

Obtaining evidence (including electronic evidence) from other countries



OECD International Academy for Tax and Financial Crime Investigation

Managing Financial Investigations



James I. Pearce
U.S. Department of Justice

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- Part I: General considerations.
 - Part II: Electronic evidence.
 - Part III: Other special issues.
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Part I: General Considerations:

To understand the system is to master the system:

- ❑ A 20th Century mechanism adapting to life in the 21st Century.
 - ❑ Know when and when not to use it.
 - ❑ Know how long it takes.
 - ❑ There are multiple channels, one of which may be better than others.
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What can you obtain with an MLAT:

- Certified bank, electronic, and business records
 - Witness testimony
 - Seizure and forfeiture of assets
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Some questions to be asking:

- Does the request needed to be translated?
- What assistance is possible?
- How long does it take? (Often several month or more)
- Who will execute the MLAT? (A judge? Justice Ministry? Law enforcement?)
- Can we contact witnesses directly?
- Can we preserve evidence?

Given the limitations of the system, consider whether it is possible to avoid an MLAT request or letter rogatory.

- (i) Voluntary witness testimony: possibly at an embassy; only works in certain countries.
- (ii) Use of other arrangements, such as other agencies, financial intelligence units, financial or securities regulators, etc.
- (iii) Foreign attachés and Legats are an invaluable asset.

Understand (1) through which officials the request travels; (2) how to avoid objections and ensure request ends up in the right hands.

- (i) Is there a particular foreign law enforcement component in interest in the foreign country to which the request should be referred?
- (ii) National law enforcement attachés can guide you.
- (iii) Draft request to include reference to the foreign law-enforcement component referred to above; show nexus between your investigation and evidence sought; include a home country point of contact if possible to deal with unforeseen problems after transmission;

Understanding the System (Continued)

- (iv) KISS: keep it simple, stupid!: draft your request so that the translators get it right; avoid legal jargon.

 - (v) Be attentive the assistance requested, procedures to be used, and need for procedures sections
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Tips on drafting requests

Some frequent, but avoidable problems:

- ❑ confidentiality (should be prominently mentioned in most cases).
 - ❑ urgency (where necessary, this should be very visible in request).
 - ❑ clarity regarding legal authority, particularly in the absence of a bilateral MLAT
 - ❑ Be realistic given amount of time available; ask for too much and you may get nothing in time!
 - ❑ Certification of records – can be difficult in some places; ask if you should seek in uncertified form first.
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Part II: Electronic evidence

- Foreign Service Providers (FSP)
 - Seek Preservation
 - MLAT to seize computer in foreign country?
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The Need to Freeze - Preservation



Part II: Electronic evidence - Preservation

- ❑ FSP generally not required by foreign law to maintain for specific period of time.
 - ❑ Many FSPs delete on regular basis (in the EU they are required to do so).
 - ❑ Some will voluntarily preserve (note expiry date).
 - ❑ Is the FSP law-enforcement Friendly? Contact law-enforcement Attaché or Foreign law enforcement.
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• Part II: Electronic evidence – Type of Data Available Tips

Does company have law-enforcement Guide?

kik.



■ Examples:

kik.

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Law Enforcement Resource Center

Welcome!

Guide for Law Enforcement

Navigating Kik for Law
Enforcement Video

Emergency Disclosure Request

Preservation Request

Contact us

- **Part II: Electronic evidence – Type of Data Available Tips**

- Country standards may differ
 - Example: demonstrate “reasonable grounds to believe that an offense has been committed; and that evidence of the commission of the offense or information that may reveal the whereabouts of a person who is suspected of having committed the offence, will be found in Canada.” (for all evidence)
 - Europe tends to be more a relevance standard.
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Part III: Some other special issues

Video-conferencing:

- Depositions: Best for prosecutor to be on site in foreign country; defense attorney may also insist on going, but under U.S. law, a defendant need not travel under specified circumstances. Foreign authorities don't normally have these limitations in incoming requests.
 - Also an excellent way to confer with foreign colleagues running a parallel investigation.
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Securing witness testimony

- ❑ May or may not be necessary to send an MLAT; find out earlier *and don't wait until the last minute!*
 - ❑ Make sure foreign witness understands what to do and has help when arriving in the if needed.
 - ❑ Sometimes you may also be looking for a third country in which to conduct a witness interview.
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OBTAINING EVIDENCE FROM ABROAD: TAKEAWAYS

- KISS (Keep it simple), and when in doubt.
 - Electronic Evidence:
 - Preservation Request. Note expiry date.
 - FSP law-enforcement Friendly? Domestic possibility? Consider speaking to Attaché.
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Questions or comments?

