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Recommended Citation: Jonathan M. Redgrave & Ted S. Hiser, *The Information Age, Part I: Fishing in the Ocean, A Critical Examination of Discovery in the Electronic Age*, 2 SEDONA CONF. J. 195 (2001).

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THE INFORMATION AGE, PART I: FISHING IN THE OCEAN, A CRITICAL EXAMINATION OF DISCOVERY IN THE ELECTRONIC AGE

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I. INTRODUCTION

Discovery of electronic data is not new. Since 1970, the definition of a “document” in Rule 34 of the Federal Rules of Civil Procedure has included a reference to electronic data.² The role of electronic evidence in discovery disputes is also well recognized, as reflected in this oft-quoted passage from Wright & Miller:

[I]t has become evident that computers are central to modern life and consequently also to much civil litigation. As one district court put it in 1985, ‘computers have become so commonplace that most court battles now involve discovery of some computer-stored information.’³

Accordingly, many courts and lawyers assume that there is no reason to consider the nature of the documents (*i.e.*, electronic vs. paper) in applying the rules and case law regarding document production and that any attempt to limit electronic discovery is an attempt to “shield” responsive documents from discovery.

This article challenges that assumption. In particular, this article briefly reviews the explosive growth (and projected growth) of the “paperless” business environment, reviews the history of judicial concerns about “fishing expeditions,” and then applies these historic concerns (and objections) of overbreadth and burden in light of the plethora of electronic information and argues for a flexible approach to electronic discovery issues.⁴

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2 The Advisory Committee Notes for the 1970 amendments to the Federal Rules note the inclusive nature of the term “document”:
The inclusive description of “documents” is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can, as a practical matter, be made usable by the discovering party only through respondent’s devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data. The burden thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs. Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentiality of nondiscoverable matters, and costs.

3 8A Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice & Procedure*, section 2218 at 449 (2d ed. 1994) (quoting *Bills v. Kenecott Corp.*, 108 F.R.D. 459, 462 (D. Utah 1985)). Similarly, the *Manual for Complex Litigation* (Third) recognizes that the benefits and problems associated with computerized data are substantial in the discovery process and at trial and that courts must address such issues early. *Manual for Complex Litigation* (Third), section 21.446 (1995).

4 The authors further note that this paper is written in the context of the accompanying paper submitted by Barbara Caulfield and seeks to avoid duplicating the contents of her work to the greatest extent possible.

II. THE OCEAN

Much has been written in law reviews and periodicals in the last five years regarding “electronic discovery.”⁵ Even so, it is helpful to pause again at the magnitude of the issue:

- 3.4 trillion e-mail messages were sent in 1998, including 343 billion in the United States alone.
- There are currently more than 275 million e-mail addresses in the world.⁶
- The average office worker in the United States sends and receives an average of 60 e-mail messages each day.⁷
- 93 percent of the world’s information is being generated and stored in digital form; only 7 percent in other media such as paper and film.⁸

But just as the ocean is not just water, electronic data is not just another way to store information. Electronic data geometrically expands the types of information, as well as the volume, captured and retained:

- Networked computers often create multiple repositories for electronic documents — network hard drives and local drives “shadowing” one another.
- Most companies necessarily employ “disaster” recovery procedures that generate an additional set of data on a regular basis — often including documents or e-mails that were “deleted” by users.
- Laptop computers and hand-held personal digital assistants (*e.g.*, Palm Pilots) create additional sources of unique as well as duplicative data.
- An electronic copy of an e-mail message may contain up to 30 fields of information, many of which will not be apparent on the hard copy printout of the message.
- Document management programs and word processing programs often associate “Metadata” with files. For example, Microsoft Word can automatically create and store within each file a set of information that reveals prior versions of the document as well as drafts and distribution history.
- New products, such as Microsoft’s Exchange 2000, allow for full text indexing of e-mails *and* attachments.

⁵ See, *e.g.*, Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Fed. R. Civ. P. 34 Up to the Task?*, 41 B.C. L. Rev. 327, 332-33 (2000) (The term “electronic discovery” refers to discovery of “any electronically-stored information subject to pretrial discovery.”); see also Dale M. Cendali & Lydia R. Zaidman, *Electronic Discovery*, 610 Prac. L. Inst./Pat. 859, 903 (2000) (“[d]ata may be found in many ... places including on floppy disks, back-up tapes, punch cards, e-mail, word processing documents, computerized spreadsheets, accounting files, wide area networks, private sites and voice mail ... This list is hardly exhaustive.”); Mark D. Robins, *Computers and the Discovery of Evidence - A New Dimension to Civil Procedure*, 17 J. Marshall J. Computer & Info. L. 411, 505 (1999) (“[t]he potential sources of evidence may include[] hard drives, floppy diskettes, magnetic tapes, and CD-ROMs, ... e-mail, system history files, back-up files, files containing drafts, deleted files, dormant files, data stored ‘off the end’ of currently active sections of magnetic tape, partially overwritten file remnants, and broken hard drives.”). Moreover, the range of information subject to electronic discovery continually expands as the technology continues to develop. See, *e.g.*, *Natl Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1257, 1262 (E.D. Pa. 1980) (excerpting from the Advisory Committee Notes for Fed. R. Civ. P. 34, 48 F.R.D. 487, 527 (1970), “[t]he inclusive description of ‘documents’ is revised to accord with changing technology”).

⁶ See <http://www.emarketer.com>.

⁷ Marcia Stephanek, *Office E-Mail: It Can Zap You - In Court*, Business Week (June 8, 1998).

⁸ Kenneth J. Withers, *The Real Cost of Virtual Discovery*, Federal Discovery News (Feb. 2001).

- New “instant messaging” services and their equivalents create virtual written conference calls that are “recorded” or erased at the option of the user.
- Internet based applications allow multiple users to simultaneously create and edit (and delete) files and information.
- Financial and data processing programs and software have become increasingly complex in terms of the tasks performed and the amount of data generated.

