

High Tech Crimes: Smart Phones, The Internet of Things and The Dark Web

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“Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases”

**Department of Justice (DOJ) and Administrative Office of the U.S. Courts (AO)
Joint Working Group on Electronic Technology in the Criminal Justice System
(JETWG)**

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Introduction to Recommendations for ESI Discovery in Federal Criminal Cases

Today, most information is created and stored electronically. The advent of electronically stored information (ESI) presents an opportunity for greater efficiency and cost savings for the entire criminal justice system, which is especially important for the representation of indigent defendants. To realize those benefits and to avoid undue cost, disruption and delay, criminal practitioners must educate themselves and employ best practices for managing ESI discovery.

The Joint Electronic Technology Working Group (JETWG) was created to address best practices for the efficient and cost-effective management of post-indictment ESI discovery between the Government and defendants charged in federal criminal cases. JETWG was established in 1998 by the Director of the Administrative Office of the U.S. Courts (AOUSC) and the Attorney General of the United States. It consists of representatives of the Administrative Office of U.S. Courts' (AOUSC) Office of Defender Services (ODS), the Department of Justice (DOJ), Federal Defender Organizations (FDO), private attorneys who accept Criminal Justice Act (CJA) appointments, and liaisons from the United States Judiciary and other AOUSC offices.

JETWG has prepared recommendations for managing ESI discovery in federal criminal cases, which are contained in the following three documents:

1. **Recommendations for ESI Discovery in Federal Criminal Cases.** The Recommendations provide the general framework for managing ESI, including planning, production, transmission, dispute resolution, and security.
2. **Strategies and Commentary on ESI Discovery in Federal Criminal Cases.** The Strategies provide technical and more particularized guidance for implementing the recommendations, including definitions of terms. The Strategies will evolve in light of changing technology and experience.
3. **ESI Discovery Checklist.** A one-page Checklist for addressing ESI production issues.

The Recommendations, Strategies, and Checklist are intended for cases where the volume and/or nature of the ESI produced as discovery significantly increases the complexity of the case. They are not intended for all cases. The Recommendations, Strategies, and Checklist build upon the following basic principles:

Principle 1: Lawyers have a responsibility to have an adequate understanding of electronic discovery. ([See #4 of the Recommendations.](#))

Principle 2: In the process of planning, producing, and resolving disputes about ESI discovery, the parties should include individuals with sufficient technical knowledge and experience regarding ESI. ([See #4 of the Recommendations.](#))

Principle 3: At the outset of a case, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. Where the ESI discovery is particularly complex or produced on a rolling basis, an on-going dialogue may be helpful. ([See #5 of the Recommendations](#) and [Strategies.](#))

Principle 4: The parties should discuss what formats of production are possible and appropriate, and what formats can be generated. Any format selected for producing discovery should maintain the ESI's

integrity, allow for reasonable usability, reasonably limit costs, and, if possible, conform to industry standards for the format. ([See #6 of the Recommendations](#) and [Strategies.](#))

Principle 5: When producing ESI discovery, a party should not be required to take on substantial additional processing or format conversion costs and burdens beyond what the party has already done or would do for its own case preparation or discovery production. ([See #6 of the Recommendations](#) and [Strategies.](#))

Principle 6: Following the meet and confer, the parties should notify the court of ESI discovery production issues or problems that they reasonably anticipate will significantly affect the handling of the case. ([See #5\(s\) of the Strategies.](#))

Principle 7: The parties should discuss ESI discovery transmission methods and media that promote efficiency, security, and reduced costs. The producing party should provide a general description and maintain a record of what was transmitted. ([See #7 of the Recommendations](#) and [Strategies.](#))

Principle 8: In multi-defendant cases, the defendants should authorize one or more counsel to act as the discovery coordinator(s) or seek appointment of a Coordinating Discovery Attorney. ([See #8 of the Recommendations](#) and [Strategies.](#))

Principle 9: The parties should make good faith efforts to discuss and resolve disputes over ESI discovery, involving those with the requisite technical knowledge when necessary, and they should consult with a supervisor, or obtain supervisory authorization, before seeking judicial resolution of an ESI discovery dispute or alleging misconduct, abuse, or neglect concerning the production of ESI. ([See #9 of the Recommendations.](#))

Principle 10: All parties should limit dissemination of ESI discovery to members of their litigation team who need and are approved for access, and they should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure. ([See #10 of the Recommendations.](#))

The Recommendations, Strategies, and Checklist set forth a collaborative approach to ESI discovery involving mutual and interdependent responsibilities. The goal is to benefit all parties by making ESI discovery more efficient, secure, and less costly.

