Judge Issues Marching Orders for Electronic Records Search

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Federal custodians of electronic records in a Freedom of Information Act case must provide a detailed description of their searches for responsive documents, the search words used and whether the search words are effective, Southern District Judge Shira Scheindlin has ruled.

Ruling in a massive FOIA action seeking documents on the federal policy of obtaining fingerprints from state and local arrestees for a national immigration database, Scheindlin (See Profile) faulted the Department of Homeland Security and other federal agencies for failing to provide affidavits that, in the words of the law, "contain reasonable specificity of detail rather than merely conclusory statements."

"Defendants' counsel recognize that, for over twenty years, courts have required these affidavits 'set [] forth the search terms and the type of search performed,'" Scheindlin wrote in a 49-page opinion in *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency*, 10 Civ. 3488. "But, somehow," the judge said, the Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), and the FBI "have not gotten the message."

She ordered the agencies to conduct more responsive searches and said their custodians of records must disclose the search terms they used. Prior to the judge's ruling, which came on motions for summary judgment, the government had in many instances refused to even disclose the terms they plugged in to search for documents or emails.

Scheindlin instructed the agencies to work with plaintiffs to develop a targeted search plan. She also said the parties can, if they wish, engage in the use of predictive coding and other innovative techniques for searching emails and other documents, although lawyers in the case doubt predictive coding—teaching computers to search for responsive documents—would be helpful in the sprawling litigation.

The National Day Laborer Organizing Network, the Center for Constitutional Rights, and the Immigration Justice Clinic of the Benjamin N. Cardozo School of Law brought the FOIA action in 2010 seeking documents on the controversial Secure Communities immigration policy initiative, which began in 2008.

While it has been a long-standing practice for local law enforcement to send fingerprints of those arrested and booked to the FBI, the Secure Communities initiative calls for local law enforcement also to send fingerprints to the Department of Homeland Security.

Some of the records sought by the plaintiffs, who were fighting to derail Secure Communities, dealt with the issues of whether and for how local law enforcement agencies can opt out of the program.

The parties initially came to an agreement on the expedited production of records, but Scheindlin found in December 2010 that the agencies failed to abide by the agreement. She ordered them to produce documents related to the opt-out provisions by Jan. 17, 2011, and the remainder of the expedited documents by Feb. 25, 2011.

The result was the production of tens of thousands of documents followed by cross-motions for summary judgment on the adequacy of the searches.

In her opinion, Scheindlin said "some of the searches appear to have been extremely rigorous, some woefully inadequate, and many simply documented with detail insufficient to permit proper evaluation."

Of several failures detailed by the judge, one of the "woefully inadequate" searches was when the FBI FOIA office sent its search memorandum to the National Security Law Branch in the Office of General Counsel (OGC).

The FBI "did not receive confirmation from OGC that a search had been conducted but nevertheless 'viewed a non-response as a 'no records' response," she said. "This assumption was plainly improper."

Another example of inadequate searches, she said, was the failure to search the files and email records of seven ex-employees of the Interoperability Initiatives Unit, which manages the FBI's collaboration with DHS on Secure Communities.

On the other hand, Scheindlin turned aside the plaintiffs' objection and found responsive a search by the Office of Legal Counsel, which assists the U.S. attorney general on the advice given to the president.

Clear Search Terms

The judge then reviewed the use of search terms, finding that in some cases terms were only recommended, and some agencies never provided the plaintiffs or the court with the terms used.

"It is impossible to evaluate the adequacy of an electronic search for records without knowing what search terms have been used," she said, as "the precise instructions that custodians give their computers are crucial."

Scheindlin added, "Yet the FBI, to take one example, has given the Court no specific information about the search that it conducted beyond explaining that much (but not all) of it was 'manual.' For the portions that were not manual, I do not know what search terms were used, let alone how they were combined. I do not even know if any search terms were *recommended.*"

Scheindlin said "it bears repetition: the government will not be able to establish the adequacy of FOIA searches if it does not record and report the search terms that it used, how it combined them, and whether it searched the full text of documents."

Moreover, she said, recent scholarship and case law has shown that "most custodians cannot be 'trusted' to run effective searches because designing legally sufficient electronic searches in the discovery or FOIA contexts is not part of their daily responsibilities."

She cited Southern District Magistrate Judge Andrew Peck (See Profile), who is presiding over the first use of predictive coding in the search for responsive documents and emails in *Moore v. Publicis Group & MSL Group*, 11 Civ. 1279.

Peck said it is important for judges to hold lawyers' feet to the fire as they teach computers to search for responsive documents, saying that, all too often, "the way lawyers choose keywords is the equivalent of the child's game of 'Go Fish,'" and keyword searches alone "usually are not very effective."

Scheindlin said, "In short, a review of the literature makes it abundantly clear that a court cannot simply trust the defendant agencies' unsupported assertions that their lay custodians have designed and conducted a reasonable search."

But in this case, the largest FOIA search in the history of ICE and a huge search for both DHS and the FBI, Scheindlin said it would be wasteful to repeat "vast swaths of the search in order to *ensure* adequacy."

"Rather than fully revisit old searches, the parties will need to work cooperatively to design and execute a small number of new, targeted searches," the judge said. "Custodians who should have searched their records but did not will need to conduct complete searches; this order requires the defendants to do no more than they should have to comply with FOIA initially."

Furthermore, she said, custodians who did searches but "failed to provide the Court with any details about those searches will also need to conduct new, fully-documented searches; so will a smaller sample of the custodians who listed the search terms but provided no evidence about the efficacy of those terms."

She said the parties must agree on "search terms and protocols— and, if necessary, testing to evaluate and refine those."

Opinion Followed Closely

David Kearney, director of technology services at Pittsburgh-based Cohen & Grigsby, who is not involved in the case, told *Law Technology News*, a Law Journal affiliate, that Scheindlin's opinions on best practices and the evolution of e-discovery are followed closely.

"Judge Scheindlin's decision speaks directly to the fundamentals of standard e-discovery practices. Her strong emphasis that all parties must collaborate, cooperate and keep complete documentation on how decisions and results are developed and achieved is the core of basic e-discovery best-practices," Kearney said. "This cannot be an optional practice. It is critical to show how work, in this case searches, was performed and by whom when the work surrounding electronically stored information is ever challenged. Transparency regarding search criteria, preservation, collection, processing, etc., is key to balancing the merits of a case."

Sonia Lin and Peter Markowitz represent the Immigration Justice Clinic.

Lin said the opinion provides a road map in a still-developing area of the law, especially in the context of FOIA.

"There was not a whole lot of case law in terms on what agencies' obligations are and what constitutes an adequate search when you are dealing with a lot of electronically-stored information under FOIA," Lin said. "There wasn't a lot of guidance and Judge Scheindlin really filled a void in this area."