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## Government's Discovery Deficiency in a Criminal Case Subject to Increased Scrutiny

By Kirby D. Behre and Adam J Schwartz

The scope of discovery that corporate and individual criminal defendants receive from the federal government is often less than the scope of discovery afforded in civil cases. In addition, defense challenges to government productions of documents in criminal cases often do not receive careful judicial scrutiny. Frequently, general and self-serving government representations regarding the adequacy of the government's production are accepted by courts with little challenge or inquiry. However, a recent decision by a federal Magistrate Judge suggests a heightened level of judicial scrutiny and involvement in the criminal discovery process.

In *United States v. O'Keefe*, 2008 WL 449729 (D.D.C.), Magistrate Judge John M. Facciola of the United States District Court for the District of Columbia held that the production of responsive documents by the government to a criminal defendant must adhere to rigorous standards similar to those set forth in Rule 34 of the Federal Rules of Civil Procedure. The resort to civil procedure discovery rules in a criminal case represents new thinking about the duties of the government to make responsive and material information in its possession available to a criminal defendant.

### THE FACTS OF O'KEEFE

The government indicted O'Keefe on conspiracy and bribery charges, alleging that he expedited visa requests at the U.S. Consulate in Toronto for individuals in exchange for gifts and other personal benefits. During discovery, the defendants moved to

compel the production of documents under Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure.

Judge Paul Friedman, the trial judge, required the government to produce two categories of responsive information: (1) requests regarding visa applications submitted by or on behalf of the individuals in question; and (2) rules and related documents regarding the treatment of expedited visa applications at various U.S. consular outposts throughout Canada and Mexico.

The government claimed that it had conducted comprehensive searches of hard copy documents and electronic files. The defendants asserted that there were numerous deficiencies in the government's production: (1) the failure to provide Bates labels and an accompanying index indicating custodial and source information for hard copy documents; (2) the failure to produce hard copy files in the form in which they were ordinarily maintained and in an appropriately organized and labeled form; (3) the failure to properly preserve responsive documents; and (4) the failure to use sufficient search terms to gather responsive electronic files.

### THE O'KEEFE DECISION

Judge Facciola criticized the government for failing to adhere to established norms of document production and imposed rigorous discovery standards on the government. In crafting an order to remedy the deficiencies, Judge Facciola applied standards taken from Rule 34 of the Federal Rules of Civil Procedure.

Judge Facciola first recommended that the trial judge deem authentic all documents produced by the government to circumvent authentication problems stemming from the government's failure to provide custodial and source information regarding the documents produced. He also ordered the government to meet with defense counsel to identify all documents that could not be identified on their face. In addition, the order required the government to provide declarations from all consular representatives involved in locating documents for production indicating how the searches were conducted. Finally, Judge Facciola instructed the government to preserve all electronic documents in native format, including all metadata, should the metadata become necessary to identify a document. He did not rule on the adequacy of the government's search terms.

### THE SIGNIFICANCE OF *O'KEEFE*

The *O'Keefe* decision may be explained, in part, by the fact that the documents at issue were in control of a federal agency rather than a private third party. Complex white collar crime cases can involve massive quantities of electronic data, most of which is obtained by the government pursuant to third-party subpoenas. For example, in prosecutions of a CEO or CFO of a public company for accounting fraud, the vast majority of the government's evidence comes from the public company via a federal grand jury subpoena. In those situations, the government can only produce documents it receives from third parties. In *O'Keefe*, the government may have been held to a higher standard because it had custody of the documents requested.

This is not the first time that Judge Facciola has imposed discovery obligations on the government in the ediscovery context. In an ongoing dispute between the National Security Archive and the Executive Office of the President involving the White House's preservation of e-mails, Judge Facciola twice has demanded detailed explanations from the White House on matters related to e-mail preservation. On March 18, 2008, Judge Facciola insisted that the Executive Branch explain why they should not be required to copy all e-mails on computers in the Executive Office of the President. And earlier, January 8, 2008, Judge Facciola compelled answers from the White House regarding preservation of e-mails, which ultimately led to disclosures that the government had recycled computer backup tapes prior to October 2003. Certainly, the recent decision carries some import because Judge Facciola is well recognized among the judicial ranks for his significant decisions on electronic discovery issues. Still, it remains to be seen whether other judges will follow Judge Facciola's aggressive approach and use civil discovery standards in the context of criminal cases.

Nevertheless, the new level of judicial scrutiny employed by the court is compelling. The *O'Keefe* court demonstrated a willingness to thoroughly evaluate the adequacy of the government's ediscovery production and to ensure that the government fairly and completely provides the defendants with a full set of responsive documents sought through discovery.



***If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:***

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