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Ben Kerschberg, Contributor
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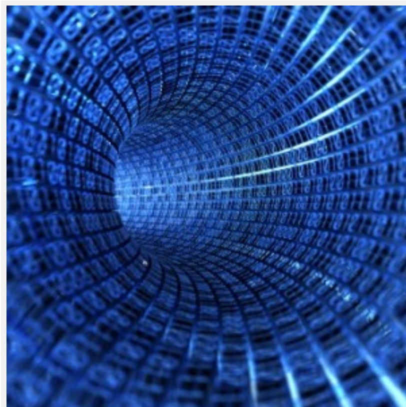
200 Terabytes of Government E-Discovery Abuse

In *United States v. Faulkner* (N.D. Tex. Dec. 28, 2010), the U.S. government accused 19 defendants of having participated in a criminal conspiracy over the course of seven years. The defendants are alleged to have created fraudulent companies to exceed authorized access to the victim companies' computer systems, as well as failing to pay for leased equipment, services, and premises.



Tunneling Through Data

What the government didn't tell the defendants is that it would make it exceedingly difficult to conduct a proper defense by burying them in a Kafkaesque amount of electronically stored information (i) deemed irrelevant by the federal district court and (ii) that would ultimately lead the court to grant one defendant's Motion to continue his trial. In the face of the evidence, described below, the government did not even object. The court granted the Motion, finding that serving "the ends of justice by taking such action outweighs the best interests of the public and the defendant to a speedy trial." This is no small measure given the court's obligations under the Speedy Trial Act, which aims to ensure that defendants are not subjected to unfair judicial proceedings stemming from delay.

This case is also noteworthy in light of the court's appointment of a "coordinating discovery attorney" for the defendants given the complexities and massive volume of electronic discovery produced by the government.

Legal opinions and Orders often contain gems in their footnotes. In footnote 2 of its Order granting Faulkner's Motion, the court stated that it had

> been advised that digital data in this case exceeds 200 terabytes. Ten terabytes of space would hold the printed collection of the Library of Congress. The government has advised [the appointed coordinating discovery attorney] that approximately eight terabytes of files comprise the evidence relevant to the issue of intent. The court has also been advised that eight terabytes printed would fill 2.72 million banker boxes.

The court provided the comparisons above to put this matter in perspective. In short, the government produced an avalanche of unnecessary document production. With only eight terabytes deemed relevant, the government produced 25 times that amount; 20 times the size of the Library of Congress; and an equivalent of 136 million banker boxes. The court-appointed coordinating discovery attorney thus recommended that the court hire a computer forensics expert.

It gets even better. Even the relevant files were not in their native format so that they could be searched. Rather, the Federal Bureau of Investigations produced them in a format that still had to be converted to be viewed in a searchable database. According to the court, "[t]his process takes four to six weeks."

The government responded that 200 TB of data were taken from 300 computers and other devices, as well as 10,000 pages of data. *Two hundred terabytes?* The number strains all credulity.

It is reasonable—and, unfortunately, even expected—that the discovery process results in the production of a certain amount of superfluous data or documents. Human error is part of the process, as is deliberate overproduction, which is often sanctioned. However, it is *patently unreasonable* for the U.S. government with a straight face to produce 200 TB of data, or 25 times the amount deemed relevant to the proceedings, thereby requiring a continuance of trial up to six weeks simply to return the *relevant* files to their native format.

Holding the Government to its Own Standards – And More

Let's consider an example of what the federal government expects from private parties vis-à-vis e-Discovery.

The U.S. Department of Justice's Antitrust Division requires parties under investigation to produce documents based on extremely high standards of technological know-how, but standards certainly within the reach of law firms and their clients. According to Epiq Systems (Nasdaq: EPIQ), for example, processes such as *prioritization* "get relevant information to decision makers as it becomes available" to e-Discovery systems. *See* Mary Ann Benson & Chris Janak, *New Technology Can Prioritize Documents*, Conn. L. Tribune (Feb. 7, 2011). Epiq notes that this is especially important when time is of the essence, such as when responding to Second Requests by the Antitrust Division. This isn't a one-way street: "[P]rioritizing documents on the basis of their responsiveness to issues benefits all concerned both from a strategic and cost perspective." *Id.* Yet the defendants here never realized those benefits because the government figured that it could get away with far less than it expects in return.

The government requires production of documents based on standards that private parties race to meet. Should the U.S. government be held to any lesser standard? On the contrary – it has greater means than any other litigant in the country and it should be required to act accordingly – or be sanctioned.

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