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Court Orders Responding Parties to Demonstrate Why ESI Is Not "Reasonably Accessible"

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Murray v. Coleman, et al., 2012 U.S. Dist. LEXIS 130219 (W.D.N.Y. Sept. 12, 2012)

On September 12, 2012, a District Court for the Western District of New York ruled that a Defendant had thirty days to file an affidavit detailing why certain electronically stored information ("ESI") was not "reasonably accessible" as required by Rule 26(b)(2)(B) of the Federal Rules of Civil Procedure ("FRCP").

In *Murray v. Coleman*, *pro se* Plaintiff sought "access to electronic records" from his former employer, New York State Department of Correctional Services ("DOCS"), in connection with alleged harassment and retaliation claims.[1] A discovery dispute arose between the parties when the Defendant failed to produce the ESI as requested by the Plaintiff. In his motion to compel discovery, the Plaintiff asserted that Defendants "never provided a 'chronological e-mail history of any kind.'"[2] In response, Defendant said he provided Plaintiff with "copies (free of charge) of the documents sought" and, therefore, plaintiff's motion is "moot," but Plaintiff contended that the Defendant produced "virtually no electronic records" in the discovery responses.[3]

Under FRCP Rule 26(b)(2)(B), a party fails to produce ESI requested by a party during discovery, the producing party "must show that the information is not reasonably accessible because of undue burden or cost." *See Star Direct Telecom, Inc. v. Global Crossing Bandwidth, Inc.*, 272 F.R.D. 350, 358-59 (W.D.N.Y. 2011)("The responding party must also identify, [*4] by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.")(quoting Fed. R. Civ. P. 26 advisory committee's note (2006)).[4]

In ruling on the Plaintiff's motion, the Court found that "Defense counsel's terse response ... makes it difficult ... to determine whether defendants have in fact produced all relevant electronic records." Moreover, the Defendant's counsel did "not provide any details regarding how and where [ESI] is held, what efforts were made to preserve relevant ESI, and the method used by defendants to locate, search and produce relevant ESI."[5]

As such, the Court construed the Defendant's "terse" answer as a claim that the ESI requested by the Plaintiff was not produced "because the data demanded has been destroyed or is not 'reasonably accessible'" as required by FRCP Rule 26(b)(2)(B).[6] Therefore, "in order for the Court to determine whether defendants have met their

discovery obligations and to comply with the requirements of Rule 26(b)(2)(B) of the Federal Rules of Civil Procedure," the Court ruled that the Defendant must file an affidavit of a person with direct knowledge —such as internal IT staff or an e-discovery associate— of the Defendant's document and email system stating:

> *(1) the document/email retention policy used by DOCS currently and during the relevant time periods, (2) the dates of emails "reasonably accessible" for production in this litigation, (3) the back up or legacy system, if any, used by DOCS to preserve or archive emails that are no longer "reasonably accessible" and whether responsive documents or data may potentially be found on such back up or legacy systems,*
> *(4) whether accessing archived or back [*5] up emails would be unduly burdensome or costly and why, and*
> *(5) the date when a litigation hold or document preservation notice was put in place by DOCS regarding this matter and either a copy of or a description of the preservation or litigation hold utilized by DOCS.**[7]***

As you can see the need to familiarize yourself or work with experienced e-discovery specialists continues to grow increasingly more important as both cases and judges require lawyers to understand and take the necessary steps to produce electronically stored information.

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[1] *Murray v. Coleman*, 2012U.S. Dist. LEXIS 130219, *1 (W.D.N.Y. Sept. 12, 2012).

[2] *Id.* at *2.

[3] *Id.* at *2.

[4] *Id.* at *3-4.

[5] *Id.* at *3.

[6] *Id.*

[7] *Id.* at *4.