Perhaps the most troubling aspect of this vast volume of information and technological complexity is the simultaneous appearance of simplicity. One desktop server hard disk drive for a network of a modest size can occupy less physical space than a toaster. The corollary assumption is that copying the disk contents for discovery must not be costly or burdensome. While this assumption is partially true, it obscures the real problem.

The truth of the statement lies in the advantages of electronic discovery, at least from the perspective of a *discovering* party. Indeed, the author of a February 2001 article in *The Internet Lawyer* posited: “Given the fact that e-discovery is ‘more convenient, less burdensome and less expensive’ than the technically (yet pervasive) process of print-scan-OCR, courts will increasingly favor electronic discovery as the preferred approach.”⁹ The article thereafter examines the recently amended Rule 26(b)(2) to support this proposition, specifically noting that the actual cost of copying data is usually minimal.

The fallacy in the above cost assumption becomes apparent when we return to the ultimate purpose of discovery under the Rules of Civil Procedure: to produce or make available non-privileged documents and information relevant to the subject matter of the litigation or reasonably calculated to lead to the discovery of admissible evidence. This requires legal analysis of each e-mail or piece of information at some level: What does it say? What does it mean? Is it relevant? Is it privileged? Is it a trade secret or commercially sensitive? Unfortunately, a lawyer cannot visually inspect the hard drive (*i.e.*, the toaster) to determine if the contents are relevant or contain material protected from disclosure under privilege or privacy laws. Instead, the data must be “unpacked” and reviewed piece by piece — creating a massive task that can quickly dwarf the largest paper reviews and productions. This “unpacking” will involve “de-duplication” of files, eliminating irrelevant program files, locating applications to open all attachments, restoring deleted or hidden files, reviewing Metadata and then reviewing the content of each message and document on file. In addition to the lawyers’ time, such a process invariably involves computer forensic experts that cost hundreds of dollars per hour (in addition to equipment costs). While this may be a boon to forensic service providers, these costs must be considered when undertaking the cost/burden analysis dictated by Federal Rule of Civil Procedure 26(b)(2), as explained below. Indeed, one of the leading practitioners in this field recently expounded on the reality facing courts and practitioners:

Paradoxically, the advantages of computerization in the business world — the reduction of costs and greater efficiency in recording, storing, manipulating and retrieving information — have not translated into advantages in discovery. After a review of case law and articles in the legal press, and an informal survey of federal magistrate judges conducted by the Federal Judicial Center in 2000, the discovery of computer-based information appears to cost more, take more time and create more headaches than conventional, paper based discovery.

9 Larry Johnson, *Changes to Rule 26 Dictate Use of Electronic Discovery*, *The Internet Lawyer* (Feb. 2001).

Kenneth J. Withers, *The Real Cost of Virtual Discovery*, Federal Discovery News at 3 (Feb. 2001). Stated otherwise, the appearance of efficient electronic discovery is largely illusory.

III. FISHING EXPEDITIONS: A HISTORY

There is not — nor has there ever been — a defined “fishing expedition” standard for objecting to discovery requests. Instead, the term is used to describe discovery requests that seek documents or information beyond that allowed by the Rules. From the Rules’ enactment, courts have refused to allow fishing expeditions into matters that were irrelevant to the claims or issues in the case in which the requests were propounded. In addition, courts do not allow fishing expeditions where the proponent of the discovery was either attempting to force the responding party to develop the proponent’s case or attempting to develop speculative claims lacking any support in fact. Occasionally, but not often, courts apply the fishing expedition label to discovery that is overly broad, unduly burdensome or imposes unnecessary expense on the responding party.

A. The Rules’ Drafter’s Concerns that the Expanded Discovery Contemplated by the Rules Would Result in Fishing Expeditions

Prior to the enactment of the Rules in 1938, discovery in federal courts was “extremely limited.” Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. Rev. 691, 698 (1998). In law cases, the only discovery available to the parties was provided for in two federal statutes dealing with depositions. *Id.*¹⁰

The Advisory Committee that drafted the new Rules first met in June 1935. *Id.* at 717. The Committee agreed that “the method of taking depositions, examinations before trial, discovery, and subjects of that nature, being procedural,” were within the proper scope of the new Rules. *Id.* There was consensus on the Committee, however, that the Rules had to be drafted to prevent discovery “from being used as a basis for annoyance and blackmail” *Id.* Members of the Committee had “deep concerns about the problems inherent in liberal discovery” *Id.* at 720.

One concern was that oral depositions could spin out of control into “fishing expeditions.” *Id.* One member of the Committee warned that there would be “an outburst against this discovery business unless we can hedge it about with some appearance of safety against fishing expeditions.” *Id.* at 722 (citation omitted). Others thought that the proposed Rules would “increase so-called speculative litigation or litigation based on suspicion rather than facts, with the hope that such fishing may reveal a good cause of action as alleged or otherwise” *Id.* at 731 (citation omitted).

During the drafting stage, several ideas were proposed for limiting discovery.¹¹ Members of the patent bar suggested that the party seeking discovery should be required to secure from the court an order specifying the scope of the subject matter covered by the discovery. *Id.* at 730-31. The purpose of these suggestions was to “limit at the outset a ‘fishing expedition’” *Id.* at 731.

¹⁰ The first statute allowed depositions only where the witness lived more than 100 miles from the place of trial, was at sea, was about to leave the United States, or was old or infirm. *Id.* The second statute allowed depositions only in cases “where it was necessary to prevent a failure or delay of justice.” *Id.* (quoting Edson R. Sunderland, *The New Federal Rules*, 45 W.Va. L.Q. 5, 19 (1938)). These statutes also applied to equity cases. *Id.* There were two additional rules allowing for limited discovery in equity cases. *Id.* at 699-700.

