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Government Told to Provide 'Searchable' Documents in FOIA Request

BY DANIEL WISE

THE FEDERAL government must provide documents "in a usable format" when it responds to Freedom of Information Act requests, a federal judge in Manhattan has ruled.

Southern District Judge Shira A. Scheindlin, after faulting the government for offering "a lame excuse" for delivering non-searchable documents, ruled for the first time that federal agencies must turn over documents that include "metadata," which allows them to be searched and indexed.

Judge Scheindlin also ruled that "common sense dictates" that the handling of FOIA requests should be informed by "the spirit if not the letter" of the Federal Rules of Civil Procedure, which govern the handling of electronic information stored in computers. Writing more broadly, Judge Scheindlin noted that "even highly respected private lawyers, government lawyers and professors of law" need to comply with judges' expectations that adversaries "meet and confer" to minimize the cost and delay often associated with e-discovery.

Judge Scheindlin's ruling means that five government agencies must produce, in an accessible electronic format, documents concerning a program in which state and local governments provide arrest and other data to aid the federal government in enforcing immigration laws.

Three groups sued in *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency*, 10 Civ. 3488, to require production of a wide-range of documents under the Freedom of Information Act in August 2010. In addition to the National Day Laborer Organizing Network, the plaintiffs included the Center for Constitutional Rights and the Immigration Justice Clinic at the Benjamin N. Cardozo School of Law.

In response to the groups' requests, the government agencies delivered docu- » Page 6


Judge Scheindlin

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ments lumped together in large files that were not searchable and in which individual documents could not be identified without reading through the entire file. Also, e-mails were separated from their attachments.

In the FOIA context, Judge Scheindlin noted that no federal court had required that data be furnished in a format allowing it to be searched and electronically organized.

Following the decisions of several state courts dealing with their own FOIA statutes, Judge Scheindlin ruled that the federal law requires that metadata, which allows for electronic files to be organized and searched, must be retained in the records agencies produce.

The federal act is silent as to the form in which documents must be delivered, Judge Scheindlin noted. It only requires that documents be provided in any "format" designated in the FOIA request if it is "readily reproducible" by the agency in that format.

Metadata, in the FOIA context, is "readily reproducible," she held.

For both FOIA and e-discovery purposes, Judge Scheindlin further observed that "whether or not metadata has been specifically requested," the production of non-searchable documents is "an inappropriate downgrading" of electronically stored information.

The government's provision of files "stripped of all metadata and lumped together without any indication of where a record begins and ends" is not an "acceptable form of production," she said.

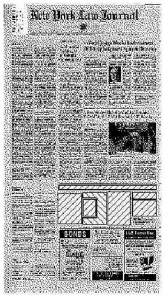
Judge Scheindlin wrote several opinions starting in 2003 with *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, which were influential in the development of the law on e-discovery and the 2006 amendments to the Federal Rules of Civil Procedure, which govern e-discovery, said H. Christopher Boehning, a litigation partner at Paul, Weiss, Rifkind, Wharton & Garrison who was not involved in the case. Judge Scheindlin is also a member of Administrative Office of U.S. Courts' Task Force on Electronic Public Access.

Despite the rules addressing e-discovery, Mr. Boehning, a Law Journal columnist on federal e-discovery issues, said that for many litigators there still is an aspect of "playing chicken with e-discovery—if you don't ask for it, you don't get it."

Now, he added, Judge Scheindlin "has made it clear what must at a minimum be provided in terms of electronic formatting."

While the specifics of the formatting to be included in government documents are not binding beyond the case before Judge Scheindlin, Mr. Boehning said that they are "likely to be used as a template by other judges and by lawyers when they are negotiating the handling of e-discovery."

The plaintiffs were represented by Bridget Kessler, an instructor at the Immigration Justice Clinic, and Sunita Patel, a staff attorney at the Center for Constitutional Rights.



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Norman Cerullo and Anthony J. Diana of Mayer Brown joined the plaintiffs' legal team pro bono last fall to provide expertise on e-discovery. Mr. Diana is co-head of Mayer Brown's e-discovery unit.

The government was represented by Southern District Assistant U.S. Attorneys Joseph N. Cordaro and Christopher Connolly. Eleli Rivera, a spokesman for the office, decined to comment.

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