Phoenix Law Review
Spring, 2010

*69 ACCESSING ARIZONA'S GOVERNMENT: OPEN RECORDS REQUESTS FOR METADATA AND OTHER ELECTRONICALLY STORED INFORMATION AFTER LAKE v. CITY OF PHOENIX

David W. Degnan [FNa1]

Copyright © 2010 Phoenix Law Review; David W. Degnan

I.	Introduction	70
II.	Lake v. City of Phoenix: Does an Open Records Request Include the Accompanying Metadata?	72
A.	Issue and Framework	72
B.	Background	72
C.	Lake v. City of Phoenix, 207 P.3d 725 (Ariz. Ct. App. 2009) (Majority)	73
D.	Lake v. City of Phoenix, 207 P.3d 725 (Ariz. Ct. App. 2009) (Dissent and concurrence)	76
E.	Lake v. City of Phoenix, 218 P.3d 1004 (Ariz. 2009)	77
F.	Impact of Lake v. City of Phoenix	77
III.	Open Records and Discovery of	78

	Metadata: What's the Difference?	
A.	What is Metadata?	79
B.	Discovering Metadata	81
C.	Requesting Open Records	84
D.	Lake v. City of Phoenix: An Open Records Case or a Discovery Case?	84
IV.	Requests for the Metadata of Open Records Case Law	85
A.	Case Law Addressing Open Records Law	85
B.	Statutes Addressing Open Records Law	89
C.	Lake v. City of Phoenix: Statutory Interpretation	91
D.	Lake v. City of Phoenix: Applying the Sedona Conference Cooperation Proclamation	93
V.	A Matter for the Legislature?	95
VI.	Conclusion	97

***70** I. Introduction

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Perhaps the biggest challenge created by electronically stored information (ESI) is the sheer volume of digitalized data that is available. [FN1] A study published in 2003 suggests that 93% of all communications are conducted through an electronic medium and this percentage will only rise in the coming years. [FN2] For example, email has outpaced standard mail as the preferred means of written communication; [FN3] electronic storage has replaced filing cabinets, creating a large storage site on a device that is the size of one's thumb; [FN4] and computer software now creates and executes specific tasks and translates those tasks into a written record without the command of the operator. [FN5]

In most cases, computer users are oblivious to the computer's automatic creation of ESI. [FN6] For example, the computer automatically stores temporary files from websites in its cache; creates, copies, and saves emails several times on a computer's hard drive; and documents and stores information about a record for quick retrieval and future use. [FN7] In short, computers generate and store more information than people realize. In addition, people have become less cautious about what they write in emails, text messages, and chat room conversations. [FN8] As a result, more and more information is becoming available to search, compile, preserve, review, and produce for ***71** future litigation. [FN9] Indeed, in the seven years since the landmark Zubulake saga of cases, [FN10] the bench and the bar have squarely addressed the preservation and production of ESI in the discovery context. By contrast, the bench and bar have not had as many opportunities to address such concerns in the context of open records laws.

It was not until 2009 that the Arizona Court of Appeals and the Arizona Supreme Court first addressed whether the open records laws require the production of metadata and other ESI along with the requested document. [FN11] These decisions, according to an amicus brief, could have a ranging impact on many fields, but the most notable impact would be on journalists, city administrators, and lobbyists. [FN12] In the next section, this note will address, discuss, and compare the Arizona Court of Appeals and Arizona Supreme Court decisions in the Lake v. City of Phoenix case. [FN13] And although the court of appeals' opinion has been vacated, this article will discuss both decisions, as both provide differing approaches in judicial philosophies on statutory interpretation and open records laws. In the third section, this note will explain what metadata is, differentiate between open records laws and the discovery laws as they relate to the production of metadata and other ESI, and propose an alternative specific to this case. [FN14] In the fourth section, this note will present the relevant case law for open records requests across the country, define the five notable statutory differences between the states, analyze the textual and policy arguments presented in Lake by the appellate court, and explain how the parties may solve open records disputes involving ESI through cooperation. [FN15] Finally, the fifth section will propose a suggested course for the Arizona State Legislature. [FN16]

