UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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NATIONAL DAY LABORER ORGANIZING NETWORK, CENTER FOR CONSTITUTIONAL RIGHTS, and IMMIGRATION JUSTICE CLINIC OF THE BENJAMIN N. CARDOZO SCHOOL OF LAW,

Plaintiffs,

v.

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.

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ECF CASE

10 CV 3488 (SAS)(KNF)

[Rel. 10 CV 2705]

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO 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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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

BACKGROUND 5

ARGUMENT 7

I. Defendants Fail To Demonstrate a Likelihood of Success on the Merits 8

A. The Court's Orders Were Substantively Correct 9

1. Metadata is Part of a "Record" Under FOIA 9

2. The Court Correctly Determined that the Metadata Associated with Electronic Records is Presumptively Readily Reproducible in Some Format 15

B. The Court's Orders Were Procedurally Proper 20

1. The Court Properly Exercised Its Discretion in Deciding the Format of Production Issue Without Full Summary Judgment Briefing 20

2. The Court Properly Exercised Its Discretion in Calling Upon the Federal Rules When Evaluating the Parties' Format of Production Dispute 22

3. Plaintiffs' Request for Metadata is not "Unexhausted" and the Orders Do Not Impermissibly Expand the FOIA Request 25

II. Defendants Will Not Be Irreparably Injured Absent a Stay 29

III. Further Delay Will Harm Interested Parties 31

IV. The Public Interest Weighs Against Granting a Stay 33

V. Relief 35

TABLE OF AUTHORITIES

Page(s)

CASES

Aguilar v. Immigration and Customs Enforcement,
255 F.R.D. 350 (S.D.N.Y. 2008) 14

Am. Civ. Liberties Union v. Dep't of Def.,
357 F. Supp. 2d 708 (S.D.N.Y. 2005).....30, 33

Armstrong v. Exec. Office of the President,
1 F.3d 1274 (D.C. Cir. 1993) 14

Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.,
601 F.3d 145 (2d Cir. 2010).....12

Bloomberg L.P. v. Bd. Of Governors of the Fed. Reserve Sys.,
649 F. Supp. 2d 262 (S.D.N.Y. 2009).....21

Ctr. For Nat'l Sec. Studies v. DOJ,
215 F. Supp. 2d 94 (D.D.C. 2002) 29

Ctr. For Nat'l Sec. Studies v. DOJ,
217 F. Supp. 2d 58 (D.D.C. 2002) 29

Doe v. Lee,
2001 WL 536730 (D. Conn. May 18, 2001).....8

FCC v. AT&T Inc.,
131 S.Ct. 1177 (Mar. 1, 2011) 11

Francis v. City of New York,
235 F.3d 763 (2d Cir. 2000).....27

Front Carriers Ltd. v. Transfield Cape Ltd.,
2010 WL 571967 (S.D.N.Y. Feb. 15, 2010).....8

Gillin v. IRS,
980 F.2d 819 (1st Cir. 1992) 26

Halpern v. FBI,
181 F.3d 279 (2d Cir. 1999).....18

Hidalgo v. FBI,
344 F.3d 1256 (D.C. Cir. 2003) 28

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Nortel Networks Corp. Sec. Litig.,
539 F.3d 129 (2d Cir. 2008).....25, 26

Irwin v. Onondaga Cnty. Res. Recovery Agency,
72 A.D.3d 314 (4th Dep't 2010).....14

Jowers v. Lakeside Family and Children's Servs.,
2005 WL 3134019 (S.D.N.Y. Nov. 22, 2005).....27

Kowalczyk v. Dep't of Justice,
73 F.3d 386 (D.C. Cir. 1996).....27

Lake v. City of Phoenix,
218 P.3d 1004 (Ariz. 2009).....14

Lewis v. Rawson,
564 F.3d 569 (2d Cir. 2009).....21

McClelland v. Andrus,
606 F.2d 1278 (D.C. Cir. 1979).....23

Milner v. Dep't of Navy,
2011 WL 767699 (Mar. 7, 2011).....11, 12

Miscavige v. IRS,
2 F.3d 366 (11th Cir. 1993).....21

Mohammed v. Mukasey,
290 F. App'x 58 (2d Cir. 2008).....23

Murphy v. FBI,
490 F. Supp. 1134 (D.D.C. 1980).....23

Natural Res. Def. Council v. U.S. Envtl. Prot. Agency,
2010 WL 431885 (S.D.N.Y. Feb. 8, 2010).....7

NLRB v. Sears, Roebuck & Co.,
421 U.S. 132 (1975).....12

O'Neill v. City of Shoreline,
240 P.3d 1149 (Wash. 2010).....14

People for the Am. Way Found. v. Dep't of Educ.,
518 F. Supp. 2d 174 (D.D.C. 2007).....8, 29

People for the Am. Way Found. v. Dep't of Educ.
516 F. Supp. 2d 28 (D.D.C. 2007).....29

TABLE OF AUTHORITIES
(continued)

Page(s)

Pray v. Dep't of Justice,
902 F. Supp. 1 (D.D.C. 1995) 26

Safecard Servs. v. SEC,
926 F.2d 1197 (D.D.C. 1991) 23

Sample v. Bureau of Prisons,
466 F.3d 1086 (D.C. Cir. 2006) 15, 16

SEC v. Collins & Aikman Corp.,
256 F.R.D. 403 (S.D.N.Y. 2009) 17

Simmons v. U.S. Dep't of Justice,
796 F.2d 709 (4th Cir. 1986) 23

Tarullo v. Dep't of Def.,
170 F. Supp. 2d 271 (D. Conn. 2001) 18

TPS, Inc. v. Dep't of Def.,
330 F.3d 1191 (9th Cir. 2003) 15, 16

Weisberg v. Dep't of Justice,
627 F.2d 365 (D.D.C. 1980) 23

Wilbur v. CIA,
335 F.3d 675 (D.C. Cir. 2001) 28

Williams v. Sprint/United Mgmt. Co.,
230 F.R.D. 640 (D. Kan. 2005) 14

STATUTES

5 U.S.C. § 552 ..... 13, 15, 22, 24

OTHER AUTHORITIES

Fed. R. Civ. P. 26 ..... 22, 23, 24, 25

Fed. R. Civ. P. 34 ..... 22, 23, 24, 25, 34

Fed. R. Civ. P. 56 ..... 20, 21

Peter S. Kozinets, *Access to Metadata in Public Records: Ensuring Open Government in the Information Age*,
27-JUL Comm. Law. 1, 1 (2010) 12

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(continued)

Page(s)

W. Lawrence Wescott II, *The Increasing Importance of Metadata in Electronic Discovery*, 14 RICH. J.L. & TECH 10, 1 (2008) 9

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1898 (1961) 13

TABLE OF CONVENTIONS

Orders

Feb. 7 Order	Opinion and Order, Dated February 7, 2011
Feb. 14 Order	Supplemental Order, Dated February 14, 2011

Defendants' Motion

Stay Motion	Memorandum of Law in Support of Motion by the Government 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

Defendants' Declarations in Support of Stay Motion

Fourth Hardy Decl.	Fourth of David M. Hardy, dated February 18, 2011
2/18/11 Souza Decl.	Declaration of Crystal Rene Souza, dated February 18, 2011
Pavlik-Kennan Decl.	Declaration of Catrina Pavlik-Keenan, dated February 20, 2011
Lewis Decl.	Declaration of Donna A. Lewis, dated February 18, 2011
Law Decl.	Declaration of Ryan Law, dated March 23, 2011
Fifth Hardy Decl.	Fifth Declaration of David M. Hardy, dated March 23, 2011
Holzerland Decl.	Declaration of William H. Holzerland, dated March 23, 2011
Roat Decl.	Declaration of Maria Roat, dated March 23, 2011
3/24/11 Souza Decl.	Declaration of Crystal Rene Souza, dated March 24, 2011

Plaintiffs' Declarations in Opposition to Defendants' Stay Motion

Feltz Decl.	Declaration of Renee Feltz, dated March, 30 2011
Kessler Decl.	Declaration of Bridget Kessler, dated March 30, 2011
Novak Decl.	Declaration of Jason A. Novak, dated March 30, 2011
Garbe Decl.	Declaration of Patrick Garbe, dated March 30, 2011

TABLE OF CONVENTIONS

(continued)

Uribe Decl.	Declaration of Sarahi Uribe, dated March 30, 2011

Plaintiffs National Day Laborer Organizing Network ("NDLON"), Center for Constitutional Rights ("CCR") and Immigration Justice Clinic of the Benjamin N. Cardozo School of Law (collectively "Plaintiffs") oppose the Stay Motion filed by defendants United States Immigration and Enforcement Agency ("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") on February 21, 2011. Defendants have asked for a stay of this Court's Orders of February 7 and February 14, 2011 (the "Orders") pending appeal to the United States Court of Appeals for the Second Circuit. For the following reasons, the Stay Motion should be denied.

