U.S. Department of Justice

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Southern District of New York

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February 14, 2011

BY FACSIMILE (212) 805-7920
The Honorable Shira A. Scheindlin
United States District Judge
500 Pearl Street
New York, New York 10007

Re: Nat'l Day Laborer Organizing Network, *et al.* v. ICE, *et al.*, 10 Civ. 3488 (SAS)

Dear Judge Scheindlin:

This Office represents the defendants (collectively, the "Government") in this Freedom of Information Act ("FOIA") action. In connection with the Court's Opinion and Order dated February 7, 2011 (the "February 7 Order"), the Government respectfully requests authorization to submit declarations in connection with a motion for reconsideration of the February 7 Order.[1] Furthermore, pursuant to Section IV of the Court's Individual Practices, which requires the submission of pre-motion letters, the Government wishes to inform the Court that it intends to move expeditiously for a stay of the February 7 Order pending the disposition of the motion for reconsideration or, in the alternative, for a stay of the order pending consideration of appeal.

The propriety of granting a stay turns on four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009) (citation and internal quotation marks omitted). "The degree to which a factor must be present varies with the strength of the other factors, meaning that more of one [factor] excuses less of the other." *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007) (alteration in original; citations and internal quotation marks omitted).

The Government can show a strong likelihood of success on the merits or, at least, a "substantial case on the merits." *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 240 F. Supp. 2d 21, 22 (D.D.C. 2003) (citation and internal quotation marks omitted). FOIA requests must "reasonably describe[ ]" the records sought, 5 U.S.C. § 552(a)(3)(A), and "bind[ ] an agency to disclose information to the extent that the agency is able to determine precisely what

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[1] The Local Rules of this Court bar parties from filing affidavits in connection with a motion for reconsideration unless directed by the Court. Local Civ. R. 6.3.

records are being requested." *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999). Plaintiffs' FOIA request, dated February 3, 2010, contained neither a demand for metadata, or for a form or format of production. As the Court noted, plaintiffs' first written demand for load files and metadata fields occurred with the submission of their Protocol on December 22, 2010—over *ten months* after the FOIA request. Feb. 7 Order at 6. This was after the commencement of litigation, after search cut off-dates had been fixed, and after the agencies had begun to accumulate large numbers of records without regard to the production of metadata. Defendants thus acted reasonably in construing the request as not embracing metadata or a particular form or format of production, and in concluding that metadata was neither implied nor intrinsic to the request. *See Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) (agency must read request as drafted, "not as either agency officials or [requester] might wish it was drafted).

It is "impermissible" for a FOIA requester "to expand a FOIA request after the agency has responded and litigation has commenced." *Gillin v. IRS*, 980 F.2d 819, 823 n.3 (1st Cir. 1992); *see Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996) ("A reasonable effort to satisfy [the FOIA] request does not entail an obligation to search anew based upon a subsequent clarification."). Whether the request seeks metadata, or a particular form or format, could factor into several pre-litigation agency decisions, including, *inter alia*, the amount of fees, and whether expedited processing will be granted. *See* 5 U.S.C. §§ 552(a)(4)(A), (a) (6)(B). Allowing a requester to wait ten months to request metadata would cause chaos for agencies confronted with myriad FOIA requests. *See Kowalczyk*, 73 F.3d at 388 ("Requiring an additional search each time the agency receives a letter that clarifies a prior request could extend indefinitely the delay in processing new requests."); *Bibermann v. FBI*, 528 F. Supp. 1140, 1144 (S.D.N.Y. 1982) ("It would be untenable to hold that, as the litigation proceeds, a plaintiff, by continually adding new requests . . . could command a priority based on the date of the initial requests.").