¹¹ One suggestion was to enact more rigorous pleading rules and then limit the scope of discovery to allegations in the pleadings. *Id.* at 722. At one stage it was proposed that a party serving interrogatories pay one dollar for every interrogatory in excess of twenty. *Id.* at 723. Finally, in order to protect witnesses at depositions, it was suggested, among other things, that a party seeking to depose someone first go to a judge for permission to conduct the deposition. The judge could make an order specifying the subjects to be inquired into. *Id.* at 724.

Nonetheless, the final draft of the Rules contained “fewer constraining devices” than the original draft. *Id.* at 729. Furthermore, the enacted Rules contained almost none of the limitations on discovery contemplated during the Committee’s deliberations. *Id.*

B. The Evolution of the “Fishing Expedition” Exception: 1938 - 1983

1. Early Judicial Interpretations of the Rules

Courts interpreting the new Rules were in disagreement on the scope of discovery. *Id.* at 734. Although the scope of depositions was limited to “any matter, not privileged, which is relevant to the subject involved in the pending action, whether relating to the claim or defense of’ ... either party,” some courts added an admissibility requirement. *Id.* at 734-35. The admissibility requirement meant, for example, that hearsay evidence was not subject to discovery. *Id.* at 735 & n.242 (citations omitted).

2. The 1946 Amendment to the Rules

In 1946, the Supreme Court amended Rule 26 to eliminate the judicially-crafted admissibility requirement. The amended Rule established the standard that survives to this day: “[i]t is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* at 736 (citations omitted).

While the amendment broadened the scope of permissible discovery, the Committee did not intend to sanction unlimited discovery. The Committee Notes to the 1946 amendment made clear that matters inquired into had to be relevant to the case at hand. “[M]atters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry...” Fed. R. Civ. P. 26 Advisory Committee Notes.

3. Hickman v. Taylor

In its 1947 decision in *Hickman v. Taylor*, 329 U.S. 495 (1947), the United States Supreme Court declared that under the Federal Rules of Civil Procedure, discovery rules were “to be accorded a broad and liberal treatment” and that “[n]o longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case.” *Id.* at 507 (citation omitted). Wright & Miller give its blessing to *Hickman’s* admonition, stating that “an objection that a request for inspection is a fishing expedition should be given short shrift.” 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* section 2206 at 380 (2d ed. 1994).

4. Post-Hickman Treatment of the Fishing Expedition Objection

While *Hickman’s* disapproval of a party’s invocation of the fishing expedition objection to discovery requests appears absolute, the Court also noted that discovery was not without its limits. The Court recognized that discovery could not be employed in bad faith or to annoy, embarrass or oppress the subject of the inquiry. Nor could discovery be had into matters that were irrelevant or privileged. *Hickman*, 329 U.S. at 507-08.

It is important to note *Hickman’s* explicit declaration that discovery could not be had into irrelevant matters. In *E.I. Du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416 (D. Del. 1959), the court refused the defendant’s requests for records of the

plaintiff's interdepartmental communications and internal decisions. *Id.* at 423. The court held that there was

nothing to support this part of the request except a hope that the defendant *might find something which will help its case*. If it could be made to appear to me that there was any substantial foundation for such hope, the question would be different. I realize that "fishing expedition" is no longer a ground of objection to discovery. But, on the other hand, unless the Court requires the moving party to show *that there is something more than a mere possibility that relevant evidence exists*, the only appropriate order would be one requiring the party to turn over every scrap of paper in its files as well as the contents of its waste baskets.

Id. (emphasis added). Therefore, case law immediately following *Hickman* refused to follow *Hickman's* apparent endorsement of fishing expeditions and instead embraced *Hickman's* caveat that discovery could not be had into irrelevant matters.

There were, however, cases decided soon after *Hickman* that expressed the view that fishing expeditions were permitted under the Rules. See *Reed v. Swift & Co.*, 11 F.R.D. 273, 274 (W.D. Mo. 1951)¹² and *Glick v. McKesson & Robbins, Inc.*, 10 F.R.D. 477, 479 (W.D. Mo. 1950). But that approval was qualified. Notably, cases ostensibly approving of fishing expeditions also acknowledged that the inquiry had to be into relevant matters.

For example, the *Glick* court, after stating its approval of fishing expeditions, added that interrogatories must relate to the subject matter of the case or have the potential to lead to relevant fact. *Glick*, 10 F.R.D. at 479. One 1948 decision, after acknowledging the liberal interpretation to be given the discovery rules and quoting *Hickman's* disapproval of fishing expedition objections, declared that "[a]bout the only limitation or requirement [on the scope of discovery] is that the information sought is relevant." *Brown v. Dunbar & Sullivan Dredging Co.*, 8 F.R.D. 107, 108 (W.D.N.Y. 1948) (quotation omitted).

5. The 1983 Amendment to the Rule 26(b)

In 1983, Rule 26 was amended to reign-in overly broad discovery addressed concerns that had arisen in the courts. In *Hardrick v. Legal Services Corp.*, the court noted that "courts have become concerned about . . . discovery abuse and inordinate expense involved in overbroad and far-ranging discovery requests." *Hardrick*, 96 F.R.D. 617, 618 (D.D.C. 1983). According to the Advisory Committee Notes to the 1983 Amendments, "[e]xcessive discovery and evasion or resistance to reasonable discovery pose significant problems." The Notes add that the

spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.

Fed. R. Civ. P. 26 Advisory Committee Notes.

¹² The *Reed* decision was incredibly broad. The court held that the only way for it to determine whether discovery requests sought irrelevant information was to have the information requested before the court. *Reed*, 11 F.R.D. at 274. It added that it was "more desirable to allow discovery of facts which may prove to be irrelevant and immaterial than to deny discover [sic] which may bring to light facts which are more material to the issues than any facts theretofore known." *Id.*

The 1983 amendment added provisions allowing the court to limit discovery otherwise permitted by the rules if the discovery was unreasonably cumulative or duplicative or if the burden or expense of the proposed discovery outweighed its likely benefit. Fed. R. Civ. P. 26(b)(2). These amendments were drafted to prevent fishing expeditions. *Robbins v. Camden City Bd. of Educ.*, 105 F.R.D. 49, 62 (D.N.J. 1985).