PRELIMINARY STATEMENT

This is not your ordinary FOIA action. It is a FOIA action seeking information about a controversial federal immigration enforcement program that is impacting the lives of thousands of individuals across the United States. It is about the permanent and devastating harm that may come to those individuals as a result of the program's rapid and secretive implementation. It is about the inability of states and localities to make informed decisions about their participation in that controversial program. And it is about the federal government's extraordinary delay in releasing information to the public despite its statutory obligation to do so. Defendants view the Stay Motion as just a format of production issue. Plaintiffs disagree.

Secure Communities is a federal immigration enforcement program that requires the unprecedented, wide-scale involvement of states and localities in the enforcement of federal immigration law. Fingerprints taken upon arrest for any crime are automatically forwarded to federal immigration authorities, who direct local police departments to detain any person deemed subject to immigration deportation proceedings. Since Plaintiffs filed their Freedom of Information Act request for records related to this controversial program in February 2010 (the

"FOIA Request"), many states have entered into Memoranda of Understanding ("MOU") with ICE. The program has been activated in several thousand localities in those states. And the stated intention of the program is to have every jurisdiction in the country activated by 2013.

Secure Communities has incited a groundswell of criticism (in part because of information released by order of this Court) among state and local government officials who are questioning whether to participate in the program and the impact of the program on their constituencies. But to make an informed decision, each state and locality needs specific information relating to its jurisdiction and the issues of import for its constituencies. This includes information about the representations made to state officials when they entered into MOU, how the program is being implemented, and its true impact on the immigrant community. Through this FOIA action, Plaintiffs attempt to compel Defendants to produce additional information relevant to the impending decisions by states and localities.

To have any impact on the public debate, Plaintiffs need to disseminate the information in a timely, accurate and comprehensive manner *before* decisions by each jurisdiction are made. Rarely will the release of a large number of requested records have a bigger potential impact on an important and urgent public policy matter. Plaintiffs have been, and will be, severely crippled (if not completely thwarted) in this effort if Defendants fail to produce the requested records in accordance with the Orders in the next few months. Thus, the Court's decision on the Stay Motion may very well impact the fate of Secure Communities in jurisdictions across the country and the lives of thousands of individuals affected by the program.

The Stay Motion, and the Orders, must be viewed through the prism of Defendants' ongoing effort to obstruct the release of information about Secure Communities. Plaintiffs' FOIA Request was issued in February 2010. When concerns about format of production were

first raised with this Court in January 2011, Defendants had produced less than 2,000 pages of documents. The records released were produced in a way that rendered the records unusable and of questionable validity: (i) emails and their attachments were pulled apart and mixed within the production; (ii) documents were produced one large electronic file with no means of determining where one document began and ended; (iii) the productions were devoid of intrinsic electronic information ("metadata"); and (v) the productions could not be readily indexed, searched or organized. In essence, Defendants denied Plaintiffs their statutory right to receive complete and accurate non-exempt records responsive to their FOIA Request, and ensured that Plaintiffs would be unable to quickly and efficiently disseminate the disclosed information to the interested parties.

This Court, acting well within its discretion, recognized the need to act promptly to address the production of future records. The Orders did not compel the release of additional records. The Court directed Defendants to release responsive, non-exempt information intrinsic and integral to an electronic record ("metadata") and to produce those records in a standard and "readily reproducible" format ("load file") that would allow for a large number electronic records to be indexed, searched and organized in an effective manner. Thus, the central question for this Stay Motion is whether this Court acted within it discretion when its balanced the needs of the Plaintiffs with the burdens to Defendants in this unique circumstance, and whether this Court has the power (or jurisdiction) to continue to do so. Defendants cannot meet their burden to show that the granting of a stay of the Orders pending the appeal is appropriate here, and Defendants' Stay Motion should be denied.

First, Defendants fail to demonstrate a likelihood of success on the merits. Defendants ignore the plain text of FOIA, the statute's fundamental purpose, and the relevant case law in

challenging the substantive merits of the Orders, resting their defense on the burdens of complying with Plaintiffs' FOIA Request. But the burdens imposed on Defendants do not overcome the validity of the Court's substantive rulings; namely, that information integral to an electronic record ("metadata") falls within the definition of "record," and that the production of such information in a load file or in native format is "readily reproducible" under FOIA. Defendants also raise a number of procedural objections to the Orders that are meritless because they elevate form over substance, and they base their objections on the notion that this Court, and any court, cannot exercise appropriate discretion when managing a complex civil litigation involving FOIA.

Second, Defendants fail to show that they will be harmed, much less irreparably harmed, if they must comply with the Orders pending the appeal. Defendants cannot be irreparably harmed by the release of responsive information that is not subject to a FOIA exemption. Even if compliance with their legal obligations can be considered harm, it certainly is not irreparable if it merely involves additional resources being expended during the pendency of the appeal.

Third, Defendants fail to show that Plaintiffs and other interested parties would not be irreparably harmed by the granting of a stay pending appeal. If the stay is granted, Plaintiffs will be forced to grapple with incomplete and unwieldy productions (if they get any information at all), effectively preventing them from identifying and disseminating information that is needed immediately to influence the public debate about Secure Communities before this program is fully implemented. Given the high stakes, it is remarkable that Defendants blithely conclude that there would be no irreparable harm to Plaintiffs.

Fourth, the public interest clearly weighs heavily in Plaintiffs' favor. Despite Defendants' claim that there is a public interest in the impact the Orders may have on FOIA

practice generally, any purported impact is mitigated by the fact that the Orders were expressly limited to the unique circumstances present in this FOIA action. Further, any interest the public may have on the impact to FOIA practice is outweighed by the irreparable harm discussed above.

Accordingly, the Court should deny Defendants' Motion.

BACKGROUND

Defendants' recitation of the factual background leading up to this dispute omits key information about Defendants' instrumental role in the extraordinary delays Plaintiffs have faced in their struggle to secure the release of information about Secure Communities. Plaintiffs issued a FOIA request to Defendants on February 3, 2010 (the "FOIA Request"). (FOIA Request, Docket # 12-1) That FOIA Request sought "Records" related to the Secure Communities Program, and defined "Records" to include, *inter alia*, documents preserved in electronic form. (*Id.*). Defendants failed to respond to *any* of Plaintiffs' Request in the statutory timeframe. (Complaint, Docket # 1 at ¶ 8). On April 27, 2010, having exhausted their administrative remedies, Plaintiffs filed a lawsuit seeking to compel Defendants to immediately process Plaintiffs' Request and release the Records being withheld. (*Id.* at ¶ 9).

After the commencement of this action, on July 7, 2010, Plaintiffs and Defendants agreed upon a list of documents that would be produced by July 30, 2010. (Prelim. Inj. Mot., Docket # 11). In return, Plaintiffs agreed to limit the scope of the Request by allowing Defendants' agencies to search for and produce only records originating in that agency. (*Id.*). On July 23, 2010, before the Defendants had produced any documents, Plaintiffs requested via email that any document productions provide each document as a separate file, Excel documents in native format and documents consecutively Bates stamped. (Ex. A to Kessler Decl. ¶ 5). Defendants did not respond to this request. (Kessler Decl. ¶ 5). Defendants failed to meet the deadline agreed to in July and only produced a small percentage of requested documents in August and

September 2010. (*Id.*). Not only were the produced documents not in the format requested by Plaintiffs, but those documents were produced in a disorganized and difficult to process format, rendering the productions largely unusable absent significant manual effort and guesswork by Plaintiffs. (*Id.*). Plaintiffs attempted to negotiate with the Defendants on a compromise regarding a format of production that would be useful to Plaintiffs and not overly burdensome for the Defendants. (Kessler Decl. ¶ 11). Defendants refused to negotiate with Plaintiffs regarding format of production. (*Id.*).

In an attempt to reach a resolution, Plaintiffs provided Defendants with a Proposed Production Protocol. (*Id.*). Defendants still would not engage in meaningful discussions with Plaintiffs about the production format. (*Id.*). In the absence of Defendants' cooperation, Plaintiffs raised the issue with this Court. (*Id.* at ¶ 12). At that time, Defendants had produced only 2,000 pages of material. (Garbe Decl. at ¶¶ 6-8, 19). On January 12, 2011, after oral argument, the Court ordered Defendants to produce documents in accordance with the format requested in Plaintiffs' July 23, 2011 email until it further considered the format of production issue. (Kessler Decl. ¶ 12). The Court made clear that it would welcome additional submissions by the Parties regarding format of production. (Jan. 12, 2011 Hr'g Tr. at 53). Plaintiffs accepted the Court's invitation and provided the Court with additional briefing on this issue. (Kessler Decl. ¶ 12). Defendants chose not to provide the Court with additional information. (*Id.*). On January 17, 2011, the Defendants produced records that did not comply with this Court's instruction. (*Id.* at ¶ 13). Defendants continued to refuse to meaningfully negotiate with Plaintiffs on format of production issues. (*Id.*).[1]

[1] Plaintiffs remain open to collaborating with Defendants and this Court to devise a solution to this dispute that is acceptable to all Parties. Plaintiffs are (and have been) more than willing to compromise on the format of production, even if the resulting format is less than what the Court

On February 7, 2011, the Court issued its Opinion and Order and on February 14, 2011, this Court issued a Supplemental Order. (Feb. 7 Order; Feb. 14 Order). On February 21, 2011, Defendants moved this Court to stay the Orders pending review by the Second Circuit. (Stay Mot.). On February 21, 2011, Defendants appealed the Orders. (Notice of Appeal, Docket # 63).

