Coates' Canons Blog: Metadata, E-Discovery, and E-Public Records in North Carolina

By Kara Millonzi

Article: https://canons.sog.unc.edu/metadata-e-discovery-and-e-public-records-in-north-carolina/

This entry was posted on September 15, 2011 and is filed under Open Government, Public Records (Electronic)

The “digital age” has been upon us for many years, but the legal system continues to struggle to keep pace with the fundamental transformation it has caused in the way people communicate and generate and store information. The discovery of electronic information in civil litigation (e-discovery) is one area that presents particular difficulties for public sector entities. Providing access to electronic information pursuant to public records laws is another. The sheer volume of data that is now created and stored electronically and the dispersion of that data across multiple platforms and repositories poses ever-increasing costs and burdens on governments forced to search, retrieve, and review electronic information pursuant to even routine public records or discovery requests. A significant body of case law has developed over the last several years to address the myriad of issues posed by operating (and litigating) in the digital age. One of the many issues that continue to vex litigants, courts, and commentators is the preservation and production of metadata.

As described in a previous **post**, metadata is information describing the history, tracking, or management of an electronic document. There is no single, “dictionary” definition of metadata. The term has come to be understood, at least in the legal community, to describe a variety of information associated with electronic documents or files. Examples of metadata include a document’s or file’s designation, dates it was created, last accessed, or modified, its author, and its edit history. Metadata also may include information that is recorded by a computer to assist in storing and retrieving a file, or aid in its searchability. Finally, metadata allows the functioning of routines within a document or file, such as cell formulae in spreadsheets. Some metadata is supplied by the creator or author of electronic information; other metadata is created automatically by a computer. Metadata often is not static—at least some of the metadata associated with a particular electronic record may be modified multiple times and even deleted.

This post details the newly amended North Carolina Rules of Civil Procedure as they relate to the discovery of metadata in civil litigation in North Carolina courts. It compares the new North Carolina requirements regarding the production of metadata with those imposed under the Federal Rules of Civil Procedure and discusses potential implications for North Carolina litigants. Finally, the post suggests that the newly-amended NCRCP may provide some guidance to public sector entities as to the extent that metadata must be produced pursuant to public records requests.

Metadata and the FRCP

Recognizing the difficulties of operating in the digital age, at least with respect to e-discovery, the United States Supreme Court promulgated amendments to the Federal Rules of Civil Procedure (FRCP) in 2006, which were subsequently approved by the United States Congress, to specifically address the discovery of electronic information in federal courts. Among other things, the 2006 amendments explicitly authorize the discovery of electronically stored information (ESI). *See* FRCP 34. ESI is defined to include “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained….” According to the committee note to FRCP 34, the definition of ESI is “intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.” The definition allows discovery obligations to adjust to new technologies and, at least in theory, prevents litigants from evading discovery obligations by claiming that the definition of document does not keep pace with the technological changes.

The FRCP, however, do not directly address whether, and to what extent, metadata is subject to civil discovery. FRCP 26 emphasizes the need of parties to litigation to discuss the form or forms of production, including any issues relating to metadata, and resolve any differences without resorting to court intervention. In the event that parties do not agree, the producing party has the option to produce ESI either as it is “ordinarily maintained” or in a form or forms that are “reasonably usable.” *See* FRCP 34. If the receiving party is not satisfied it may file a motion to compel production in a

specified form, including a form that includes any and all of the metadata associated with the ESI.

To date courts have articulated conflicting views over whether the default production forms include metadata. For example, in *Williams v. Sprint/United Management Co*., 230 F.R.D. 640 (D.Kan. 2005), a federal district court held that "[b]ased on [] emerging standards, … when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact . . . ." Contrast that with *Wyeth v. Impax Laboratories, Inc*., 248 F.R.D. 169 (D.Del. 2006), in which another federal district court held that "[e]merging standards of electronic discovery appear to articulate a general presumption against the production of metadata." Although these cases are several years old, they continue to accurately represent the spectrum of divergent views about the discoverability of metadata. And these views are largely informed both by the specific metadata at issue and the specific context of a particular case. Collectively, the decisions provide no firm rules and offer very little prospective guidance to current and future litigants on whether, when, and what metadata must be preserved and produced.