C. Fishing Expedition Objection: The Present State of the Law

1. Discovery Requests that Inquire into Matters Unrelated to the Case's Claims or Defenses are Fishing Expeditions

Rule 26 states that discovery may be had regarding any matter, not privileged, which is relevant to the subject matter of the pending action. Relevance in the discovery context is broader than that required for admissibility at trial. Nonetheless, this "broader" standard of relevancy does not sanction fishing expeditions.¹³

Courts have held that "[t]he legal tenet that relevancy in the discovery context is broader than in the context of admissibility should not be misapplied so as to allow fishing expeditions in discovery." *Piacenti v. General Motors Corp.*, 173 F.R.D. 221, 224 (N.D. Ill. 1997) (quotation omitted) (denying a plaintiff's discovery requests pertaining to a different model vehicle than that at issue in the litigation); *Wacker v. Gehl Co.*, 157 F.R.D. 58, 59 (W.D. Mo. 1994) (denying request for income tax returns of opposing side's expert witness on grounds that general information contained in the returns was not reasonably calculated to lead to the discovery of admissible evidence); *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992). In *Hofer*, the Eighth Circuit, held that "[s]ome threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case." *Id.* (ruling that the denial of discovery regarding products dissimilar in design to the product at issue was proper).

Courts frame their denial of fishing expeditions on the grounds that the discovery sought inquired into matters unrelated to the claims or defenses in the underlying case. See *Zaborik v. Cornell Univ.*, 98 F.R.D. 27, 31 (N.D.N.Y. 1983). This is a narrowly applied rule. *Zaborik* involved a sex discrimination suit brought by a female educator against Cornell University. The court allowed the plaintiff's discovery into past instances of sex discrimination against female educators. *Id.* at 31. The court rejected the plaintiff's attempts to

conduct a general "fishing expedition" into areas unrelated to their claims such as the University's treatment of non-academic personnel, administrators, or discrimination claims based on factors other than sex.

Id.; see also *Fidelity and Deposit Co. v. McCulloch*, 168 F.R.D. 516, 526 (E.D. Pa. 1996) (requested discovery of other lawsuits involving the defendant deemed a fishing expedition where the other actions concerned completely different facts and circumstances); *Bridges v. Eastman Kodak Co.*, 850 F. Supp. 216, 222-23 (S.D.N.Y. 1994) (allowing discovery into

¹³ It further must be noted that the December 1, 2000 amendments to Rule 26(a) concerning disclosures limit the material that is required to be included in the disclosure:

Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

* * *

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless when solely for impeachment;

* * *

Fed. R. Civ. P. 26(a)(1)(B). Commentators and practitioners have agreed in principal that the new rule narrows the breadth of what needs to be produced, echoing the committee comments to the new rule. See, e.g., Kate Marquess, *Digital Discovery Grab Bag*, ABA Journal at 70 (Feb. 2001).

plaintiff's personal history but warning that defendant's discovery could not turn into a fishing expedition into matters totally irrelevant to the issue of plaintiffs' emotional distress); and *Robbins*, 105 F.R.D. at 62 (holding that "[i]n the context of an individual plaintiff alleging illegal denial of tenure, information concerning defendant's practices in hiring, promotion, transfer, discharge, and so on, 'seems one step beyond the parameters of relevance in its broadest sense.'" (citation omitted)).¹⁴

2. Fishing Expeditions May Not be Used to Either Establish or Build a Party's Case

As noted above, the *E.I. Du Pont* court in 1959 held that a party seeking discovery must show that there is more than a mere possibility that relevant evidence exists before expansive discovery will be allowed.¹⁵ And despite Wright & Miller's assertion that the fishing-expedition objection should be given "short shrift," they also recognize that "the party seeking discovery must still designate what it wishes to inspect, but all this obstacle means is that the would-be angler *must have a general idea of what kind of fish he or she is hoping to catch.*" Wright & Miller, *supra* at 380 (emphasis added).

The requirement that discovery must be grounded in some basis in fact survives to this day. In *Koch v. Koch Industries, Inc.*, 203 F.3d 1202 (10th Cir.), *cert. denied*, 121 S.Ct. 302 (2000), the Tenth Circuit ruled on the propriety of "extraordinarily expansive discovery requests" that the proponent argued were "relevant to two broad, non-specific allegations" in their complaint. *Id.* at 1238. The Tenth Circuit, noting that the district court had found the "likely benefit of this attempted fishing expedition was speculative at best," held that

[w]hen a plaintiff first pleads its allegations in entirely indefinite terms, without in fact knowing of any specific wrongdoing by the defendant, and then bases massive discovery requests upon those nebulous allegations, in the hope of finding particular evidence of wrongdoing, that plaintiff abuses the judicial process.

Id.

The court in *Moldenhauer v. United States*, 958 F. Supp. 394 (C.D. Ill. 1996), denied the discovery sought in a case in which the plaintiff failed to state a claim for unauthorized disclosure of his tax return information. *Id.* at 396. The plaintiff sought additional discovery of "various unknown disclosures." *Id.* The court found that the requests were a fishing expedition and "not grounded in any reasonable basis in fact or law" and refused to allow such discovery because its only purpose was to construct the proponent's case. *Id.*; see also *Bastin v. Federal Nat'l Mortgage Ass'n*, 104 F.3d 1392, 1396 (D.C. Cir. 1997) (affirming denial of motion to compel where proponent of discovery supported its need for a "fishing expedition" on "rank speculation").¹⁶

¹⁴ Of course, the mere assertion of a fishing expedition objection will not automatically relieve a party from its discovery obligations. If the request is relevant to a claim or issue in the case, discovery will be allowed. See *Geophysical Sys. Corp. v. Raytheon Co., Inc.*, 117 F.R.D. 646, 648-49 (C.D. Cal. 1987).