ARGUMENT

Despite Defendants' vehement protests, they fail to demonstrate any legitimate basis sufficient to justify the extreme measure of staying an Order of this Court and further delaying Plaintiffs' ability to obtain and disseminate critical information about the implementation of Secure Communities. "A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion and the propriety of its issue is dependent upon the circumstances of the particular case." *Natural Res. Def. Council v. U.S. Envtl. Prot. Agency*, No. 09 Civ. 4317 (DLC), 2010 WL 431885, at *3 (S.D.N.Y. Feb. 8, 2010) (citation omitted). A court should consider the following factors when determining whether to issue a stay:

> (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.

Id. (citing *In re World Trade Center Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007) (additional dictations omitted)).

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ordered, if the resulting format of production is usable and would enable the Plaintiffs to receive information responsive to their FOIA Request sooner than later. It is Defendants' contention that this Court does not have jurisdiction to help fashion such a compromise while the appeal of the orders is pending.

"A party who moves for a stay pending appeal bears the burden of showing the balance of the four factors weighs in favor of the stay . . ." *People for the Am. Way Found. v. Dep't of Educ.*, 518 F. Supp. 2d 174, 177 (D.D.C. 2007); *see also Front Carriers Ltd. v. Transfield Cape Ltd.*, No. 07 Civ 6333 (RJS), 2010 WL 571967, at *1 (S.D.N.Y. Feb. 15, 2010); *Doe v. Lee*, No. 3:99CV314 (RNC), 2001 WL 536730, at *1 (D. Conn. May 18, 2001). Defendants argue that they need demonstrate only a "substantial case on the merits," as opposed to a "strong showing that [they are] likely to succeed on the merits." (Stay Mot. at 10-11). But Defendants concede that this argument presumes the other three factors used in evaluating a stay are clearly met. (*Id.*). As discussed below, Defendants have not met their burden to show that *any* of the four factors weigh in Defendants' favor. Accordingly, while the higher standard should apply, even if the lower standard applied, Defendants have not met their burden and the Court should deny Defendants' Stay Motion.

I. DEFENDANTS FAIL TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

As discussed below, Defendants' objections to the substantive merits of the Order are premised on an impermissibly narrow interpretation of the terms and operation of FOIA that cannot stand in the face of the clear purposes of FOIA, recent Supreme Court precedent and the reality of modern technology. Defendants' additional objections regarding procedural issues distort the purpose of the rules and ignore a district court's discretion in managing complex FOIA litigation.

A. The Court's Orders Were Substantively Correct

1. Metadata is Part of a "Record" Under FOIA

The central holding of the Orders—"that metadata is an integral or intrinsic part of an electronic record"—is technically, factually and legally correct. (Feb. 7 Order at 17-18). Defendants' challenge to this ruling demonstrates a fundamental misunderstanding of metadata.

a. *Metadata is an Integral or Intrinsic Part of an Electronic Record*

Metadata is defined as "data about data" or "'evidence, typically stored electronically, that describes the characteristics, origins, usage and validity of other electronic evidence.'" W. Lawrence Wescott II, *The Increasing Importance of Metadata in Electronic Discovery*, 14 RICH. J.L. & TECH 10, 1 (2008); *see also* Novak Decl. ¶¶ 5-14. Metadata exists upon the creation of an electronic record and is integral to the understanding and function of that record. (*See* Novak Decl. ¶ 14).[2] For example, some metadata does not appear in the text of the document itself, but provides information regarding who created and edited the document, to whom the document was sent, and when the document was created or edited. (*See id.* at ¶¶ 8-14). Other metadata provides information about how a document was stored and in whose files. (*See* Novak Decl. ¶ 7).

Some metadata is embedded within the text of the document itself, but may not be viewable when an electronic document is converted to an image format such as TIFF or PDF (which is equivalent to printing the file). For example, Excel spreadsheets may contain hidden columns, comments and formulas not obvious upon viewing an Excel Spreadsheet without affirmative action by the viewer to move the cursor over a particular cell or unfreeze a particular

[2] There are three basic types of metadata, each of which may have a different use or function: (1) file system metadata; (2) application or embedded metadata; and (3) email metadata. (Novak Decl. ¶¶ 6-14); s*ee also* Practicing Law Institute, Electronic Discovery Deskbook 13-4 (Thomas Y. Allman et al. eds., 2010).

column. (*See* Novak Decl.¶ 28). Converting an Excel Spreadsheet to a PDF or TIFF image may impermissibly "strip" information from the record and alter the basic functionality of the record, resulting in the production of an incomplete, and possibly misleading, record. Similarly, email metadata may contain the identification of persons who were blind-copied ("bcc"), which may not be visible when an email is converted to a PDF or TIFF image.

While the concept of metadata may seem novel or complex, it is merely an electronic extension of concepts that unquestionably apply to hard copy documents. In the Electronic Age, metadata acts in much the same fashion as a staple, paperclip, folder, time stamp, or handwritten note. It conveys information about how a document was organized, stored, and manipulated and by whom. For example, it may be important to know that a hard copy document was stored in the files of multiple individuals, to see the handwritten notes on different copies of the same hard copy document, or to know that a document was stored in a senior official's desk in a file marked "IMPORTANT DOCUMENTS." This type of information is as integral to electronic documents as it is to hard copy documents.[3]

While, at one time, the production of metadata could only be effected by providing that party with the original, or "native," electronic file, technology today allows for the production of metadata in other forms. (Novak Decl. ¶¶ 21-25; Garbe Decl. ¶ 18-20). For example, certain metadata may be produced via a "load file" containing selected metadata fields associated with the original electronic document. (Novak Decl. ¶¶ 30-34). The production of metadata via load

[3] In the Stay Motion, Defendants do not expressly discuss the Court's prior rulings directing that a complete record consists of both the "parent" document and its "children." However, Defendants' stated concerns about their alleged inability to maintain such relationships and their need to separate parents and children for purpose of production is troubling. (*See, e.g.*, 2/20/11 Pavlik-Keenan Decl. ¶¶ 12, 30; 2/18/11 Hardy Decl. ¶ 5; 2/18/11 Souza Decl. ¶ 15). As this Court noted, it is unquestionable that a parent and a child (*e.g.*, an email and its attachments) are part of the same record. (Jan. 12, 2011 Hr'g Tr. at 33; Novak Decl. ¶ 18).

files is used for several reasons: (1) to facilitate the exchange of electronic files in a format that preserves the integrity of the original record; (2) to facilitate the review, searching and organization of voluminous document productions in electronic format; (3) to enable parties to redact privilege, confidential or otherwise protected information from disclosure; and (4) to guard against inadvertent corruption of native files. (Novak Decl. ¶¶ 44-49; Garbe Decl. ¶¶ 18-20).[4] Whether metadata is part of a record under FOIA must be evaluated with this information in mind.

b. *Defendants Attempt to Narrowly Construe the Term "Record" to Avoid the Disclosure of Metadata*

Defendants attempt to cast doubt on the breadth of the definition of the term "record" as set forth under FOIA and the E-FOIA amendments in order to avoid the production of metadata. (Stay Mot. 20-22). That is, Defendants disregard the plain language of FOIA and argue that the term "record" should be confined to mean the information that Defendants, in their discretion, decide they can produce without undue burden. (*Id.*). Nowhere in the statute or the case law is there any language that supports such an absolute restriction and, in fact, this interpretation runs directly counter to the purpose of FOIA.

The Supreme Court has held in a recent case that the interpretation of FOIA must start "with its text" and "the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Milner v. Dep't of Navy*, No. 09-1163, 2011 WL 767699, at *5 (Mar. 7, 2011); *see also FCC v. AT&T Inc.*, 131 S.Ct. 1177 (Mar. 1, 2011) (analyzing the plain meaning of terms in FOIA and reviewing rules of statutory interpretation). The purpose of

[4] In addition to facilitating the production of metadata fields intrinsic to an electronic record, load files may be used to produce such information as Bates numbers, document break information, document family break information, or extracted text. (Novak Decl. at ¶ 31). The information provided in a load file may not otherwise be produced where a native file is converted and produced in an imaged format. (*Id.* at ¶ 21).

