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by Michael K. Ligorano, Fernando M. Pinguelo,
and Andrew D. Linden*

The opinion in *Aguilar v. Immigration & Customs Enforcement Division*, 255 F.R.D. 350 (S.D. N.Y. 2008), is an example of how eDiscovery is becoming more and more prevalent in a variety of legal contexts. Judge Frank Maas’ decision provides an in-depth analysis of eDiscovery, particularly principles concerning metadata, in the context of an immigration matter. More importantly, this case serves as a reminder to attorneys and clients to make sure that their discovery requests are timely and well-drafted.

In *Aguilar*, over thirty Latino plaintiffs alleged that the United States Immigration and Customs Enforcement (“ICE”) violated their Fourth Amendment rights by conducting unlawful searches of their homes in connection with ICE’s “Operation Return to Sender” program. The program is intended to identify and arrest individuals who had been ordered to be deported but remained in the U.S.

Plaintiffs served their first request for the production of documents in February 2008, which included a request for electronically stored information (“ESI”). Plaintiffs’ request, however, did not specify the form of production

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for ESI or that metadata be produced. Plaintiffs first mentioned the production of metadata in March 2008, when defendants had nearly completed assembling their documents responsive to plaintiffs' initial request. The parties' first formal conversation regarding metadata did not occur until a May 2008 conference call.

In May 2008, plaintiffs requested that defendants produce ESI in Tagged Imaged File Format ("TIFF") with load documents containing metadata. Load documents indicate where individual pages or files belong together as documents and the beginning and end of each document. Plaintiffs further requested that defendants produce spreadsheets and databases in "native" format (*i.e.*, the form in which the original file was created). Defendants objected to producing databases in native form and suggested that they produce this information in text-searchable PDFs. Defendants indicated that they would produce metadata to the extent that plaintiffs could demonstrate that it was relevant, but the parties failed to agree which metadata was in fact relevant.

At the direction of the court, the parties met several times to resolve the metadata issues; however, they could not reach an amicable resolution. Plaintiffs then sought to compel defendants' production of ESI in TIFF, with metadata and information concerning the metadata fields of defendants' databases.

The court began its analysis of plaintiffs' request to compel with a discussion about metadata. It noted that metadata is generally "data about data" and that it is electronically-stored evidence about the history, formatting, processing and use-information of the ESI. Additionally, the court explained that the more interactive the program application, the more important the metadata. For example, metadata provides little insight to the understanding of a word processing document, but it is critical to understanding a database or spreadsheet.

Judge Maas further explained that there are three types of metadata: a) substantive, b) system, and c) embedded. Substantive metadata demonstrates modifications made to a document and substantive changes made by a user. It is embedded in the document and remains with the document even if it is moved into another folder or the document is copied. The court stated that substantive metadata is not produced on a routine basis, and the requesting party must demonstrate good cause for its production. System metadata refers to information created by the user or the information management system, such as the author, date, time of creation, and dates of modifications. Typically, system data is irrelevant; however, if the authenticity of a

document is at issue or a party is attempting to establish when a certain person received certain information, then system metadata is important. In those instances, system metadata allows a party to access and search a large amount of documents efficiently. Embedded metadata is the text, numbers, or data that a user inputs into a native file that is not typically visible to a user viewing the output display. This includes hyperlinks, hidden columns, and database information, which can be critical to understanding the ESI. The court expressed that embedded data should be regularly produced and is generally discoverable.

Next, the court described the rules governing the discovery of metadata. Pursuant to the Federal Rules of Civil Procedure ("FRCP"), metadata is discoverable if it is relevant, and, like any other matter that is relevant to the action, the court may order its discovery for good cause. FRCP 34 provides that a requesting party may request metadata and specify the form of its production. The responding party is obligated to produce in the specified form or object. Upon an objection or the requesting party's failure to specify the form of production, the responding party shall indicate the form for its production. If the requestor objects to the form proposed by the responding party, the parties must confer and attempt to resolve the matter prior to filing a motion to compel. If the requesting party does not specify the form, it should be produced in a form in which the metadata is ordinarily maintained or in a reasonably usable form.

