Whitepaper

CORPORATIONS TAKE CONTROL OF E-DISCOVERY

Chris Dale | eDisclosure Information Project

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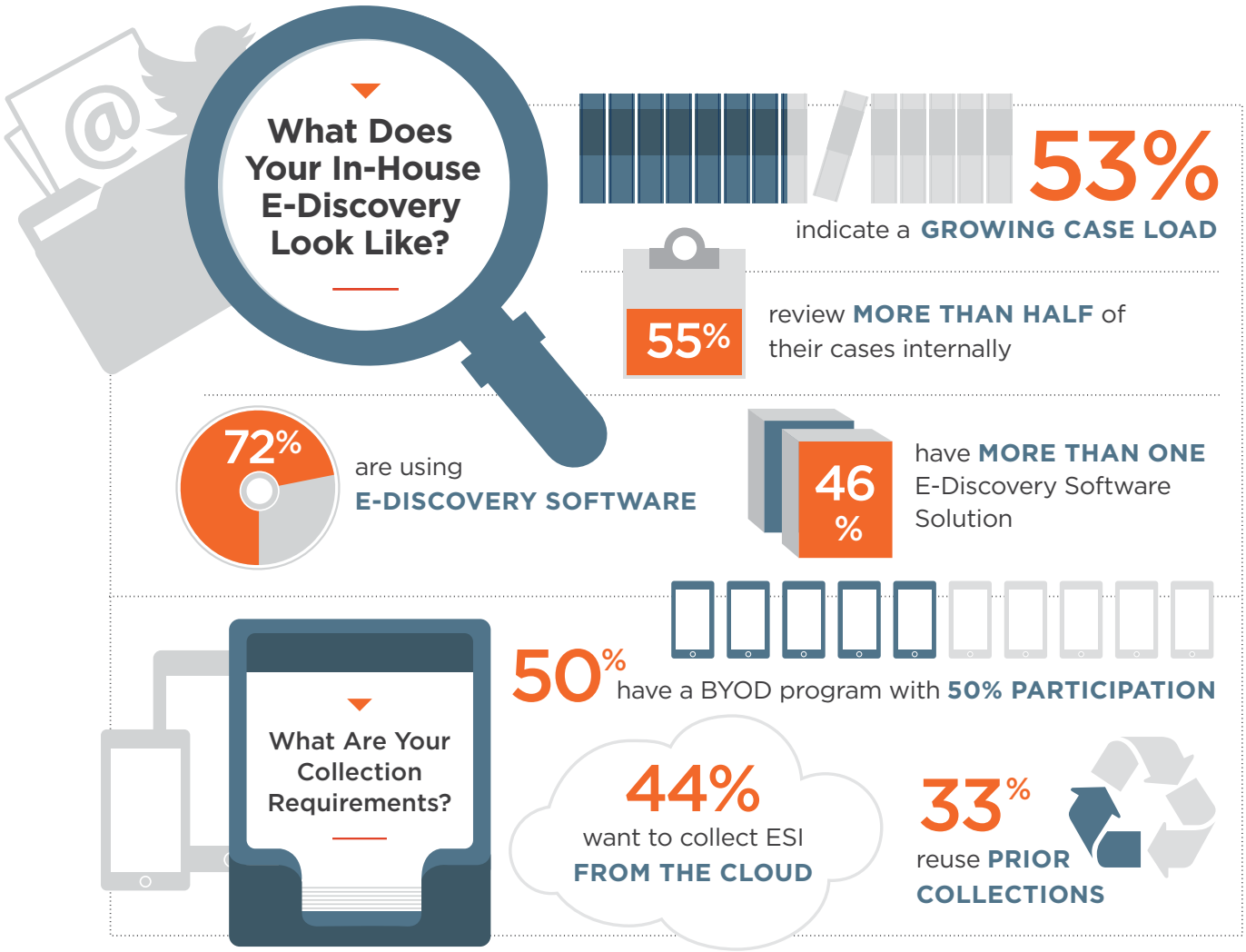

This paper is written by Chris Dale of the UK-based eDisclosure Information Project in conjunction with Guidance Software.

