REDGRAVE RESOURCES
CASE ALERT

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Judge Scheindlin's Latest eDiscovery Opinion & Order: Observations on Metadata and More Failures to Communicate

On February 3, 2011, in the case of *National Day Laborer Organizing Network v. United States Immigration and Customs Enforcement Agency,* Judge Shira A. Scheindlin entered an Opinion and Order ("Order") resolving the parties' dispute regarding the defendants' form of production. Judge Scheindlin required the defendants to reproduce previously produced spreadsheets in native format and previously produced text records in "static image file format together with their attachments." Judge Scheindlin also required that all future productions must be bates numbered, produced in TIFF format with accompanying load files containing specified metadata fields, and spreadsheets must be produced in native format. On February 7, 2011, Judge Scheindlin entered a revised Order that replaced and slightly altered her previous Order and modified the types of metadata and other information that must be contained in any future document production's accompanying load files in the case.

While the requirements in the Orders for future productions are neither ground-breaking nor binding on other courts, they do contain important points of discussion and guidance regarding Freedom of Information Act ("FOIA") and Rule 34 issues that will likely be cited and debated in many cases to come.

Background of the Dispute

In February 2010, plaintiffs submitted identical FOIA requests to four federal agencies: the Department of Homeland Security, the Federal Bureau of Investigations, the Office of Legal Counsel, and the United States Immigration and Customs Enforcement Agency ("ICE"). Each request sought documents pertaining to "Secure Communities," which is a collaborative program established by ICE and the Department of Justice that enlists states and localities in the enforcement of federal immigration law.

Having received no substantive response to their FOIA requests, plaintiffs initiated a lawsuit on April 27, 2010 seeking to compel production of responsive records. Thereafter, the parties reached an agreement on July 7, 2010 that narrowed the scope of the requests and required the defendants to produce "the bulk of responsive, non-exempt materials" by July 30, 2010.

Although it appears that the parties did not conduct a detailed Rule 26(f) conference, plaintiffs' counsel sent the following email to defendants regarding the requested form for productions on July 23, 2010:

> We would appreciate if you could let us know as soon as possible how ICE plans to produce the Rapid Production List to plaintiffs. To facilitate review of the documents between several offices, please (1) produce the responsive records on a CD and, if possible, as an attachment to an email; (2) save each document on the CD as a separate file; (3) provide excel documents in excel file format and not as PDF screen shots; and (4) produce all documents with consecutively numbered bate [sic] stamps…. Thank you for your help and if you have any questions or concerns, please feel free to call me.

Defendants did not respond to plaintiffs' counsel's email and produced about two thousand pages in four productions that occurred on August 3, August 13, September 8, and October 22, 2010. Defendants' production consisted of CDs that contained PDF files comprised of both paper and electronic documents that were in a non-searchable PDF format without any metadata and, in some cases, attachments were not included with their parent documents.

Following the October 22, 2010 production, the plaintiffs determined that the defendants had not satisfied the substance of the parties' July 7, 2010 agreement. As a result, plaintiffs moved for a preliminary injunction requiring compliance with that agreement. In their motion, plaintiffs did not raise any issues related to defendants' form of production.

After a hearing on plaintiffs' motion on December 9, 2010, the Court entered an Order requiring that defendants produce certain documents no later than January 17, 2011. Again, plaintiffs did not raise any issues related to defendants' form of production at the hearing.

On December 22, 2010, plaintiffs sent defendants a Proposed Protocol Governing the Production of Records ("Proposed Protocol"), which is annexed to Judge Scheindlin's Orders. The Proposed Protocol set forth plaintiffs' requested production format for paper and electronic documents and, as plaintiffs pointed out, was based in part on the production format demands of the United States Securities and Exchange Commission and the Department of Justice Criminal Division. Among other things, the Proposed Protocol indicated that electronic documents should be produced in TIFF format with bates numbers, extracted text files, accompanying load files that would contain twenty-four specified metadata fields. It also indicated that spreadsheets should be produced in both TIFF and native formats.

