Litigation Support and E-Discovery Alert

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Judge Scheindlin Holds That FOIA Production Presumptively Includes Metadata

By: Jonathan B. Head and David Deusner

Judge Shira Scheindlin wrote the seminal *Zubulake* case that ushered in the modern era of e-discovery. She recently ruled on another significant e-discovery issue for companies who file Freedom of Information Act (FOIA) requests with the federal government. The case resolved whether the government must produce metadata — information describing how the government had kept its electronic files before producing them to the requester — in response to a FOIA request. Judge Scheindlin writes, "[C]ertain metadata is an integral or intrinsic part of an electronic record. As a result, such metadata is 'readily reproducible' in the FOIA context. ... [M]etadata maintained by the agency as part of an electronic record is presumptively producible under the FOIA ...."

The government produced documents in PDF format, without any metadata. The government created unsearchable PDF files, separated attached files from emails, and combined documents into a few large files. The requester had specified the format it wanted the records produced in. (It cleverly based its request on format demands made by government agencies in other litigation.) The government never agreed or objected to the requested forms of production. Though ultimately holding for the requester, Judge Scheindlin chided the parties for not conferring about the production format and noted the requester's specification was only a brief email.

The court rejected the government's argument that the FOIA and the Federal Rules of Civil Procedure conflicted, since the FOIA was "silent with respect to form of production." Because "common sense dictates that parties incorporate the spirit, if not the letter, of the discovery rules" in FOIA litigation, the federal government must include metadata in its FOIA productions. Judge Scheindlin also held that "certain metadata is an integral … part of an electronic record."

The court did not make the government reproduce all the requested records, but the government had to meet the requester's original specification. For all electronic productions, the court required disclosure of each file's location within the government's information systems, the custodian of the file, and last date the government modified the files.

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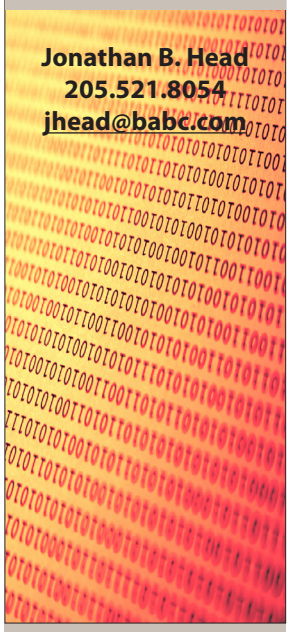

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- Litigation hold implementation
- Creating an e-discovery plan and budget
- Implementing review and production plans

Services include:

- Assistance in early case assessment
- In-house ESI processing
- Database planning and design
- Records management solutions

For email productions, the court required additional production of all sender and recipient information, the date and time the email was sent and received, the subject of the email, and the identification of any attachments to the email.

Judge Scheindlin's reasoning springs from the principles that "metadata is generally considered to be an integral part of an electronic record" and "production of a collection of [unsearchable] static images … is an inappropriate downgrading" of electronically stored information. By calling this metadata production "basic," this case sets a standard for other federal courts to follow. Additionally, law firms and e-discovery vendors may need to change their current practices. Intentionally or not, Judge Scheindlin has raised the standard of e-discovery practice again.

Case: *National Day Laborer Organizing Network v. United States Immigration and Customs Enforcement Agency*, 10 Civ. 3488, (S.D.N.Y., Feb. 7, 2011).

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