It is based on the results of Guidance Software's Second Annual E-Discovery Survey, which analyzed the responses of nearly 100 people from in-house legal departments and e-discovery service providers.

ABOUT THE AUTHOR

Chris Dale runs the eDisclosure Information Project which disseminates information about the court rules, the problems, and the technology to lawyers and their clients, to judges, and to suppliers. He was a member of Senior Master Whitaker's Working Party which drafted the 2010 eDisclosure Practice Direction and Electronic Documents Questionnaire.

Chris writes an authoritative and objective web site and blog on the subject and is a well-known speaker and commentator in the UK, the US and any jurisdiction which requires electronic discovery of documents. Chris is an English solicitor and was a litigation partner in London, a litigation software developer and litigation support consultant before turning to commentary on electronic disclosure / discovery.

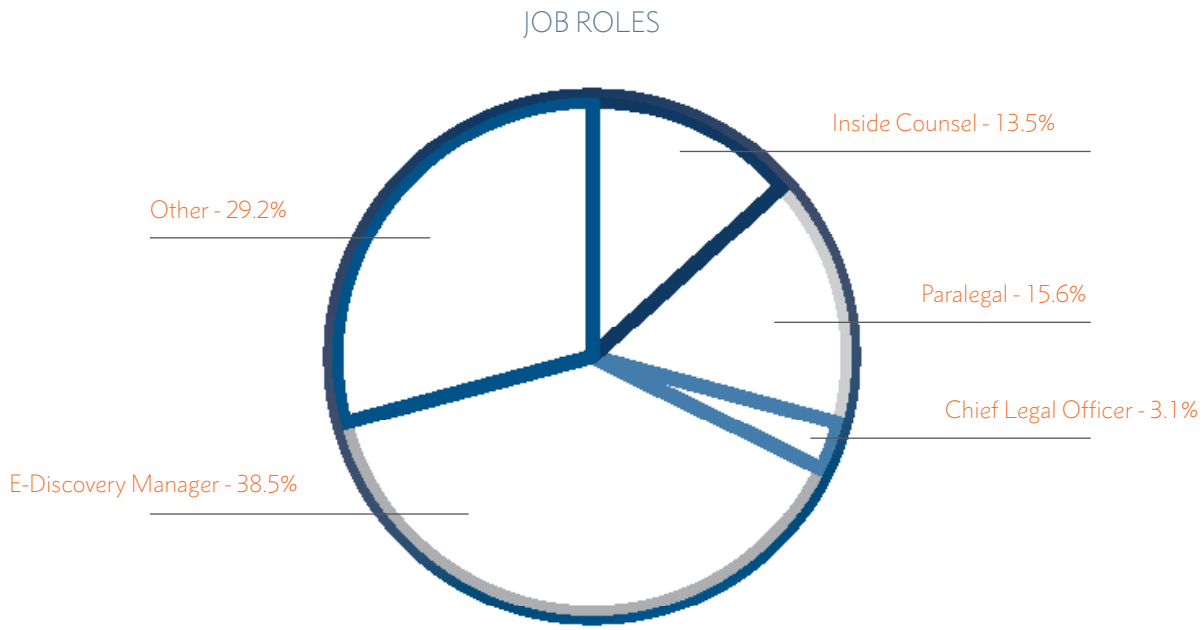

Figure 1: *Job functions of E-Discovery Survey Respondents*

One of the survey's aims was to establish who is taking responsibility for handling electronic discovery between the corporation itself and outsourced providers. Other questions related to the level of e-discovery activity, to the sources of ESI (electronically stored information), to the distribution of work (e.g. as between in-house teams and outsourcers), and to things like cybersecurity and information governance.