***72** II. Lake v. City of Phoenix: Does an Open Records Request Include the Accompanying Metadata?

A. Issue and Framework

Lake v. City of Phoenix is a fascinating case that exists at the intersection of statutory interpretation, electronic discovery, and open records laws. [FN17] The issue is whether the law should treat metadata as part of the document itself or whether it should separate the metadata from the initial record. [FN18] Metadata, by definition, is the information about the record, “describing the document's history, tracking, and management.” [FN19] On one hand, requesters will argue that open records laws should include metadata because such laws are supposed to make the government operations completely transparent. [FN20] On the other hand, the government and its agencies will argue that the courts should separate the metadata from the requested document, [FN21] reasoning that agencies and cities may become overburdened if they must expend the time and effort to produce everything that may be stored on the computer. [FN22]

B. Background

In 2006, Officer David Lake submitted eighteen public records requests pursuant to Arizona open records laws. [FN23] Officer Lake sought evidence to support his claim that he was demoted after reporting his supervisor's misconduct. [FN24] Fourteen of his categories of records were received and produced, as requested. [FN25] However, the City of Phoenix (City) denied the other four requests, determining that the requested records failed to qualify as public records under Arizona law.

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN26] Officer Lake alleged that the City's failure to produce those records was retaliatory [FN27] because he had also filed an Equal Employment Opportunity (EEO) complaint against the City. [FN28]

***73** Specifically, Officer Lake sought "all notes kept by seven named Lieutenants, including Lieutenant Robert Conrad, [FN29] documenting supervisory performance" between 2005 and 2006. [FN30] Suspecting that his supervisors had back-dated the notes, Officer Lake sought the relevant metadata that accompanied those notes, requesting the "true creation date, access dates for each time the file was accessed, including who accessed the file as well as print dates, etc." [FN31] Additionally, the City refused Officer Lake's requests for information from the police computer database, [FN32] government emails made in furtherance of a public duty, [FN33] and a record relating to an "on-going police investigation." [FN34]

Officer Lake filed a special action with the Arizona Superior Court, [FN35] asserting that the City wrongfully denied four requests for public records and should (1) produce them, and (2) bear the costs, fees, and double damages statutorily prescribed for the prevailing party in such an action. [FN36] When the superior court denied jurisdiction and dismissed the matter, [FN37] Lake appealed. [FN38] The Arizona Court of Appeals accepted jurisdiction and reviewed the denials of Lake's public records requests as a matter of law, subject to de novo review. [FN39]

C. Lake v. City of Phoenix, 207 P.3d 725 (Ariz. Ct. App. 2009) (Majority)

Focusing primarily on Officer Lake's first request for metadata, the court, after thoroughly discussing what metadata is, held that the requested metadata failed to meet the definition of a public record. [FN40] The court then ordered the government to produce the record without the accompanying metadata. [FN41] The court noted that, as a threshold consideration, it must decide if the record is a public record. [FN42] Once the court makes that determination, then "the presumption favoring disclosure applies and, when ***74** necessary, the court can perform a balancing test to determine whether privacy, confidentiality, or the best interest of the state outweigh the policy in favor of disclosure." [FN43]

Citing Griffis v. Pinal County [FN44] and Salt River Pima-Maricopa Indian Community v. Rogers, [FN45] the Lake court noted that Arizona law had not yet defined a "public record." [FN46] However, the cited cases acknowledged that there are three judicial interpretations of statutes, developed through case law, [FN47]which Arizona courts have followed. [FN48] Under these interpretations, a public record is any record that meets one of the following definitions:

> (1) a record "made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference"; (2) a record "required to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written said or done"; or (3) a "written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by law or not." [FN49]

In Lake, the court determined for numerous reasons that the requested metadata failed to meet any of the definitions of a public record. [FN50] First, finding the metadata was "not made 'in pursuance of a duty,'" the court declined to apply the first definition because the requested notes were made "only as a by-product of his use of a computer." [FN51] Second, finding that metadata was not created as "evidence of something written, said, or done," the court declined to apply the second definition because Officer Lake's supervisor was only obligated to produce his notes; [FN52] he was not obligated to produce the surrounding information about his notes. [FN53]