¹⁵ At least one case prior to *E.I. Du Pont* held that although the liberal discovery rules in place in 1952 allowed fishing expeditions, "each counsel must prepare his own case and not require his opponent to do so by a system of interrogatories so broad that they would bring about this result." *Close v. Sanderson & Porter*, 13 F.R.D. 123, 124 (W.D. Pa. 1952).

¹⁶ It is worth noting that this ground for denying a fishing expedition most likely stands on its own feet. The information sought in *Moldenhauer*, for instance, generally was relevant to the claims being asserted by the proponent of discovery. But because the proponent claims had "no factual support in the record," discovery was denied. *Id.* at 396.

IV. FISHING IN THE OCEAN

A. Currents

There is no question that courts can and should approach electronic evidence with the same initial mindset as paper documents. See *In re Grand Jury Proceedings*, 43 F.3d 966 (5th Cir. 1994) (per curiam); see also *Simon Property Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639 (S.D. Ind. 2000); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94-2120, 1995 WL 649934, at *2 (S.D.N.Y. Nov. 3, 1995); *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), *aff'd*, 80 F.3d 1401 (9th Cir. 1996); *Heidelberg Harris, Inc. v. Mitsubishi Heavy Indus., Ltd.*, No. 95-0673, 1996 WL 732522 (N.D. Ill. Dec. 18, 1996); *Santiago v. Miles*, 121 F.R.D. 636 (W.D.N.Y. 1988); *Byrne v. Byrne*, 650 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1996). Likewise, the previously mentioned benefits to discovering parties cannot be denied although they should be scrutinized. The real question is whether the breadth and depth of the oceanic waters, combined with the nature and number of claims, warrant consideration of limits on discovery in appropriate circumstances and, if so, where the line should be drawn. In other words — even if it is logistically and technically feasible (and inexpensive from a technical standpoint) to access the information — can the relevance and burden objections (*e.g.*, “fishing expedition” objections) prevail.

Early cases addressing electronic discovery issues demonstrated balancing of the purported need for discovery against the costs and the intrusion into non-relevant matter. For example, in *Fennell v. First Step Designs, Ltd.*,¹⁷ the court affirmed the refusal to allow a litigant access to an opponent’s computers to determine whether an exonerating memorandum was composed before or after the plaintiff complained of discriminatory behavior. The plaintiff claimed the memo was fabricated after her complaint to exonerate the defendant, asserting “that the original date of creation or date of any earlier modification could be determined by a review of the file as it resided on [defendant’s] hard drive, rather than the diskette that had been” produced.¹⁸ Initially, the district court allowed the discovery, so long as the parties could come up with a “protocol ensur[ing] that hard drive access would have a minimal degree of intrusion time-wise and interference-wise with” defendant’s operation, and “provid[ing] adequate assurances of confidentiality.”¹⁹ The plaintiff proposed to “mirror” defendant’s hard drive, and take the mirror copy to its facility for analysis.²⁰ After reviewing both protocols, the court decided not to allow the discovery. The First Circuit affirmed, recognizing that “[d]iscovery matters are for the informed discretion of the district court, and the breadth of that discretion ... is very great.”²¹

Likewise, in *Strasser v. Yalamanchi*,²² the court refused plaintiff’s request to inspect defendant’s computer because “plaintiff would have unrestricted access to defendant’s entire computer system with ... all of the records of defendant’s entire business.”²³ Moreover, “Plaintiff’s expert ... states retrieval of purged data is theoretically possible; whereas defendant’s computer expert, after having actually logged onto the system and searched for any sign of the purged data, states that the purged data is irretrievably gone.” Consequently, the court concluded that the plaintiff’s request should only be granted “[i]f plaintiff can

17 83 F.3d 526 (1st Cir. 1996).

18 *Id.* at 530.

19 *Id.* at 531-32 (internal quotation marks omitted).

20 Fennell’s protocol proposed “(1) a conference call between the parties and their computer representatives to discuss the computer system configuration; (2) an on-site visit at [defendant’s] warehouse where counsel would observe Fennell’s computer representative create a ‘mirror’ of the target hard drive; (3) an off-site analysis of the mirror hard drive by a specialty laboratory, whereby the technicians would attempt to determine the creation date or modification date of the relevant files; (4) the erasure or destruction of the mirror hard drive, certified by affidavit; and (5) a protective order stipulating, in sum, that all information on the mirror hard drive not relating to the creation, modification, or erasure, of the relevant files is confidential.” *Id.* at 532 n.5.

21 *Id.* at 532 (citation omitted).

22 669 So. 2d 1142 (Fla. Dist. Ct. App. 1996).

23 *Id.* at 1145.

present evidence to demonstrate the likelihood of retrieving purged information, and if the trial court finds that there is no other less intrusive manner to obtain the information,”²⁴ setting a high threshold for obtaining access to an opponent’s computers.²⁵

As courts have become more comfortable with electronic discovery, however, they have become more willing to permit access to another’s computers and digital data — albeit under certain well-defined protocols. Typically, such access requires the use of one or two experts, to avoid disclosure of trade secrets or damage to the computer system. In the most comprehensive decision on this issue to date, *Playboy Enterprises, Inc. v. Welles*,²⁶ the plaintiff sought access “to recover deleted files which may be stored on the hard drive of Defendant’s personal computer.”²⁷ The defendant objected on grounds of undue burden, and even presented an expert declaration that asserted that the recovery of deleted e-mail was “unlikely.”²⁸

The court determined that “the need for the requested information outweighs the burden on Defendant.”²⁹ It determined that the defendant’s concerns about financial losses due to the down time required for the discovery, attorney-client privilege, and invasion of privacy, could be dealt with by the issuance of an appropriate order providing “Defendant’s counsel ... an opportunity to control and review all of the recovered e-mails, and produce to Plaintiff only those documents that are relevant, responsive, and non-privileged.... Plaintiff will pay the costs ... [and] the work, which will take approximately four to eight hours [will be] coordinated to accommodate Defendant’s schedule as much as possible, ... [so] that the ‘down time’ ... will result in minimal business interruption.”³⁰

The court entered an elaborate order attempting to balance the parties’ competing concerns. The computer would be “mirrored” by a neutral expert acting as an officer of the court after signing a confidentiality agreement. Only representatives of the defense would be present, and defense counsel would become the sole custodian of the “mirror,” responsible for conducting production from the “mirror” and explaining any deficiencies in that production. The expert and the plaintiff would disclose all of their communications to the defendant.