FOIA is "'to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.' As the Act is structured virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975) (citations omitted; quoting S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965)). The FOIA exemptions are "exclusive" and "must be narrowly construed." *Milner*, 2011 WL 767699, at *3 (citing *EPA v. Mink*, 410 U. S. 73, 79 (1973) and *FBI v. Abramson*, 456 U.S. 615, 630 (1982)); *see also Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 145, 147 (2d Cir. 2010) (stating that FOIA exemptions are consistently given a narrow compass and all doubts are resolved in the favor of disclosure). As this Administration has made clear, FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails. . . . All agencies should use modern technology to inform citizens about what is known and done by their Government." FOIA Memorandum for the Heads of the Executive Departments and Agencies by President Barack Obama, *available at* http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.[5]

To interpret the term "record" as used in FOIA, one must first turn to the language of the statute. A "record" is defined under FOIA as:

> *any information* that would be an agency record subject to the requirements of this section when maintained by an agency in *any format*, including an electronic format . . .

[5] *See also* FOIA Memorandum from the Attorney General, Memorandum for the Heads of the Executive Departments and Agencies ("[T]he [DOJ] will defend a denial of a FOIA request only if . . . disclosure is prohibited by law."), *available at* http://www.justice.gov/ag/foia-memo-march2009. pdf; *see also* Peter S. Kozinets, *Access to Metadata in Public Records: Ensuring Open Government in the Information Age*, 27-JUL Comm. Law. 1, 1 (2010) ("[P]rotecting public access to electronic records, including metadata, is essential to safeguarding the public's ability to open government conduct to public scrutiny.").

5 U.S.C. § 552(f)(2)(A) (emphasis added). The "ordinary meaning" of the terms used in the definition can be found in Webster's Dictionary. It defines the term "information" as "the communication or reception of knowledge or intelligence," "record" as "an official document that records the acts of a public body or officer" and "format" as "a method of organizing data (as for storage)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1898 (1961).

The broad sweep of the language used to define record under FOIA plainly supports the inclusion of metadata, information intrinsic and integral to any electronic record. The stated purpose of FOIA is antithetical to withholding information not expressly exempted by the statute. FOIA contains no exemption alleviating the Defendants' obligation to produce the metadata inherently associated with any electronic record maintained by the Defendants in response to a FOIA request. FOIA contains no express exclusion of metadata from the definition of record. FOIA contains no absolute provision relieving the Defendants' of its obligations based solely on the burden associated with responding to a FOIA request. Defendants should be granted no more authority to withhold metadata from Plaintiffs than is provided by the express exemptions permitted under FOIA.[6]

c. *The Court's Orders Are Consistent With Existing Federal and State Court Rulings Regarding Metadata*

While this Court is the first federal court to confront the issue of whether metadata is part of a record in the federal FOIA context, it is not the first to recognize that metadata is part of an electronic record. The Court's ruling is entirely consistent with prior rulings in the context of

[6] Defendants' rigid interpretation of the term "record" would restrict the ability of a court to interpret a statute in a manner consistent with the evolution of the "ordinary meaning" of the words used therein. But courts are not so restricted. Courts frequently are called upon to apply old statutes to new concepts and, in particular, new technology. That is exactly what the Court did here. It applied a 21st Century understanding of "electronic records" to FOIA in a manner consistent with FOIA's underlying purposes.

state FOIA counterparts and analogous holdings in federal non-FOIA cases. Several federal courts have recognized that metadata is an integral part of an electronic record that is subject to production in civil litigation. *See, e.g., Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 652 (D. Kan. 2005) ("metadata is an inherent part of an electronic document, and its removal ordinarily requires an affirmative act by the producing party that alters the electronic document"); *Aguilar v. Immigration and Customs Enforcement*, 255 F.R.D. 350 (S.D.N.Y. 2008) (ordering, in a *Bivens* action, the production of metadata associated with certain records and the production of native Excel files). As early as 1993 the federal courts recognized that simply converting electronic records to paper records is not sufficient. *See Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1280 (D.C. Cir. 1993) (recognizing that simply providing paper print-outs of electronic documents violated the Federal Records Act because "essential transmittal information relevant to a fuller understanding of the context and import of the electronic communication will simply vanish").

In fact, every state court that has confronted the issue has agreed that the rationale supporting the premise that metadata is part of a record in the civil context applies with even greater force to public records under state FOIA counterparts. *See Lake v. City of Phoenix*, 218 P.3d 1004, 1007-08 (Ariz. 2009) ("[T]he metadata in an electronic document is part of the underlying document; it does not stand on its own. When a public officer uses a computer to make a public record, the metadata forms part of the document as much as the words on the page."); *Irwin v. Onondaga Cnty. Res. Recovery Agency*, 72 A.D.3d 314, 319 (4th Dep't 2010) (holding that the metadata associated with certain public records should have been disclosed pursuant to the state freedom of information law); *O'Neill v. City of Shoreline*, 240 P.3d 1149,

1154 (Wash. 2010) (holding "an electronic version of a record, including its embedded metadata, is a public record subject to disclosure").

Defendants have not shown even a "substantial case on the merits" with respect to whether metadata is an "integral or intrinsic part of an electronic record" under FOIA, let alone a "likelihood of success on the merits."

2. The Court Correctly Determined that the Metadata Associated with Electronic Records is Presumptively Readily Reproducible in Some Format

Defendants' claim that metadata is not "readily reproducible" conflates the question of whether metadata is part of a record under FOIA with the question of whether the format of production ordered by this Court is "readily reproducible." If metadata is part of the record under FOIA, it must be produced pursuant to FOIA. At that point, the question is not *whether* Defendants must produced metadata, but *in what form* that metadata must be produced. And Defendants' argument that metadata *cannot* be produced because Defendants either have not produced metadata in the past or do not know how to produce metadata, must fail.

a. *As Metadata is an Intrinsic Part of Any Electronic Document Maintained by Defendants, it Must be Presumptively "Readily Reproducible" in Some Format as a Matter of Law*

FOIA provides, "[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). "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. Dep't of Def.*, 330 F.3d 1191, 1195 (9th Cir. 2003) (citing 32 C.F.R. § 286.4(g)(2)). "Under any reading of the statute, [] 'readily reproducible' simply refers to an agency's technical capability to create the records in a particular format." *Sample v. Bureau of Prisons*, 466 F.3d 1086, 1088 (D.C. Cir.

2006). The *Sample* court cites other federal decisions holding that "readily reproducible" means "readily accessible" or "as the ability to duplicate." *Id.* (citing *Carlson v. U.S. Postal Serv.*, No. C-02-05471 RMW, 2005 WL 756573, at *7 (N.D. Cal. 2005), and *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 59, 63 (D.D.C. 2003)).

In determining whether information responsive to a FOIA request is "readily reproducible" in the format requested, a court should review the agency's capability overall to provide metadata in the format requested and not just the FOIA offices' capabilities.[7] *See TPS*, 330 F.3d at 1195. "The language of FOIA does not support a reading that distinguishes between 'business as usual' for FOIA requests and 'business as usual for activities that are part of the *agency's* business.'" *Id.* (emphasis added). Further, Defendants cite no authority for the proposition that "readily reproducible" should be defined *solely* in terms of the costs or burden of compliance.[8]

Defendants appear to suggest that—regardless of how the records are used or maintained by Defendants in the ordinary course of business—if Defendants have typically responded to FOIA requests in a certain manner in the past, including but not limited to altering documents stored in electronic form by stripping the metadata from those documents, reorganizing the documents by destroying parent-child relationships, or exploring only the limited technology provided to the agency's FOIA office, then that process should be accepted as the *only* means by which the information is "readily reproducible." (Stay Mot. at 13-16). This cannot be the case.

[7] Because the purpose of FOIA is to provide the public with insight into the workings of its government, it would be anomalous to permit Defendants to rely exclusively on the technological capabilities within an agency's FOIA office with no reference to the technological capabilities in other departments within the same agency.

[8] While Defendants cherry pick certain comments from the legislative history for the E-FOIA amendments in 1996 in support of their arguments that the Court abused its discretion, nothing in the legislative history supports the notion that the burden of complying with a FOIA request acts as an absolute bar to complying with a request for electronic information.