***75** The court found that the third definition presented an admittedly closer question about whether metadata qualifies as a public record. [FN54] Although the court did find that the metadata created "information reflecting certain transactions that occur in connection with the use of a computer," [FN55] it distinguished the written notes made by the supervisor from the metadata that was made by the computer. [FN56] Furthermore, finding that the purpose of the computer was to "facilitate preparation of the notes" rather than to provide information about the document itself, [FN57] the court declined to apply the third definition because Officer Lake's request failed to fit the definition of a public record. [FN58] Therefore, the court concluded that the requested metadata need not be produced with the document. [FN59]

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Addressing the second test for disclosure of public records, the court held that because the metadata that accompanied the record failed to meet the definition of a public record, [FN60] it was not necessary to balance the competing privacy interests against the presumption of disclosure. [FN61] Moreover, the court also addressed the plaintiff's arguments, finding that an electronic public record was not synonymous with electronic evidence; [FN62] that a public record was distinguishable from a record, noting that a record of grocery lists and personal emails were neither relevant nor needed to be produced under open records laws; [FN63] and that the "physical location of the information does not determine whether [a record] meets the definition of a public record." [FN64] However, the court did admit that the legislature and at least one Arizona court have, on limited occasions, interpreted a record and a public record as one and the same. [FN65]

But the court relied primarily on textual arguments to distinguish a record, as it is defined under Arizona statutory law, from a public record, as ***76** it is defined under judicial interpretation of ambiguous case law throughout the nation. [FN66] In a footnote, the court declined to follow Carlson v. Pima County, an Arizona appellate court decision that held that such an open records law question turns "on whether the release of the information would have an important and harmful effect upon the official duties of the agencies." [FN67] Citing Griffis, the court reasoned that "to apply a presumption of disclosure when a question exists as to the nature of the document is inappropriate" because the "initial inquiry must be whether the document is subject to the statute." [FN68] Moreover, in another footnote, the court cited in the example of a Washington case, O'Neill v. City of Shoreline, that addressed open records laws and held to the contrary. [FN69] The Lake court distinguished the Washington case on the grounds that the state of Washington has a different statutory definition of public records, which required the Washington court to disclose the accompanying ESI. [FN70]

After finding that the requested metadata failed to meet the definition of a public record, the Lake court made numerous other findings, including: (1) that three other records requests were valid and improperly denied, (2) that police records were public records, (3) that the emails requested should have been preserved after the EEO complaint was filed, and (4) that documents relating to an ongoing investigation must be produced. [FN71] As a result, the court ordered that the trial court instruct the City to produce relevant documents and to consider if the plaintiff should be awarded statutorily prescribed fees, costs, and damages. [FN72]

D. Lake v. City of Phoenix, 207 P.3d 725 (Ariz. Ct. App. 2009) (Dissent and Concurrence)

While concurring in relation to the three other records that were improperly denied, the dissenting judge relied primarily on purpose and policy arguments to counter the majority's textual attack on the definition of public records. [FN73] The dissenting judge noted that the metadata is inseparable from the actual document itself. [FN74] Citing The Sedona ***77** Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age (The Sedona Guidelines), the judge reasoned that "the metadata information omitted is as valuable as the text itself because the information can identify and certify the scope, authenticity, and integrity [of the public record]." [FN75] As a result, the judge suggested that a person should be entitled to see the whole document and the majority's decision to the contrary went against the purpose of the open records laws, which is "to open government activity to public scrutiny." [FN76]

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

Lake filed a Petition for Review. After oral argument and supplemental briefing, the Arizona Supreme Court unanimously overturned the court of appeals' decision. [FN77] The court held that the record and the embedded metadata are public records, [FN78] and that the metadata cannot be separated as an "electronic orphan" from the original record. [FN79] The court reasoned that "it would be illogical, and contrary to the policy of openness to conclude that public entities can withhold information embedded in an electronic document while they would be required to produce the same information if it were written manually on a paper public record." [FN80] Therefore, the court held that Officer Lake was entitled to the document history of the police report, including how and when the record was created. [FN81]

F. Impact of Lake v. City of Phoenix

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

The impact of this case is far reaching. It affects lobbyists, journalists, and elections. Lake keeps government transparent, allows for easier access to information, and ensures that "the real record" [FN82] may be validated. [FN83] One commentator has noted that "[g]iven the frequency with which metadata outs lobbyists' and corporations' efforts to mask their own contributions to ***78** public debates, this is a good thing." [FN84] Moreover, similar to Lake, individuals can verify what the government is doing and ensure compliance with existing laws and regulations.

