U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, Third Floor
New York, New York 10007

January 11, 2011

BY HAND DELIVERY TO CHAMBERS
The Honorable Shira A. Scheindlin
United States District Judge
500 Pearl Street
New York, New York 10007

Re: National Day Laborer Organizing Network, *et al.* v. United States Immigration and Customs Enforcement, *et al.*, 10 Civ. 3488 (SAS)

Dear Judge Scheindlin:

This Office represents defendants in this Freedom of Information Act ("FOIA") action. In their letter dated January 6, 2011, plaintiffs request three amendments to the Court's Order dated December 17, 2010, the first two of which are premature, and the third of which already was resolved at the hearing on December 9, 2010. The request thus should be denied.

The Power of the Court Under FOIA

Under FOIA, the district court has "jurisdiction to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). This jurisdiction "is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'" *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980). "Unless each of these criteria is met, a district court lacks jurisdiction to devise remedies to force an agency to comply with the FOIA's disclosure requirements." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989); *see Megibow v. Clerk of U.S. Tax Court*, No. 04 Civ. 3321 (GEL), 2004 WL 1961591, at *2 (S.D.N.Y. Aug. 31, 2004) (*Kissinger* test is a prerequisite "to the authority of the federal courts . . . to 'devise remedies and enjoin agencies'. . . ." (quoting *Kissinger*, 445 U.S. at 150)).

Format of Production

FOIA provides: "In making any record available to a person under this paragraph, 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." 5 U.S.C. § 552(a)(3)(B). The statute thus places the burden on the *requester* to request that the agency provide the records in a certain form or format. Here, plaintiffs demand that defendants produce records in the format specified in the so-called "Protocol Governing Production of Records" ("Protocol") and contend that defendants' productions violate the Protocol and, by extension, section 552(a)(3)(B). But

plaintiffs gloss over the fundamental flaw in their argument: they did not submit the Protocol to defendants until *December 22, 2010*. Plaintiffs did not mention the Protocol in the original FOIA request, the Rapid Production List ("RPL"), or their preliminary injunction motion. Nor did plaintiffs raise this issue during the December 9, 2010 hearing, even though defendants already had made six productions, the most recent of which was three days before the hearing. With the Government on the verge of a production of opt-out records that may exceed 10,000 pages, plaintiffs' eleventh-hour request that the Protocol apply to these records should be denied.

The Court also should decline plaintiffs' invitation to amend the December 17 Order to compel compliance with the Protocol for future productions, including the RPL. A mere request for a particular format does not automatically entitle the FOIA requester to that format. Defendants first must be given an opportunity to determine whether the records are "readily reproducible" in the requested format. 5 U.S.C. § 552(a)(3)(B). If they are not, the Government should be permitted to brief this issue in the context of a summary judgment motion, as was done in *TPS, Inc. v. Dep't of Defense*, 330 F.3d 1191 (9th Cir. 2003), cited by plaintiffs. FOIA contemplates that defendants would be entitled to submit affidavits concerning "reproducibility under paragraph [(a)](3)(B)," and provides that the Court must accord these affidavits "substantial weight." 5 U.S.C. § 552(a)(4)(B). Plaintiffs' request ignores the Government's statutory right to assess reproducibility and fully brief this issue.

Plaintiffs' demand for metadata suffers from the same fundamental flaw: plaintiffs did not request metadata until December 22, 2010. Accordingly, there has been no withholding of metadata, let alone an improper one. An order compelling defendants to produce metadata, at this juncture, thus would run afoul of *Kissinger* and *Tax Analysts*. Furthermore, as this Court certainly is aware, metadata comes in several types. *See Aguilar v. Immigration & Customs Enforcement*, 255 F.R.D. 350, 354 (S.D.N.Y. 2008) (discussing distinction between substantive, system, and embedded metadata). Plaintiffs do not specify what kind of metadata they want, though they refer to system metadata. *See* Pl. Letter at 1 n.1, Tab A at 1. Nor do plaintiffs allow for the applicability of FOIA's exemptions to the metadata. *See* 5 U.S.C. § 552(b). Finally, even if metadata is a "form or format" of production—which defendants do not concede—defendants have not had an opportunity to submit affidavits on reproducibility, as discussed above.

In addition, while plaintiffs attempt to analogize FOIA to civil discovery, in *Aguilar*—a non-FOIA case—the plaintiffs also did not formally request metadata until after defendants began, and nearly completed, their document collection efforts. *See Aguilar*, 255 F.R.D. at 359. Magistrate Judge Maas denied much of the request because it was unduly burdensome and would not yield important information, *see id.* at 360-63, and required plaintiffs to pay the costs of a portion of the request that was granted, *see id.* at 362. The Court instructed: "[I]f a party wants metadata, it should 'Ask for it. Up front. Otherwise, if [the party] ask[s] too late or ha[s] already received the document in another form, [it] may be out of luck." *Id.* at 357 (citation omitted). Likewise, here, plaintiffs' explanation for why their FOIA request must be expanded to include metadata, *see* Pl. Letter at 1 n.1, is both unconvincing and contrary to the Court's observation that the request was "overbroad in the first place." Dec. 9, 2010 Hrg. Tr. at 12.

Search Cut-Off Dates

Plaintiffs' request for an October 15, 2010 search cut-off date for the RPL has no basis in law. DHS and DOJ regulations provide that a component's responsiveness determination "ordinarily will only include records in its possession as of the date the component begins its search for them." 6 C.F.R. § 5.4(a); 28 C.F.R. § 16.4(a). Records created after the search began "are not covered by [plaintiffs'] request." *Defenders of Wildlife v. U.S. Dep't of the Interior*, 314 F. Supp. 2d 1, 12, n.10 (D.D.C. 2004) (citing Department of Interior search cut-off regulation). Although the Government is adhering to the Court-ordered October 15, 2010 cut-off date for opt-out records, plaintiffs have no basis at this time to request that the Court set that date as the search cut-off date for the rest of the RPL or, for that matter, the FOIA request—particularly when defendants made three productions before October 15, 2010. *See Fox News Network, LLC v. U.S. Dep't of the Treasury*, --- F. Supp. 2d ---, 2010 WL 3705283, at *8 (S.D.N.Y. Sept. 3, 2010) (noting that "courts have consistently held that an agency may limit its FOIA search to records created on or before the date of the commencement of the search").

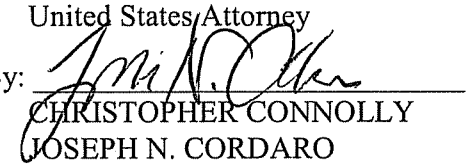
Adequacy of Search

Defendants' position on adequacy-of-search declarations with respect to opt-out records simply echoes *the Court's* position. In a colloquy with the undersigned, the Court made clear that a motion by the Government on its asserted exemptions could "be distinguished from the adequacy [of] search." Dec. 9, 2010 Hrg. Tr. at 16. The Court continued: "I [k]now one of the requests in the preliminary injunction motion is for the sworn affidavit. We'll get to that too but for this motion on exemptions we're ready to do it." *Id.* Later in the hearing, the Court directed: "Whatever the deadline is for producing [opt-out records] it [is] the deadline for moving to assert exemption[s]." *Id.* at 18. Paragraph 1(a) of the December 17 Order reflects the Court's remarks. While the Government expects that a motion for summary judgment on adequacy of search eventually will be necessary, the Court has stated that it will not entertain such a motion now.

For the foregoing reasons, the Court should deny plaintiffs' request to amend the December 17 Order. Thank you for your consideration.

Respectfully,

PREET BHARARA
United States Attorney

By: 
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