UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL DAY LABORER ORGANIZING NETWORK; CENTER FOR CONSTITUTIONAL RIGHTS; and IMMIGRATION JUSTICE CLINIC OF THE BENJAMIN N. CARDOZO SCHOOL OF LAW,

Plaintiffs,

- against -

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; FEDERAL BUREAU OF INVESTIGATION; and OFFICE OF LEGAL COUNSEL,

Defendants.

No. 10 Civ. 3488 (SAS)
ECF Case

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE GOVERNMENT'S MOTION FOR A STAY PENDING APPELLATE REVIEW OF THE COURT'S OPINION AND ORDER DATED FEBRUARY 7, 2011, AND THE COURT'S SUPPLEMENTAL ORDER DATED FEBRUARY 14, 2011

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Defendants United States Immigration and Customs Enforcement ("ICE"), United States Department of Homeland Security ("DHS"), Federal Bureau of Investigation ("FBI"), Executive Office for Immigration Review ("EOIR"), and Office of Legal Counsel ("OLC") (collectively, "defendants" or the "Government"), by their attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submit this reply memorandum of law in further support of their motion for a stay of the Court's orders dated February 7, 2011, and February 14, 2011, pending the Government's appeal of those orders.[1]

PRELIMINARY STATEMENT

The Government's motion for a stay pending appeal is straightforward. The Court has ordered defendants to disclose certain metadata to plaintiffs pursuant to FOIA. Defendants have appealed that order. As discussed in the Government's opening brief, defendants contend that, as a matter of fact and law, they are not obligated to produce *any* metadata in this case. Plaintiffs argue in their opposition brief that the Government should not be permitted to withhold non-exempt metadata that, in their view, is part of a responsive record. But that is exactly the point. Defendants have no basis, absent success on appeal, to withhold non-exempt metadata that this Court has ordered disclosed. Without a stay, that metadata must be released, rendering the Government's appeal moot as to that metadata. Once the Government discloses any information to a FOIA plaintiff pursuant to a district court order, that disclosure constitutes a release to the general public. The appellate court cannot unring the bell. Courts thus routinely grant stays pending appeal of their disclosure orders in FOIA cases, and a stay should be granted here.

Defendants have more than satisfied each of the four factors governing the stay analysis, as discussed in the Government's opening brief. Defendants will raise on appeal a substantial

[1] Unless otherwise noted, capitalized and defined terms in the Government's opening brief have the same meaning herein.

case on the merits for at least four reasons: (1) plaintiffs' belated metadata demand is unexhausted and impermissibly expanded plaintiffs' FOIA request, (2) the metadata demanded by the plaintiffs, and ordered produced by the Court, is not "readily reproducible" by defendants, and the Court erred in effectively granting summary judgment on this issue without developing a full record or affording the Government the procedural protections in Fed. R. Civ. P. 56(f), (3) the federal discovery rules do not govern the processing of FOIA requests, and (4) metadata is not a "record" or an "integral or intrinsic part" of a "record" for FOIA purposes. This Court need not agree with the Government's arguments; it only must assess whether the Government has substantial arguments to make before the Second Circuit. It clearly does.

Defendants will be irreparably harmed absent a stay because compliance with the Court's Order would compel disclosure of the very information at issue on appeal, thereby depriving the Government of its right of appellate review. In addition, plaintiffs will not be substantially injured by the grant of a stay. The appeal has not stopped the flow of information to plaintiffs. And plaintiffs' ten-month delay in seeking the metadata at issue belies any of their claims of urgency. Finally, the public interest favors a stay. Given that the Court's Order could have a dramatic and detrimental effect on FOIA processing nationwide, and in light of the Government's contention that the Order was issued on an incomplete record, a stay pending full appellate review of the Order clearly is in the public interest.

Plaintiffs' opposition papers, along with their supporting declarations, only confirm what this Court already has indicated both on the record and in its Order: the metadata issues are "complicated" and require the courts "to figure out," as a matter of first impression in the federal courts, "what is required of FOIA requesters." The Second Circuit's ruling, in all likelihood, will be the first pronouncement by a circuit court on this complex issue of national importance.

Plaintiffs' contention that the Government has not demonstrated a substantial case on the merits is thus misplaced, as is their contention that the Government is not entitled to meaningful appellate review of these complicated issues of first impression. The Government's motion for a stay pending appeal thus should be granted.