However, this case may be more notable for what it did not address. The Lake court noted that metadata, by virtue of the definition it chose to adopt, did not "encompass external or 'system' metadata, which may contain information about the document but is not inherent to the document; that is, does not exist as a part of it." [FN85] Moreover, the court did not address when or whether a public entity is statutorily obligated to preserve ESI. [FN86] These, likely, will be tough questions that future courts and the legislature will have to address.

III. Open Records and Discovery of Metadata: What's the Difference?

Open records requests and discovery requests for production are two unique concepts that cannot be lumped into one joint category. [FN87] At the most basic level, an open records request requires the government to produce public records, as they are kept in the ordinary course of public business at the time of the request, without the need for judicial involvement. [FN88] However, discovery requests are made in the context of litigation and are made pursuant to the rules of civil procedure and are conducted under judicial supervision. [FN89] And, as a general rule, when that litigation is reasonably anticipated, there is a duty to preserve records that may be subject to discovery. [FN90] With those rules in mind, this section discusses what metadata is; [FN91] describes the basic rules of producing metadata in litigation versus producing a public record pursuant to an open records request; [FN92] and analyzes Lake v. City of Phoenix, proposing an explanation for how the defendant may attain the metadata he is seeking. [FN93]

***79** A. What is Metadata?

Dictionaries, online guides, and best practices manuals have attempted to define metadata. According to Black's Law Dictionary, metadata is "[s]econdary data that organize, manage, and facilitate the use and understanding of primary data." [FN94] Microsoft Office notes that "[m]etadata enhance[s] editing, viewing, filing, and retrieval of Office documents." [FN95] The Sedona Principles defines metadata as the ESI that "includes all the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or achieved electronic information or records." [FN96]

Several court cases have grappled with metadata's definition. In Williams v. Sprint/United, [FN97] the producing party was asked to disclose emails and spreadsheets in native (as opposed to static) [FN98] format. [FN99] The court found that metadata must be defined in reference to the software application that was employed. [FN100] The court noted that

> [a]t one end of the spectrum is a word processing application where the metadata is usually not critical to understanding the substance of the document. The information can be conveyed without the need for the metadata. At the other end of the spectrum is a database application where the database is a completely undifferentiated mass of tables of data. [FN101]

***80** The court held that spreadsheets and emails must be preserved and then produced with their metadata intact because that is the way that the documents were maintained in the ordinary course of business. [FN102]

Similarly, in Aguilar v. ICE, the court noted that metadata can be categorized into three forms: substantive metadata, system metadata, and embedded metadata. [FN103] The court noted that substantive metadata is "'created as a function of the application software used to create the file or document' and reflects substantive changes," including "prior edits or editorial comments, and instructs the computer how to display fonts and spacing in the document." [FN104] System metadata "reflects information created by the user or by the organization's information management system," including the "author, date

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

and time of creation, and the date a document was modified." [FN105] The court opined that this form of metadata is "easily retrieved." [FN106] Finally, embedded metadata is "texts, numbers, content, data, or other information that is directly or indirectly inputted into a native file by a user and which is not typically visible to the user," including "spreadsheet formulas, hidden columns, [and] externally or internally linked files." [FN107] Citing the Maryland Suggested Protocol for the Discovery of Electronically Stored Information [FN108] as an example of how courts should treat metadata, the court noted that this type of embedded metadata should be produced "as a matter of course." [FN109]

The Arizona Supreme Court, like the court in Aguilar, adopted a nuanced definition of metadata, distinguishing metadata found within the file from the external or system metadata and holding that "embedded" metadata was subject to disclosure under the Arizona open records law. [FN110] However, this ruling may prove to be a Pyrrhic victory for the plaintiff, who asked for metadata containing "the TRUE creation date, the access date, the access dates for each time it was accessed, including who accessed the file as well as print dates . . . ." [FN111] This particular information may only be ***81** found in the system metadata, and as a result, the City may have room to again deny Lake's request.

