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January 14, 2011

BY FAX & E-MAIL DELIVERY

Hon. Shira A. Scheindlin  
United States District Judge  
Daniel Patrick Moynihan  
United States Courthouse  
500 Pearl St.  
New York, N.Y. 10007-1312

Re: NDLON et al. v. ICE et al., No. 10 CV 3488 (SAS)  
(KNF)

Dear Judge Scheindlin:

As discussed at the hearing on January 12, 2011, we write on behalf of all Plaintiffs in the referenced Freedom of Information Act ("FOIA") action to further elaborate as to why this Court should order Defendants to produce all records from the Rapid Production List ("RPL") (due to be produced by February 25, 2011, per this Court's December 17<sup>th</sup> Order), and any other future productions, in the format requested by Plaintiffs (the "Production Protocol", attached as Tab C to Plaintiffs' January 6, 2011 letter). The present disputes about the format of production and metadata present important questions concerning the Government's obligations under FOIA, 5 U.S.C. § 552(a)(3)(B), which requires the government to: "[P]rovide 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. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section."

This Court addressed a similar issue in *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403 (S.D.N.Y. 2009), where government agencies sought to exempt themselves from the law and best practices concerning format of production. As this Court noted there, government agencies "must abide by the Federal Rules of Civil Procedure", and are subject to the requirements of FRCP 34, whose "purpose . . . is to facilitate production of records in a useful manner to minimize discovery costs." *Id.* at 413. Indeed, Rule 34 provides that "a party must produce ESI in a form . . . in which it is ordinarily maintained or in a *reasonably usable* form . . . ." FRCP 34(a)(1)(A) (emphasis added). While we have found no precedent specifically analogizing the "readily reproducible" standard in the FOIA context to the "reasonably usable" standard under FRCP 34, the practical and policy considerations regarding the production of electronically stored information ("ESI") are the same. Thus, established precedent under Rule 34, at a minimum, should inform the interpretation of the "readily reproducible" standard under FOIA.

"Readily reproducible" under FOIA simply means "a FOIA request must be processed in a requested format if 'the capability exists to respond to the request'" in that format. *TPS, Inc. v.*

Hon. Shira A. Scheindlin  
January 14, 2011  
Page 2

*Dep't of Defense*, 330 F.3d 1191, 1195 (9th Cir. 2003) (citing 32 C.F.R. § 286.4(g)(2)). Defendants have failed to present any plausible argument that the capability does not exist to produce records in the format described in the Production Protocol. Every indication is that Defendants can, indeed, comply with the Production Protocol. First, the Production Protocol was modeled, in large part, upon the requirements set forth by the SEC and DOJ when those agencies request documents. This establishes that, not only does the capability exist to comply with the Production Protocol, but *federal agencies possess the precise capabilities that would enable Defendants to comply*. Second, based upon the declaration submitted by the FBI (*see* Declaration of David M. Hardy, attached as Exhibit B to the Declaration of Christopher Connolly submitted with Defendants' opposition to Plaintiffs' motion for a preliminary injunction), that Defendant-agency converts all native files to Tagged Image File Format ("TIFF"), which ordinarily enables the extraction of the limited metadata requested in the Production Protocol. Thus, at least one Defendant-agency has conceded that it can comply with the Production Protocol.

It would be helpful for this Court to think about the format of production issue in the following context: should Defendants be permitted to produce records in a format that makes it not "reasonably usable" by Plaintiffs on a standard review platform, despite a request to the contrary, where there are not specific grounds that such format is not "readily reproducible" by Defendants? The Production Protocol was designed to request a form of production that would allow Plaintiffs to review, organize and prioritize what Plaintiffs hope will be a voluminous production on a standard review platform.<sup>1</sup> As noted previously, the Production Protocol was designed in large part upon the requirements set forth by the SEC and DOJ, which require a form of production (with specific required metadata) that enable those agencies to use standard review platforms. *See SEC v. Collins*, 256 F.R.D. at 407-08 (noting that documents in the SEC's Concordance database "are not inaccessible, as review of massive document databases is routinely conducted in large-scale commercial litigation").

Other than the FBI, the other Defendant-agencies have not submitted declarations that provide information about whether they have utilized review platforms where records have been converted to TIFFs and metadata has been retained. Nevertheless, parties may not convert ESI from one form to another less usable form for production consistent with FOIA or FRCP 34 any more than Defendants would be allowed to remove paper documents from their file folders and produce them in a fashion that obscures their origins, organization or creators.<sup>2</sup> Thus, if

<sup>1</sup> The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production, Principle 12 (The Sedona Conference Working Group Series, 2d ed. 2007) (hereinafter "Sedona Principles") ("[P]roduction should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form . . .").

<sup>2</sup> FRCP 34(b) advisory committee notes ("[The responding party's] option to produce [ESI] in a reasonably usable 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").

Hon. Shira A. Scheindlin  
January 14, 2011  
Page 3

Defendants insist that they will not produce all records in native format, they should at least be ordered to produce those records in accordance with the Production Protocol, which provides for a production format that maintains certain critical metadata that is inherently part of each record and renders such records, even if converted to TIFF, as reasonably usable.

As this Court noted at the hearing, metadata is a part of each record requested by Plaintiffs. While we understand Defendants' position that it may be burdensome to produce and review *all* metadata for each record requested, that is not what Plaintiffs have requested. Rather, the limited metadata fields requested in the Production Protocol seek basic, but necessary, information about the records that pertain to information necessary to organize and prioritize records in a standard review platform, and help Plaintiffs determine whether Defendants have produced responsive records, *i.e.*, a "readily reproducible" and "reasonably usable" form of production.<sup>3</sup>

For example, some of the metadata requested is necessary for the simple operation of the review platform and to understand the relationships among the records, such as noting when records begin and end, and noting any attachments. Other metadata helps explain the origins of the records, which is needed to understand where and how the records were stored, located or created. Understanding who the custodian of a record was, what the file path was, and the dates surrounding the creation or modification of the record, reveal important information about the nature of the record, will be important information in determining the exact scope of Defendants' search for responsive records, and allows Plaintiffs to contest that search and collection with specific information (*e.g.*, there are no emails from an important person's email account around specific time periods, *etc.*).

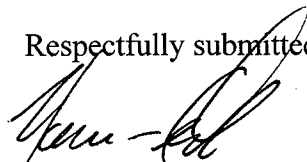
Other metadata will be helpful in organizing and prioritizing records that will be useful for public advocacy, and in understanding how those records were maintained or used internally. Thus, for instance, file names and extensions can help Plaintiffs pinpoint specific PowerPoint presentations that were made that describe Secure Communities, and standard email metadata (to, from cc, *etc.*) can help identify individuals who were working on the implementation of Secure Communities in specific jurisdictions, and help identify what representations may have been made to government officials in such jurisdictions. In sum, the limited metadata requested is important to understand each record and will make the records requested "reasonably useable." The failure to provide such metadata will deprive Plaintiffs of portions of the record itself and increase Plaintiffs' costs by forcing Plaintiffs into a manual and time-consuming process of reviewing and coding the tens of thousands of records that may be produced by Defendants. Defendants' creation of obstacles to effectively access and use any records obtained through FOIA runs counter to the purpose of FOIA and the FRCP.

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<sup>3</sup> Accord Sedona Principles 12, cmt. 12(b) ("In an effort to replicate the usefulness of native files while retaining the advantage of static productions, image format productions are typically accompanied by "load files," which are ancillary files that may contain textual content and relevant system metadata.").

Hon. Shira A. Scheindlin  
January 14, 2011  
Page 4

Respectfully submitted,



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Encls.

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