ARGUMENT

I. THE GOVERNMENT WILL RAISE A SUBSTANTIAL CASE ON THE MERITS

The Government demonstrated in its opening brief that it can make a substantial case on appeal. Plaintiffs' opposition papers confirm the complexity of the issues addressed in the Court's Order, and illustrate the need for meaningful appellate review.

A. Plaintiffs' Metadata and Format Demands Constitute an Expansion of Their FOIA Request and Are Unexhausted

Throughout their brief, plaintiffs gloss over the fact that their FOIA request contained no request for metadata, and no request for a particular form or format of production. Those requests only came after this litigation was filed, and after defendants had commenced their searches for responsive documents. Plaintiffs' request for native-format spreadsheets was not made until July 23, 2011—over five months after their FOIA request and nearly three months after the complaint was filed. Plaintiffs' proposed protocol, which contained their first metadata request and other format requests, did not arrive until December 22, 2011—over ten months after their FOIA request and nearly eight months after the complaint was filed. These requests were unexhausted and constituted an impermissible expansion of plaintiffs' FOIA request.

Plaintiffs' claim that this will not present a substantial question on appeal because the Government waived these arguments, *see* Pl. Br. at 25-26, is incorrect. In its letter to the Court prior to the pre-motion hearing, the Government noted that the power of the Court to afford injunctive relief under FOIA "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), and that "[u]nless 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* Cordaro Decl., Ex. G at 1 (quoting *Kissinger* and *Tax Analysts*). The Government's letter then turned to the format requests in plaintiffs' proposed protocol, and explicitly noted that the demands therein were not mentioned in the FOIA request, nor at any other time in the litigation prior to December 22, 2010. *See* Cordaro Decl., Ex. G at 2.

The Government then explicitly addressed plaintiffs' belated metadata request, stating: "Plaintiffs' request 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*." *Id*. The Government thus plainly raised the argument that the Court lacked authority to order defendants to comply with the protocol—with respect to metadata or the format requests therein—because defendants could not possibly "improperly" "withhold" information that plaintiffs failed to request in their FOIA request. An order directing the Government to disclose that information only could be accomplished by impermissibly expanding the scope of the FOIA request—the precise effect of the Court's Order. Because the Government made specific reference to these issues in its letter, its exhaustion and scope-of-request arguments have not been waived.[2]

[2] Defendants did not waive their exhaustion argument by failing to raise it in their answer, as plaintiffs suggest. *See* Pl. Br. at 27-28. Defendants filed their Answer several months before plaintiffs presented the Government with its proposed protocol.

Moreover, plaintiffs cite no authority to support the proposition that a party can waive an argument in a pre-motion conference letter or at a pre-motion hearing, particularly where, as here, the Government expressly requested an opportunity to brief the issue of compliance with plaintiffs' protocol in the context of a summary judgment motion. *See* Cordaro Decl., Ex. G at 2; *see also id.*, Ex. H at 13 ("This is obviously not something that can be inserted into a scheduling order. It is a very complicated topic and would need a lot of briefing."). In fact, courts have found that a waiver cannot take place under such circumstances. *See Park S. Hotel Corp. v. N.Y. Hotel Trades Council*, 705 F.2d 27, 30 (2d Cir. 1983) (vacating district court's ruling after court converted pre-motion conference to an on-the-record proceeding and issued ruling on the same day, despite request from aggrieved party for full briefing); *Schweitzer ex rel. Schweitzer v. Crofton*, No. 08-CV-135(DRH)(ETB), 2010 WL 3516161, at *7 (E.D.N.Y. Sept. 1, 2010) ("Plaintiffs proffer no authority, and the Court has been unable to find any, for the proposition that a pre-motion conference letter, a mechanism provided for in a judge's Individual Practice Rules, constitutes a 'motion' under Rule 12 such that a failure to raise a defense in such a letter results in a waiver of that defense.").[3]

Plaintiffs' contention that their FOIA request expressly sought the production of electronic documents, and that metadata presumptively is encompassed by that request, Pl. Br. at 26, is baseless. Plaintiffs already conceded to the Court during the pre-motion hearing that the protocol, which contained their first metadata requests, did not exist prior to December 22, 2010. *See* Cordaro Decl., Ex. H at 17. The Court found that the protocol was the first time that