Plaintiffs' more reasoned interpretation of the term "readily reproducible" gives effect to the purposes of FOIA, while recognizing the need to minimize the burden on the Government. That is, if electronic records are maintained by Defendants in the ordinary course of business, then Defendants presumptively are able to produce those electronic records in a form or format that maintains the integrity of the original record, *to wit*, with metadata and familial relationships. This is particularly true where an agency already has access to enabling technology. (*See* Section I(A)(2)(b)).[9] To the extent the production imposes an undue burden on the Defendants or is unwarranted for a particular FOIA request, the agencies should work with the requestor to identify an alternative, less burdensome production format. If the parties cannot resolve a dispute over production format, they may appeal to the administrative process or the court, as appropriate.[10]

b. *The Defendants' Declarations Do Not Relieve Them of Their Obligations Under FOIA*

Defendants submit that the declarations presented in support of the Stay Motion demonstrate that the information sought by Plaintiffs' FOIA Request is not "readily reproducible" in the format ordered by this Court. But a careful analysis reveals that Defendants' arguments are, for the most part, consistent with how they have comported

[9] As a civil litigant, the Government is expected to produce electronically stored information, just like any other civil litigant. *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414-15 (S.D.N.Y. 2009). And the Government routinely requests and receives electronic documents from other civil litigants. *See id.* at 410-11; Garbe Decl. ¶ 11. Compliance with the Federal Rules as a civil litigant, therefore, is part of "business as usual" for the agencies. If Defendants are equipped and prepared to fulfill their discovery obligations as civil litigants, they should not be permitted to invoke FOIA to claim that production in the format requested by Plaintiffs is not "business as usual."

[10] Even if Defendants could demonstrate that the format set forth in the Court's Order is not currently "readily reproducible," it does not absolve them of their responsibility to comply with FOIA. If Defendants—or the United States Government—were not previously aware of the dangerous deficiencies in the FOIA response process, they certainly are now.

themselves throughout this litigation: Defendants follow those rules and orders that suit their interests, dismiss those that do not, and then seek refuge behind self-interested declarations.

First, while declarations can be afforded deference in the FOIA context, such deference is neither absolute nor automatic, and certainly is no panacea for resolving FOIA disputes. *See, e.g., Tarullo v. Dep't of Def.*, 170 F. Supp. 2d 271, 275 (D. Conn. 2001) (FOIA defendants' declarations were insufficiently detailed to warrant deference); *Halpern v. FBI*, 181 F.3d 279, 295 (2d Cir. 1999) (declining to afford deference to assertions in FOIA defendant's affidavit).

Second, Defendants' declarations can hardly evidence a likelihood of success on the merits where they demonstrate an ignorance of basic principles of collection and production of electronic records and a failure to comprehend the scope of Defendants' duties under FOIA.[11] For example:

- Defendants concede that they maintain at least some records in electronic form. (Law Decl. ¶¶ 8-9; Fifth Hardy Decl. ¶¶ 8-9; Holzerland Decl. ¶ 12; 3/24/11 Souza Decl. ¶ 8, 10). When electronic data is requested, responsive and available, then the metadata associated with those records must be produced in some appropriate format.[12]

- Defendants insist that if the standard processes followed by each agency's FOIA office do not already accommodate the collection and production of metadata, then metadata is not "readily reproducible" in any format. (Law Decl. ¶¶ 5-18; Fifth Hardy Decl. ¶¶ 2-10, 15-16; Holzerland Decl. ¶ 7-16, 24; 3/24/11 Souza Decl. ¶¶ 16-23). By this theory, Defendants would *never* need to produce metadata in any format and would *never* need to update the FOIA process to accommodate modern technology, new data sources, or developing understandings of electronic data.[13]

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[11] Plaintiffs note that Defendants failed to comply with this Court's order to provide a complete response to the questions presented in Plaintiffs' February 28 letter because they fail to provide information regarding the data sources of the records requested. (Mar. 8, 2011 Hr'g Tr. at 2-6).

[12] This Court has already recognized that Defendants are not required to produce metadata for documents maintained solely or primarily in paper form. (Feb. 7 Order at 18).

[13] Defendants also state repeatedly in their declarations that this is the first time that a requestor under FOIA has sought the production of metadata in any format. (Law Decl. ¶¶ 10, 15; Holzerland Decl. ¶¶ 13, 23; Roat Decl. ¶ 13). FOIA contains no "first time" exemptions from the production of responsive information.

- The FOIA Offices' did not instruct the program offices to preserve and collect information responsive to a FOIA request in the form in which it currently exists, *e.g.*, to collect electronic records in electronic form and paper records in paper form. (Law Decl. ¶¶ 6-11; Fifth Hardy Decl. ¶ 6; Holzerland Decl. ¶¶ 10-11; 3/24/11 Souza Decl. ¶¶ 6-9). Further, Defendants admit that electronic records are often immediately converted to paper or PDF when collected, thus removing the metadata and altering the document before it even reaches the FOIA Office. (Law Decl. ¶ 8; 3/24/11 Souza Decl. ¶ 13; Fifth Hardy Decl. ¶¶ 2, 15). Defendants' failure to properly identify and collect information responsive to a FOIA request cannot serve as a basis for a finding that the information requested is not "readily reproducible" in any format.

- The FOIA Offices insist that metadata is not "readily reproducible" in any format because the need to securely redact or withhold exempt information makes such production impossible. (3/24/11 Souza Decl. ¶¶ 19-22; Law Decl. ¶¶ 10, 18; Fifth Hardy Decl. ¶ 8). The declarations claim that the only way to safely and securely produce documents with redactions and to maintain copies of the unredacted versions of those records is to convert those documents to PDF. (3/24/11 Souza Decl. ¶¶ 19-20; Law Decl. ¶ 11; Fifth Hardy Decl. ¶ 10; Holzerland Decl. ¶¶ 12-13). The declarations also state redacting the extracted text is the only way to produce redacted records with extracted text and without revealing the redacted information. (Law Decl. ¶ 40). But a multitude of processes exist to accommodate such concerns. (Novak Decl. ¶ 37-39). The need to redact exempt information does not mean metadata is not "readily reproducible" in any format.[14]

- Defendants claim that converting an electronic document to TIFF or PDF means that it is impossible to retain metadata or to maintain the parent-child relationships. (Fifth Hardy Decl. ¶ 8). This is untrue. Documents are routinely converted to TIFF in civil litigation, and the parties in those actions are also required to maintain parent-child relationships and produce metadata. (Novak Decl. ¶¶ 18, 25).

- Defendants claim that the production of Excel spreadsheets in native format means that they would have to delete exempt information from the native document. (Fifth Hardy Decl. ¶ 6). As the Court expressly held that Excel documents requiring redactions should be produced in TIFF format, not native, this argument is irrelevant. (Feb. 7 Order at 23).[15]

- Several of the Defendants currently do have access to modern e-discovery software, such as Clearwell or Concordance, that would allow them—if properly used—to

[14] To the extent certain metadata fields in a load file present significant burdens with respect to exempt information, Plaintiffs are, and have been, willing to work with Defendants to exclude those metadata fields from production in a load file, if appropriate.

[15] The one Excel spreadsheet to date that Plaintiffs have requested in native format is one that does *not* require redactions. Yet Defendants refuse to comply with the Court's Orders, even as to this one Excel spreadsheet. (Kessler Decl. ¶ 18).

> comply with the Court's Orders. (Law Decl. ¶¶ 22-26; Roat Decl. ¶¶ 15-20 3/24/11 Souza Decl. ¶¶ 11, 22). Those Defendants claim that use of that software is either exclusively reserved for other purposes (such as civil litigation) or else is cost prohibitive. *See, e.g.*, Law Decl. ¶¶ 33-37; Holzerland Decl. ¶¶ 24-25; Roat Decl. ¶¶ 22-23; 3/24/11 Souza Decl. ¶ 20. The Defendants fail to explain, however, why the cost barrier is acceptable to deny complete and open disclosure as required by FOIA, or why compliance with the Defendants' civil discovery obligations are somehow more important than compliance with FOIA, particularly where a civil action has been filed as has happened here.

While these examples are by no means exhaustive, they do evince Defendants overall approach to FOIA and to Plaintiffs' FOIA Request. Defendants fail to meet their burden to show that the information sought by Plaintiffs' FOIA Request is not "readily reproducible" in the format ordered by this Court.

B. The Court's Orders Were Procedurally Proper

Defendants raise a variety of procedural challenges to the Court's Orders. Their arguments are grounded in the misunderstanding that this Court has virtually no discretion to resolve the FOIA disputes brought before it. Defendants are incorrect.

1. The Court Properly Exercised Its Discretion in Deciding the Format of Production Issue Without Full Summary Judgment Briefing

Defendants argue that this Court improperly resolved the Parties' dispute regarding format of production in the absence of complete submissions on summary judgment pursuant to Federal Rule of Civil Procedure 56(f). According to Defendants, summary judgment is the only vehicle available to this Court for resolving any FOIA production dispute. (Stay Mot. 16-17). Thus, Defendants assert that the Court erred in *effectively* granting partial summary judgment to Plaintiffs because it deprived Defendants of notice and an opportunity to respond. (*Id.* at 16-18).