There is no indication as to whether the defendants responded to plaintiffs' Proposed Protocol. However, sometime in January 2011, the defendants produced additional documents in the same format as their prior productions.

Prior to a scheduled court conference on January 12, 2011, plaintiffs asked the Court to adopt the Proposed Protocol as an Order. In response, defendants argued that the format of their previous productions was appropriate, largely basing their argument on the fact that the Proposed Protocol was the first written demand by the plaintiffs for production of load files and certain metadata fields.

As indicated below, the Court granted most of the plaintiffs' requests but did not require the defendants to reproduce all of their prior productions. Notably, in the Order's Conclusion, the Court reflected that "[o]nce again, this Court is required to rule on an e-discovery issue that could have been avoided had the parties had the good sense to 'meet and confer,' 'cooperate' and generally make every effort to 'communicate' as to the form in which ESI would be produced."

Resolution of the Dispute

The Court first addressed whether production of metadata is required in non-native productions under Rule 34 and FOIA, even in the absence of a request for the production of metadata. By equating FOIA's requirement that "an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format" with Rule 34's requirement that in the absence of a request or an agreement on the form of production, the producing party may produce documents and electronically stored information either (a) in the form in which the material "is ordinarily maintained" or (b) in a "reasonably usable form," the Court determined that production of at least certain metadata fields is required by both FOIA and Rule 34 for non-native productions. In addition to finding that the defendants failed to comply with the requested production format in the plaintiffs' counsel's July 23, 2010 email, the Court further found that the defendants "violated the Federal Rules of Civil Procedure (the 'Rules') by failing to produce the records in a reasonably usable form, and by producing the records in a form that makes it difficult or burdensome for the requesting party to use the information efficiently."

Next, the Court addressed the question of whether metadata is part of a public record as defined by FOIA. While noting that no federal court has previously addressed the matter, the Court sided with several state courts that have decided the issue and held that "consistent with the state court decisions . . . certain metadata is an integral or intrinsic part of an electronic record. As a result, such metadata is 'readily reproducible' in the FOIA context."

In deciding *which* metadata should be considered as an intrinsic part of the public record, the Court acknowledged that "there is no ready answer to this question" and that "[t]he answer depends, in part, on the type of electronic record at issue (*i.e.,* text record, email or spreadsheet) and how the agency maintains its records." In addition to the type of electronic record at issue, the Court noted that agencies may maintain electronic records in different format (*e.g.,* printed or imaged versions of final or official records, or in native format), and that electronic record may be migrated from one system to another which could impact the existence of metadata associated with such documents and information. Outside of these caveats, however, the Court decided 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.'" (emphasis in original).

Notably the Court did not require the defendants to produce all future productions in native format. Although the Court did not substantively address the defendants' argument that reviewing metadata would "increase the time and expense of responding to the FOIA request," the Court observed that "[w]hile native format is often the best form of production, it is easy to see why it would not be feasible where a significant amount of information must be redacted."

In deciding which metadata fields should be produced in non-native productions to ensure such productions meet Rule 34's "reasonably usable" requirement, the Court found that all twenty-four fields requested by plaintiffs were not needed. Instead, the Court identified specific metadata fields that must accompany productions of "*all forms of ESI*" and those that must accompany productions of emails and paper (emphasis in original). Judge Scheindlin required that all future productions by the defendants contain the following fields in the accompanying load files:

- **All productions of any form of ESI must include these fields:**
  - Identifier, File Name, Custodian, Source Date, Source Device, Source Path, Production Path, Modified Date, Modified Time, and Time Offset Value
- **Productions containing emails must include these additional fields:**
  - To, From, CC, BCC, Date Sent, Time Sent, Subject, Date Received, Time Received, and Attachments
- **Productions of paper documents (presumably only those converted to TIFF images) must include these additional fields:**
  - Bates Begin, Bates End, Attach Begin, and Attach End

Judge Scheindlin also noted generally that parties' requests for additional metadata fields or other production specifications "are subject to negotiation by the parties on a case-by-case basis." Furthermore, if the parties cannot reach agreement on these issues, "the court must determine the appropriate form of production, taking into account the principles of proportionality and considering both the needs of the requesting party and the burden imposed on the producing party."