[3] Plaintiffs' attempt to recast the January 12, 2011 "pre-motion hearing" as an oral argument is belied by their own e-mails. Plaintiffs informed the Government that the hearing would be a "pre-motion hearing." Cordaro Decl., Ex. F; Gov't Br. at 6. One day after the pre-motion hearing, plaintiffs again referred to the conference as a "pre-motion hearing" in an e-mail to the Court's law clerk, on which the Government was copied: Reply Declaration of Joseph N. Cordaro ("Cordaro Reply Decl."), dated April 11, 2011, Ex. A.

plaintiffs had made a written request for metadata, no doubt based on plaintiffs' concession. Order at 5-6 ("The Proposed Protocol was first provided to Defendants on December 22, 2010, and also was the first time Plaintiffs made a written demand for load files and metadata fields."). Plaintiffs' vague FOIA request for "electronic records" plainly did not embrace metadata, much less the *specific* metadata fields appearing in the protocol, or the fields enumerated in the Order. Such an argument is unsupportable, and is contrary to the statutory requirement that FOIA requests "reasonably describe[ ]" the records sought. 5 U.S.C. § 552(a)(3)(A). Nor was it unrealistic for the agencies to construe a request for electronic records as not encompassing metadata.

Finally, plaintiffs are wrong to argue that the purposes of the exhaustion rule would not be served by having them present their metadata request to the agencies in the first instance. *See* Pl. Br. at 28. The purpose of the exhaustion requirement is to allow agencies "to correct or rethink initial misjudgments or errors," *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 64 (D.C. Cir. 1990), and to "[g]ive[ ] the parties and the courts the benefit of the agency's experience and expertise," *Martin v. Court Servs. & Offender Supervision Agency*, No. 05-853(JDB), 2005 WL 3211536, at *3 (D.D.C. Nov. 17, 2005). Plaintiffs acknowledge that they had the option of submitting to the agencies a new FOIA request containing specific demands for metadata or formats of production. They declined because they wanted to jump the queue of other FOIA requesters, *see* Pl. Br. at 28 n.20, thereby circumventing the administrative process. This is exactly the scenario that the exhaustion rule is designed to prevent.

B. The Metadata Fields Ordered by the Court Are Not "Readily Reproducible"

As the Government's stay motion demonstrates, the metadata requested in the protocol, and ordered produced by the Court, is not "readily reproducible" under FOIA. The statute itself

makes clear that the "readily reproducible" inquiry, at bottom, is a factual one, and not subject to resolution as a matter of law. The Government thus will raise a substantial case on appeal concerning the Court's holding that "certain metadata is an integral or intrinsic part of an electronic record" and thus is "'readily reproducible' in the FOIA context." Order at 18.

FOIA explicitly provides that "[i]n 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). Under the plain meaning of this statute, the issue of whether metadata (or anything else) is readily reproducible requires a factual inquiry regarding the extent of the agencies' capabilities. The Ninth Circuit's decision in *TPS, Inc. v. U.S. Department of Defense*, 330 F.3d 1191 (9th Cir. 2003), cited in plaintiffs' brief, confirms this view. *See* Pl. Br. at 15 ("'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." (quoting *TPS, Inc.*, 330 F.3d at 1195)). This reading is consistent with the statute, which requires courts to "accord substantial weight to an affidavit of an agency concerning . . . reproducibility under [5 U.S.C. § 552(a)(3)(B)]." 5 U.S.C. § 552(a)(4)(B); *see also* H.R. Rep. No. 104-795, at 22 (explaining that such deference is appropriate because "agencies are the most familiar with the availability of their own technical resources to process, redact, and reproduce records"). The statute does not permit a finding that a record, or other information, is *presumptively* "readily reproducible" under FOIA, as the Court found, *see* Order at 18, and plaintiffs now argue, *see* Pl. Br. at 15. On this basis alone, the Government has raised a substantial case on the merits. This argument becomes all the more compelling because the issue is a complicated one of first impression.

Plaintiffs' argument (and the Court's finding) that certain metadata is *presumptively* reproducible, and readily reproducible as a matter of law in this case, further ignores that the technology available to the agencies, as described in their declarations, is insufficient to allow them to produce metadata in a manner consistent with FOIA and the Court's Order. In the Government's supplemental declarations, defendants explained that their existing FOIA practices do not provide them with a mechanism to review, much less redact, metadata. *See* Declaration of Ryan Law, dated Mar. 23, 2011, ¶¶ 8-18; Fifth Declaration of David M. Hardy, dated Mar. 23, 2011, ¶¶ 7-8, 11, 16; Declaration of Crystal Rene Souza, dated Mar. 24, 2011 ¶¶ 9-11, 18-20; Declaration of Maria Roat, dated Mar. 23, 2011, ¶¶ 6-14; Declaration of William H. Holzerland, dated Mar. 23, 2011, ¶ 24.