The court noted that “the burden of attempting the recovery must fall on Defendant as this process has become necessary due to Defendant’s own conduct of continuously deleting incoming and outgoing e-mails, apparently without regard for this litigation.” It required plaintiff, “as a predicate to further discovery,” to “provide the Court with sufficient evidence that recovering some deleted e-mail is just as likely as not recovering any deleted e-mail, and that no damage will result to Defendant’s computer.”³¹ The *Welles* court employed a significantly lower threshold than *Strasser*.

In *Simon Property Group L.P. v. mySimon, Inc.*,³² the court took a similar approach. Simon sought to inspect all computers, computer servers, and electronic recording devices of mySimon, and all computers in the possession, custody, or control of several key mySimon employees, regardless of their location. The court, “in light of the sparse record,” concluded

²⁴ *Id.*

²⁵ Other courts have held that overly-broad requests should be denied. See *Alexander v. FBI*, 188 F.R.D. 111, 117 (D.D.C. 1998) (court refused to order restoration of all deleted files and e-mail where plaintiff did not propose targeted searches for limited numbers of individuals); *Nicholas J. Murias Living Trust v. Mobil Oil Corp.*, No. 93 C 6956, 1995 WL 124186, at *5 (N.D. Ill. Mar. 20, 1995) (production of entire computer database “would indeed be unduly burdensome. . . and [ir]relevant”); *Armstrong v. Bush*, 139 F.R.D. 547, 553 (D.D.C. 1991) (court noted that original request for “all information” on defendants’ computer systems was unduly broad); *Lawyers Title Ins. Corp. v. United States Fidelity & Guar. Co.*, 122 F.R.D. 567, 570 (N.D. Cal. 1988) (court reduced requests to only capture information related to policies of the same type involved in dispute).

²⁶ 60 F. Supp. 2d 1050 (S.D. Cal. 1999).

²⁷ *Id.* at 1052.

²⁸ *Id.* at 1054 n.5.

²⁹ *Id.* at 1054.

³⁰ *Id.*

³¹ *Id.* at 1054-55.

³² 194 F.R.D. 639 (S.D. Ind. 2000).

“that plaintiff is entitled to attempt (at its own expense) the task of recovering deleted computer files from computers used by the ... individuals, whether at home or at work.”³³

In trying to implement this decision “without undue burdens on defendant,” the court generally followed *Welles*, but went into even greater detail on a number of issues such as the computers subject to the order, assistants employed by the expert, and the types of information the expert could try to find:³⁴

The expert shall ... provide in a reasonably convenient form to defendant’s counsel, all available word-processing documents, electronic mail messages, powerpoint or similar presentations, spreadsheets, and similar files. The court intends that files making up operating systems and higher level programs in the computer not be duplicated, and that the copying be limited to the types of files reasonably likely to contain material potentially relevant to this case. To the extent possible, the expert shall also provide to defendant’s counsel: (a) the available information showing when any recovered “deleted” file was deleted, and (b) the available information about the deletion and contents of any deleted file that cannot be recovered.

* * *

[T]he court believes plaintiff is entitled to look for this material, but in terms of the factors relevant under Fed. R. Civ. P. 26(b)(2)(iii), the court is not convinced that the subject of this very expensive discovery lies at the very heart of the case.³⁵

The trend in case law seems to indicate that as courts become more familiar with electronic data discovery, there is a corresponding increase in the propensity to grant liberal discovery into computer systems and files.³⁶

B. Rough Seas Ahead

A number of courts have apparently found that the better route is a bright line applying the rules and case law equally to paper documents and electronic data without any distinction. Moreover, some of these courts take direct aim at corporate electronic records storage policies as the source of any alleged burdens and are thus unsympathetic to claims of undue burden. See, e.g., *In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 987, MDL 997, 1995 WL 360526, at *2 (N.D. Ill. June 15, 1995); *Linnen v. A.H. Robins Co.*, No. 97-2307, 1999 WL 462015, at *5-6 (Mass. Super. Ct. June 16, 1999). In *In re Brand Name Prescription Drugs Antitrust Litigation*, the court found that the “normal and reasonable translation of electronic data into a form usable by the discovering party should be the ordinary and foreseeable burden of a respondent....” 1995 WL 360526, at *2. Similarly, the costs of the burden were to be shouldered by the respondent because the costs were the product of the company’s record keeping scheme and the risk of litigation was foreseeable. *Id.* at 3.

The *Linnen* court agreed. In particular, in response to an objection to a “multi-million dollar fishing expedition,” the court held that the significant cost associated with

³³ *Id.* at 641. The court’s decision may have been influenced, in part, by the fact that “Plaintiff has shown in its motion papers some troubling discrepancies with respect to defendant’s document production.” *Id.*

³⁴ See *id.*

³⁵ *Id.* at 641-42 (citations omitted).

³⁶ See also *Easley, McCaleb & Assoc. v. Perry*, No. E-26663 (Ga. Super. Ct. July 13, 1994) (reported in *Current Developments: Litigation*, The Computer Lawyer, Sept. 1994, at 28) (laying out an equally specific and elaborate protocol).

restoring and producing responsive communications “is one of the risks taken on by companies which have made the decision to avail themselves of computer technology now available to the business world ... To permit a corporation ... to reap the business benefits of such technology and simultaneously use that technology as a shield in litigation would lead to incongruous and unfair results.” 1999 WL 462015, at *6.³⁷

The authors agree that no party, corporation or individual, should be able to use any means to improperly shield relevant “documents” (paper or electronic) from the discovery process. However, the strong rhetoric of the *In re Brand Name Prescription Drugs Antitrust Litigation* and *Linnen* courts, especially when taken out of context, quickly leads other courts and discovering parties to the rigid position that electronic discovery of all files is not only permissible but mandatory. As noted at the beginning of this paper, we posit that an inflexible approach based upon such statements has numerous negative consequences.