B. Discovering Metadata

Federal Rule of Civil Procedure (FRCP) 26(b)(1) allows for the production of any relevant matter that is not privileged. [FN112] The 2006 advisory committee's notes further remark that the definition of ESI is interpreted broadly to include metadata [FN113] subject to the limitations of FRCP 26(b)(2)(C). Similarly, FRCP 34(b) requires that documents be produced in the form or forms that they are kept in the ordinary course of business, unless otherwise requested or agreed upon by the parties. [FN114] As noted in Armor Screen Corp. v. Storm Catcher, Inc., if a party objects to the form of production, the parties should meet at the FRCP 26(f) conference to discuss how the documents should be produced. [FN115] Therefore, courts across the country have required the preservation and production of metadata in anticipation of litigation, [FN116] so long as there is a showing (1) of how the requested ESI is ordinarily maintained or stored, (2) that the data is relevant and not privileged, and (3) that the data is reasonable accessible. [FN117]

Absent any agreement between the parties, a court typically will inquire into how the data is ordinarily maintained before allowing for the production of metadata. [FN118] If the data is ordinarily maintained in native format, then there is a presumption that such data is to be produced in the same format. [FN119] However, the burden is on the requesting party to request its desired form of production, and the requesting party gets only one bite of the apple. If it fails to specify a desired form of production of ESI or if it agrees to accept production of ESI in the form produced, then it cannot ***82** simply request that the ESI be produced a second time in another form. [FN120] For example, if requested documents are produced in PDF format, the producing party can deny the subsequent request to reproduce ESI in native format, [FN121] unless the requesting party initially asked for the documents in native format. [FN122] However, the court may require that all future productions be in native format. [FN123]

For metadata to be discoverable, it must be relevant. [FN124] Metadata will be relevant upon a showing that the data is needed to prove a claim or defense, the subject matter of litigation, or that it leads to the discovery of admissible evidence. [FN125] Because of the sheer volume of ESI that is available, parties must demonstrate that they are requesting relevant documents they need in good faith, rather than going on a fishing expedition to drive up the costs of litigation and force settlement. [FN126] For instance, in Williams v. Sprint/United Management Company (Williams I), [FN127] the court held that the spreadsheets should be produced in native format because they are relevant and the information produced in native format would likely lead to discoverable information. [FN128] However, in Williams v. Sprint/United Management Company (Williams II), the court held that the request for emails in native format should be denied because "Plaintiffs have not sufficiently explained why they need the transmittal e-mails in native format." [FN129]

***83** For metadata to be discoverable, it must also be reasonably accessible, [FN130] meaning that the ESI may be accessed if its value does not create "undue cost or burden" disproportionate to the resolution of the issues in the litigation. [FN131] The reasonably accessible inquiry usually turns on the form that the document is ordinarily maintained, and the unique facts of each case. [FN132] For example, a Microsoft Word (Word) file may be maintained in native format or in static format (e.g., TIFF or PDF). [FN133] If the file is maintained in Word, the file itself, with its metadata, such as track

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

changes, may be considered “reasonably accessible.” [FN134] However, TIFF or PDF files eliminate the Word metadata and replaces it with a much more restricted TIFF or PDF metadata set. [FN135] On the other hand, a company's standard practice may involve converting Word files to PDF format for maintenance and archival purposes. [FN136] In that case, the original Word files, with their original metadata, may theoretically be retrievable from backup media or forensically from computer hard drives, but the burden and cost of retrieval would likely be disproportionate to the benefit or gain, rendering that source of ESI “not reasonably accessible” under FRCP 26(b)(2)(B). [FN137]

Therefore, in federal civil litigation, the requesting party has the burden of showing that ESI is relevant. After such a showing, it is presumed that the metadata is the subject of preservation and production unless the producing party carries its burden in showing that the metadata is not reasonably accessible. [FN138] Simply put, metadata still may be subject to the duty of preservation, unless the costs or burdens of preservation are disproportionate to the case.

