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Judge Schindlin Issues Latest Order on E-Discovery Focused on Metadata

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A federal judge in the Southern District of New York, who has authored several frequently cited opinions about e-discovery, recently issued an opinion regarding the production of metadata in e-discovery. In *National Day Laborer Organizing Network v. Immigration Customs Enforcement Agency*, 2011 WL 381625 (S.D.N.Y. Feb 7, 2011), Judge Sheindlin held that metadata maintained by an agency as part of an electronic record is presumptively producible in response to a request for records under the Freedom of Information Act ("FOIA"). Although the case arises in the context of the FOIA, the opinion also addresses obligations that arise under Federal Rules of Civil Procedure 26 and 34, and much of the opinion's reasoning could be applied to e-discovery in any civil case. In *National Day Laborer Organizing Network*, the plaintiffs requested records from government agencies pursuant to the FOIA. When certain records were produced, the plaintiffs complained that the records were produced in an unsearchable PDF format. The plaintiffs requested the Court to order the government to produce electronically stored information ("ESI") in accordance with Plaintiff's Proposed Protocol. The Proposed Protocol would require the bulk of ESI to be produced in TIFF image format with corresponding load files containing 24 specific fields of metadata, Bates stamping, and the preservation of the relationship between each attachment and its parent record. Plaintiffs requested that spreadsheets be produced in both native format and TIFF format and that hard copy records be produced in TIFF format with corresponding load files. The Court adopted nearly all of the requirements of Plaintiff's Proposed Protocol, seeking to balance the burden on the government with the plaintiff's need to conduct an efficient review. The Court reasoned that certain metadata is an "integral or intrinsic part of an electronic record," and recognized "the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party." In reaching this balance, the Court admonished counsel for not having the "good sense" to meet and confer, cooperate, and make every effort to communicate as to the form in which ESI would be produced. The parties did not reach an agreement regarding the form of ESI production. As a result, the government was required

to re-produce many records at its own expense. In light of this opinion and others regarding e-discovery, litigators should be mindful of metadata both when requesting documents and when producing documents. The requesting party should specifically request production of metadata. The responding party should anticipate the obligation to produce metadata and should preserve its electronic records accordingly. In any event, both parties should be mindful of their obligations to cooperate and communicate regarding the form in which ESI will be produced.

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