First, under the threat of potential discoverability of stored information, companies are often urged to adopt electronic “retention” policies that quickly delete everything in an effort to avoid the potential discoverability of documents should litigation ever arise.³⁸ While this may be understandable given the costs and problems associated with the retention of large quantities of electronic data in litigation, it is hardly consistent with the truth finding function discovery is supposed to serve and it can have negative implications for business data retention needs. Yet without protection from the threat of wholesale invasion of forensic consultants in the future, it is difficult to justify the risks to a corporation of not adopting such a policy.

Second, while the technology innovations of the past decade have been astounding, the threat of litigation costs deters use of many innovations. Remarkably, the New York Law Journal recently reported that one Wall Street banking firm prohibits the use of e-mail for any purpose.³⁹ Likewise, many clients involved in litigation face difficult decisions when the business managers find a new web-based platform to share and build ideas. Rather than immediately benefit from the new efficiencies promised by the technology, companies must halt and consider how the systems work and whether the billions of streaming bits of data must be captured for all posterity even though the very concept was to create an “idea flow” that purposely discarded ideas that are deemed unworthy to pursue. These costs are below the surface but remain real: businesses cannot adopt new technologies; shareholders cannot realize gains from potential efficiencies, and consumers ultimately must pay higher prices for goods and services because of the lost efficiencies.

Third, there is no doubt that a literal, unyielding approach to electronic data can be devastatingly expensive.⁴⁰ Unlike the visual impact of paper records, business people in an organization do not see electronic data “piling up.” As noted above, it is much more likely to remain, often in numerous places, than paper documents. And when the discovery requests and orders come over the transom, the costs start to pile up quickly. Corporate information technology staffs are distracted from their core business assignments to assist lawyers and outside consultants to find data. Historic hard drives, floppy drives, tapes and other media are located and reviewed for electronic crumbs, incurring more costs in terms of

³⁷ See also *Daewoo Electronics Co. v. United States*, 650 F. Supp. 1003, 1006 (Ct. Int'l Trade 1986) (“The use of excessive technical distinctions is inconsistent with the guiding principle that information which is stored, used, or transmitted in new forms should be available through discovery with the same openness as traditional forms”); cf. *Alliance to End Repression v. Rochford*, 75 F.R.D. 441, 447 (N.D. Ill. 1977) (applying same rationale to chide defendant for improper records management of paper documents).

³⁸ See Wendy R. Leibowitz, *E-Evidence Demands New Expert*, The National Law Journal at AO1 (March 9, 1998) (quoting legal counsel’s advice concerning e-mail: “We recommend deletion after 30 days”); see also Stepanek, *supra* note 7 (citing widespread corporate use of “electronic shredding” programs and “E-shredders”).

³⁹ Tamara Loomis, *Damaging Bits*, New York Law Journal (Feb. 26, 2001).

⁴⁰ The allocation of costs is addressed more fully in Ms. Caulfield’s paper. Compare *In re Brand Name Prescription Drugs Antitrust Litigation*, Nos. 94 C 987, MDL 997, 1995 WL 360526, at *2 (N.D. Ill. June 15, 1995) (responding party must pay because it chose manner in which to store data) with *Williams v. E.I. Du Pont de Nemours & Co.*, 119 F.R.D. 648, 651 (W.D. Ky. 1987) (party seeking electronic data bears costs).

business disruption and consultant's fees. Last, and not least, the lawyers must be concerned about confidentiality, relevance, privacy and privileges, inflicting even more significant costs upon the process.

While some courts may see fit to place the blame upon the company or organization that did not store its data in a more readily accessible form, that criticism is too severe and too simplistic. Most corporate business leaders have no detailed concept of how electronic data is stored. (Indeed, only recently are "Chief Information Officers" gaining the same level of respect, compensation and authority with corporations.) Nor should this ignorance be a sin — the complexities of data storage farms, jukeboxes, RAID arrays, virtual memory, data compression and encryption are the province of experts for a good reason. Moreover, corporate decision-making regarding data retention should not be excoriated simply because it is not convenient for litigation. Litigation concerns should not dictate the purpose of business communication and data storage systems or else we will have truly allowed the tail to wag the dog. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 363 (1978) ("... we do not think a defendant should be penalized for not maintaining his records in the form most convenient to some potential future litigants whose identity and perceived needs could not have been anticipated.").

Equally important, such criticism ignores the development of a myriad of software programs that have been employed by businesses throughout time, as well as the separate problem of different and changing storage media.⁴¹ While there are a few dominant operating systems and business applications, there is a virtually unlimited number of specialized applications and off-the-shelf applications that have been and will be used in the future. These systems do not store data in the same format and, by their very nature, may not be susceptible to easy data retrieval. And, as technology marches forward, the architecture of systems can change dramatically. (By way of example, Microsoft's Exchange program for e-mail represented a significant improvement over its precursor, MS-Mail, in many ways due to the different way in which data was stored and transmitted). Business leaders cannot be faulted for buying technology that later becomes outdated or surpassed in terms of technology.

Fourth, there is an unmistakable threat of collateral discovery issues overshadowing the real matters at issue in a lawsuit. The very cases cited in this article and the accompanying article of Ms. Caulfield demonstrate the significant discovery battles that can be waged. Moreover, the appropriately serious consequences for spoliation of evidence take on an apocryphal tone in electronic discovery because of the inevitable ability to find a "problem." For example, when a user "saves" a document, she is actually re-writing the data and may be, depending upon the system configuration, "destroying" the earlier version. Can this be spoliation? Are companies in litigation forced to suspend the "cycling" of weekly back-up tapes and preserve forever the electronic forest of back-up data every week simply because there is undoubtedly something responsive (even if duplicative) on those tapes? Can a secretary ever delete a paragraph of a first draft without fear of spoliation? While these examples may appear extreme, they are not. More importantly, if courts apply a rigid approach to electronic data discovery and retention, the incentive is great for parties to find the missing bits and bytes and pursue spoliation charges to bolster their strategic position in the case.⁴² Even if not successful or justified, such a battle inflicts enormous costs on the parties and the court.