Guidance Software's first e-discovery survey, in 2014, showed a clear trend towards greater involvement by in-house legal departments in the management of the e-discovery process, with more control being taken by the corporations; they did this either by setting up their own teams and installing their own software or, at the least, by exercising more direct management over the conduct of e-discovery by, for example, dictating the choice of method, of provider or of software tools.

The 2015 survey goes yet further in the same direction. There is now more hands-on control of other things relating to the management of information, not least cybersecurity - cost is not the only factor driving the move in-house.

SUMMARY OF THE KEY FINDINGS

- **53.5 percent** indicated that caseloads are growing
- **55 percent** of those surveyed review more than 50 percent of their cases internally
- **72 percent** have an e-discovery software solution, with 46.7 percent having more than one
- **50 percent** reported having a bring-your-own-device (BYOD) program in place with an average of 50 percent participation by employees
- **44.4 percent** want the ability to collect ESI from the cloud in a defensible manner

Other questions related to levels of cybersecurity readiness, collection from social media platforms, the use of TAR (technology-assisted review), and the status (or not) of any information governance initiative.

LITIGATION CASELOADS AND REVIEW

Companies are facing more litigation, with 53.5 percent of the respondents indicating an increase in litigation volume year over year. It needs no survey to suggest that companies' data volumes are also increasing year over year, so when this is added to an increase in the number of cases, one can see why companies are looking at alternative strategies for managing it.

More than half the respondents indicated that they review more than half of the cases internally, a slight increase since last year.

Of the cases that make it to review, what percentage are reviewed internally vs. by outside counsel / legal service provider?

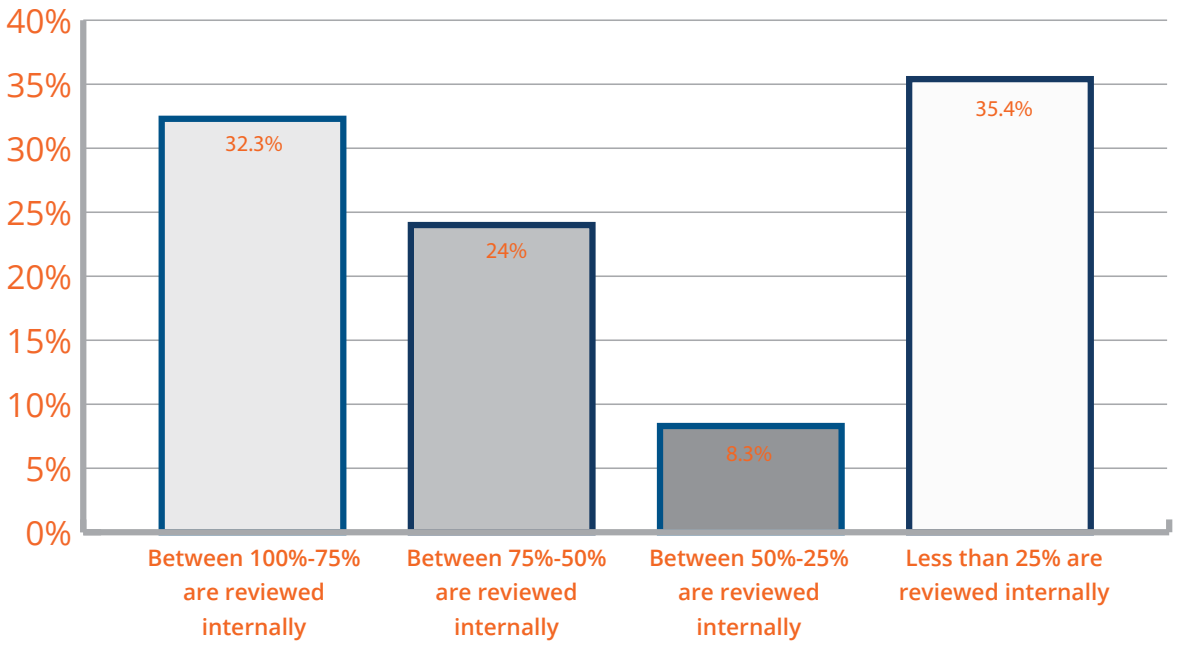

Figure 2: *Percentage of cases that are reviewed internally*

Companies are not just taking the task in-house, but thinking about better and more effective ways of dealing with it, not least methods that are more easily performed behind the firewall than from outside it. A notable trend is the increase in work product re-use, with 32.6 percent of respondents using the prior collections for early case assessment. In many cases, that content has already been reviewed and tagged.

