



Public to see metadata?

by L. Bradfield “Brad” Hughes

The Ohio Public Records Law may go high-tech. One of the issues that the Supreme Court of Ohio may decide in *State ex rel. John McCaffrey v. Mahoning County Prosecutor’s Office*, which remains pending as of this writing, is whether public offices must produce metadata along with their responses to public-records requests.¹ Metadata, frequently described as “data about data,” is the information within a computer-generated document that describes how, when and by whom the document was collected, created, accessed or modified; its size; and how it is formatted.

In July 2010, WKBN news in Youngstown broke into the station’s regular programming to announce the filing of a 73-count indictment in Mahoning County Common Pleas Court.² The indictment alleged that a developer and others conspired with elected officials and a former Jobs and Family Services (JFS) director to try to prevent JFS from leaving the developer’s mall and relocating to another plaza purchased by the county.³

John McCaffrey, counsel for multiple defendants named in the indictment, requested documents from the Mahoning County Prosecutor’s Office under Ohio’s Public Records Act. He requested, among other things, records about any support that county prosecutors provided to the special prosecutors appointed in the matter, communications between the judge and the members of the grand jury, and communications between those grand jury members and county prosecutors. McCaffrey asked for both paper and electronic records responsive to his requests.

The prosecutor’s office produced some responsive documents to McCaffrey but declined to produce others. In his Supreme Court complaint, McCaffrey contends that the prosecutor’s office is improperly withholding responsive documents. He also alleges that the prosecutor’s responses “included documents that exist in an electronic database and/or format, but ... did not contain metadata concerning these documents; therefore the Responses are incomplete.”⁴

The issue of whether responses to public-records requests must include metadata is a new one for the Supreme Court of Ohio, and has been hotly disputed elsewhere. In February, in a case under the Freedom of Information Act (FOIA), U.S. District Judge Shira Scheindlin (well-known for influential e-discovery decisions), opined that “it is well accepted, if not indisputable, that metadata is generally considered to be an integral part of an electronic record.”⁵ Noting that no federal court had yet ruled on the question, Judge Scheindlin went on to hold that “metadata maintained by the agency as a part of an electronic record is presumptively producible under FOIA, unless the agency demon-

strates that such metadata is not ‘readily reproducible.’”⁶ Judge Scheindlin further listed the specific types of metadata that she thought, at a minimum, should be included for electronic documents and emails produced in response to FOIA requests.⁷ The government sought an interlocutory appeal of Judge Scheindlin’s ruling, and it remains to be seen what approach the Supreme Court may adopt with respect to the production of metadata under Ohio’s Public Records Act.⁸

In its motion for judgment on the pleadings, the prosecutor’s office contends that metadata is not a public record because it is not used to carry out the duties and responsibilities of a public office, and that the Supreme Court “should reject what is tantamount to a request for judicial enactment of a potentially costly and unfunded mandate that the state and local governments throughout Ohio would bear if they are required to produce metadata” in response to public-records requests.⁹ *McCaffrey* responds that metadata is an embedded part of responsive electronic documents, and that courts in Washington, Arizona, New York and Connecticut have agreed that metadata should be produced.¹⁰ *McCaffrey* disputes the county prosecutor’s “unfunded mandate” argument because he has agreed to pay the costs associated with his requests.¹¹

On April 6, 2011, the Supreme Court denied the prosecutor’s request for judgment on the pleadings and set a schedule for the presentation of evidence and briefs.¹² Evidence was submitted on May 16, and McCaffrey filed his merit brief on May 26. *Ohio Lawyer* readers who advise private or public sector clients about the requirements of Ohio’s Public Records Law may wish to follow *McCaffrey* to see if the Court decides whether, and to what extent, metadata must be included along with responses to requests for public records.¹³ ■

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Endnotes

- ¹ See April 6, 2011, entry, *State ex rel. John McCaffrey v. Mahoning County Prosecutor’s Office and Paul Gains*, Supreme Court of Ohio Case No. 2010-1642 (denying respondents’ request for judgment on the pleadings and setting a schedule for the presentation of evidence and briefing).
- ² See Oakhill Grand Jury Files Indictments article and related video,

available at www.wkbn.com/content/news/local/story/Oakhill-Grand-Jury-Files-indictments/c_vcG8NE2k6WT_QPHuXvBQ.csp.

³ Id. The criminal case of *State v. Cafaro et al.*, Mahoning County, C.P. No. 2010 CR800A-1, remained pending as of the date of this writing, and neither the author nor the Ohio State Bar Association expresses any opinions on the truth or falsity of the allegations in the indictment as reported by WKBN.

⁴ Complaint, *State ex rel. John McCaffrey*, supra, at ¶15. On May 6, 2011, McCaffrey sought leave to file an Amended Complaint containing similar allegations at ¶23.

⁵ *National Day Laborer Organizing Network et al. v. U.S. Immigration and Customs Enforcement Agency et al.* (S.D.N.Y. Feb. 7, 2011), No. 10 Civ. 3488(SAS), 2011 WL 381625, at *3.

⁶ Id. at *5 (emphasis in original).

⁷ Id. at *6-7. For all forms of electronically stored information, Judge Scheindlin ordered the production of the following metadata fields: (1) identifier; (2) file name; (3) custodian; (4) source device; (5) source path; (6) production path; (7) modified date; (8) modified time; and (9) time offset value. Judge Scheindlin then listed the following additional metadata fields to accompany the production of email messages: (1) to;

(2) from; (3) CC; (4) BCC; (5) date sent; (6) time sent; (7) subject; (8) date received; (9) time received; and (10) attachments.

⁸ See Government Appeals and Seeks a Stay of Judge Scheindlin's FOIA Order on Metadata in *NDLON v. ICE*, available at <http://e-discovery-team.com/2011/03/10/government-appeals-and-seeks-a-stay-of-judge-scheindlinsfoia-order-on-metadata-in-ndlon-v-ice/>.

⁹ Respondents' Jan. 11, 2011, motion for judgment on the pleadings, *State ex rel. John McCaffrey*, supra, at pp. 19-20.

¹⁰ John McCaffrey's Jan. 21, 2011, memorandum in opposition to respondents' motion for judgment on the pleadings, *State ex rel. John McCaffrey*, supra, at pp. 20-21, citing *O'Neill v. City of Shoreline* (Wa. 2010), 240 P.3d 1149; *Lake v. City of Phoenix* (Az. 2009), 222 Ariz. 547, 218 P.3d 1004; *Irwin v. Onondaga County Resource Recovery Agency* (N.Y. App. Div. 2010), 72 A.D.3d 314, 322, 895 N.Y.S.2d 262; *Pictometry v. FOIC* (June 23, 2010), Conn. Super. No. HHBCV084019021S, 2010 WL 2822759.

¹¹ Id. at p. 22.

¹² See n.1, supra.

¹³ Automatic updates from the Court about the case are available at www.sconet.state.oh.us/rss/subscription/.



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