First, Defendants offer no legal support for the proposition that summary judgment is the only appropriate method for resolving FOIA disputes. The cases cited by Defendants merely acknowledge that summary judgment is the *preferred* or *general*, not the only, procedural

vehicle for resolving FOIA production disputes. *See, e.g., Bloomberg L.P. v. Bd. Of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 271 (S.D.N.Y. 2009) ("[s]ummary judgment is the *preferred* procedural vehicle for resolving FOIA disputes") (emphasis added); *Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993) ("*Generally*, FOIA cases should be handled on motions for summary judgment . . .") (emphasis added). And it is indisputable that courts have broad authority and discretion in managing and overseeing the actions brought before them, even FOIA actions. S*ee, e.g., Lewis v. Rawson*, 564 F.3d 569, 575 (2d Cir. 2009) (courts are vested with control to manage their own affairs in order to achieve the expeditious disposition of cases) (internal citations omitted). The Court's decision to resolve this dispute without full summary judgment briefing cannot, by itself, be considered reversible error.

Second, Defendants' argument that they were deprived of notice and the opportunity to respond elevates form over substance.[16] The Parties had clear notice that this Court was evaluating, and would be ruling on, format of production and were given ample opportunity to respond to Plaintiffs' arguments. (Kessler Decl. ¶ 12). The Court not only held oral argument but reviewed numerous letters from the Parties, requested additional information from the Parties, and indicated on various occasions that it would be ruling on format of production. (*Id.*). Defendants made the tactical decision not to avail themselves of the opportunity to submit

[16] Defendant rely on the current version of Rule 56(f) as amended ("Judgment Independent of the Motion") in support of its argument that the issuance of the Orders is contrary to the Rule 56(f). Such reliance is misplaced. Even assuming *arguendo* that the Orders were an effective grant of partial summary judgment, the current version of Rule 56(f) is inapplicable to the current matter. The amendments took effect on December 1, 2010, and only govern proceedings thereafter commenced. Nonetheless, Defendants were provided with ample notice and opportunity to respond, as discussed below.

additional legal or factual information to the Court, and their claim that they were deprived of notice and the opportunity to fully respond to Plaintiffs' arguments rings hollow.[17]

Third, Defendants position would render FOIA's format of production provision meaningless and enable Defendants to delay the response process with impunity. Section 552(a)(3)(B) of FOIA requires an agency to "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." If parties were forced to resolve disputes under this section only through summary judgment, it would effectively provide Defendants with a mechanism to avoid complying with a particular format of production request under FOIA. Defendants could (a) produce records in an improper format, and (b) later argue that Defendants should not be required to undertake the burden of recollecting, reprocessing and reproducing those same records in a different format. Such a result is nonsensical, and would impede a court's ability to efficiently manage FOIA actions.

2. The Court Properly Exercised Its Discretion in Calling Upon the Federal Rules When Evaluating the Parties' Format of Production Dispute

Defendants argue that this Court improperly relied upon the Federal Rules of Civil Procedure ("Federal Rules") in support of the Orders. This argument is based on two incorrect conclusions: (1) that Federal Rules 26(f) and 34 do not apply to FOIA disputes; and (2) that the Court's Orders are reliant upon those rules.

a. *Federal Rules 26(f) and 34 Do Apply to a FOIA Litigation*

Defendants' tired refrain that "there is no discovery in FOIA" reveals an inaccurate interpretation of the relevant precedent. A district court has broad discretion to minimize the burden imposed on the Government by discovery pursuant to the Federal Rules. But that does

[17] Moreover, even if the record was incomplete before, the Court now has an ample record on which to evaluate the Orders.

not lead to the conclusion that the Federal Rules do not apply. And Plaintiffs are hard-pressed to consider what rules of civil procedure *would* apply to a FOIA litigation, if not the Federal Rules.

The cases cited by Defendants for the proposition that Federal Rules 26(f) and 34 do not apply to a FOIA dispute are inapposite. *See McClelland v. Andrus*, 606 F.2d 1278 (D.C. Cir. 1979) (noting that the Federal Rules do not apply to administrative hearings); *Mohammed v. Mukasey*, 290 F. App'x 58 (2d Cir. 2008) (Federal Rules do not apply to administrative hearings). Neither Plaintiffs nor the Court have suggested that the Federal Rules apply to pre-litigation FOIA requests. The Parties, however, are currently engaged in litigation before this Court, not an administrative proceeding.

Further, while there is precedent for the concept that discovery is generally limited or restricted in a FOIA litigation, the origin of that case law is grounded in a court's broad discretion to manage the scope of discovery, not on an absolute statutory bar against the applicability of the Federal Rules. *See, e.g., Simmons v. U.S. Dep't of Justice*, 796 F.2d 709, 711-12 (4th Cir. 1986) (stating that "the district court has the discretion to limit discovery in FOIA cases"); *Weisberg v. Dep't of Justice*, 627 F.2d 365, 371 (D.D.C. 1980) ("[c]ourts have ample opportunity to protect agencies from oppressive discovery"); *Safecard Servs. v. SEC*, 926 F.2d 1197 (D.D.C. 1991) (noting in a FOIA action that the court will overturn a district court's exercise of its broad discretion to manage the scope of discovery only in unusual circumstances); *Murphy v. FBI*, 490 F. Supp. 1134 (D.D.C. 1980) (stating that discovery is appropriate and often necessary in a FOIA case, but it is limited to factual disputes).

Nor do the Court's Orders "circumvent" FOIA by application of the Federal Rules. As this Court recognized, the Federal Rules do not conflict with FOIA in this instance. (Order at 16, n.33). In terms of format of production, the applicable provisions of Federal Rule 34 are

strikingly similar to FOIA. *See* Fed. R. Civ. P. 34(b)(1)(C) & (b)(2)(D) & (E) (party can request that electronic documents be produced in a certain form or format and documents must be produced as they are maintained in the ordinary course of business or in a reasonably usable form); 5 U.S.C. § 552(a)(3)(B) ("agency shall provide the record in any form or format requested"). And the requirements to meet and confer about a number of issues, including format of production, are entirely consistent with FOIA and the process acknowledged by Defendants for coordinating the exchange of information under FOIA. (Fed. R. Civ. P. 26(f) (directing parties to meet and confer on discovery issues); 5 U.S.C. § 552 (a)(6)(A)(ii)(I), (a)(6)(B)(ii) (discussing agency and requestor collaboration); Holzerland Decl. ¶ 9; Scheduling Order, Docket # 25 ("[t]he Parties [to] continue to meet and confer regarding the protocol governing the electronic format of production.")). Thus, Defendants' argument that a court does not have discretion to apply Federal Rules 26(f) and 34 to a FOIA action is incorrect.[18]

b. *The Court's Orders Are Not Dependent Upon the Federal Rules*

In any event, Defendants' critique of the Court's uncontroversial analysis of Federal Rules 26 and 34 is a misreading of the Court's opinion. Nowhere in the Order does the Court assert, as Defendants suggest, that either Federal Rule 26 or 34 "govern[s] *pre-litigation* FOIA administrative proceedings, either directly or by analogy." (Stay Mot. 18). Rather, the Court

[18] Plaintiffs and this Court recognize that there is no one production format that will be appropriate for every FOIA production. (Feb. 7 Order at 23, n.44). Nor is there only one format in which metadata can be produced in response to a request. (*See* Novak Decl. ¶ 24). Indeed, this Court expressed the exact same sentiment as did President Clinton upon the signing of the E-FOIA amendments: that FOIA works best when the agencies and the requestors work together to devise the most efficient and least burdensome manner of production. (Order at 25; The White House, Press Release, *Statement by the President* (Oct. 2, 1996) ("Accordingly, H.R. 3802 establishes procedures for an agency to discuss with requesters ways of tailoring large requests to improve responsiveness. This approach explicitly recognizes that FOIA works best when agencies and requesters work together.")). Plaintiffs have been, and remain, willing to work with Defendants and this Court to identify a solution that benefits all parties. Defendants have not been so willing. (Kessler Decl. ¶ 11).

states with respect to Rules 26(f) and 34 that "[r]egardless of whether FOIA requests are subject to the same rules governing discovery requests, [the Federal Rules] surely should *inform* highly experienced litigators as to what is expected of them when making a document production in the twenty-first century." (Feb. 7 Order at 16) (emphasis added). The Court provides sound reasoning for this view:

> [B]ecause the fundamental goal underlying both the statutory provisions [of FOIA] and the Federal Rules is the same – *i.e.*, to facilitate the exchange of information in an expeditious and just manner – common sense dictates that parties incorporate the spirit, if not the letter, of the discovery rules in the course of FOIA litigation.

(Feb. 7 Order at 16 n. 33).

Defendants can hardly show a likelihood of success on appeal where the Court did not even issue the ruling presented for review by the Second Circuit.