The court noted that plaintiffs sought all metadata for all ESI; however, this request had not been made until months after plaintiffs' first document demand and after defendants had already started to fulfill plaintiffs' request. The court then addressed plaintiffs' request that emails be produced with blind copy ("bcc") information, backup tapes, and other underlying metadata that would allow plaintiffs to search the files more efficiently. Defendants conceded that bcc information could be relevant, but maintained that information pertaining to the folder to which an email was saved was irrelevant because it did not demonstrate how an individual used the information in the email. At the time of the motion, defendants had produced approximately 500 emails, but not all of the emails' metadata had been preserved. Plaintiffs requested that defendants retransmit the forwarded emails with their original, unaltered metadata.

Had plaintiffs originally requested metadata before defendants harvested substantial ESI, the court would have entertained the request; however, plaintiffs' request was delayed. Moreover, metadata was not necessary for efficient management of the emails as there were only

500 emails produced. Thus, the court did not require defendants to re-produce the forwarded emails as .msg or .pst files. As for back-up tapes, defendants convinced the court that restoring the tapes would be extremely burdensome, and plaintiffs had not demonstrated that they would likely recover important information that was not already disclosed. Accordingly, defendants did not have to produce any metadata with respect to emails.

Plaintiffs also desired metadata for Word, Excel and PowerPoint documents, including date created, date modified and “modified by” field information. Plaintiffs argued that this information was necessary to efficiently search the documents and it would help plaintiffs learn “who knew what when.” According to plaintiffs, this metadata would enable them to show that defendants engaged in a practice of unconstitutional home searches and lacked probable cause for the searches.

The court recognized that the requested documents could be searched more easily with metadata, but defendants had produced the documents in text-searchable PDFs. Also, the court noted the “limited universe of documents” involved in this case and that plaintiffs would not have significant difficulty searching and managing the documents.

As for relevancy, the court found that information concerning the creator or creation date had little relevance as to whether the home searches violated plaintiffs’ constitutional rights. The documents sought did not contain information concerning the targets of the investigation. Additionally, because defendants admitted that there was no probable cause to search plaintiffs’ homes (defendants claimed they obtained consent for the searches), “who knew what when” had nominal relevance. Although this particular metadata might provide evidence of a pattern of unconstitutional searches, the probative value of the metadata was likely outweighed by the burden of a second production by defendants. Nevertheless, the court granted plaintiffs’ motion to compel the production of metadata on the condition that plaintiffs pay the costs of defendants’ second production.

The court then turned its attention to the production of metadata for spreadsheets, reiterating that the complexity of the spreadsheet dictated whether the production of metadata was warranted. In this case, the spreadsheets were lists, capable of being created on a word processing application. Some spreadsheets contained formulas totaling the number of arrests by category, but those formulas were simple, and the spreadsheets were readily understood without seeing the underlying formulas. Although the court appeared to be foreshadowing a denial of plaintiffs’ request, it ultimately granted the motion to compel because production of such metadata was

not burdensome and defendants previously expressed a willingness to reproduce the spreadsheets.

Lastly, the court considered the metadata associated with various databases used by defendants. Plaintiffs sought metadata for two databases used to prepare subject reports for individuals. The reports were printed out and kept in hardcopy form. Defendants had produced those hardcopies. Still, plaintiffs were concerned that without knowing the architecture of these databases, they may be deprived of information that they were entitled to receive under the FRCP. Defendants resisted disclosing the databases’ architecture, citing law enforcement privilege. To alleviate plaintiffs’ concern, the court ordered defendants to conduct a live demonstration of the databases processes. Thereafter, if plaintiffs’ still sought the databases’ metadata, they would have to submit a letter to the court explaining and justifying their request.

There are several lessons that practitioners can take away from *Aguilar*.

Up Front: If you want metadata, ask for it in the initial document request. That way, you will not have to make a subsequent request that may be unduly burdensome on opposing parties once they have already started the document production process.

Clear and Explicit: If you want metadata in a specific form, ask for that particular form. Otherwise, a party may produce ESI in a form in which it is ordinarily maintained or in a reasonably usable form.

Talk About It: Discuss your eDiscovery expectations, including requests for metadata, with opposing parties. Do not allow your case to be bogged down with issues that are more easily resolved through early communication.

Know Your Metadata. Under certain circumstances, a court may order a party to re-produce ESI with appropriate metadata, even if that party has nearly completed the document gathering process. If you and your client can anticipate the type of metadata that will be requested, you can eliminate production costs and form a plan to have that metadata preserved and readily accessible for production.

Keeping these points in mind may help to reduce your clients’ costs, the time for discovery, and unnecessary aggravation. ■