Recommendations for ESI Discovery Production in Federal Criminal Cases

1. Purpose

These Recommendations are intended to promote the efficient and cost-effective post-indictment production of electronically stored information (ESI) in discovery¹ between the Government and defendants charged in federal criminal cases, and to reduce unnecessary conflict and litigation over ESI discovery by encouraging the parties to communicate about ESI discovery issues, by creating a predictable framework for ESI discovery, and by establishing methods for resolving ESI discovery disputes without the need for court intervention.

ESI discovery production involves the balancing of several goals:

- a) the parties must comply with their legal discovery obligations;
- b) the volume of ESI in many cases may make it impossible for counsel to personally review every potentially discoverable item, and, as a consequence, the parties increasingly will employ software tools for discovery review, so ESI discovery should be done in a manner to facilitate electronic search, retrieval, sorting, and management of discovery information;
- c) the parties should look for ways to avoid unnecessary duplication of time and expense for both parties in the handling and use of ESI;
- d) subject to subparagraph (e), below, the producing party should produce its ESI discovery materials in industry standard formats;
- e) the producing party is not obligated to undertake additional processing desired by the receiving party that is not part of the producing party's own case preparation or discovery production²; and
- f) the parties must protect their work product, privileged, and other protected information.

The following Recommendations are a general framework for informed discussions between the parties about ESI discovery issues. The efficient and cost-effective production of ESI discovery materials is enhanced when the parties communicate early and regularly about any ESI discovery issues in their

¹ The Recommendations and Strategies are intended to apply only to disclosure of ESI under Federal Rules of Criminal Procedure 16 and 26.2, *Brady*, *Giglio*, and the Jencks Act, and they do not apply to, nor do they create any rights, privileges, or benefits during, the gathering of ESI as part of the parties' criminal or civil investigations. The legal principles, standards, and practices applicable to the discovery phase of criminal cases serve different purposes than those applicable to criminal and civil investigations.

² One example of the producing party undertaking additional processing for its discovery production is a load file that enables the receiving party to load discovery materials into its software.

case, and when they give the court notice of ESI discovery issues that will significantly affect the handling of the case.

2. Scope: Cases Involving Significant ESI

No single approach to ESI discovery is suited to all cases. These Recommendations are intended for cases where the volume and/or nature of the ESI produced as discovery significantly increases the complexity of the case.³ In simple or routine cases, the parties should provide discovery in the manner they deem most efficient in accordance with the Federal Rules of Criminal Procedure, local rules, and custom and practice within their district.

Due to the evolving role of ESI in criminal cases, these Recommendations and the parties' practices will change with technology and experience. As managing ESI discovery becomes more routine, it is anticipated that the parties will develop standard processes for ESI discovery that become the accepted norm.

3. Limitations

These Recommendations and the accompanying Strategies do not alter the parties' discovery obligations or protections under the U.S. Constitution, the Federal Rules of Criminal Procedure, the Jencks Act, or other federal statutes, case law, or local rules. They may not serve as a basis for allegations of misconduct or claims for relief and they do not create any rights or privileges for any party.

4. Technical Knowledge and Experience

For complex ESI productions, each party should involve individuals with sufficient technical knowledge and experience to understand, communicate about, and plan for the orderly exchange of ESI discovery. Lawyers have a responsibility to have an adequate understanding of electronic discovery.

5. Planning for ESI Discovery Production - The Meet and Confer Process

At the outset of a case involving substantial or complex ESI discovery, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. The parties should determine how to ensure that any "meet and confer" process does not run afoul of speedy trial deadlines. Where the ESI discovery is particularly complex or produced on a rolling basis, an on-going dialogue during the discovery phase may be helpful. In cases where it is authorized, providing ESI discovery to an incarcerated defendant presents challenges that should be discussed early. Also, cases involving classified information will not fit within the Recommendations and Strategies due to the unique legal procedures applicable to those cases. ESI that is contraband (*e.g.*, child pornography) requires special discovery procedures. The [Strategies](#) and [Checklist](#) provide detailed recommendations on planning for ESI discovery.

³ Courts and litigants will continue to seek ways to identify cases deserving special consideration. While the facts and circumstances of cases will vary, some factors may include: (1) a large volume of ESI; (2) unique ESI issues, including native file formats, voluminous third-party records, non-standard and proprietary software formats; and/or (3) multiple defendant cases accompanied by a significant volume of ESI.