⁴¹ See *supra* note 3.

⁴² The gravity of sanctions for spoliation, and thus the accompanying risks, is significant. See, e.g., *In re Prudential Ins. Co. Sales Practices Litig.*, 169 F.R.D. 598, 616-17 (D.N.J. 1997) (million-dollar fine for failure to adequately preserve documents); *Capellupo v. FMC Corp.*, 126 F.R.D. 545 (D. Minn. 1989) (sanctions for destroying evidence three months before suit).

C. Plotting the Course

The authors of this article respectfully suggest that courts and practitioners alike start from, and return to, the touchstone of Rule 26(b)(2)(i) and (iii) in assessing the viability of limits on electronic discovery excursions. These two subsections of Rule 26 provide significant guidance on where to draw the line for allowable intrusions into electronic data in the course of civil discovery and echo the cost/benefit analysis found in the Advisory Committee Notes to Rule 34.

First, Rule 26(b)(2)(i) provides that discovery may be limited if “the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.” This has numerous applications to electronic data discovery. Some examples:

- If significant volumes of paper documents are available, is the request to search for illusive “Metadata” or “hidden drafts” appropriate or are they unreasonably cumulative or duplicative?
- If a party searches the network server files, must individual computers (stand alone computers and laptops) be searched or are such additional steps unreasonably cumulative or duplicative?
- If a party searched for the e-mails of the “significant employees” involved in the transaction at issue, is it unreasonably cumulative or duplicative to demand searches of employees further removed from the events in question?
- Are other discovery devices available, such as requests for admission or depositions, that can provide a more efficient means of securing admissible evidence of the point in controversy?

Second, Rule 26(b)(2)(iii) provides that discovery may be limited if “the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the dispute.” This also has many applications to electronic data discovery. For example:

- How much will it cost to recover and review deleted e-mails to identify potentially relevant data?
- Did the party requesting data narrowly tailor the request to the matter in controversy?
- If a party searched for the e-mails of the “significant employees” involved in the transaction at issue, is it unreasonably cumulative or duplicative to demand searches of employees further removed from the events in question?
- What is the risk (and associated cost) of the inadvertent disclosure of privileged or otherwise confidential data?
- Did the responding party have a reasonable plan in place to collect and produce documents (including electronic data) such that the cost of

retrieval and production can be meaningfully identified and balanced against the purported need and/or shifted to the requesting party as appropriate?

- How critical is the additional information gained by electronic discovery to the core issues involved in the case?
- Did a party purposely conceal or destroy electronic evidence to shield it from discovery?
- How much attorney time will be involved in reviewing the data for relevance and privilege determinations?

With the rule as the basic guide, courts and counsel must also apply the rule of reason and common sense. Demanding access to “all” computers and computer systems must be done with a particular need and purpose in mind. Such a broad excursion should be the exception, not the rule, even if a computer consultant can technically copy the data for a modest fee. Again, the cost is not just the consultants’ fee — it also includes the costs of lawyer review time, the production of non-relevant data, and the exposure of confidential and privileged materials to loss. In the absence of a demonstrated need for “all data” and “all e-mails,” requests for electronic data should be tailored to meet the particular needs of the case, such as limiting e-mail discovery to the “significant” individuals involved or limiting the discovery to a narrow time period or particular topics.

V. CONCLUSION

We submit that the better line of authority are those cases that reflect a balancing of the interests from the outset, rather than a blind presumption that a party responding in discovery must preserve and produce all electronic data potentially responsive “or else.”⁴³ Such an approach is consistent with the Advisory Committee comments to Rule 34 and the United States Supreme Court’s early pronouncement in *Oppenheimer*. Courts must balance the purported, articulated need for the discovery in electronic format against (1) the potential for disruption to the continuing business activities, (2) the danger of exposing non-discoverable matters, and (3) the costs and burdens associated with the discovery.

In other words, the mere existence of electronically generated and stored information, the dynamic technologies to retrieve such information, and the assertions of “employing” electronic “shields” to discovery should not equate a fishing license to explore all electronic data wherever it may exist absent the balancing of interests required under the Federal Rules of Civil Procedure. The burdens and relevance concerns that support “fishing expedition” objections have equal validity to electronic data as they do to paper documents.

⁴³ Examples of courts that have limited electronic evidence discovery or employed some form of a balancing approach include: *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526 (1st Cir. 1996) (discussed above); *Proctor and Gamble v. Haugen*, 179 F.R.D. 622, 632 (D. Utah 1998), *aff’d in relevant part, rev’d in part*, 222 F.3d 1262 (10th Cir. 2000) (search of electronic data limited in terms of number of searches to be conducted to yield relevant information); *Strasser v. Yamanchi*, 669 So. 2d 1142 (Fla. Dist. Ct. App. 1996) (discussed above); *Chu v. Green Point Savings Bank*, 646 N.Y.S.2d 28 (N.Y. App. Div. 1996) (limiting subpoena for electronic payment information); *In re Convergent Tech Sec. Litig.*, 108 F.R.D. 328, 331 (N.D. Cal. 1985) (requiring balancing of need for potential information with burden to be imposed). Even the *Linnen* court incorporated a balancing approach when it ordered a sampling technique before wholesale electronic discovery commenced. *Linnen v. A.H. Robins Co.*, No. 97-2307, 1999 WL 462015, at *5-6 (Mass. Super. Ct. June 16, 1999) (court directed use of sampling of electronic data from various sources to gauge the likelihood that they contained relevant and responsive information and that the burdens that would be imposed could be justified).