

Winter 2015, Vol. 5 No. 2

E-Discovery in Government Investigations: An Introduction

By Adam M. Reich – March 12, 2015

In 2013, Allison C. Stanton, Director of E-Discovery, FOIA, and Records for the Civil Division of the United States Department of Justice (DOJ), [acknowledged](#) that “electronic evidence plays a tremendous role in investigations.” Two years later, these words could not be truer. This article provides some basic guidance to attorneys new to counseling clients regarding production of electronically stored information (ESI) in response to government investigations.

Vendor Selection

There are many companies that offer ESI support, such as data collection, databases, and document-review tools—e.g., [FTI Consulting](#); [Evolve Discovery](#); [Exterro](#); [Advanced Discovery](#); [Kroll Ontrack](#); [7safe](#); [Altlaw](#); [Compliance Discovery Solutions](#); [Inventus](#); [Servient](#). The similarities among these companies outnumber the differences, but there is more than price to consider in choosing the “right” vendor. Among other things, you should consider vendor data-collection capabilities; search/review capabilities (including technology assisted review (TAR), predictive coding, and redaction tools); processing capabilities (including ability to process and render searchable PDFs, emails, and TIFFs); production capabilities (including privilege-log generation and sequential bates numbering); and industry reputation.

Generally, it is advisable to send a request for information (RFI) to a short list of vendors, as the complexity or clarity of their responses to your pointed questions may help with the decision process. After receiving responses to an RFI, it is also worthwhile to ask vendors to demonstrate their technology, provide a list of references, and identify their security procedures and resources, both online and at any facility where they operate. Yet another thing to consider is the vendor’s database maintenance schedule (i.e., frequency and at what time) and quality-control schedule, because when a database is down, attorneys cannot review documents.

Litigation Holds and Document-Preservation Notices

As a general rule, when a client learns that it is a subject of an investigation, it is advisable to issue a litigation hold and document-preservation notice. Federal law provides severe criminal penalties for anyone who “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation . . . within any matter within the jurisdiction of any department or agency of the United States. . . .” 18 U.S.C. § 1519. The DOJ is [“very serious about prosecuting cases where there is destruction of evidence,” according to John Haried](#), e-discovery working group chair for the DOJ, so it is vital that attorneys take extra precaution to have clients maintain ESI as soon as there is reason to believe that clients have become subjects of investigations, no matter how preliminary. [Per Tracy Greer, DOJ Senior Litigation Counsel for E-Discovery, Antitrust Division, this includes suspending preexisting short-term document-preservation policies.](#)

Searches in ESI Databases

In 2012, U.S. District Court Judge Andrew J. Peck observed, “[i]n too many cases, however, the way lawyers choose keywords is the equivalent of the child’s game of ‘Go Fish.’” [Moore v. Publicis Groupe](#), 287 F.R.D. 182, 191 (S.D.N.Y. 2012). This, in a nutshell, sums up the limitations of relying on search terms to hunt and peck for responsive

documents in an ESI database. Indeed, this limitation is why many ESI vendors are pitching predictive coding and TAR ([though these too have limitations](#)). Lawyers conducting searches of ESI [need to think about potential gaps from those searches as well as their precision and recall](#), as shoddy searches may damage any trust they have developed with the investigating government attorneys.

In February 2014, the DOJ's Antitrust Division published a Model Second Request, which [according to Greer, is designed to help lawyers "recognize that they use words differently from most document custodians and that they are ill-suited to select search terms."](#) This is instructive for lawyers thinking about using keyword searches in response to government investigations. [In pertinent part, the Model Second Request provides:](#)

If search terms will be used, in whole or in part, to identify documents and information that are responsive to this Request, provide the following: (1) a list of the proposed search terms; (2) a word dictionary or tally list of all the terms that appear in the collection and the frequency with which the terms appear in the collection (both the total number of appearances and the number of documents in which each word appears); (3) a glossary of industry and company terminology (including any code words related to the Transaction); (4) a description of the search methodology (including the planned use of stem searches and combination (or Boolean) searches); and (5) a description of the applications that will be used to execute the search. The Department strongly recommends that the company provide these items prior to conducting its collection of potentially responsive information and consult with the Department to avoid omissions that would cause the company's response to be deemed deficient.

Aside from conveying the deficiencies of keyword searches, this request indicates that conferring with government attorneys about search terms before conducting searches may save clients and attorneys money and time.

Double-Checking Production Sets Before Sending to the Government

Second- and even third-level review of ESI is a necessity when responding to a government subpoena or other request for ESI, most of the time with an eye toward privilege in addition to responsiveness. The double- and triple-checking should not stop there, though. Once you have a set of documents ready to produce to the government, it is best to take one more pass through, as the government, [according to Stanton, "in many instances . . . may not be amenable to"](#) [subscription required] clawback agreements, where you learn post-production that you inadvertently sent the government a privileged email or other document.

Other Considerations

The world of ESI is a complicated, overwhelming place. This article is only meant to provide a broad overview of a few concepts important to attorneys counseling clients in response to government investigations involving ESI. Other issues you should consider are budgeting appropriately; creating a succinct, comprehensible, effective document-review protocol; retaining contract document reviewers for first-level review; assembling a higher-level review team; liaising with the government attorneys and maintaining open lines of communication; keeping an eye toward potential litigation and letting that inform your strategy; and evaluating the benefits and place for TAR.

Keywords: litigation, young lawyer, e-discovery, electronically stored information, ESI, investigation, production

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