6. Production of ESI Discovery

Production of ESI discovery involves varied considerations depending upon the ESI's source, nature, and format. Unlike certain civil cases, in criminal cases the parties generally are not the original custodian or source of the ESI they produce in discovery. The ESI gathered by the parties during their investigations may be affected or limited by many factors, including the original custodian's or source's information technology systems, data management practices, and resources; the party's understanding of the case at the time of collection; and other factors. Likewise, the electronic formats used by the parties for producing ESI discovery may be affected or limited by several factors, including the source of the ESI; the format(s) in which the ESI was originally obtained; and the party's legal discovery obligations, which may vary with the nature of the material. The Strategies and Checklist provide detailed recommendations on production of ESI discovery.

General recommendations for the production of ESI discovery are:

- a. The parties should discuss what formats of production are possible and appropriate, and what formats can be generated. Any format selected for producing discovery should, if possible, conform to industry standards for the format.⁴
- b. ESI received from third parties should be produced in the format(s) it was received or in a reasonably usable format(s). ESI from the government's or defendant's business records should be produced in the format(s) in which it was maintained or in a reasonably usable format(s).
- c. Discoverable ESI generated by the government or defense during the course of their investigations (*e.g.*, investigative reports, witness interviews, demonstrative exhibits, etc.) may be handled differently than in 6(a) and (b) above because the parties' legal discovery obligations and practices vary according to the nature of the material, the applicable law, evolving legal standards, the parties' policies, and the parties' evolving technological capabilities.
- d. When producing ESI discovery, a party should not be required to take on substantial additional processing or format conversion costs and burdens beyond what the party has already done or would do for its own case preparation or discovery production. For example, the producing party need not convert ESI from one format to another or undertake additional processing of ESI beyond what is required to satisfy its legal disclosure obligations. If the receiving party desires ESI in a condition different from what the producing party intends to produce, the parties should discuss what is reasonable in terms of expense and mechanics, who will bear the burden of any additional cost or work, and how to protect the producing party's work product or privileged information. Nonetheless, with the understanding that in certain instances the results of processing ESI may constitute work product not subject to discovery, these

⁴ An example of "format of production" might be TIFF images, OCR text files, and load files created for a specific software application. Another "format of production" would be native file production, which would accommodate files with unique issues, such as spreadsheets with formulas and databases. ESI in a particular case might warrant more than one format of production depending upon the nature of the ESI.

recommendations operate on the general principle that where a producing party elects to engage in processing of ESI, the results of that processing should, unless they constitute work product, be produced in discovery along with the underlying ESI so as to save the receiving party the expense of replicating the work.

7. Transmitting ESI Discovery

The parties should discuss transmission methods and media that promote efficiency, security, and reduce costs. In conjunction with ESI transmission, the producing party should provide a general description and maintain a record of what was transmitted. Any media should be clearly labeled. The Strategies and Checklist contain detailed recommendations on transmission of ESI discovery, including the potential use of email to transmit ESI.

8. Coordinating Discovery Attorney

In cases involving multiple defendants, the defendants should authorize one or more counsel to act as the discovery coordinator(s) or seek the appointment of a Coordinating Discovery Attorney⁵ and authorize that person to accept, on behalf of all defense counsel, the ESI discovery produced by the government. Generally, the format of production should be the same for all defendants, but the parties should be sensitive to different needs and interests in multiple defendant cases.

9. Informal Resolution of ESI Discovery Matters

- a. Before filing any motion addressing an ESI discovery issue, the moving party should confer with opposing counsel in a good-faith effort to resolve the dispute. If resolution of the dispute requires technical knowledge, the parties should involve individuals with sufficient knowledge to understand the technical issues, clearly communicate the problem(s) leading to the dispute, and either implement a proposed resolution or explain why a proposed resolution will not solve the dispute.
- b. The Discovery Coordinator within each U.S. Attorney's Office should be consulted in cases presenting substantial issues or disputes.

⁵ Coordinating Discovery Attorneys (CDA) are AOUSC contracted attorneys who have technological knowledge and experience, resources, and staff to effectively manage complex ESI in multiple defendant cases. The CDAs may be appointed by the court to provide in-depth and significant hands-on assistance to CJA panel attorneys and FDO staff in selected multiple-defendant cases that require technology and document management assistance. They can serve as a primary point of contact for the U.S. Attorneys Office to discuss ESI production issues for all defendants, resulting in lower overall case costs for the parties. If a panel attorney or FDO is interested in utilizing the services of the CDA, they should contact the National Litigation Support Administrator or Assistant National Litigation Support Administrator for the Office of Defender Services at 510-637-3500.