While two of the Defendant agencies, ICE and the FBI, have access to software that has been used in the civil discovery context to produce metadata, such software would not provide an adequate solution.[4] As an initial matter, the software (Clearwell and Concordance) is not currently available for FOIA purposes. *See* Fifth Hardy Decl. ¶ 14 & n.5 (explaining that the FBI no longer has access to Clearwell, and that its Concordance software is "being used in active criminal investigations . . . [and] cannot be redeployed for [FOIA] use"); Law Decl. ¶¶ 21, 24, 28 (explaining that (1) a non-FOIA ICE component purchased a Clearwell license for civil litigation purposes, (2) Clearwell was loaned to the FOIA Office on a provisional basis to meet a particular deadline in this case, and (3) if Clearwell were used to process the remainder of plaintiffs' FOIA request, that itself could use up the remainder of the license).

Moreover, even if the software were available for FOIA purposes, it would not provide a viable means for producing only non-exempt metadata here. The Concordance software to

[4] Neither EOIR nor the other relevant DHS components have access to such software. *See* Souza Decl. ¶ 21; Roat Decl. ¶¶ 15-20.

which the FBI has access "would . . . be an ineffective tool because it is incompatible with the TIFF images that [the FBI's FOIA Office] works with to process documents responsive to FOIA/Privacy Act requests." Fifth Hardy Decl. ¶ 14 n.5.

In addition, based on ICE's experience, there are two ways to produce only non-exempt metadata using Clearwell. *See* Law Decl. ¶¶ 41-42. *First*, ICE could convert the metadata files into PDF files, review and redact the exempt information from the PDF files, and then produce the redacted PDF files. *Id.* ¶ 41. "This option — which would produce 'flat' PDFs — would not allow Plaintiffs to use the metadata in connection with a review application such as Concordance," and would thus be ineffectual. *Id.* *Second*, ICE could review the electronic metadata file for each document, determine which metadata fields contain exempt information, and then instruct Clearwell to produce only the metadata fields that contain non-exempt information. *Id.* ¶ 42. "This process would need to be completed for each and every single document." *Id.* That is not feasible, much less "readily reproducible." Such an endeavor would exponentially increase the time and expense of processing FOIA requests. Moreover, this option would not allow for the redaction of exempt metadata in accordance with FOIA. Any fields with exempt information would simply not be produced.[5]

Plaintiffs' contention that the Court should review an agency's overall capability to produce metadata in the format requested, not just the FOIA office's capabilities, Pl. Br. at 16, is impractical. According to information publicly available on the internet at www.foia.gov, defendants have received the following quantity of FOIA requests in the last three years:

[5] ICE is submitting a supplemental declaration with this filing which clarifies certain statements it made in prior declarations regarding Clearwell. None of those clarifications is material to ICE's ability to produce metadata here. *See* Declaration of Ryan Law, dated April 11, 2011, ¶¶ 14-18.

	2008	2009	2010
ICE	4,224	6,746	8,523
DHS (excluding ICE)	104,728	96,347	121,575
FBI	17,241	15,664	14,957
EOIR	13,236	14,497	17,498
OLC	57	79	72

Cordaro Reply Decl., Ex. B. Requiring the agencies' FOIA offices to seek out other offices in order to utilize their software for FOIA purposes—assuming that such software could produce data in the format the FOIA requester seeks—would divert that software from its assigned uses, *see, e.g.*, Fifth Hardy Decl. ¶ 14 & n.5; Law Decl. ¶ 28; *see also* Fourth Hardy Decl. ¶ 8 (in order to produce a *sampling* of Excel spreadsheets in TIFF format with load files for this *one FOIA request*, FBI trained 15 FOIA analysts to use Clearwell program on a temporary basis, but the program was being utilized by FBI's Financial Crimes Section and reached maximum capacity as a result of that office's ongoing investigations), thus having an adverse effect on Government operations. Information is not "readily" reproducible if producing it would compromise an agency's other functions.