***84** C. Requesting Open Records

In contrast to discovery laws, one does not have to state that the public record is relevant or that there is a need for such information. [FN139] Open records requests are produced based on the state's open records statutes. [FN140] Universally, states keep records open and produce records on request so long as the state does not classify the particular document as not exempt or private. [FN141] Many states, including California, have statutes that specifically allow for the production of metadata in response to a request for public records. [FN142] Other states, such as Arizona, require that the production of records created and maintained pursuant to some official duty, [FN143] in which case a court may conclude that “system” metadata fails to meet that definition unless that metadata somehow has been created and maintained pursuant to the person's official duty. [FN144]

States differ, however, in what documents are exempt or private under the open records law. Some states draw distinctions between public records and private records. [FN145] Other states draw distinctions between public records and records, noting that a court will look at the record's nature and purpose to determine if the record is a public record. [FN146] Still other states draw a distinction between data and records. [FN147] These distinctions essentially mean that private records, such as a child's report card or any other personal information, should be exempt, while the production of the public records will depend on the statute's definition and courts' interpretation. [FN148]

D. Lake v. City of Phoenix: An Open Records Case or a Discovery Case?

Curiously, Officer Lake filed an open records request after he filed the EEO complaint. [FN149] As part of the EEO complaint and the pending suit for ***85** wrongful termination, Officer Lake could have requested that the city place a litigation hold on the system metadata and the relevant records in their native format, including whatever records or data provide the “true creation date, the access date, the access dates for each time [the file] was accessed, including who accessed the file as well as print dates, etc.” [FN150]

IV. Requests for the Metadata of Open Records Case Law

Lake focused attention on the question of whether open records requests should include the accompanying metadata. Because this issue affects media investigators, political contributors, and lobbyists in Arizona, this case has garnered plenty of attention. [FN151] Several courts have addressed electronic discovery in the context of open records laws; however, many of the cases discussed below were authored before the term “metadata” came into common use. This section examines the case law and statutes across the country and defines the divergence in the courts that have addressed this issue. Accordingly, in section A, this note compiles open records case law addressing ESI. These cases can be categorized into three groups: (1) those courts holding that the state's statute requires the production of ESI, (2) those courts holding that the state should develop a procedure to find relevant information that is maintained on electronic media, and (3) those courts holding that ESI may not be produced or that courts should not develop a program to produce ESI. In section B, this note categorizes ten to fifteen state statutes in an attempt to depict a landscape of state open records laws. In section C, this note will analyze how

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Lake v. City of Phoenix fits into the matrix of cases and statutes on the subject. Finally, in section D, this note addresses how open records disputes involving ESI could be minimized, or perhaps even eliminated, with planning and cooperation.

A. Case Law Addressing Open Records Law

At least one case approves of the disclosure of metadata, holding that the legislature has already weighed in on the issue and allowed for the production of ESI. [FN152] In Crossman v. DTIS, an open records case stemming from a requested spreadsheet detailing a California agency's budget, the ***86** agency argued that it properly placed the file in PDF format before producing the document because producing documents in native Excel format would be too costly. [FN153] The task force hearing the arguments noted that, in California, the Sunshine Act requires that "requested documents, including electronic documents in their native formats, must be produced unless the responding agency demonstrates that the requesting documents contain exempt information." [FN154] Accordingly, the court held that the requested Excel spreadsheet should have been produced in its native format in the absence of any specifically addressed exemption. [FN155]