3. Plaintiffs' Request for Metadata is not "Unexhausted" and the Orders Do Not Impermissibly Expand the FOIA Request

Defendants raise on appeal—for the first time—the argument that Plaintiffs' metadata and format of production requests were unexhausted and impermissibly broadened the scope of Plaintiffs' FOIA Request. Given that Defendants never raised these arguments with this Court prior to the Stay Motion, it is difficult to see how Defendants now contend that they are likely to prevail on the merits on appeal. However, even if this Court had been presented with these issues prior to the Stay Motion, Defendants' arguments do not withstand scrutiny.

a. *Defendants Cannot Show a Likelihood of Success on the Merits on Appeal Where the Issues Were Never Raised with the District Court*

As a general matter, "'it is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.'" *In re Nortel Networks Corp. Sec. Litig.*,

539 F.3d 129, 132 (2d Cir. 2008) (citations omitted). Here, Defendants elected not to raise the questions of whether Plaintiffs' request for metadata in a particular format was "unexhausted" or whether the Orders impermissibly expanded the scope of the FOIA Request, either prior to the issuance of the Court's Orders or on a motion for reconsideration thereafter. (*See* Feb. 14, 2011 J. Cordaro Letter to Court, Docket # 57; Feb. 14, 2011 Hr'g Tr. 7). Defendants, therefore, have waived the right to raise these issues on appeal. *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d at 132.

b. *The Orders Do Not Impermissibly Expand the FOIA Request*

Defendants' argument that the Orders impermissibly expanded the scope of the FOIA Request fundamentally misconstrues the request at issue. First, at no point have Plaintiffs sought to expand the scope of the substantive information sought by their FOIA Request. Plaintiffs' FOIA Request expressly sought the production of electronic documents.[19] (FOIA Request, Docket # 12-1). As discussed above, metadata is an intrinsic and integral part of an electronic record and is presumptively encompassed by a request for electronic records. (*See* Section I(A)).

Second, the cases cited by Defendants all relate to attempts to amend a FOIA request during litigation to seek new or entirely different records. *See Gillin v. IRS*, 980 F.2d 819, 823 (1st Cir. 1992) (rejecting taxpayer's attempt to use interrogatories and document requests to expand scope of FOIA request to include new category of documents in litigation commenced after agency had already responded); *Pray v. Dep't of Justice*, 902 F. Supp. 1, 2-3 (D.D.C. 1995)

[19] Plaintiffs defined the term record in its February 3, 2010 FOIA request as "Record(s)" includes, but is not limited to, all Records or communications *preserved in electronic* or written form, such as correspondences, emails, documents, data, videotapes, audio tapes, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, legal opinions, protocols, reports, rules, technical manuals, technical specifications, training manuals, studies, or any other Record of any kind." (FOIA Request, Docket # 12-1) (emphasis added).

(rejecting plaintiffs' request for information from Newark Field Office where this request was not encompassed by the original FOIA request); *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996) (treating letter purporting to appeal agency's "denial-by-silence" of a FOIA request as a new request where request was expanded to include additional records). Those cases are inapposite where Defendants are *not* being asked to produce new or different records. Rather, Plaintiffs seek the production of complete electronic records responsive to the original FOIA Request in a usable and understandable format. In fact, this request originated from receipt of Defendants' wholly deficient and entirely unusable initial productions and Defendants' absolute refusal to discuss alternative formats for production. (*See* Kessler Dec. ¶¶ 5, 11; Garbe Decl. ¶ 10).

c. *Plaintiffs' Request for Metadata is not "Unexhausted"*

Defendants' exhaustion argument is equally unavailing. First, Defendants contention ignores the reality of what transpired in this action. This FOIA action originated after Defendants failed to produce *any* information in response to Plaintiffs' FOIA Request and the available administrative remedies were exhausted. (Complaint, Docket # 1).

Second, Defendants have not asserted a failure to exhaust administrative remedies at any time during the more than ten months since Plaintiffs filed the Complaint. In fact, in their Answer to the Complaint, Defendants averred that, for each agency named in the Complaint, "any administrative appeal was closed as a result of the filing of the instant Complaint." (Answer, Docket # 8 ¶¶ 65, 67, 73). Thus, Defendants have waived any argument that Plaintiffs' failed to exhaust their administrative remedies. *See Francis v. City of New York*, 235 F.3d 763, 766-67 (2d Cir. 2000) (stating that defendants' long delay in attacking the sufficiency of plaintiffs' administrative exhaustion clearly constituted a waiver of the exhaustion requirement); *Jowers v. Lakeside Family and Children's Servs.*, No. 03 Civ. 8730 (LMS), 2005 WL 3134019,

at *6 n.9 (S.D.N.Y. Nov. 22, 2005) (finding that defendants' failure to raise exhaustion of administrative remedies in their Answer or Motion for Summary Judgment constituted a waiver of that defense).

Third, a failure to exhaust administrative remedies under FOIA precludes judicial review only if "the purposes of exhaustion and the particular administrative scheme support such a bar." *Hidalgo v. FBI*, 344 F.3d 1256, 1258-59 (D.C. Cir. 2003) (internal quotations and citations omitted). In evaluating whether the purposes of exhaustion support such a bar, the court must analyze whether the action presents a risk of "undermining the purposes and policies underlying the exhaustion requirement, namely, to prevent premature interference with agency processes, to give the parties and the court the benefit of the agency's experience and expertise and to compile an adequate record for review." *Wilbur v. CIA*, 355 F.3d 675, 677 (D.C. Cir. 2004) (internal citations omitted).

Here, there is no premature interference with agency processes, because the agencies in question have refused to continue their internal administrative review and have actively litigated this dispute for nearly a year. Moreover, as discussed *supra*, Defendants had ample opportunity to offer the Court their expertise, such that it is, and to complete the record regarding the dispute at issue. (*See* Section I(B)(1)). Defendants, therefore, have not demonstrated a likelihood of success on appeal with respect to their "unexhaustion" argument.[20]

[20] Defendants exhaustion argument suggests that Plaintiffs could have or should have avoided the current dispute by filing a new FOIA request. This suggestion is untenable for a variety of reasons, including but not limited to the fact that it would compound Defendants' already profound delay in producing responsive information by forcing Plaintiffs to the back of the FOIA queue only to re-litigate the very issues before this Court. (*See* Section III). Indeed, the declarations make clear that if such a request was explicitly made, Defendants would object.

II. DEFENDANTS WILL NOT BE IRREPARABLY INJURED ABSENT A STAY

Defendants' argument that they will be irreparably harmed absent a stay falls flat. Defendants first characterize the "irreparable harm" by claiming that "the release of documents will disrupt the status quo and effectively destroy Defendants' right of appellate review with respect to those records." (Stay Mot. at 23). But Defendants neglect to note a crucial point: the instances in which the Defendants' right of appellate review may be destroyed by the release of records involve situations where the *content* of the disclosure would release information that was potentially exempt or otherwise damaging to the Government into the public sphere. *See, e.g.*, *People for the Am. Way Found. v. Dep't of Educ.*, 518 F. Supp. 2d 174, 176-77 (D.D.C. 2007) (staying its order, in *People for the Am. Way Found. v. Dep't of Educ.* 516 F. Supp. 2d 28 (D.D.C. 2007) (denying Government's claimed exemptions)); *Ctr. For Nat'l Sec. Studies v. DOJ*, 217 F. Supp. 2d 58 (D.D.C. 2002) (staying its order, in *Ctr. For Nat'l Sec. Studies v. DOJ*, 215 F. Supp. 2d 94 (D.D.C. 2002) (denying Government's exemption claims)). The dispute at hand does not relate to potentially exempt information or the public dissemination of information that may harm Defendants or Defendants' personnel; it relates to the production of information that is intrinsically part of records Defendants has already decided are responsive to the FOIA Request and non-exempt.[21] Producing complete records, as required by FOIA and requested by Plaintiffs, is not an irreparable harm.

[21] Defendants are correct that the outcome of this Stay Motion will effectively decide whether the Orders will have a material impact on the document productions in this action. By the time the appeal is decided, Defendants will either have produced the records to Plaintiffs, or Secure Communities will have been almost fully implemented and Plaintiffs will have missed their window to use the records to inform the public debate. However, to the extent Defendants are concerned with the impact of the Orders on FOIA practice generally (*see* Stay Mot. at 24-25), a denial of the Stay Motion does not moot the precedential value of any Second Circuit decision relating to the issues raised by Defendants on future FOIA actions.

The real "irreparable harm" proffered by Defendants is the burden associated with complying with the Orders and Defendants' alleged lack of resources. (*See, e.g.,* Pavlik-Keenan Decl. ¶¶ 5-15; Lewis Decl. ¶ 11; 2/18/11 Souza Decl. ¶ 13; Fourth Hardy Decl. ¶¶ 7-13; Law Decl. ¶¶ 33-43; Fifth Hardy Decl. ¶ 16; Holzerland Decl. ¶ 25; Roat Decl. ¶¶ 21-25; 3/24/11 Souza Decl. ¶¶ 21-22). However, the difficulty of compliance or the scarcity of resources does not amount to irreparable harm. *See Am. Civ. Liberties Union v. Dep't of Def.*, 357 F. Supp. 2d 708, 711-12 (S.D.N.Y. 2005) (holding in FOIA action that the unavailability of personnel "to work with the records collected by the Inspector General" does not amount to irreparable harm).