Metadata and the NCRCP

The General Assembly recently adopted amendments to the North Carolina Rules of Civil Procedure (NCRCP) to address the discovery of electronic information in North Carolina state courts. *See* **S.L. 2011-199 (HB 380)**. (The amendments are effective as of October 1, 2011.) The NCRCP amendments mirror the 2006 amendments to the FRCP in many respects, including specifically authorizing the discovery of ESI. There is one significant difference, though. The newly amended NCRCP 26 defines "electronically stored information" to include

> reasonably accessible metadata that will enable the discovering party to have the ability to access such information as the date sent, date received, author, and recipients. The phrase does not include other metadata unless the parties agree otherwise or the court orders otherwise upon motion of a party and a showing of good cause for the production of certain metadata.

NCRCP 26 arguably is more expansive than FRCP 34 because it appears to require the production of at least some metadata. At the same time, it also appears to limit the types of metadata that must be produced, at least absent consent of the producing party or court order. So, what type or types of metadata are discoverable under NCRCP 26? First, the metadata must be "reasonably accessible." The term "reasonably accessible" has come to be understood in the e-discovery realm as information that may be retrieved, stored, and produced without undue burden or cost to a party. Thus, whether metadata is reasonably accessible will depend on a variety of factors, including the type of metadata at issue, and the manner in which the party creates and stores information.

In addition to being reasonably accessible, NCRCP 26 seems to further limit automatic access to metadata to certain types of information. The Rule specifies that the type of metadata that is discoverable is "such information as the date sent, date received, author, and recipients." This is a non-exclusive list but it does appear to set some parameters as to what type of metadata a party may be required to produce. The listed metadata items all relate to e-mail transmissions. One possible interpretation of this provision is that the only metadata that is automatically discoverable is reasonably accessible metadata associated with e-mails or other electronic transmissions. That seems unduly restrictive, though. For example, it is hard to imagine that the General Assembly intended to allow the discovery of e-mail header information, but not the formulae that underlie spreadsheet information. The requirement may be better understood as allowing discovery of reasonably accessible metadata that provides necessary contextual information about the underlying information (which likely will vary on a case-by-case basis).

There is a further wrinkle to the analysis. Newly amended NCRCP 34 specifies that unless otherwise agreed by the parties to the litigation or ordered by the court, a party must produce ESI "in a reasonably usable form or forms." FRCP 34 imposes a similar requirement and the committee note to that requirement states that "if the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature." If North Carolina courts interpret NCRCP 34 analogously, then a party may be required to produce ESI with enough additional metadata to maintain the searchability of the information.

Only time (and judicial or legislative guidance) will tell how expansive (or restrictive) the requirement to produce metadata is under NCRCP 26. (Note that the new Act directs the Revisor of Statutes to publish as annotations to the amended rules

"all explantory comments of the drafters of this act, the North Carolina Bar Association Litigation Section E-Discovery Committee, as the Revisor may deem appropriate." The explanatory comments also may give some insight as to how to interpret this requirement.) Until further direction is provided, litigants are well-advised to attempt to work together to address issues relating to the preservation and production of metadata.

Metadata, the NCRCP and E-Public Records

Public sector officials may have reason to focus on the recent amendments to NCRCP even if they currently are not involved in civil litigation. That is because public agencies in North Carolina routinely provide copies of ESI pursuant to public records requests. As discussed in previous posts (see **here**, **here**, **here,** and **here**) it is unclear whether, and to what extent, the metadata associated with a public record is part of that public record for purposes of public access. Based on the few reported decisions in other states, it is likely that at least some metadata associated with a public record that is retained in an electronic format must be produced (at least upon specific request). And the courts that have addressed this issue in the public records context have relied heavily on the emerging case law relating to the discovery of metadata in civil litigation. Given this, North Carolina courts may look to the newly amended NCRCP 26 (and eventual case law interpretations of this Rule) for guidance as to the types of metadata that must be produced pursuant to a public records request.

Links

- canons.sog.unc.edu/?p=1984
- www.ncleg.net/Sessions/2011/Bills/House/PDF/H380v4.pdf
- canons.sog.unc.edu/?p=3417
- canons.sog.unc.edu/?p=4023