The Government also can raise a substantial issue on the merits concerning reproducibility because the Court did not develop a factual record on this issue. The Order was premised on three undocketed (at the time) three-page letters from counsel, and the transcript of a pre-motion hearing. No declarations were submitted, and the Government never was informed that the pre-motion hearing actually was, in fact, an "oral argument." Plaintiffs suggest that even if the record *was* incomplete, the submissions accompanying the instant stay motion somehow create "an ample record." Pl. Br. at 22 n.17. That argument is wrong. The instant motion is for a stay pending appeal, not summary judgment or reconsideration. The submissions on this

motion are tailored for stay purposes and do not alter the incomplete state of the record at the time the Court issued the Order.

Furthermore, the Court failed to follow Rule 56(f), which requires notice and an opportunity to respond before the Court grants summary judgment in favor of a non-movant, or *sua sponte*.[6] A motion for summary judgment under Rule 56 is the preferred method for resolving FOIA production disputes, as the Government showed in its opening brief. *See* Gov't Br. at 17 (citing authorities). The Government cited six cases addressing the "readily reproducible" provision of FOIA, 5 U.S.C. § 552(a)(3)(B)—all of which were decided on summary judgment motions. *See id.* Plaintiffs acknowledge the point, but suggest that Rule 56 is not the *only* procedural mechanism for resolving FOIA production disputes. *See* Pl. Br. at 19-20. Plaintiffs fail to specify, however, *what* procedural mechanism the Court utilized to resolve the instant dispute, if not summary judgment. And in any event, it is clear that the Court's procedural mechanism—which at most offered an abbreviated opportunity for argument devoid of a factual record—was inadequate because the Government was not able to make its evidentiary submissions on a factual issue.

Plaintiffs' next argument that the Government had "clear notice" that the Court would rule on the form or format issue, *id.* at 21, is likewise inconsistent with the record. Indeed, at the conclusion of the pre-motion hearing the Court noted that it "didn't decide what to do about the

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[6] Plaintiffs' argument that the current version of Rule 56(f), which became effective on December 1, 2010, does not apply to the Court's Order, *see* Pl. Br. at 21 n.16, is difficult to fathom, given that the Government quoted in its brief the Supreme Court's order providing that the amended Federal Rules of Civil Procedure, including the new Rule 56(f), govern pending proceedings "insofar as just and practicable," Gov't Br. at 16-17 (quoting Order Amending Fed. R. Civ. P. (U.S. Apr. 28, 2010)). Plaintiffs do not argue that application of Rule 56(f) to this proceeding would be unjust or impracticable. In any event, Rule 56(f) simply codified pre-existing law regarding the need for notice and an opportunity to be heard before a court may enter summary judgment. *See, e.g., NetJets Avaiation, Inc. v. LHC Commc'ns, LLC*, 537 F.3d 168, 178 (2d Cir. 2008).

metadata issue, so to speak. That I have to think about." *See* Gov't Br. at 7 (quoting Cordaro Decl., Ex. H at 53). This was not the "clear notice" required under Rule 56(f) before granting summary judgment to a non-movant, or *sua sponte*. Fed. R. Civ. P. 56(f)(1), (3). In addition, before granting summary judgment *sua sponte*, the Court must "identify[ ] for the parties material facts that may not be genuinely in dispute." Fed. R. Civ. P. 56(f)(3). Here, this was not done, and the Court did not have before it a proper factual record. The Government thus will raise a substantial claim on appeal that the Court effectively granted partial summary judgment in plaintiffs' favor without affording defendants the mandatory protections of Rule 56(f).

Plaintiffs' final argument—that the utilization of summary judgment motions to resolve FOIA disputes is a mechanism for Government delay, Pl. Br. at 22—is meritless. Courts plainly can, and do, order expedited summary judgment briefing when appropriate. Also baseless is plaintiffs' contention that requiring summary judgment motions for FOIA disputes arising under section 552(a)(3)(B) would give the Government an incentive to produce records in an improper format and then argue that it should not be required to re-process the records in a different format ordered by the Court. Pl. Br. at 22. As indicated in defendants' opening brief, reproducibility disputes under that section have been resolved on summary judgment motions. *See* Gov't Br. at 17 (citing six cases). As far as the Government is aware, the instant case is the only exception.

For the foregoing reasons, the Government can raise a substantial case on the merits of its appeal with respect to the Court's determination that the metadata fields specified in its Order are "readily reproducible."

