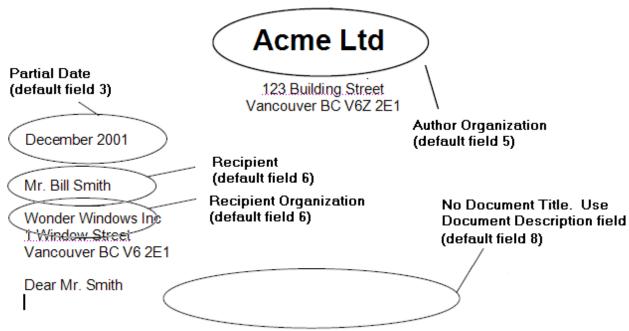


I am writing further to my letter of this morning. I regret to say that our sorrowful mood has returned, in spades, now that we have received your bill. No wonder your contractor was so cheerful.

It was our stock that was stolen, not our common sense. If you think we are going to pay such an exorbitant sum for a hunk of glass, you are very much mistaken. Please send us a revised, and sensible, bill at your first convenience.

Kind regards





I received a "friendly reminder" from your office today advising me that your November 20<sup>th</sup> account is overdue and accruing interest. Does anyone over there read your mail? I thought I made it clear in my last correspondence that I consider your account to be outrageously high and have no intention of paying it until it is adjusted. I am certainly not paying interest.

Kind regards

Tom Parker

ABC000003

#### **APPENDIX 3**

#### **Database Field Guidelines**

The following table describes a number of fields of data that might be provided in a list or schedule of Discoverable Documents. Fields that are required by the Default Standard are shaded. The Default Standard requires that the data be exchanged in a tab delimited format. In that format all fields are stored as text. However, each field must be formatted so as to allow the receiving party to conveniently import the data into a database with different data types. The "Target Data Type" shown below is the data type that should be anticipated in the receiving party's database.

Field	Target Data Type *	Notes
Document ID Default Field 1	Text	A string of letters and numbers that uniquely identify a document. For the purposes of the default standard, the following format is specified.
		First, a Page ID is defined as follows: a string in the form AAA000000 where the "AAA" represents a three letter abbreviation of the party name and "000000" is a six digit number. Except when processing Native Files, each page in a document will have a unique Page ID and the Page ID should be stamped on the image of that page that is produced to the other parties. A file in its Native Format will have a single Page ID for the entire file and that Page ID will not be added to the Native File.
		The Document ID is the Page ID of the first page of a document or, in the case of a Native File, the Page ID for that file.
		File names should correspond to Page ID's. If each page of a document is a separate file, the file name for each page should contain the Page ID for that page. If the entire document is contained in a single file, the file name should contain the page ID of the first page of the document.

		Example:		
		A ("		
		images is numbered		five separate TIFF
		inages is number	<del>.</del>	
		Page Number	Page ID	File Name
		1	ABC000001	ABC000001.tif
		2	ABC000002	ABC000002.tif
		3	ABC000002	ABC000003.tif
		4	ABC000004	ABC000004.tif
		5	ABC000005	ABC000005.tif
			710000000	710000000.111
		ABC000001, which A second and th would have Do	ID for this doo h is the Page ID for ird document, both ocument IDs of vidual pages would	the first page. n in Native Format ABC000006 and
		A fourth documen		s long and is stored
			<b>.</b>	
		Page Number	Page ID	File Name
		1	ABC000008	ABC000008.tif
		2	ABC000009	ABC000009.tif
			ID for this doo Page ID for the first p	
Host Document Number	Text	the Document ID		field should contain ument (that is, the ttached).
			e multiple entries in only ever have one	n this Field as each host document.
Date (Default Field <b>2</b> )	Date	Date can be insert	ed as:	
(Default Field <b>2</b> )		YYYY-MM-DD for YYYY = Year MM = Month DD = Day	example 1996-04-0	8
			xchange only and c Y  e.g. 05-MAY-200	an still be displayed 1]
		date such as "Nov is no way of a	rember, 1990" or "19 scertaining the co ne complete date is	not contain a partial 990-11-00". If there omplete date of a s illegible, this field
			or even just 1990, le	termined, such as eave this field blank