Here, after comparing the fields identified above to the twenty-four fields requested by plaintiffs in the Proposed Protocol, Judge Scheindlin concluded that the defendants need not produce the following fields: Parent Folder, File Size, File Extension, Record Type, Master Date, and Author. Notably, the list of fields to be included and those that were rejected for future productions changed in the four days between the first Order and the revised Order.

In adopting most of plaintiffs' requests set forth in their Proposed Protocol, Judge Scheindlin made clear that requiring the use of the protocol is limited to this case and that she "is certainly not suggesting that the Proposed Protocol should be used as a standard production protocol in all cases." While acknowledging that "[t]he production of individual static images on a small scale, where no automated review platform is to be used, may be perfectly reasonable depending on the scope and nature of the litigation," she issued the following a stern warning to parties and counsel involved in non-small scale productions: "One final note. It is no longer acceptable for any party, including the Government, to produce a large collection of static images of ESI without accompanying load files."

Unfortunately, both Orders are silent as to whether the required metadata fields must be produced *only if they already exist or can be automatically generated*, or whether a producing party must include these fields in every production of ESI and paper. While the latter scenario may seem unreasonable, it is foreseeable that some parties will use these Orders to make that very argument.

Lessons for the Rest of Us

- The case represents another example of a discovery dispute that looks like it could have been avoided had the parties complied with their Rule 26 obligations and substantively conferred about the form of production. As Judge Scheindlin states in her closing remarks, "[A]ll lawyers – even highly respected private lawyers, Government lawyers, and professors of law – need to make greater efforts to comply with the expectations that courts now demand of counsel with respect to expensive and time-consuming document production. Lawyers are all too ready to point the finger at the courts and the Rules for increasing the expense of litigation, but that expense could be greatly diminished if lawyers met their own obligations to ensure document production us handled expeditiously and inexpensively as possible. This can only be achieved through cooperation and communication." Woe to those who continue to ignore the judicial expectations that parties will meet and confer meaningfully on all discovery issues.

- The Orders convey a strong preference for native productions. Indeed, Judge Scheindlin indicates that "native format is often the best form of production" and that native productions "will reduce costs." These Orders will bring this issue to the forefront in many disputes. Litigants who object to producing documents in native format should develop defensible arguments for not producing documents in native format, including identifying with particularity the expected additional costs, burdens, difficulties, and other justifications for producing documents in a static format with a corresponding load file. Similarly, litigants seeking native files are likely to cite the Orders liberally and thus it is important for everyone to understand what the Orders do – and do not – mean.

- Several previous cases provided little or no relief to the requesting party if the original request was vague or silent on the issue of form of production. Here, however, Judge Scheindlin indicates that relying on the requesting party's failure to specify a form of production as a justification for not providing metadata along with a static image production is a "lame excuse." The distinction between this and other cases may be explained in terms of the nature of the action as well as the timing of the dispute, but the distinctions are less important than the practical import: *you should not assume that silence is golden*. Whether you are the requesting party or the producing party – specify what you want or what you are doing and get any disputes out into the open.

- The Order seeks to establish the standard for large scale productions – at least in the Southern District of New York. In a nutshell, producing static images without corresponding metadata fields is not acceptable for cases before Judge Scheindlin. This standard may also be imposed in other courts that agree with Judge Scheindlin's finding that: "it is by now well accepted that when a collection of static images are [sic] produced, load files must also be produced in order to make the production searchable and therefore reasonably usable." Knowing your court will be

critical if you cannot find common ground with your adversary – which, of course, is the preferred alternative.

Contact Us

For further information or if you have any questions regarding this Alert, please contact your Redgrave LLP attorney or Managing Partner Victoria Redgrave at (202) 681-2599 or vredgrave@redgravellp.com.
