Discovery of Officers' Text Messages

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More than a trillion text messages are sent each year in the United States alone. Some of these messages are work-related communications from law enforcement officers to fellow officers, witnesses, prosecutors, and others. Which, if any, of these messages are discoverable? How should officers preserve discoverable messages? Must prosecutors ask for officers' text messages before providing discovery to the defense? This post begins to address these questions.

Statutory discovery. G.S. 15A-903 generally requires "[t]he State to make available to the defendant the complete files of all law enforcement agencies . . . involved in the investigation of the crimes committed." The term "file" includes witness statements, officers' notes, and "any other matter or evidence obtained during the investigation."

Some work-related text messages sent by officers are likely part of the "file." For example, a text message may memorialize a witness statement, such as a message from one officer to another stating, "I talked to the alibi witness and she said she wasn't with the defendant on the night of the crime." *Cf. United States v. Suarez*, 2010 WL 4226524 (D.N.J. Oct. 10, 2010) (unpublished) (ruling that text messages between officers and cooperating witnesses were witness statements subject to discovery and were "fertile ground for cross examination"; the government's failure to preserve and produce the messages justified an adverse inference instruction). Other text messages may function as notes, as when an officer texts a colleague, "I went to the convenience store next door to the crime scene but it doesn't have a surveillance camera." Furthermore, although the statutory definition of "file" doesn't expressly refer to correspondence, the list of items included in the file isn't exhaustive and it seems to me that substantive correspondence about the investigation, whether by letter, email, or text message, may be part of the file. For example, one officer texts another, "We are severely understaffed on the Jones case, we will not be able to do a timely and complete neighborhood canvas with only four officers and we may lose out on important leads," I suspect that many judges would rule that the message is part of the case file. *Cf. State v. Dorman*, 225 N.C. App. 599 (2013) (noting that a superior court judge had ruled that certain emails between an officer, a medical examiner, and a victim's advocate were discoverable, and assuming but not deciding that the judge's determination was correct).

On the other hand, some work-related text messages are administrative in nature and don't seem to be part of the "file." For example, if an officer texts a prosecutor to say, "I'm running 5 minutes late for our meeting," I don't think the letter or the spirit of the discovery statutes require that message to be preserved and turned over. Unfortunately, the line between substantive and administrative messages is fuzzy. Suppose an officer investigating an assault texts her supervisor, "I'm going to look into the suspect's gang connection." That's arguably administrative: it simply lets the supervisor know what the officer plans to do next, without describing any facts or evidence. But what if (1) there turns out to be no gang connection, (2) the defendant is actually an honor student and sings in his church choir, and (3) the defense is that the police focused on the defendant because of his race, and rushed to judgment based on biased assumptions and prejudices? Then the fact that the officer was eager to pursue a non-existent "gang connection" might be significant. The standard advice for officers and prosecutors confronting gray areas is to err on the side of caution. Until we have case law that offers guidance about what's discoverable and what's not, that advice is probably wise.

Brady/Giglio. Some text messages will implicate *Brady* or *Giglio*, such as a text message from an officer to a

prosecutor saying, “Our star witness has serious mental health problems,” or a message from a crime scene technician to an officer saying, “I found a dozen prints at the scene but none of them match your suspect.” In such a case, the information contained in the text message would need to be produced regardless of statutory discovery obligations.

Information memorialized in formal reports. Presumably, the contents of most substantive text messages will eventually be memorialized in formal reports. Is it sufficient if the defense gets a report from the crime scene technician saying that the prints at the scene don’t match the suspect but doesn’t get the original message from the technician to the officer? I think that would satisfy *Brady*, since *Brady* is concerned the disclosure of the information itself. But I am not sure that it would satisfy the statutory discovery provisions. If the original text message was part of the file, it seems to me that it would remain so even if a report is filed later that covers the same territory. Of course, if the original message and the report are consistent, the defendant would not be prejudiced by receiving only the report. *Cf. State v. Rush*, 178 N.C. App. 235 (2006) (unpublished) (an officer made field notes, then used the field notes to prepare a formal report; in discovery, the State produced the report, but not the notes; under these circumstances, even “[p]resuming” that a discovery violation took place, the trial judge did not abuse his discretion when he declined to sanction the State). But if the report omits or minimizes information contained in the text message, the defendant would be prejudiced if denied the opportunity to explore the inconsistency.