If outside lawyers have been slow to adopt technology assisted review, their clients have been quicker to appreciate the benefits. In this survey, 35.7 percent of respondents reported using TAR on more than 50 percent of their cases, up from 23 percent in 2014. The primary uses are data culling, early case assessment, and responsive review.

BYOD, CLOUD, AND SOCIAL MEDIA

Stepping outside the survey for a moment, the increase in the trend known as BYOD grew unobserved by many companies and, indeed, by their lawyers. Many, if not most, employees now have one or more devices that are connected to the Internet outside the protection of the firewall.

The fact that many of them are also connected to the company's systems raises one set of issues. Others derive from the ease with which employees may remove data from the company, introduce data or application programs from outside, and use their own devices for company business, each of which has the potential to cause problems even before discovery implications are considered. It can make it almost impossible for a company to be certain that it has fulfilled its discovery obligations; even if the existence of devices and data is known about, questions arise about the ownership of data and its mixture with private information. Since it is, in practice, impossible to control this as a technical matter, it is necessary to establish policies which govern the use of non-company devices.

In this survey, 50.5 percent of respondents said that they already offer a BYOD program, 20 percent are working on one, and 29.47 percent have no plans to offer a BYOD program for employees.

If that deals with devices, there is the separate (though often related) problem of cloud collection. Of the survey respondents, 44.4 percent see a business need, now or in the coming year, to collect from cloud repositories such as Box, Dropbox, Google Drive, or SkyDrive. It is not clear whether the others have considered the question and decided there is no need to address it or have not applied their minds to to establish policies which govern the use of non-company devices.