Another court has allowed for the production of metadata, even in the absence of specific statutory language allowing for metadata. [FN156] In O'Neill v. City of Shoreline, an open records case in which the plaintiff requested an email regarding a zoning dispute, the city argued that its agent rightfully retracted the header block of the email to spare the sender any embarrassment. [FN157] The threshold inquiry was whether a document is a public record. [FN158] In Washington, a public record is "[1] any writing containing information [2] relating to the conduct of government [3] owned, used, or retained by the state or local agency." [FN159] In this case, the court held the email itself was most certainly a public record. [FN160] Moreover, the court held that the email header—the metadata—was also a public record. [FN161] The court, relying on a dictionary definition to determine legislative intent, reasoned that ownership is defined as having possession of something. [FN162] Because the government had an email header relating to a government zoning matter that was owned (or in the possession of) the agency, it too should be classified as a public record. [FN163] Therefore, the court concluded that the email metadata should have been produced because it was a public record, notwithstanding the city's reasoning for nondisclosure. [FN164]

***87** Similarly, in Armstrong v. Executive Office of the President, [FN165] the D.C. Circuit held that the electronic record systems had been defined to include any information that the computer produced or stored. [FN166] Therefore, the agencies must "undertake some periodic review [of their employees' electronic recordkeeping practices] to assure that 'established agency procedures, standards, and policies are being adhered to.'" [FN167]

Before the concept of "metadata production" became part of the legal community's vocabulary, several courts addressed similar issues, sometimes at great length, in their opinions. Courts have found that a city or an agency may be required to produce electronic records and the unintended recordkeeping so long as the entity was not being required to analyze the new information. [FN168] For example, in Tennessean v. Electric Power Board, an open records case where the plaintiff requested the names, addresses, and telephone numbers that were stored in the computer, but in a format that would require the Nashville Electric Service (NES) to create software program to collect and format that information, the NES argued that the physical format requested precluded disclosure. [FN169]

In Tennessee, a public record encompasses electronic data processing files and output. [FN170] The Public Records Act in Tennessee defines a "public record" as "all documents, papers, microfilms, electronic data processing files and output or other material, regardless of physical form made in or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." [FN171] The court held that "once information is entered into a computer, a distinction between information and record becomes to a large degree impractical." [FN172] The court reasoned that because the Tennessean requested records already in the possession of NES, and the request did not require NES to interpret, analyze, or explain the records, NES could not hide behind a shield of formatting and access issues to limit public access to those records. [FN173]

***88** Similarly, in Hamer v. Lentz, [FN174] which involved a request made under the Illinois Freedom of Information Act for pension information from a state ledger during a dispute regarding those pensions, [FN175] the respondent argued

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

that it should not be required to produce the requested information because it would require the respondent to develop a computer program to separate exempt from non-exempt requested information. [FN176] The court disagreed and held that the agency must devise a computer program to disclose all the requested information that was stored on the computer; [FN177] however, the exempt and non-exempt information may be separated. [FN178]

In Seigle v. Barry, [FN179] a notable Florida case regarding an open records appeal for access to school computer records in a collective bargaining agreement dispute, the appellant-agency argued that it properly refused to disclose the records because disclosure would require it to make a new record in a different format to satisfy the records request. [FN180] The District Court of Appeal of Florida held that "all of the information in the computer, not merely that which a particular program accesses, should be available for examination and copying in keeping with the public policy underlying the right to know statutes." [FN181] The court reasoned that "the information in a computer is analogous to information recorded in code. Where a public record is maintained in such a manner that it can be interpreted by use of a code[,] then the code book must be furnished by the applicant." [FN182] Therefore, the records requested and the ancillary information stored by the computer were required to be produced. [FN183]

By contrast, one state court has held that the ESI should not be produced under its open records law. [FN184] In Gabriels v. Curiale, a New York court held that the agency need not compile and print out the report that results from "other unattended record keeping." [FN185] The court reasoned that "to accommodate petitioner's request, it is necessary for a computer operator to create new records through a 'computer run,' i.e., a search of the ***89** online databases, accomplished by entering petitioner's criteria." [FN186] Therefore, the department need not "create new records nor develop a program to accomplish this task for the purpose of complying with the petitioner's request." [FN187]

B. Statutes Addressing Open Records Law

Open records case law addressing metadata appears to revolve around the straightforward application of each state's statutory law and on the evolving definition of metadata. This section categorizes several state statutes regarding the classification of a "public record" and proposes to quantify the likelihood of courts allowing for the production of metadata based on that definition. Some states have failed to define "public record" and, therefore, those states rely on the definitions derived from judicial interpretation, as seen in the Lake appellate decision. Other states do not draw a distinction between records and public records. However, a vast majority of states have specifically defined an "open" or "public record." Based upon this author's research, there appear to be approximately five different categories of open records laws. [FN188]

