Forbes

Ben Kerschberg
BKC3 Consulting
ben@bkc3consulting.com

Metadata, The Freedom of Information Act, and Government Hypocrisy

As originally published in *Forbes* (Apr. 11, 2011).

Metadata, or data that is embedded in electronic documents, can tell us precisely how and when an electronic document was created, modified, and transmitted. More poetically, "the document tells its own story." *Embedded Information in Electronic Documents* (Applied Discovery White Paper 2011). Recently featured in *The New York Times*, advanced e-discovery software can "deduce patterns of behavior that would have eluded lawyers examining millions of documents." John Markoff, *Armies of Expensive Lawyers Replaced by Cheap Software*, N.Y. Times (Mar. 4, 2011). The ability of software to "put together a chain of events . . . over different media" and to "capture 'digital anomalies'" by parties hoping to hide their activities depends on both artificial intelligence and metadata. *Id.*

Until recently, no federal court had considered the important issue of whether metadata is part of a public record and must thus be preserved by the federal government when responding to requests for information filed under the Freedom of Information Act ("FOIA"). FOIA (effective 1967) requires federal agencies to make records and documents publicly available unless they fall within one of several statutory exemptions, none of which is at issue here. FOIA further requires that the government provide requested records in any form or format requested by the person if the document is readily available in that form or format.

In the context of state FOIA laws, three States (New York, Washington, and Arizona) have answered this question uniformly in the affirmative. The U.S. District Court for the Southern District of New York recently did so too in *National Day Laborer Organizing Network v. United States Immigration and Customers Enforcement Agency* (S.D.N.Y. Feb. 7, 2011). The U.S. Attorney's office for the Southern District, as counsel for the five defendants—four federal agencies and the Department of Justice's Office of Legal Counsel (collectively, the "Government")—filed a motion to stay pending the case's appeal to the U.S. Court of Appeals to the Second Circuit Judge Scheindlin's Order compelling the defendants to produce the records in question in their native format without any degradation of electronically stored information

("ESI"). These developments are worth watching, and a look at the district court's Order is the focus of this piece.

Three plaintiff organizations filed a FOIA request to obtain public records from the Government related to "Secure Communities", a program launched in 2008 by the U.S. Immigration and Customs Enforcement Agency and the Department of Justice ("DOJ") to enlist States and localities—the program now operates in 38 States—in the enforcement of federal immigration law. This case arose as a result of the inadequate formats in which the Government entities produced electronic text records, emails, Excel spreadsheets, and other records to the plaintiffs.

After disputes stemming from the Government's untimely production of various paper records, the plaintiffs submitted an official Proposed Protocol requesting the production of certain records in specific electronic formats separate and apart from paper records that were not stored electronically. The district court noted that the protocol was based "on precisely the format demands routinely made by two government entities – the Securities Exchange Commission and the DOJ's Criminal Division." The plaintiffs invited the Government to play by its own rules and were still stonewalled. The Government's extraordinary response consisted of paper records and five PDF files totaling fewer than 3,000 largely unsearchable pages.

Let's put this into perspective. If a citizen files a FOIA request seeking era-specific documents that demonstrate what the U.S. government knew about Sputnik before its launch, he should expect paper records. No native electronic documents. Nothing searchable. No metadata. Just photocopies or scans of government files. This speaks for itself. However, if plaintiffs file FOIA requests with five federal government entities about a program launched in 2008 to assist with national immigration law policy—an issue that certainly attracts the attention of the federal government—is it not reasonable to expect thousands (at a minimum) of searchable electronic documents replete with metadata? This is a simple but important reality check.

The plaintiffs registered with the court three objections regarding the produced records, which were unusable. First, the produced data set was in a PDF format that could not be searched. Second, the electronic records had been stripped of all metadata. And third, the Government indiscriminately had merged paper and electronic records in the same PDF files. The Government in fact admitted that it had produced all ESI in an unsearchable PDF format with no metadata. This admission does not *per se* end the inquiry, but rather begs the question whether (and what kind of) metadata is part of public records, as well as what standards must apply to U.S. Government responses to FOIA requests.

Determining What Standards Apply To The U.S. Government's Production of Documents Under The Freedom Of Information Act

Determining what standards should apply to federal government responses to FOIA requests is at the heart of *National Day Laborer*. Unlike civil litigation, where procedural (and thereby substantive) moves are governed by the Federal Rules of Civil Procedure ("FRCP"), FOIA does not have official rules that have responded to new technology such as metadata and would thus dictate how the government must respond in a case like this one. By contrast, the very title of FRCP 34 specifically addresses the production of ESI. Given the importance of this issue—one can easily imagine it arising daily—and the need for clarity, the district court appropriately sought an analogy (i) in FRCP 34, which has been widely interpreted by the courts; and (ii) to the Rule's Advisory Notes, which also provide valuable guidance.