Nor would plaintiffs be entitled to metadata under the Federal Rules of Civil Procedure, even if the Rules were applicable here—which they are not because discovery principles cannot be engrafted onto an administrative process that exists outside litigation. *See Jones v. FBI*, 41 F.3d 238, 250 (6th Cir. 1994) (explaining that "a plaintiff's right to discovery" in civil litigation does not "entitle a FOIA plaintiff to circumvent the rules limiting release of documents under FOIA"). Defendants made *six* productions of over two thousand pages before plaintiffs demanded metadata via the Protocol. This demand was clearly untimely. *See Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418, 426 (D.N.J. 2009) (unduly burdensome for party to re-produce documents based on belated metadata request); *Aguilar v. ICE*, 255 F.R.D. 350, 359 (S.D.N.Y. 2008) (denying majority of plaintiffs' motion to compel belatedly requested metadata); *Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc.*, 248 F.R.D. 556, 559 (N.D. Ill. 2008) ("It seems a little late to ask for metadata after documents responsive to a request have been produced in both paper and electronic format. Ordinarily, courts will not compel the production of metadata when a party did not make that a part of its request." (citing cases)).

The second factor of the stay analysis concerns whether the Government can show irreparable injury. Compliance with the February 7 Order on February 25, 2011 will irreparably

harm the Government because it will moot any motion for reconsideration, and any subsequent appeal, thereby "entirely destroy[ing] [the Government's] rights to secure meaningful review." *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979); *Ctr. for Nat'l Sec. Studies v. DOJ*, 217 F. Supp. 2d 58, 58 (D.D.C. 2002) (granting stay of order requiring release of information under FOIA where disclosures "would effectively moot any appeal"); *see also Ferguson v. FBI*, 957 F.2d 1059, 1060 (2d Cir. 1992) (noting, without discussion, that panel of Second Circuit granted motion for stay pending appeal of district court's order directing government to disclose information under FOIA). A stay also would permit the Government to avoid the Hobson's choice of either violating the Court's February 7 Order in order to complete the record on a motion for reconsideration, or appealing the order on an incomplete record.

Issuance of a stay of the February 7 Order clearly will not substantially injure plaintiffs. Plaintiffs delayed over ten months in seeking metadata, and therefore should not be heard to complain about a relatively brief time delay. Moreover, plaintiffs filed a preliminary injunction motion on October 22, 2010 to compel production of certain urgent records. That motion led to the Court's order that the Government produce records pertaining to the ability of states and localities to "opt out" of Secure Communities no later than January 17, 2011. None of plaintiffs' motion papers, which included declarations, made any mention of metadata. Nor did plaintiffs' testifying witness mention metadata at the December 9, 2011 preliminary injunction hearing. Moreover, the Government is not seeking a stay of its pre-existing obligation to produce records responsive to the Rapid Production List on February 25, 2011.

Finally, the public interest will be served by the grant of a stay. The February 7 Order addresses a complex issue of whether metadata is part of an agency record for FOIA purposes, an issue of first impression for the entire federal judiciary. *See* Feb. 7 Order at 11. This fact weighs in favor of a stay. *See Ctr. For Int'l Envtl. Law*, 240 F. Supp. 2d at 22. Additionally, the Government was never given the opportunity to fully brief the issues, or to submit declarations on the issue of reproducibility, even though FOIA itself contemplates agency declarations on that very subject and instructs courts to grant them "substantial weight." 5 U.S.C. § 552(a)(4)(B). Rather, the Court's decision was based on two letters from plaintiffs' counsel, one from the Government, and a conference on January 12, 2011, that the Government was told would be a "pre-motion hearing." A controversy with such significant ramifications for nationwide FOIA practice should be decided in the context of a fully-briefed summary judgment motion, as were *Sample v. BOP*, 466 F.3d 1086 (D.C. Cir 2006) and *TPS, Inc. v. U.S. Dep't of Defense*, 330 F.3d 1195 (9th Cir. 2003), cited by the Court. *See* Feb. 7 Order at 7 & n.14. The Government seeks a stay, and permission to file declarations with its motion for reconsideration, in order to complete the record that generated the February 7 Order to the greatest extent possible.

Based on the foregoing, the Government intends to move for stay pending its motion for reconsideration of the February 7 Order, and respectfully requests authorization to file declarations with its reconsideration motion. In addition, the Government requests that the Court file this letter on the electronic docket of this case. Thank you for your consideration.

Respectfully,

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