

2. An order from the Eastern District of Missouri denying the plaintiffs' motion to compel the defendant to re-produce all of its document productions with additional metadata because the parties had not agreed to a protocol requiring that such metadata be produced and the plaintiffs had not specified the format for production in its document requests to include such metadata.

In *Cody v. City of St. Louis*, 2021 WL 2454215 (E.D. Mo. June 16, 2021), U.S. District Judge Audrey Fleissig denied a motion to compel the Defendant to re-produce all of its document productions with additional ESI in the form of metadata for the documents because the parties had not agreed that such metadata would be produced and Plaintiffs had not specified the format for production in its document requests.

In this action, where Plaintiffs sought damages and injunctive relief for various alleged dangerous, unsanitary, and inhumane conditions inside the a medium security facility in which they were incarcerated, the court was faced with several motions, including a motion to compel the re-production of the city's metadata. *Id.* at \*1.

Early in discovery, the parties had agreed that "the initial production of [ESI] can be accomplished with PDF files, paper photocopies, or screen prints. Should the need to produce other [ESI] arise, the parties will confer in an effort to facilitate production in a mutually agreeable format." Thereafter, the parties engaged in extensive discovery and motion practice regarding that discovery. However, none of Plaintiffs' discovery specified the format in which ESI should be produced, nor did Plaintiffs raise the issue of format in any of their discovery motions prior to the instant motion.

Plaintiffs sought an order compelling the city to reproduce prior ESI productions and to produce all future ESI productions in either native format or accompanied by requisite metadata that identified the custodians, recipient, and date of the document. Plaintiffs argued that where no party agreement or court order exists specifying the form of production, ESI must be produced in a reasonably usable form, which requires metadata (and the need for metadata is inherent in any request for ESI). *Id.* at \*3. The city responded that the parties had agreed at the outset of discovery that ESI would be produced in PDF files, paper photocopies, or screen prints, that if the need arose, they would confer regarding other mutually agreeable formats, and that the parties had proceeded pursuant to this agreement for years without complaint. *Id.* at \*4. The city further argued that Plaintiffs had not specified in their numerous requests for production of documents their desire for metadata. The city contended that its past productions of ESI were in a reasonably usable form and that forcing it to reproduce its voluminous prior productions, years later, in native format or with metadata would be unduly burdensome.

Judge Fleissig began her analysis with a discussion of the relevant Federal Rules of Civil Procedure. She described that both Rule 26(f) and one of her prior orders required the parties to discuss issues relating to discovery of ESI, including the form or forms in which it should be produced. *Id.* at \*6. She noted that the parties had agreed to a format of ESI production that did not require production in native format or with metadata and to confer on a mutually agreeable format, as needed. However, the parties never reached a final agreement as to the format of ESI production, nor did Plaintiffs specify a format in any of their requests for production or in any of their discovery motions. *Id.* at \*7. In this context, she noted that Rule 34(b) permits parties to specify the form or forms in which ESI is to be produced and provides that "[i]f a request does not

specify a form for producing [ESI], a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.” The Rule further specifies that “[a] party need not produce the same [ESI] in more than one form.” Finally, Judge Fleissig noted that “absent a specific request to the contrary or special circumstances not at issue here, courts regularly find that searchable PDF documents constitute a reasonably usable form.” *Id.* (citing cases).

Judge Fleissig concluded that the city would not be required to re-produce its document productions because the city had produced ESI in the format reflected by the parties’ initial agreement without objection by Plaintiffs, and Plaintiffs did not raise the format of the city’s productions with the court or specify the form of production in any of their prior discovery. However, Judge Fleissig directed Plaintiffs to provide the city with a limited list of particular documents that Plaintiffs believed are critical to this litigation and for which Plaintiffs were unable to identify the date, author, and/or recipient and required the parties to meet and confer regarding production of metadata for those documents. Judge Fleissig concluded by stating that she may require Plaintiffs to bear some or all of the cost of any reproduction of ESI in a different format, depending on the volume and importance of such documents that are at issue.