C . The Federal Discovery Rules Are Inapplicable to FOIA Processing

As discussed in the Government's opening brief, defendants can also raise a substantial case on the merits concerning the Court's erroneous application of the federal discovery rules to

the Government's processing of plaintiffs' FOIA request. Plaintiffs' suggestion that the Court's Order did not rely on Rule 26 or Rule 34, Pl. Br. at 24-25, is puzzling, given the explicit statement in the Order that 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." Order at 14; *see also id.* at 16 ("As noted earlier, Defendants' productions to date have failed to comply with Rule 34 *or* with FOIA."). Rule 34 does not govern defendants' FOIA productions. And even if it did, case law in the civil e-discovery context makes clear that a metadata requester does not have an absolute right to obtain metadata, especially if the request for it is tardy. *See* Gov't Br. at 19-20 (citing authorities). Thus, even assuming *arguendo* that the federal discovery rules applied to plaintiffs' demand for metadata, the Court should have ruled that their untimely request was waived.

D. Metadata Is Not a "Record" or an "Integral or Intrinsic" Part of a "Record" for FOIA Purposes

The Government can present a substantial case on the merits with respect to the Court's ruling that metadata is a record, or an intrinsic part of a record, for FOIA purposes—another issue of first impression. As the Government demonstrated in its opening brief, the E-FOIA Amendments were intended to clarify existing FOIA practices, and not to impose any greater burden on the agencies than paper searches. *See* Gov't Br. at 21-22. A rule providing that metadata is an intrinsic part of an agency record and that certain metadata fields are presumptively reproducible would force the Government to search for that metadata in response to *all* FOIA requests seeking electronic records, unless the FOIA requester specified otherwise. This would be an extreme hardship on the agencies, which already must process hundreds of thousands of FOIA requests each year.

Plaintiffs contend that the Government's arguments "are premised on an impermissibly narrow interpretation . . . of FOIA" and that the Government's challenge to the Court's ruling "demonstrates a fundamental misunderstanding of metadata." Pl. Br. at 8, 9. This argument flies in the face of observations that this Court already has made in this case, both in the Order and at the pre-motion hearing, which make clear that the issues at hand are both (1) complex and (2) a matter of first impression. *See, e.g.*, Order at 11 ("No federal court has yet recognized that metadata is part of a public record as defined in FOIA."), *id.* at 16 ("[T]his is an issue of first impression."); Cordaro Decl., Ex. H at 13 ("This is kind of complicated. This is not going to be easy. . . . You are asking me to figure out what is required of FOIA requests."); *id.* at 13-14 ("There is no controlling precedent. Somebody is going to have to explain this.").

The situation in the instant case is similar to *Center for International Environmental Law v. Office of the U.S. Trade Representative*, 240 F. Supp. 2d 21 (D.D.C. 2003), a FOIA case in which a district court ruled against the Government on an issue of first impression. Granting the Government's motion for a stay pending appeal, the district court made the following finding with respect to whether the Government had raised a substantial case on the merits:

> First, although the Court ultimately did not agree with defendants' position on the merits, it is evident that defendants have made out a "substantial case on the merits." *See* [*Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)]. As the Court noted in its Opinion, this case presents an issue of first impression and the first to involve the application of the Supreme Court's recent decision in *Dep't of Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 121 S. Ct. 1060, 149 L. Ed. 2d 87 (2001), in the context of earlier pronouncements of the District of Columbia Circuit. *See Center for Int'l Envt'l Law v. Office of the United States Trade Representative*, 237 F. Supp. 2d at 23-24. That this Court's decision centered on a novel and "admittedly difficult legal question" weighs in favor of a stay. *See Holiday Tours, Inc.*, 559 F.2d at 844-45; *compare Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 230 F. Supp. 2d 12, 14-15 (D.D.C. 2002) (defendants failed to demonstrate substantial case

> on the merits where they relied on novel constitutional claim utterly unsupported by legal authority and repeatedly rejected by the courts).

Center for Int'l Evt'l Law, 240 F. Supp. 2d at 22; *accord Miller v. Brown*, 465 F. Supp. 2d 584, 596 (E.D. Va. 2006) (granting stay pending appeal: "While the Court cannot say that Defendants are likely to prevail in their appeal, the Court does recognize that this case raises an issue of first impression. Because the Fourth Circuit may resolve the issue differently, Defendants have at least demonstrated a 'substantial case on the merits.'" (citing *Hilton v. Braunskill*, 481 U.S. 770, 778 (1987)).