- c. To avoid unnecessary litigation, prosecutors and Federal Defender Offices⁶ should institute procedures that require line prosecutors and defenders (1) to consult with a supervisory attorney before filing a motion seeking judicial resolution of an ESI discovery dispute, and (2) to obtain authorization from a supervisory attorney before suggesting in a pleading that opposing counsel has engaged in any misconduct, abuse, or neglect concerning production of ESI.
- d. Any motion addressing a discovery dispute concerning ESI production should include a statement of counsel for the moving party relating that after consultation with the attorney for the opposing party the parties have been unable to resolve the dispute without court action.

10. Security: Protecting Sensitive ESI Discovery from Unauthorized Access or Disclosure

Criminal case discovery entails certain responsibilities for all parties in the careful handling of a variety of sensitive information, for example, grand jury material, the defendant's records, witness identifying information, information about informants, information subject to court protective orders, confidential personal or business information, and privileged information. With ESI discovery, those responsibilities are increased because ESI is easily reproduced and disseminated, and unauthorized access or disclosure could, in certain circumstances, endanger witness safety; adversely affect national security or homeland security; leak information to adverse parties in civil suits; compromise privacy, trade secrets, or classified, tax return, or proprietary information; or prejudice the fair administration of justice. The parties' willingness to produce early, accessible, and usable ESI discovery will be enhanced by safeguards that protect sensitive information from unauthorized access or disclosure.

All parties should limit dissemination of ESI discovery to members of their litigation team who need and are approved for access. They should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure.

During the initial meet and confer and before ESI discovery is produced, the parties should discuss whether there is confidential, private or sensitive information in any ESI discovery they will be providing. If such information will be disclosed, then the parties should discuss how the recipients will prevent unauthorized access to, or disclosure of, that ESI discovery, and, absent agreement on appropriate security, the producing party should seek a protective order from the court addressing management of the particular ESI at issue. The producing party has the burden to raise the issue anew if it has concerns about any ESI discovery it will provide in subsequent productions. The parties may choose to have standing agreements so that their practices for managing ESI discovery are not discussed in each case. The Strategies contains additional guidance in sections 5(f), 5(p), and 7(e).

⁶ For private attorneys appointed under the Criminal Justice Act (CJA), this subsection (c) is not applicable.

ESI Discovery Production Checklist

- ☐ Is this a case where the volume or nature of ESI significantly increases the case's complexity?
- ☐ Does this case involve classified information?
- ☐ Does this case involve trade secrets, or national security or homeland security information?
- ☐ Do the parties have appropriate technical advisors to assist?
- ☐ Have the parties met and conferred about ESI issues?
- ☐ Have the parties addressed the format of ESI being produced? Categories may include:
 - ☐ Investigative reports and materials
 - ☐ Witness statements
 - ☐ Tangible objects
 - ☐ Third party ESI digital devices (computers, phones, etc.)
 - ☐ Photos, video and audio recordings
 - ☐ Third party records
 - ☐ Title III wire tap information
 - ☐ Court records
 - ☐ Tests and examinations
 - ☐ Experts
 - ☐ Immunity and plea agreements
 - ☐ Discovery materials with special production considerations
 - ☐ Related matters
 - ☐ Discovery materials available for inspection but not produced digitally
 - ☐ Other information
- ☐ Have the parties addressed ESI issues involving:
 - ☐ Table of contents?
 - ☐ Production of paper records as either paper or ESI?
 - ☐ Proprietary or legacy data?
 - ☐ Attorney-client, work product, or other privilege issues?
 - ☐ Sensitive confidential, personal, grand jury, classified, tax return, trade secret, or similar information?
 - ☐ Whether email transmission is inappropriate for any categories of ESI discovery?
 - ☐ Incarcerated defendant's access to discovery materials?
 - ☐ ESI discovery volume for receiving party's planning purposes?
 - ☐ Parties' software or hardware limitations?
 - ☐ Production of ESI from 3rd party digital devices?
 - ☐ Forensic images of ESI digital devices?
 - ☐ Metadata in 3rd party ESI?
 - ☐ Redactions?
 - ☐ Reasonable schedule for producing party?
 - ☐ Reasonable schedule for receiving party to give notice of issues?
 - ☐ Appropriate security measures during transmission of ESI discovery, *e.g.*, encryption?
 - ☐ Adequate security measures to protect sensitive ESI against unauthorized access or disclosure?
 - ☐ Need for protective orders, clawback agreements, or similar orders or agreements?
 - ☐ Collaboration on sharing costs or tasks?
 - ☐ Need for receiving party's access to original ESI?
 - ☐ Preserving a record of discovery produced?
- ☐ Have the parties memorialized their agreements and disagreements?
- ☐ Do the parties have a system for resolving disputes informally?
- ☐ Is there a need for a designated discovery coordinator for multiple defendants?
- ☐ Do the parties have a plan for managing/returning ESI at the conclusion of the case?