

Judge Scheindlin Rules that Government FOIA Productions Must Be “Searchable” and Include Metadata

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In her latest opinion, Judge Shira A. Scheindlin of the Southern District of New York addressed the issue of metadata in productions. In *National Day Laborer Organizing Network v. United States Immigration and Customs Enforcement Agency*,¹ Judge Scheindlin identified metadata fields that she believes “should accompany *any* production of a significant collection of ESI.” Given Judge Scheindlin’s stature in the eDiscovery world, this opinion is likely to become a key point of reference in defining the scope of the obligation to include metadata in productions.

Specifically, in this case of first impression, Judge Scheindlin held that metadata must be included in Freedom of Information Act (FOIA) productions,² holding that “metadata *maintained* by the agency as *a part of an electronic record* is *presumptively* producible under FOIA, unless the agency demonstrates that such metadata is not ‘readily reproducible.’”

Background

The plaintiffs filed FOIA requests with four federal agencies and, after receiving no substantive response to their requests, filed suit to compel production of the records. Following negotiations and an agreement as to which records would be produced first, the defendants made some productions but failed to include documents from five key categories. The plaintiffs then moved for a preliminary injunction to compel production of those documents.

During negotiations, the plaintiffs sent an email with basic requests regarding the production format.³ Later, they mailed a proposed production protocol to the defendants. The defendants never sent notice of disagreement with the format requests but instead produced unsearchable PDF files with no metadata in which they merged paper and electronic documents indiscriminately. The plaintiffs claimed that these records were unusable in the form they were produced and asked the court to order the re-production of the documents using their proposed protocol.

1. 10 Civ. 3488 (S.D.N.Y. Feb. 7, 2011).

2. While this is the first federal court opinion recognizing that metadata is part of a federal public record as defined in the FOIA, several state courts have held that metadata is part of state public records and must be included in productions.

3. Although “less than crystal clear,” the court found that the email was sufficient to put defendants on notice of certain production format requests.

Analysis

The FOIA provides that an agency shall produce records in any form or format requested if the record is readily reproducible by the agency in that form or format.⁴ Noting the lack of any further guidance on the matter of ESI production formatting, the court turned to Rule 34 of the Federal Rules of Civil Procedure (FRCP) for guidance as to what form of production is required. Rule 34 states that the responding party should produce in the format specified by the requesting party, or may select the form in which the material is ordinarily maintained, *or* in a “reasonably useable form.”⁵ Although the defendants argued that the FRCP do not apply to FOIA requests, the court noted that “[r]egardless of whether FOIA requests are subject to the same rules governing discovery requests, Rule 34 surely should inform highly experienced litigators as to what is expected of them when making a document production in the twenty-first century.”

Turning to the relationship between a record and its metadata, the court concluded that “[b]y now, it is well accepted, if not indisputable, that metadata is generally considered to be an integral part of an electronic record.” The court referenced the 2008 *Aguilar* decision, which provided a “guidebook” explaining the relationship between a record and its metadata as well as explaining the role of the load file in relation to its relevant scanned images.⁶ The *Aguilar* court noted in particular that parties should produce such metadata and load files to enable the receiving party to have the same ability to access, search, and display the information as the producing party.

Although Judge Scheindlin held that metadata fields are intrinsic elements of ESI, she also noted that the question of *which* metadata fields are intrinsic will depend on the type of electronic document and the manner in which the agency maintains its records. However, she specified what she believes are “the minimum fields of metadata that should accompany any production of a significant collection of ESI.”⁷ Elsewhere she explains further: “To be clear, my Order . . . is limited to this case. I am certainly not suggesting that the Proposed Protocol should be used as a standard production protocol in all cases.” However, the court definitively stated, “Whether or not metadata has been specifically requested—which it should be—production of a collection of static images without any means of permitting the use of electronic search tools is an inappropriate downgrading of ESI. . . . Thus, it is no longer acceptable for any party, including the Government, to produce a significant collection of static images of ESI without accompanying load files.”⁸

Throughout the opinion, Judge Scheindlin emphasized the parties’ lack of communication and failure to confer and cooperate as to the form in which ESI would be produced, concluding that “While certainly not rising to the level of a breach of an ethical obligation, such conduct certainly shows that all lawyers—even highly respected private lawyers, Government lawyers, and professors of law—need to make greater

4. 5 U.S.C. § 552(a)(3)(B).

5. *See* Fed. R. Civ. P. 34(b)(2)(E)(ii) and related Advisory Committee Note.

6. *Aguilar v. Immigration and Customs Enforcement Division of the U.S. Department of Homeland Security* 255 F.R.D. 350 (S.D.N.Y. 2008).

7. Specifically, the court noted that the following nine fields should be included in load files for all forms of ESI: Identifier, File Name, Custodian, Source Device, Source Path, Production Path, Modified Date, Modified Time, and Time Offset Value. The following additional ten fields should accompany email messages: To, From, CC, BCC, Date Sent, Time Sent, Subject, Date Received, Time Received, and Attachments. Finally, paper records should be produced with these four fields: Bates_Begin, Bates_End, Attach_Begin, and Attach_End. Judge Scheindlin further notes that “[r]equests for additional fields should be considered on a case-by-case basis.”

8. The court noted that the defendants relied on *Aguilar* in arguing that if a party waits until documents are already produced to ask for the metadata they may be “out of luck.” Judge Scheindlin’s response to that argument was simply, “Given Plaintiffs’ . . . email [containing basic requests regarding form of production] and Defendants’ tardy productions, I cannot accept this lame excuse for failing to produce the records in a *usable format*.”

