

Preservation and Production: Don't Forget the Metadata

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Electronic discovery continues to evolve and change today's litigation landscape. Corporations must address a number of issues when it comes to producing electronic discovery, including whether metadata or other embedded information must be produced. Courts are beginning to address what must be done in this area.

Decisions relating to employment actions are increasingly recorded via electronic files, including e-mails and spreadsheets. In the ever-evolving world of electronic discovery (e-discovery), plaintiffs' attorneys are increasingly seeking production of those electronic files in litigation. Typically, production would involve providing the "visible" version of the electronic document, such as a paper, PDF or TIFF image of the document. All relevant information about electronic files, however, is not necessarily disclosed by these images. For example, the history of when and by whom the document was created or edited are captured by "metadata," which is not visible on the printed version of the document. Metadata, which has been defined as "information describing the history, tracking, or management of an electronic document," can also include information about prior drafts or embedded edits of the electronic version of a document.

Therefore, parties now face the question of whether metadata, or other embedded information, must be routinely produced in litigation. In what appears to be a case of first impression, a federal district court in Kansas has ruled on whether a court order directing an employer to produce electronic documents as they are maintained in the ordinary course of business requires the employer to provide those documents with metadata intact.

The Williams Case

In *Williams v. Sprint/United Management Company*,¹ Shirley Williams sued her employer, asserting that age was a determining factor in the decision to terminate her and her coworkers in connection with a reduction in force (RIF). During discovery, the employer produced the Excel spreadsheets used in the selection process in a TIFF format. The attorneys for the terminated employees then asked the court to have the employer produce "active file" electronic versions of the Excel spreadsheets so they could electronically

manipulate the data without having to reenter the information. The plaintiffs' attorneys also noted that certain columns and information were not captured in the nonelectronic versions produced by the employer. The employer agreed to provide the electronic versions of the spreadsheets once it made certain redactions of Social Security numbers and privileged adverse impact analysis.

When the employer produced the electronic version, the metadata files had been scrubbed and certain data cells had been locked to prevent access by the plaintiffs. The plaintiffs complained, and in response, the court ordered the employer to show cause why it should not be sanctioned for not producing the electronic data "in the manner in which it was maintained." In its defense, the employer explained that the metadata had been scrubbed because it was irrelevant and contained privileged information. The employer also contended that metadata is not presumed to be part of a document unless specifically requested and relevant, and metadata had never been requested or discussed at any of the many discovery conferences held with the court.

In reviewing the issue, the court concluded that neither the federal rules nor case law provided sufficient guidance on the employer's obligation to produce the spreadsheets' metadata. The court then reviewed, and relied upon, materials issued by the Sedona Conference Working Group on Electronic Document Production which discussed best practices for e-discovery. The court concluded that although there did appear to be a general presumption against production of metadata, there is a caveat to that presumption if the producing party is aware, or should be reasonably aware, that particular metadata is relevant to the dispute.

The court then held that when a party is to produce an electronic document (in native format or as an active file) that production must include all metadata unless:

- (1) the party timely objects to the metadata;
 - (2) the parties agree that metadata should not be produced;
- or
- (3) the producing party requests a protective order — even if the requesting party never specifically requested production of the metadata.

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Although the court did not issue monetary sanctions, it did find that the spreadsheet metadata was relevant to the claim that the employer had “reworked” pools of employees in order to pass the adverse impact analysis. The court also deemed any privilege waived as to the production of metadata, except to the extent that the employer had previously asserted a privilege.

Notably, the court reaffirmed the principle that e-discovery obligations should be reviewed on a case-by-case analysis. For example, in most cases, it will still be appropriate to produce text files in a paper, TIFF or PDF image. Employers must be prepared, however, to respond to judicial directives to produce certain information/documents in native format, such as spreadsheets as indicated in the *Williams* case, or e-mails that may be required to be produced with expanded headers.

The Zubulake Ruling

This decision underscores the fact that metadata cannot be forgotten when drafting and implementing litigation hold notices. As directed by Judge Scheindlin in the well known *Zubulake* decisions on e-discovery, a litigation hold is triggered when an employer suspects future litigation, and at the latest when the employer receives notice that an Equal Employment Opportunity Commission (EEOC) charge has been filed. Therefore, it is essential to ensure that electronic information, including metadata, is properly preserved in the event that there is litigation relating to employment decisions, including the process by which employees are selected for displacement in RIFS. Although the general rule is that employers do not need to preserve all information, Judge Scheindlin cautioned that employers must preserve information that (1) they reasonably should know is relevant,

(2) they reasonably expected to be requested, and/or (3) is the subject of a pending discovery request.

Judge Schiendlin’s instruction is consistent with the court’s finding in *Williams*. Although the *Williams* court acknowledged that the obligation to produce metadata is generally not presumed, the employer was obligated to produce the metadata for the spreadsheet because it was aware, or should have been reasonably aware, that the metadata was relevant to the dispute. This is true especially when the data is the type that is “ordinarily maintained” for business purposes.

In addition to issuing preservation notices, employers will be well-served by anticipating their own discovery needs, and what will be demanded from them, when litigation is imminent. In addition to its strategic value, the amended federal rules will require such analysis. Rules 26 and 16 will require that the parties discuss issues relating to the preservation and form of production of electronically stored information. The initial scheduling order also includes provisions for discovery of electronically stored information. In addition, Rule 34(a) adds “electronically stored information” to the type of information that is discoverable under the federal rules. Therefore, candid discussions at an early stage will be a crucial step in avoiding costly motion practice and possible sanctions relating to e-discovery obligations.

Notes

¹ Civil Action No. 03-2200-JWL-DJW (a copy of the opinion can be retrieved at www.ksd.uscourts.gov/opinions/032200JWLDJW-3333.pdf).