Federal Rule of Civil Procedure 34 establishes the give-and-take of the procedural dance that occurs when ESI is requested during the discovery phase of civil litigation. The requesting party ("A")—not always the plaintiff—may specify the form of production of ESI. The responding party ("B") may object to the requested form but must state the form that it intends to use. The requesting party (A) may challenge such a refusal, at which point the parties must attempt to settle their differences. If they cannot, the requesting party (A) may ask a court to compel the production of ESI in the form originally requested. This process allows both parties to be heard in a way that is fair to each and ensures that the responding party (B) can indeed prevail with its objections, but does not have carte blanche to strip ESI of its metadata. This is consistent with two important points made by the Advisory Committee that helped write FRCP 34, both of which were cited by the court. The Committee advised:

1. The responding party's "option to produce [ESI] in a reasonably useable form does not mean that [it] is free to convert [ESI] from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently." In other words, if a relevant letter exists as a searchable PDF, the respondent cannot merely print the letter in hard copy or re-scan a hard copy so that it exists as a PDF of a static, unsearchable image. As Judge Scheindlin noted, "production of a collection of static images without any means of permitting the use of electronic search tools is an inappropriate downgrading of the ESI."
2. The responding party cannot produce ESI "in a form that removes or significantly degrades" the ability to search that ESI. That is, *ESI cannot be stripped of its metadata*.

Metadata Is An Integral Part Of Public Records

The district court stated succinctly a principle that applies equally in civil litigation and FOIA:

> By now it is well accepted, if not indisputable, that metadata is considered to be part of an electronic record.

The attendant corollary *legal principle*, uniformly enunciated in the context of state FOIA laws, is that metadata, as part of electronic records, *is indeed part of public records and must be disclosed pursuant to FOIA requests for public records*. The court rejected the government's arguments that FOIA requests are not analogous to discovery in civil litigation as "rhetorically nuanced" but "unavailing" and reiterated that "*certain* metadata is an integral or intrinsic part of an electronic part of an electronic record." (emphasis added). Not mincing words for the Government's counsel, Judge Scheindlin added:

> Rule 34 [of the FRCP] surely should inform highly experienced litigators as to what is expected of them when making a document production in the twenty-first century.

"*Certain* metadata," the court stated above, carefully choosing its words. This leaves unanswered an important question: *Which* of the many types of metadata are intrinsic to an electronic record? And which are not? The court treaded carefully here, hedging with a pragmatic response that recognizes the realities that courts will face for years:

> Unfortunately, there is no ready answer to this question. The answer depends, in part, on the type of electronic record at issue (i.e. text record, e-mail, or spreadsheet) and on how the agency maintains its records. Some agencies may maintain only a printed or imaged document as the final or official version of a record. Others retain all records in native formats, which preserves much of the metadata. Electronic records may have migrated from one system to another, maintaining some metadata but not all. The best way I can answer the question is 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 producible."

Ending The U.S. Government's Hypocritical Responses to FOIA Requests

The Freedom of Information Act has been in the news recently. In *Federal Communications Commission v. AT&T*, 562 U.S. — (2011), for example, Chief Justice John Roberts, writing for a unanimous U.S. Supreme Court, held that FOIA's protection of "personal privacy" does not include corporations and their dealings with the U.S. Government. This pro-transparency decision reminds us that FOIA is not a statute without bite. Rather, it is an important safeguard by which all citizens can monitor the government. The ability to do so effectively may require different standards in different eras in large part due to advances in technology. FRCP 34 and its adaptation to ESI is a perfect example.

Stripping ESI of its metadata so as to render it unsearchable is not acceptable. Neither is deliberately mixing static paper images with electronic documents. These basic principles apply to private parties under the FRCP, and they must also apply to the U.S. Government's responses to FOIA requests. As the district court concluded, "[t]he Government would not tolerate such a production when it is a receiving party, and it should not be permitted to make such a production when it is a producing party." This is not only true in the context of civil litigation, the district court's appropriate analogy here. Rather, this must also hold true *especially in the context of FOIA*, which protects our rights to monitor the government directly. Judge Sheindlin is correct, and the Second Circuit should affirm and continue to enunciate governing standards in this important issue at the intersection of law and technology.

The Freedom of Information Act (FOIA) is a law that enables members of the public to request records from federal agencies. The following information is an overview of the FOIA process at the FEC and is provided solely as guidance. Accessing records without a FOIA request. FOIA documents and the e-FOIA reading room. The Freedom of Information Act (5 U.S.C. Â§ 552), provides a right of access to the public of government records. The Act also allows the government to withhold certain information in responding to those requests in 9 exemptions, including for national security, deliberative process and attorney client, and confidential business information, to name a few. Back to Top. II. What is FOIA? The Freedom of Information Act (FOIA) states that any person has a right of access to Federal agency records, except to the extent that such records are protected from release by a FOIA exemption or a special law enforcement record exclusion. All FOIA requests should be addressed directly to any of the approximately 400 geographically-dispersed components that maintain the records you are seeking. The Freedom of Information Act implements one of Labour's manifesto promises to end a culture of secrecy in government. Before its introduction, the UK had no legislation obliging the public sector to make information available to the general public. Instead, the code of practice on access to government information of 1994 provided a voluntary framework in which information might be shared with the public. The legislative detail of the act emanates from the 1997 white paper, Your Right to Know. While the white paper was met with widespread enthusiasm, the draft bill introduced in November 1999 was met with equal amounts of disappointment. Freedom of... Freedom of Information Act. Improving FOIA Administration under E.O. 13392. Administrative Guidance.Â The nine exemption categories that authorize government agencies to withhold information are: classified information for national defense or foreign policy. internal personnel rules and practices. information that is exempt under other laws. trade secrets and confidential business information. inter-agency or intra-agency memoranda or letters that are protected by legal privileges. personnel and medical files.