Meta Data Matters

by Lynn Reilly, Esq.

Meta data—lawyers practicing in the electronic age cannot ignore this new source of evidence.

Meta data (also known as "embedded data") literally means "data about data." It is a critical component of electronically stored documents. Lawyers can use it to bolster their own cases, streamline document review, and get the complete story of their adversaries' documents.

Software programs embed various categories of meta data in documents that users create. Meta data describes how, when, and by whom an electronic document was created, modified, and transmitted. This administrative information assists data retrieval and reveals a document's history.

Meta data represents a crucial difference between electronic and printed documents. All the information in a paper document is displayed on its face, but not so with electronic documents. Electronic documents carry their history with them. Paper shows what a document said, but meta data tells where the document went and what it did.

Importance

As lawyers become aware of meta data as a source of evidence, it gains importance in litigation. Recognizing its evidentiary value, more lawyers are requesting it from opposing parties as well as using it as a resource in making their own cases. Before producing documents, a review team needs to be aware of and prepared to confront any embedded information that might harm a client's position. Lawyers can expect at some point to face a request, or an order, to produce meta data.

Significantly, meta data is not a separate document, but is an integral part of the document it describes. One court, rejecting the argument that printouts adequately represented e-mails, described e-mails without their meta data as "dismembered documents indeed."

Recent advances in technology make preserving and viewing meta data easier, and expectations are changing about what must be produced. New tools, and an increasing appreciation of meta data's evidentiary value, drive its growing importance in litigation.

How might meta data matter to your case?

Types of Meta Data

For lawyers' purposes, one of the most important examples of meta data is that embedded in e-mail. E-mail prevails in businesses communication, so it follows that many cases now feature e-mail evidence.

An e-mail carries information about its author, creation date, attachments, and identities of all recipients, including those named in the "cc" and "bcc" fields. As e-mail "conversations" take place, the e-mail accumulates a conversation thread—replies to the sender, to other recipients, and forwards. That history becomes part of the message's meta data, allowing reviewers to trace a message or reconstruct an e-mail conversation.

Meta data also connects attachments to e-mails. When e-mail is a vehicle for transmitting other documents, such as word processing documents, spreadsheets, or presentations, links to those attachments are part of the e-mail's meta data. Preserving these links means that a reviewer can tell what document, and which version of it, was attached to a particular e-mail.

Regrettably e-mails have received a good deal of press attention, and many lawyers have stories to tell about how e-mails have factored in their cases. But e-mails are only one example of documents that hold meta data evidence.

Information embedded in other file types may include document names, file-save locations, authors, and editors. Previous edits to a document may be accessible. "Track changes" features reflect modifications by each recipient. CAD drawings can show who drafted previous versions of a design, and when.

All this information was unavailable to lawyers in the days of paper storage. When the background of a document was disputed, the answer was to depose witnesses. With electronic information, litigators don't have to rely on or debate witnesses' memories. Meta data settles factual disputes about a document's history because the document tells its own story.

Examples

A plaintiff claimed that she was discharged in retaliation for making a sexual harassment complaint. To refute the allegation of a retaliatory motive, the defendant produced an e-mail memorandum dated before her sexual harassment complaint. The memo included the plaintiff on a list of employees to be let go in a planned seasonal layoff. She claimed that the memo was fabricated in response to the litigation.

The memo's meta data confirmed its date of creation—prior to her complaint.

In another case, a terminated employee fabricated an e-mail to suggest that a manager with whom she had a romantic relationship had made the decision to terminate her. Meta data exposed the plaintiff herself as the document's author.

Yet another plaintiff contended that the defendant had improperly omitted some e-mails from production. The defendant refused this claim by reconstructing a chain of e-mails, establishing that all that was requested had been produced.

Often, the heart of an e-mail is not its text, but its attachments. If documents are reviewed in printed form, those relationships are difficult to reconstruct. Meta data can maintain the links between e-mails and attachments,
including which version of a document was attached to which e-mail. When a dispute arises over how various recipients changed a document, or what information a witness had at a given time, meta data often resolves the issue.

In any factual dispute involving knowledge of particular information, meta data is a great resource. It reveals the identities of recipients, as well as when they received and opened a document. In issues such as fraud, negligent misrepresentation, or insider trading—in which it can be crucial what a witness knew, and when—meta data can provide invaluable evidence.

When parties exchange different versions of a document using a “track changes” feature, the changes become part of the meta data. This information can be critical in situations such as a contract dispute involving the parties’ intent in negotiations.

Meta data is a trove of information about whether an adversary has properly preserved documents in the face of litigation. It reveals when a document was last modified or accessed. If documents are missing, it can reveal when they were deleted.

Streamlined Document Review

In addition to its use in factual disputes, meta data can be a valuable resource in the document review process, whether in litigation or in mergers and acquisitions practice, where lawyers often face government demands for production on tight timelines. It allows electronic searching of various fields so that lawyers can quickly locate keywords and filter searches by a document’s source, name of a witness, time period, or a subject line. These search capacities make it possible for reviewing lawyers to quickly sort millions of pages, eliminating superfluous documents and filtering an otherwise unmanageable volume of documents into a workable set for review and production.

File path information that reveals where a document came from (e.g., what file or source) may help locate other pertinent documents. Lawyers reviewing for attorney-client privilege can quickly detect the identities of document authors and recipients. If there is an allegation that purportedly privileged material was in fact shared with individuals outside the scope of the privilege, the e-mail’s meta data will show recipients—including anyone who received a “bcc.”

Meta data can also reveal the actual destination of an e-mail, rather than just the name in the address field. This information is important for a witness who uses multiple display names, or an e-mail alias. User names and e-mail aliases may not be meaningful to a reviewer without the identity of the associated person.

For example, in the Microsoft antitrust litigation, Bill Gates’ e-mails became an important source of evidence. He received intra-company e-mails under a number of different names. Meta data would capture all those messages by tracking the full e-mail address, not just the “friendly” name appearing in the address field.

Distribution lists also may be meaningless without this capability. A reviewer could not otherwise identify, for example, recipients of an e-mail sent to a group distribution list, like “Sales,” or “Executive Team.”

It is easy to see the value of meta data, whether in requesting documents, building a client’s own evidence, or simply sifting through masses of documents on a deadline. It accelerates review and proves facts that might otherwise generate disputes and further discovery. But lawyers need to be sure that their own document review tools are not compromising this information. Meta data can only be captured, accessed and viewed through electronic means. This makes proper electronic document processes essential.

Preserving Meta Data

Some methods of document review fail to account for and preserve meta data. If a document is printed in the review and production process, its meta data is lost on the printed document. A printout displays only the face of the document, not its embedded history.

Many lawyers believe they are conducting “electronic discovery” when in fact they are merely working with electronic images of documents. The process of scanning and coding documents into a database does not capture original document meta data. Additional software can allow limited electronic searching, but the original information embedded in the document is lost. Likewise, subjectively coding a database to recognize certain terms does not restore the meta data lost in the reduction to paper. It is a poor substitute for the original electronic document.

The ability to see layers of information behind the face of a document has obvious implications for litigators, whether a party is ordered to produce it or uses it to its own advantage. Lawyers must take care that their review methods capture this essential information.

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