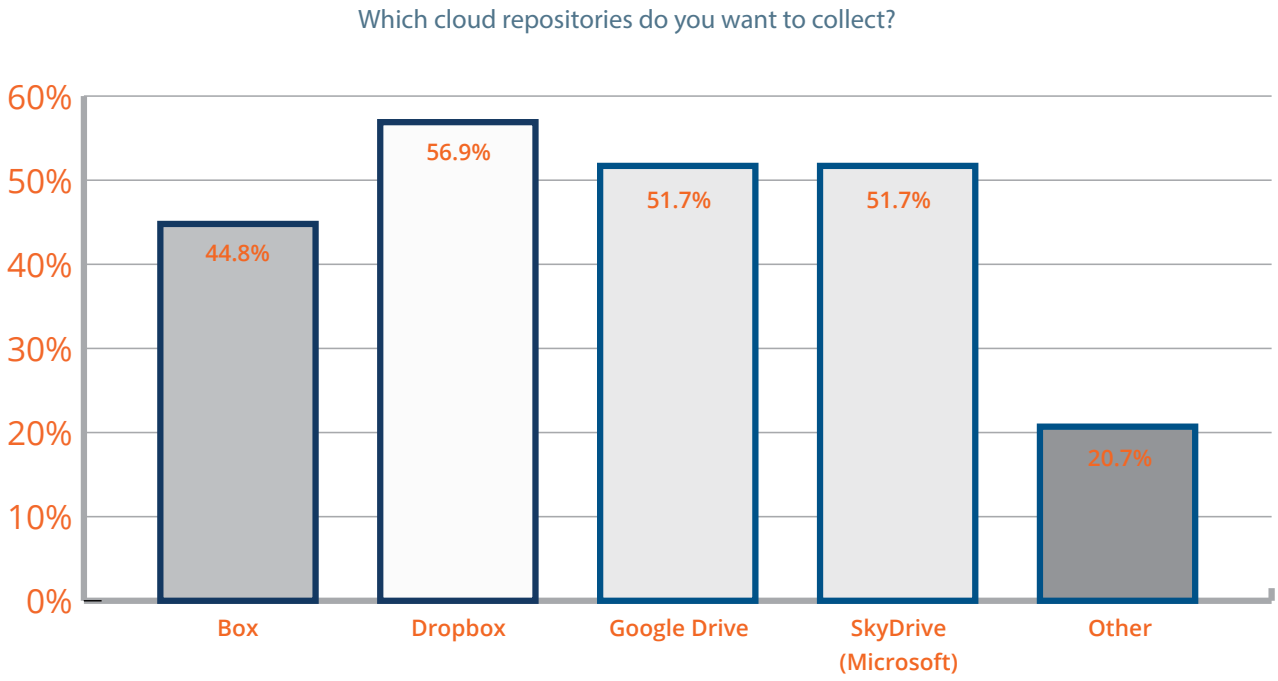

Figure 3: *Of the 44.4% respondents who indicated that they needed to collect from the cloud, this chart shows their priorities for cloud repositories*

Respondents were asked a similar question about social media platforms. A smaller number, 34.5 percent, foresaw a business need to collect from social media platforms for e-discovery purposes, with Facebook (95.1 percent percent), Twitter (85.4 percent) and LinkedIn (70.7 percent) being the sites that mattered for these purposes.

INFORMATION SECURITY

Security breaches are a concern, with 65.2 percent of those surveyed indicating that legal and security teams are meeting more regularly. This year, 47.8 percent indicated that they now have security provisions with their vendors, and 31.9 percent have requested sensitive data maps.