Further, Defendants' "offer" to continue to produce responsive information during the stay is double-edged sword. While this would result in providing Plaintiffs with some responsive information (albeit in an incomplete and largely unusable format), it would also provide Defendants with an excuse to collect and produce electronic records in a way that would preclude a timely reproduction if the appeal is denied. And it would not address the harm to Plaintiffs discussed below. (*See* Section III). Defendants make clear that they have no intention of modifying their collection process to ensure that metadata for all electronic records is preserved. In addition, they clearly believe there is an immense burden associated with recollection and reproduction. If the outstanding summary judgment motions and the current issues are resolved in Plaintiffs' favor, then Defendants will no doubt invoke this burden to further delay or avoid recollection and reproduction in the format ordered by this Court.[22]

[22] For example, the FBI declarations indicate that 99% of the material that the Criminal Justice Information Services Division initially provided to the Record/Information Dissemination Section was provided in electronic format. Yet the FBI claims that the Court's Order imposes a significant burden on the FBI because the Order requires the FBI to go back and recollect all of the responsive documents. (Fourth Hardy Decl. ¶ 12). That said, the Court has not directed the FBI to undertake such an effort. The FBI could simply reprocess the responsive data it did collect so as to maintain parent-child relationships between documents and create load files.

III. FURTHER DELAY WILL HARM INTERESTED PARTIES

Defendants claim that neither Plaintiffs nor any interested parties will be harmed if the Court were to stay implementation of the Orders because (a) the production of responsive information has already been delayed by Plaintiffs' own actions, and (b) Defendants are only seeking a stay of the form-and-format directives in the Court's Orders, not a stay of its FOIA disclosure obligations. These arguments grossly mischaracterize the genesis of the production delays that necessitated this FOIA litigation, and trivializes the potentially permanent harm that may be done to Plaintiffs and the individuals and jurisdictions directly impacted by the swift and secretive implementation of Secure Communities.

First, it was the Defendants' own delay and obstructionist tactics in responding to Plaintiffs' FOIA Request that necessitated this litigation and sparked the Parties' dispute regarding metadata and the format of production. (*See* Complaint, Docket # 1). In fact, it was Defendants' decision to make their initial productions in a disorganized, unusable format that instigated the Defendants' need to clarify its initial format of production request. (Kessler Decl. ¶¶ 5-11; Garbe Decl. ¶¶ 4-5). Nor is it true that Plaintiffs waited ten months to request metadata. As noted above, Plaintiffs specifically requested electronic records in their FOIA Request. Plaintiffs' original FOIA Request included a request for electronic records, which necessarily included metadata. (FOIA Request, Docket # 12-1). In July 2010, Plaintiffs sent an email to Defendants regarding format of production. (Ex. A to Kessler Decl.). At that point, Defendants had yet to produce any responsive documents. (Kessler Decl. ¶ 5). Further, by December 2010, when Plaintiffs again raised this issue, Defendants had produced only a handful of documents responsive to the original FOIA Request. (*Id*. ¶¶ 5-7). And when this issue was raised with the

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These small improvements would allow Plaintiffs to organize and review the documents in a more efficient manner.

Court in January 2011, Defendants had produced less than 2,000 pages of responsive documents. (Garbe Decl. ¶¶ 6-8, 19).

Second, while Defendants assert that they "only seek[] a stay of the metadata and form-and-format directives in the Order" (Stay Mot. 24), the production of complete, authentic records in a usable format is critical to Plaintiffs' and the public's ability to understand, review and disseminate the information in a timely and efficient manner. (Uribe Decl. ¶¶ 6,9; Garbe Decl. ¶ 4). As it stands, Defendants' format of production has already impacted the public debate. Plaintiffs are unable to quickly identify and distribute crucial information about the implementation of Secure Communities to the advocates, press, individuals and jurisdictions that will be—and are being—impacted by that program. (Uribe Decl. ¶¶ 6 9). This has led to an absence of informed public debate and has hindered the ability of legislatures across the country to take action against implementation. (Uribe Decl. ¶¶ 17-23; Feltz Decl. ¶ 18)

And the need to disseminate this information is urgent, as thousands of jurisdictions are currently activating Secure Communities without full knowledge of the Program and are being misled about the true opt-out choices of the Program. (Uribe Decl. ¶¶ 5-6, 17-23; *see* Feltz Decl. ¶ 12). For example, legislation is pending in California and advocates are presently meeting in Santa Clara County to discuss Secure Communities. (Uribe Decl. ¶ 19; Feltz Decl. ¶ 18). There are upcoming meetings in Illinois to discuss the information learned about Secure Communities through this litigation. (Uribe Decl. ¶ 18). Reporters from Maryland, Illinois, California and the District of Columbia have contacted Plaintiffs to request information regarding Secure Communities. (Uribe Decl. ¶ 18; Feltz Decl. ¶ 18). But Plaintiffs cannot easily locate and distribute the documents related to these jurisdictions in order to assist in educating lawmakers

and the public regarding the program. (Uribe Decl. ¶¶ 17-18). By 2013, Secure Communities will be fully implemented rendering the public debate moot. (Uribe Decl. ¶ 5).

If granted, a stay would cause Plaintiffs additional, and potentially lengthy, delay in reviewing and disseminating information going forward. The damage to the legislative process and the individuals impacted by Secure Communities by a continued delay is a damage that may not be easily undone, if it can be undone at all, by judicial action. (Uribe Decl. ¶¶ 9, 24). In short, granting the Defendants' Stay Motion will cause irreparable damage to the lives of thousands of interested parties and to the laws that govern those lives. The costs to the Defendants of compliance with their statutory duty can hardly compare.

IV. THE PUBLIC INTEREST WEIGHS AGAINST GRANTING A STAY

Although they make a passing attempt at convincing the Court that the public interest would be served by a stay pending appeal, even Defendants do not sound convinced. Indeed, it is unclear what possible interest the *public* has in enabling Defendants to delay the production of critical documents about Secure Communities while it argues in favor of limiting the information Defendants are required to provide to the public in response to a FOIA request.

Defendants' sole argument is that the public has an interest in the "potentially sweeping consequences" of the Court's Orders on FOIA practice. (S*ee* Stay Motion at 24-25). But "[d]elay [] is prejudicial, for FOIA requires prompt disclosure of non-exempt information relevant to the public interest." *Am. Civil Liberties Union*, 357 F. Supp. 2d at 712. Defendants do not address the devastating impact that continued delay in the production of the requested materials will have on the Plaintiffs' ability to procure timely information in furtherance of their advocacy efforts (Uribe Decl. ¶¶ 17-23) and the public debate about Secure Communities (*see* Section III). In light of the "sweeping consequences" that a continued delay in production will

have on the laws of the United States and the lives of the individuals impacted by Secure Communities, there is no doubt that the public interest weighs heavily in Plaintiffs' favor.

Further, Defendants critique of the Court's Order misses the mark. Defendants argue that the "Court issued a decision with potentially sweeping consequences for FOIA practice throughout the country on what is essentially an empty factual record." (Stay Motion at 25). In making this argument, however, Defendants not only gloss over their own failure to add to the record after the Court explicitly invited the Parties to do so (an invitation that Plaintiffs appreciated and acted upon) (*See* Section I(B)(1)), they also exaggerate the breadth of the Order, conveniently ignoring its unambiguous limiting language. The Order states:

> To be clear, my Order requiring the use of [Plaintiffs'] Proposed Protocol for future productions . . . is *limited* to this case. I am *certainly not suggesting* that the Proposed Protocol should be used as a standard production protocol in all cases. The production of individual static images on a small scale, where no automated review platform is likely to be used, may be perfectly reasonable depending on the scope and nature of the litigation. While Rule 34 requires that records be produced in a reasonably usable format – which at a minimum requires searchability – any further production specifications are subject to negotiation by the parties on a *case by case basis*.

(Feb. 7 Order at 23-24 n.44) (emphasis added). Given that the Order is expressly limited to the present controversy, Defendants' argument about the potentially sweeping nature of the Order is overstated. In spite of Defendants' suggestion, courts throughout this country are more than capable of reading the Order and understanding its explicit limitations.

Thus, when applying the public interest analysis to the facts of this controversy, one must ask the following: is the public interest better served by allowing Defendants to continue to withhold the production of responsive, non-exempt information in an effort to restrict disclosure under FOIA, or is it better served through the enforcement a court order, limited in scope to the facts before it that directs Defendants to produce records in a usable format so as to facilitate

informed public discourse about a controversial government program? The answer is obvious. Defendants' Stay Motion should be denied.

V. RELIEF

For the reasons set forth above, Plaintiffs respectfully request that this Court deny Defendants' Stay Motion pending appeal.

Dated: March 30, 2011
New York, New York

Respectfully submitted,

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