Notably, in *Center for International Environmental Law*, as here, the district court disagreed with the Government's position. But, as the court recognized, disagreement with the Government's position does not foreclose the possibility that the Government can make a substantial case on appeal. *See Ctr. for Int'l Envt'l Law*, 240 F. Supp. 2d at 22. Judge Haight of this Court reached the same conclusion in the context of a motion for a stay pending appeal. *See Network Enters., Inc. v. APBA Offshore Productions, Inc.*, No. 01 Civ. 11765 (CSH), 2007 WL 398276, at *1-*2 (S.D.N.Y. Feb. 5, 2007) ("In determining whether this Court should conclude that [movant] 'is likely to prevail on the merits of his appeal,' it is not necessary for me to confess error and predict a reversal by the Second Circuit." . . . While I rejected [movant's] contentions with respect to his *alter ego* liability, and remain of the opinion that I was right in doing so, it is equally clear that [movant] has a substantial case to lay before the Court of Appeals."). Accordingly, because the issue of whether metadata is a record, part of a record, or neither, involves a complex issue of first impression, defendants have shown a substantial case on the merits with respect to that issue.

II. THE GOVERNMENT WILL SUFFER IRREPARABLE INJURY ABSENT A STAY

The Government has appealed this Court's Order and will argue on appeal that *no* metadata should be produced in this case. If this Court denies the Government's motion for a stay pending appeal, the Government will be obligated to produce certain metadata, thereby mooting its appeal with respect to that metadata. Such a "loss of appellate rights is a 'quintessential form of prejudice,'" and "where the denial of a stay pending appeal risks mooting *any* appeal of *significant* claims of error, the irreparable harm requirement is satisfied." *In re Adelphia Communications Corp.*, 361 B.R. 337, 348 (S.D.N.Y. 2007) (quoting *In re Country Squire Assocs. of Squire Place, L.P.*, 203 B.R. 182, 183 (2d Cir. BAP 1996)).

Plaintiffs contend that the right to appellate review is destroyed only in "situations where the *content* of the disclosure would release information that was potentially exempt or otherwise damaging to the Government into the public sphere." Pl. Br. at 29. This novel argument misses the mark. As the First Circuit has explained: "Meaningful review [of a FOIA disclosure order] entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable. Appellants' right of appeal . . . will become moot unless the stay is continued pending determination of the appeals. Once the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time. The status quo could never be restored." *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979); *see also Ctr. for Int'l Evt'l Law*, 240 F. Supp. 2d at 23 (quoting *Providence Journal* and finding a "strong showing of irreparable harm" where disclosure of the documents would moot the appeal).

The cases that plaintiffs cite in support of their argument, *see* Pl. Br. at 29, do not stand for the proposition that meaningful appellate review in a FOIA case is destroyed only when the Government is required to release potentially exempt or damaging information. In *People for*

the American Way Foundation v. Department of Education, 518 F. Supp. 2d 174 (D.D.C. 2007), the parties agreed to a stay of the district court's disclosure order. *See id.* at 177 ("The Parties in the instant proceeding agree that a stay is necessary to avoid irreparable harm to [the Department of Education] by having to release documents prior to having the opportunity to seek meaningful appellate review. Particularly in the FOIA context, courts have routinely issued stays where the release of documents would moot a defendant's right to appeal."). In *Center for National Security Studies v. DOJ*, 217 F. Supp. 2d 58 (D.D.C. 2002), the district court observed that stays pending appeal are "routinely granted in FOIA cases" and that disclosure of the names of certain individuals detained in connection with the Government's investigation of the September 11 attacks would moot the Government's appeal of its disclosure order. *Id.* at 58. The court nowhere suggested that meaningful appellate review would be destroyed only where the Government was required to disclose potentially exempt or damaging information.