		Discoverable Documents with a date range will be coded with the earliest date unless otherwise agreed.
Partial Date (Default Field <b>3</b> )	Text	Where only a partial date can be determined, such as November, 1990 or even just 1990, leave the Date field empty and use this field to store the partial date.
		To enter a partial date use zero's for the unknown parts of the date. For example, enter the partial date 'November, 1990' as
		1990-11-00
		and enter the partial date '1990' as
		1990-00-00
Estimated Date	Binary	FALSE = If the exact <b>full</b> date is on the document (for example 04-MAR-1963).
		TRUE = Where we cannot be certain of the actual date.
		A number of factors may create uncertainty about the actual date. These include:
		<ul> <li>The date on the document has been amended by hand. (Use the original date, make the Estimated Date field = TRUE)</li> <li>The only visible date is on the Fax track and reflects the date the document was sent by Fax. (Use the Fax date, make the Estimated Date field = TRUE)</li> <li>An agreement has an original date and a later date when alterations were made. (Use the later date, make the Estimated Date field = TRUE)</li> <li>A newspaper clipping has a date written on by hand. (Use the handwritten date, make the Estimated Date field = TRUE)</li> </ul>
<u> </u>		
Document Type (Default Field <b>4</b> )	Text	This Field can be completed using common document types, for example letter, memo, deed etc.
		If the document has been faxed, this Field can include "facsimile".
		For Electronic Documents, parties may agree to use document types such as xls, doc, txt, wpd, etc. However,

		in the absence of such an agreement, traditional document types (letter, memo, deed, Fax, document, etc) should be used.
		The parties may wish to agree on a standard list of document types but this is not required by the default standard.
Author/[Author Organization] (Default Field 5)	Long Text	Person or persons who authored the document, entered as Last Name, First Name [Organization], for example Parker, Tom [Acme, Ltd.].
		Semicolons must separate multiple entries.
Recipient/ [Recipient Organization] (Default Field <b>6</b> )	Long Text	Person or persons who received the document, entered as Last Name, First Name [Organization], for example Parker, Tom [Acme, Ltd.].
		Semicolons must separate multiple entries.
Document Title (Default Field <b>7</b> )	Long Text	Title of a document such as "Report on Technology" etc. or the "re" line in a letter. If none of these then leave blank. In a discovery of Native Files this could be where the original electronic file name is captured.
Doc. Description	Long Text	There may be cases in which the other required fields do not sufficiently describe a document to comply with Rule 30. For example, a document might have no document title. In any such case, this field must be completed to provide any additional information that is required to comply with the Rules.
Why Privileged	Text	This field is to be completed for privileged documents and should contain the grounds for the claim of privilege as contemplated by the instructions in forms 30A and 30B of the Rules.
Parties	Long Text	Identifies parties to an agreement or other legal document. A semicolon or carriage return should be placed between the names of each party.

Source	Text	Parties may find this Field useful to identify Discoverable Documents that have been obtained from someone other than the party giving discovery; for example, Discoverable Documents obtained on subpoena or through some other compulsory process of obtaining access to Discoverable Documents or it could be used to identify the location of the original document. This Field would identify the party from whom such Discoverable Documents were obtained.
Non-paper record	<del>Text, 3</del> Binary	This Field can be used to identify information recorded using a medium other than paper, where the relevant information has not been printed out and discovered in Hard Copy form; for example, video and audio tapes, floppy disks and magnetic computer tapes (these could contain e-mails, non standard software applications, electronic Discoverable Documents, electronically stored Documents or Image files etc.). Permissible entries are "TRUE" and "FALSE".
Redacted	<del>Text, 3</del> Binary	If the produced document has been redacted. Permissible entries are "TRUE" or "FALSE".
Basis of Redaction	Text <del>, 12</del>	If a document has been marked "yes" in the redacted field above, then choose reason, such as privilege and confidential.
Status	Text, 10	"Copy" or "Original". Note: Parties should fully define how they wish to use this Field prior to populating it to ensure consistency.
	L	
Pages	Number	The number of pages in each document can be recorded in this Field – particularly if parties decide not to number pages but to number Documents only.

