

# Recent Criminal Case May Shed Light on Several Civil Discovery Issues

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In *United States v. O'Keefe*, a recent *criminal* case, Magistrate Judge John Facciola looked to the Federal Rules of *Civil* Procedure to address a broad range of discovery topics including the appropriate format of production, the preservation of metadata, and the sufficiency of selection criteria or "search terms." Cr. No. 06-249, 2008 U.S. Dist. LEXIS 12220 (D.D.C. Feb. 18, 2008). Thus, a number of civil discovery lessons could be gleaned from *O'Keefe*:

1. While the tsunami of digital information may mean that "all discovery is e-discovery," paper discovery is important and errors there can be just as costly.
2. With all the emphasis on the format in which electronic records are produced, responding parties must still pay attention to Rule 34(b)(2)(E)(i) and organize their production of records either (i) as they are ordinarily maintained by the party; or (ii) label them to correspond to the requests.
3. To organize productions as they are "ordinarily maintained" may require production of records with any corresponding file-folders and with information regarding custodians and source. This could have an impact on how parties preserve paper documents. In order to produce documents with file-folders and source information they must be preserved with such potentially pertinent information – simply removing records and keeping them in a preserved file may prohibit production of that record as it was "ordinarily maintained" and could increase expense. Finally, if a party does not produce documents as "ordinarily maintained," the party must label the documents so that they will correspond to the requests.
4. Opposing parties are attacking each other's selection criteria. Parties should be prepared to defend how and what selection criteria were chosen and how they were used.
5. The adequacy of an opponent's selection criteria is beyond the "ken of lay people." If you want to attack an opponent's use of search terms to collect and review documents, you may need to have an appropriate expert.
6. Mere speculative accusations that a party has not preserved records are not well-taken.
7. Electronically stored information ("ESI") produced in a "reasonably useable format" and not requested in native format, may not need to be preserved in native format. Thus, a requesting party who fails to request records be preserved or produced in native format, may waive its right to complain later if they are not.

## I. BACKGROUND

In *O'Keefe*, the indictment charged that the defendants paid or received bribes for expediting visa requests through the Department of State in Canada. *Id.* at \*1. The defendants sought to prove that expedited visa interviews were routinely granted by consulate officials without any *quid pro quo*. *Id.* at \*3. Pursuant to this defense, the government was ordered to produce, *inter alia*, "any memoranda, letters, e-mails, faxes and other correspondence prepared or received by any consular officers at these posts that reflect either policy or decisions in specific cases with respect to expediting visa applications." *Id.* at \*2. After receiving the government's production, the defendants moved to compel and the motion was addressed by the *O'Keefe* opinion.

## II. THE ORGANIZATION OF THE PAPER PRODUCTION

Defendants complained that the government's production was in a format that makes it impossible to identify the source or custodian of the document. Magistrate Judge Facciola relied on Rule 34(b)(2)(E)(i) of the Federal Rules of Civil Procedure, which requires the production of documents as they are ordinarily maintained or organized and labeled to correspond with the categories in the request. *Id.* at 10. Magistrate Judge Facciola found:

[That] if documents are removed from their original containers and then copied, those copies are not being produced in the manner in which the originals were ordinarily kept, since, in their original condition, the originals were most probably in labeled file folders. Therefore, to reproduce them in the manner in which they were kept would require the producing party to reproduce those file folders and place the appropriate documents in them so that the production replicates the manner in which they were originally kept.

*Id.* at 11-12. The government apparently produced a mass of undifferentiated paper documents. *Id.* at \*13-14. For each document that could not be identified on its face by author, recipient (if any), date of creation, and consulate location, the Magistrate Judge ordered the parties to work together to create an index showing, for each document, the author, his or her title, recipient (if any), date of creation, the source of the document, and the Bates number of the document. *Id.* at \*16-17. This does not appear to be an inexpensive solution.

## III EXPERT TESTIMONY MAY BE NECESSARY TO ATTACK SEARCH TERMS

Defendants also complained that the government did not indicate what software it used to conduct an electronic search for relevant data or how it ascertained what search terms it would use. *Id.* at \*18-19. The Judge, however, refused to rule on the sufficiency of the search terms employed by the government without expert evidence. The Judge explained, "Whether search terms or 'keywords' will yield the information sought is a complicated question involving the inter-

play, at least, of the sciences of computer technology, statistics and linguistics." *Id.* at \*23. Therefore, the court ruled that "if defendants are going to contend that the search terms used by the government were insufficient, they will have to specifically so contend in a motion to compel and their contention must be based on evidence that meets the requirements of Rule 702 of the Federal Rules of Evidence."<sup>1</sup> *Id.* at \*24.

Thus, parties attacking another parties' search terms should be prepared to bring expert testimony to bear on the question. However, parties collecting and reviewing documents should not become complacent. While Judge Facciola decided expert testimony was necessary in *O'Keefe*, one could see another court finding that expert testimony would be completely unnecessary – especially if the mistake was glaring (*i.e.* using a completely wrong date range without explanation). One could argue that the real importance of the *O'Keefe* opinion is not the need for expert testimony, but that the use and *adequacy* of selection criteria is fair game and parties need to be prepared to defend how they arrived at search terms and how they were used.

## IV. THE GOVERNMENT'S EXPLANATION OF ITS PRESERVATION OF ELECTRONIC FILES

Magistrate Judge Facciola was not impressed with defendant's accusation that the government had failed to preserve documents. *Id.* at \*20. Citing one of his earlier opinions, the Judge found that "vague notions that there should have been more than what was produced are speculative and are an insufficient premise for judicial action." *Id.* Magistrate Judge Facciola order the defendants to make direct claims of spoliation, with an evidentiary basis, within 21 business days or he would consider *the claims waived*. *Id.* at 21.

## V. ELECTRONICALLY STORED INFORMATION: PRESERVATION FORMAT AND PRODUCTION FORMAT

The defendants did not specify or object to the form of the electronic production (PDF or TIFF), but they argued that the government must preserve the electronic data in native files with unaltered metadata.

<sup>1</sup> Magistrate Judge John Facciola emphasized the point in a March 7 opinion. See *Equity Analytics, LLC v. Lundin*, Civ. No. 07-2033, 2008 U.S. Dist. Lexis 17407, 5-6 (D.D.C. Mar. 7, 2008).

Because the defendants did not specify a format, the government was free to produce in PDF or TIFF format, unless the defendants can show that such format was “not reasonably useable.” *Id.* at 22. This issue was mooted, however, because it appeared that the government was willing to produce everything in native format. *Id.*

However, Magistrate Judge Facciola still ruled that the defendants must seek a stipulation from the gov-

ernment regarding the preservation of metadata or seek an order compelling preservation. *Id.* at \*22-23. If the defendants moved to compel, the Magistrate Judge explained that defendants will be required to show that PDF or TIFF formats are not “reasonably usable” under Rule 34(b)(2)(E)(ii). *Id.* at \*23. Thus, it could be argued under *O’Keefe* that if a responding party produces records in a reasonably useable format, then it no longer needs to preserve them in any other format – namely native – for that litigation.

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