Unable to defeat the Government's irreparable harm argument as presented, plaintiffs attempt to miscast it as a "burden" argument. *See* Pl. Br. at 30 ("The real 'irreparable harm' proffered by Defendants is the burden associated with complying with the Orders and Defendants' alleged lack of resources."). The Government made clear in its opening brief that the destruction of its right to meaningful appeal with respect to the metadata at issue was its primary irreparable harm argument and satisfied the irreparable harm requirement. Gov't Br. at 23. The Court's analysis need not proceed further. *See Adelphia*, 361 B.R. at 348. As "further evidence" of the potential irreparable harm, the Government noted that compliance with the Court's Order, prior to disposition of defendants' appeal, would require the FBI to re-do its entire search, and force ICE to expend significant additional funds. *See* Gov't Br. at 23-24. This was another example of why a reversal by the Second Circuit would not remedy the irreparable

harm that defendants would suffer if a stay were denied. Moreover, absent a stay, if defendants must dedicate non-FOIA resources to the processing of plaintiffs' requests, the irreparable harm from the Court's Order would be even greater as compliance could compromise significant agency functions such as criminal investigations and ongoing litigation.

III. A STAY WOULD NOT SUBSTANTIALLY INJURE PLAINTIFFS

Any harm to plaintiffs as a result of a stay pending appeal would be minimal, and would result from their ten-month delay in presenting their metadata request. This delay strongly suggests that a stay will not substantially injure plaintiffs. *Cf. Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) (plaintiff's delay in moving for injunctive relief "suggests that there is, in fact, no irreparable injury" (citation and internal quotation marks omitted)).

The Government continues to produce records responsive to plaintiffs' FOIA request. Defendants made a 30,000+ page production on February 25, 2011, while this appeal was pending. The parties then entered into a stipulation resolving section 3 of the FOIA request, and providing for ICE and EOIR to release a significant amount of data to plaintiffs on a rolling basis beginning no later than April 30, 2011. *See* Cordaro Reply Decl., Ex. C. In that stipulation, the parties have committed to participate in settlement discussions concerning all outstanding issues that are not part of the Government's appeal. *See id.*, Ex. C at § 3. These circumstances directly contradict plaintiffs' hyperbolic contention that the Government's decision to appeal the Court's *metadata* order has led to "an absence of informed public debate and has hindered the ability of legislatures across the country to take action against implementation [of Secure Communities]." Pl. Br. at 32. Indeed, plaintiffs already have conceded the existence of at least one *New York*

Times editorial and a "number of press reports" based on documents the Government already has produced in this case. *See* Cordaro Reply Decl., Ex. D at 11-12.

IV. A STAY IS IN THE PUBLIC INTEREST

In its opening brief, the Government described the potential impact of the Court's Order on FOIA practice throughout the country. Plaintiffs respond by claiming that the Government has "exaggerate[d] the breadth of the Order" and that "the Order is expressly limited to the present controversy." Pl. Br. at 34. Neither contention is persuasive.

The Court's decision, which provides that certain metadata is readily reproducible as a matter of law, is a first-of-its-kind ruling that would have wide-ranging adverse effects on FOIA practice nationwide, including dramatically increased processing time for the enormous number of FOIA requests that the agencies receive each year, increased fees charged to requestors who do not qualify for a fee waiver, and increased expenditures by agencies attempting to comply with the Court's holding. As one of many online articles has observed, the Court's Order is a "must read decision on the production of electronically stored information." J. Rearden & F. Pepper, *Scheindlin's "Day Laborer" Decision: Much Ado About Metadata,* http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202482417028&slreturn=1&hbxlogin=1 (last accessed Apr. 11, 2011). The Government thus has not exaggerated the breadth of the Court's Order, or its scope, as plaintiffs suggest. *See* Pl. Br. at 34.

Furthermore, plaintiffs' argument that defendants are "withhold[ing] the production of responsive, non-exempt information in an effort to restrict disclosure under FOIA," *id.*, mischaracterizes the Government's position. The Government, like any other litigant, has a right to appeal decisions adverse to its interests:

> The ability to review decisions of the lower courts is the guarantee of accountability in our judicial system. . . . At the end of the appellate

> process, all parties and the public accept the decision of the courts because we, as a nation, are governed by the rule of law. Thus, the ability to appeal a lower court ruling is a substantial and important right.

Adelphia, 361 B.R. at 342. The public interest thus weighs in favor of granting a stay and preserving one of the bedrocks of our legal system—the right to a meaningful appeal.

CONCLUSION

The Court should grant defendants' motion for a Stay of the Court's Order pending appeal. In the event the Court denies defendants' motion for a stay pending appeal, defendants respectfully request an extension of the interim stay of the Order to allow the Government to seek a stay from the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
April 11, 2011

Respectfully submitted,

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