\* Note:

- A data type of 'Text' is a fixed length field. Unless another maximum length is specified, the maximum length of a Text field should not exceed 254 characters.
- A Long Text data type can be of any length
- In a tab delimited file, "Yes" or "No" can be used instead of "TRUE" or "FALSE" where the target data type is Binary.

### **APPENDIX 4**

### **GLOSSARY OF TERMS**

For the purposes of this Practice Direction, the following technical terms shall have the following meanings:

#### **Court Documents**

Documents created in the course of a lawsuit, for the purpose of filing in court and/or delivering to other parties in the lawsuit. Court Documents include pleadings, affidavits of documents, interrogatories, notices of motions, orders, and so on.

#### CSV

Comma Separated Values. A Comma Separated Values file is a delimited text file that uses a comma as a field delimiter. There is no codified standard for a CSV file and a format that enables a successful transfer of data must be agreed upon when CSV files are used.

#### Default Standard

The standard format established by Section 6 of this Practice Direction.

### **Delimited Text File**

A text file format for storing two dimensional arrays of data, such as the data in a table. In a delimited file, each row (or record) is on a separate line and each column (or field) value is separated by a delimiter character. Common delimiter characters include the comma and the tab.

There are no agreed upon standards for delimited files. Some implementations reserve the first line in the file for field names, some implementations use double quotes around fields that contain the delimiter character or the new line character(s), and so on. When a delimited text file is used, the parties will have to agree on a precise format that will allow for a successful transfer of data.

#### **Discoverable Documents**

Documents that are required to be disclosed to a party in accordance with the Queen's Bench Rules and practice of the Court.

#### **Document ID**

A Document ID is a string of letters and numbers assigned to a document, by which the document can be uniquely identified. The format of a Document ID in the Default Standard is specified in Appendix 3.

#### **Electronic Document**

An electronic document is a document stored in digital form, including, for example, email, a digital document, a digital picture, a database, an audio file, a video file, a logfile and metadata.

### GIF

**Graphics Interchange Format** 

#### Hard Copy

A copy of a document in non-electronic form. A Hard Copy is often a paper copy of a document.

### HTML

Hypertext Markup Language.

#### Image

A picture that has been created or copied and stored in electronic form; an electronic photocopy. The format of the Image is given by the file extension name suffix – for example BMP, GIF, JPEG, or TIFF.

#### Imaged Discoverable Documents

Hard Copy documents that have been scanned into digital form.

#### Native (Native Files or Native Format)

A computer file in its original digital format. For example, a document prepared in MS Word might be delivered to the other parties as a TIFF image or in Hard Copy, but the original MS Word file is the document's Native File and MS Word is the document's Native Format.

#### PDF

Portable Document Format

### **Printable Electronic Documents**

Electronic Documents that are practical to print. A database, for example, is typically not printable as a printed version. A spreadsheet might not be printable if the printed version would not allow searching the data and creating different views. A small database or spreadsheet might be printable. A letter or memo created in a word processor would typically be printable.

### Redaction

The process by which information or text is electronically covered or masked in such a way that it can not be read by other people.

### RTF

**Rich Text Format** 

## **Tab Delimited**

A Tab Delimited file is a delimited text file that uses a tab as a field delimiter. There is no codified standard for a tab delimited file and a format that allows a successful transfer of data must be agreed upon when Tab Delimited files are used.

#### TIFF

Tagged Image File Format

### XML

Extensible Markup Language