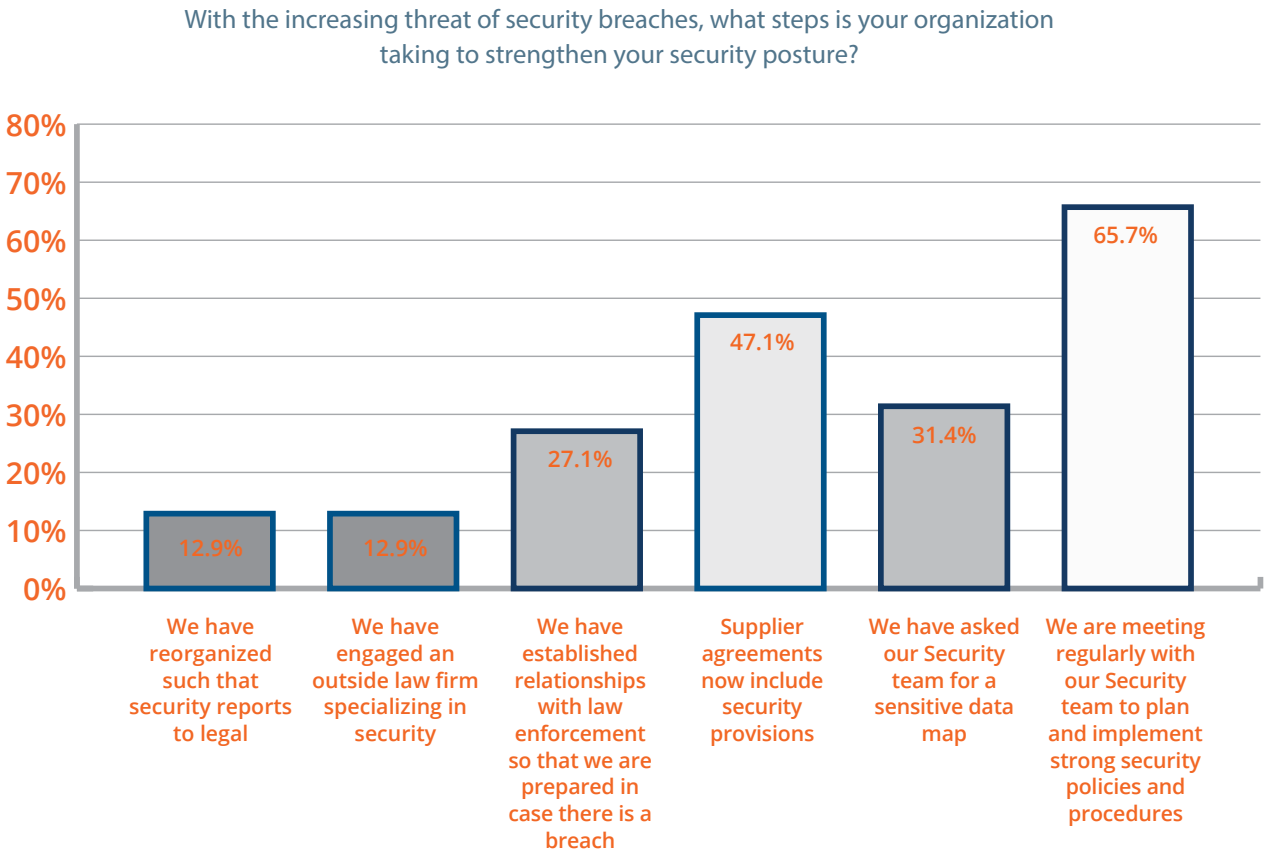

Figure 4: *This chart shows the actions organizations have taken in response to concerns over security breaches*

INFORMATION GOVERNANCE

The expression *information governance* embraces a wide range of programs, policies, and initiatives for which responsibility is spread across different divisions in a company such as Legal, IT, Privacy, and others. Information governance implies a program concerned both with extracting value and mitigating the cost and risk inherent in information.

The most interesting statistic in the survey is that 37.3 percent of organizations claim to have an information governance program in place, with 29.3 percent either planning or implementing one, and 20 percent discussing an information governance initiative.

Again, it will be interesting in future surveys to include a more granular set of questions aimed at identifying which problems and functions were addressed by these initiatives. The answers to the survey indicate that organization-wide management of information is moving up the agenda.

E-DISCOVERY TOOLS

Seventy-two percent of the respondents indicated that they have one or more e-discovery solutions in-house, and 46.7 percent of those have more than one solution. Again, it would be interesting to see a breakdown of the type of solutions in place. It is reasonable to assume that the most common tools are those whose function is legal hold, data collection, and at least the early stages of processing, including culling and, perhaps, tools giving the ability to conduct a first-pass review aimed at giving an early assessment of the case.

The answer to the earlier question about the percentage of cases reviewed internally – to which 32.63 percent of respondents indicated that between 100 percent and 75 percent were reviewed internally - suggests that a high proportion of those who have e-discovery software use it for more than just legal hold and collection.

CONCLUSION

The answers to this survey suggest a continuing move towards bringing some at least of the e-discovery process in-house, together with a growing appreciation by legal teams of the need to look more widely than the company's own data sources.

Twenty-eight percent of respondents indicated either that they did not have any discovery solution or that they outsource their e-discovery work. It is probable that a number of those who do have in-house resources use them only for early stages and thereafter send them out for management by an outsourced provider.

It would be interesting next year to seek a more granular breakdown of this, aimed at identifying, for example, how many companies host the data, giving access behind the firewall to their lawyers, and how many (after a certain stage at least) send it out to be hosted elsewhere.

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ABOUT GUIDANCE

Guidance exists to turn chaos and the unknown into order and the known-so that companies and their customers can go about their daily lives as usual without worry or disruption, knowing their most valuable information is safe and secure. The makers of EnCase®, the gold standard in forensic security, Guidance provides a mission-critical foundation of market-leading applications that offer deep 360-degree visibility across all endpoints, devices and networks, allowing proactive identification and remediation of threats. From retail to financial institutions, our field-tested and court-proven solutions are deployed on an estimated 33 million endpoints at more than 70 of the Fortune 100 and hundreds of agencies worldwide, from beginning to endpoint.