

Court Orders Government to Produce Electronic Data in Usable Form; Recognizes Need for E-Discovery Rules in Criminal Cases

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Affirming that issues concerning electronically stored information (ESI) are confined neither to civil matters nor private-party litigants, a federal district court this month ordered prosecutors to reproduce discovery in a reasonably useful format, mirroring the requirements of the Federal Rules of Civil Procedure.

Background: Difficulties with Discovery

In *United States v. Briggs, et al.*, No. 10-CR-184S (W.D.N.Y.), the defendants were charged with conspiracy to distribute cocaine and money laundering. The investigation leading to the defendants' indictment involved interceptions of cellular telephone communications and, in discovery, the government provided defense counsel with "disks containing thousands of pages of documents" related to the investigation. See *United States v. Briggs*, 2011 WL 4017886, at *2 (W.D.N.Y. Sept. 8, 2011). The defendants argued to U.S. Magistrate Judge Hugh B. Scott that the data provided in discovery had "problems with omissions and inaccuracies" and they challenged "the failure of the Government to provide this call data in the most useful form that is readily available." *Id.* Specifically, the defendants claimed that they had "been presented with graphic images (TIFF files) that cannot be sorted or searched and lack[s] missing information (such as minimization data) that a '.pdf' file . . . would have." *Id.* Defendants requested that the government be ordered to reproduce the discovery in a native or "text-accessible" format. *Id.*

The government countered, among other things, that producing TIFF images is "its national standard for all United States Attorneys' Offices" and that the Office "did not have server space to retain an OCR copy of materials produced . . . and such a duplication is cost-prohibitive." *Id.* at *3 (internal quotation marks omitted).

In its discussion, the court observed that the Federal Rules of Civil Procedure "sets forth a procedure for electronic discovery that a party produce and permit inspection and copying of its 'electronically stored information . . . stored on any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.'" *Id.* at *4 (quoting Fed. R. Civ. P. 34(a)(1)(a)). The court then pointed out that "[t]here is no such express ESI regime . . . for criminal cases." *Id.*

Thus, the court turned to Fed. R. Crim. P. 16(d)(1), which grants it authority to "deny, restrict, or defer discovery or inspection, or grant other appropriate relief," and found that "[t]his general authority includes ordering the manner of production." 2011 WL 4017886, at *5. After examining the "scant" authority on the manner in which parties are to produce discovery in criminal cases, the court concluded that, absent a specific rule, "each judge faced with a motion to compel criminal discovery with ESI data will have to devise his her own scheme for ESI discovery based upon the relief sought by the parties . . ." and must determine "which party – the Government or defense – is to bear the costs (both in money, time, technological competence, and memory space) associated with ESI discovery." *Id.* at *7.

Court Finding: Government Better Able to Bear Burden

In *Briggs*, the court found that the government was the party "better able to bear the burden of organizing these records for over twenty defendants in a manner useful to all," *id.* at *8, reasoning that the government compiled the ESI from its various native forms into a common electronic database, and that the government, not the 20 individual defendants, should bear the cost of compiling the data necessary to render the government's discovery useful. Thus, the court ordered the government to "bear the burden of reproducing these ESI materials in a fashion that defendants can retrieve and manipulate . . ." *Id.* at *9.

Although the court cautioned that its decision was not intended to adopt "the pertinent Federal Rules of Civil Procedure wholesale as the standard for production of criminal ESI," Judge Scott wrote that he "hoped that the Advisory Committee on Criminal Rules will take note of the omission and address it at the earliest opportunity." *Id.*

Criminal practitioners would be wise to watch the development of these electronic discovery issues. Cases such as *Briggs* may signify that the treatment of ESI in criminal cases is soon to catch up with that in civil cases, where parties, under the Federal Rules, are required to pay specific attention to electronic discovery issues and are entitled to receive ESI in a reasonably useful form.

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