Duties of officers and prosecutors. Our discovery statutes put the onus on officers to provide their complete files to prosecutors in a timely way. G.S. 15A-903(c). Based on the discussion above, officers may be obligated to give prosecutors at least some of their work-related text messages.

What about prosecutors? Must a prosecutor affirmatively request discoverable text messages from an officers, or may the prosecutor assume that if none are provided, then none exist (beyond any discoverable text messages to which the prosecutor is a party, of course)? The statutory discovery provisions are not crystal clear regarding the extent of a prosecutor’s duty to seek out discoverable information beyond what officers provide. However, G.S. 15A-910(c) does say that when a court is considering “whether to impose personal sanctions for untimely disclosure . . . courts . . . shall presume that prosecuting attorneys . . . have acted in good faith if they have made a reasonably diligent inquiry of [investigative agencies] and disclosed the responsive materials.” Furthermore, as to *Brady* material, the State is obligated to disclose evidence “known only to police investigators and not to the prosecutor.” *Kyles v. Whitley*, 514 U.S. 419 (1995). Therefore, a conscientious prosecutor preparing to provide discovery to a defendant may choose to ask the investigating officer whether he or she is in possession of any text messages that might be discoverable, especially if the prosecutor knows that the officer is prone to communicate via text message. (Likewise, a conscientious defense attorney preparing a discovery request may wish to reference text messages in the request.)

Retention obligations apart from discovery. Compliance with discovery obligations is not the only reason an officer might choose to retain text messages. Agency policy may direct that the officer retain certain communications, and the records retention schedules promulgated by the Department of Cultural and Natural Resources might come into play. State records retention rules are outside my expertise, but my colleagues who work in the area of state and local government law can assist interested parties in exploring those issues.

How to preserve pertinent text messages. If an officer’s text message is discoverable, one way to preserve it would be for the officer to take a screenshot of the message and then email the screenshot to himself or herself, or to the prosecutor handling the case. If readers are aware of a better solution, please say so. Screenshots are overinclusive in that they may mix discoverable messages with messages that are purely social or otherwise non-discoverable, and underinclusive in that they may not contain important metadata associated with the original messages. Courts do not yet seem fully attuned to the fact that text messages are not designed to be organized and retained permanently. *See United States v. Olivares*, 843 F.3d 752 (8th Cir. 2016) (defendant “requested all of the text messages exchanged between [an officer] and his confidential informant [but the] government was unable to produce the text messages because it failed to download or save them”; defendant argued on appeal that this constituted bad faith destruction of potentially exculpatory evidence; absent evidence of bad faith, the reviewing court rejected the argument; however, the

court stated that it "recognize[d] [the defendant's] concern" and suggested that "[w]ith the simplicity and efficiency of modern electronic storage capacity, one could imagine a policy where inculpatory materials and potentially relevant materials created or made available in proximity to the inculpatory materials are easily saved for review").

No obligation to send text messages. With some exceptions, the discovery statutes apply to existing materials and "impose[] no duty on the State to create or continue to develop documentation concerning an investigation." *Dorman*, *supra.* In general, then, officers may avoid discovery considerations by choosing not to use text messages to engage in substantive case-related communications. At least one U.S. Attorney's office recommends doing exactly that:

[S]ubstantive case-related communications may contain discoverable information . . . . [Prosecutors] should take special care to avoid creating electronic communications (including e-mails and text messages) and voice mails that contain information that may be subject to discovery [and] should also instruct the agents working on their cases to abide by the same rule. In addition, [prosecutors] and agents should not engage in substantive case discussions in e-mails, text messages, or other forms of electronic communication with witnesses or potential witnesses of any kind. As a general rule, e-mails and text messages between [prosecutors], between [prosecutors] and agents, between agents, and between witnesses and government personnel should be limited to scheduling or other procedural matters.

I imagine that some readers will view that approach as prudent and others will view it as underhanded.

What's the practice? I'd be interested to hear how officers, prosecutors, and others are handling text messages. My sense, based on the questions I've had about this topic and on the lack of North Carolina appellate cases about it, is that only a few officers and prosecutors are retaining and producing text messages, and that any defense complaints about that have not yet had much traction with the courts. But my sense could be wrong, or incomplete, so I would welcome comments or emails about this issue.