In the first category are state statutes that define public records broadly and specifically allow for the production of electronic information, software, data, or records made by the computer. For example, in Georgia, the legislature defines public records as "documents, papers, letters, maps, books, tapes, photographs, computer based or generated information or similar material." [FN189] Similarly, in Rhode Island, public records are defined broadly as including all "papers, maps, letters, books, tapes, photographs, films, sound recordings, magnetic or other tapes, electronic data processing records, [and] computer stored data." [FN190] As demonstrated by the court's decision in Crossman v. DTIS, [FN191] a court that interprets a similarly worded statute will almost always grant a request for metadata as part of the requested document.

***90** In the second category are state statutes permitting records used, owned, or retained by the state, regardless of form, to be produced unless specifically exempted. In Minnesota, the Data Practices Act refers to government data that is "collected, created, received, maintained or disseminated by any government entity such as a state agency, political subdivision, or statewide system[,] regardless of its physical form, storage media[,] or conditions of use." [FN192] Similarly, in Washington, a public record is "[1] any writing containing information [2] relating to the conduct of government [3] owned, used, or retained by the state or local agency." [FN193] As in O'Neill, courts in states with statutes that embrace this language or similar language will likely find that metadata is a public record and should be produced as part of the requested record. [FN194]

In the third category are state statutes that allow for all records in possession or control of the public agency to be produced. For example, in Kentucky, a public record covers records controlled or owned by a public agency. [FN195] The stat-

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

ute goes on to allow for the disclosure of software or other documentation that is owned or in the possession of the agency because they are deemed public records. [FN196] Similarly, in Illinois, public records are defined as "all records, reports [and] electronic data processing records regardless of physical form or characteristics, having been prepared, received, possessed or under the control of a public body." [FN197] In Oklahoma, a public record is a record that is "created by, received by[,] or under the authority of, or coming into the custody, control or possession of public officials in connection with the transaction of public business" and is accessible for examination by the public. [FN198] Most states appear to fall into this category.

In the fourth category are several states, including Arizona, that have defined records as documents made by employees or pursuant to a duty or state function. Arizona defines a record as "all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics made or received by any government agency in pursuance of law or in connection with the transaction of public business . . . ." [FN199] Similarly, Alabama defines a public record as "all written, typed or ***91** printed books, papers, letters, or documents and maps made or received in pursuance of law by the public officers of the state in the transactions of public business." [FN200] Courts in jurisdictions with similar statutes could legitimately claim that some metadata should not be produced with the original records. [FN201]

Finally, the fifth category consists of the states that specifically exclude electronic data or information created by software in their definition of a public record. In Iowa, a "government body may provide, restrict, or prohibit access to data processing software developed by the government body, regardless of whether the data processing software is separated or combined with a public record." [FN202] A court would probably interpret a statute like this by separating the actual record and the accompanying metadata.

C. Lake v. City of Phoenix: Statutory Interpretation

In Lake, the appellate court, although overturned, addressed open records law based almost completely upon the textual interpretation of the statute, [FN203] which is significant because future cases may rely heavily on statutory interpretation to solve such disputes and to determine if system metadata should be produced. In that case, the question addressed was whether the definition of public records includes metadata, as defined through judicial interpretation of various statues throughout the United States. [FN204] The court of appeals found it did not meet that definition. [FN205] However, the textual argument does not produce a definitive or unambiguous result because the Arizona legislature has not defined what constitutes a public record. In addition, the Arizona State Legislature and the Arizona courts have confused the issue more by using the terms "record" and "public record" interchangeably. [FN206] Therefore, the definition of what must be produced as a public record is ambiguous, requiring further inquiry into structure, purpose, and policy arguments.

***92** Moreover, even if the court did find metadata failed to meet the definition of a record or a public record, the inquiry must continue. Arizona Revised Statutes § 39-121 provides that "public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours." [FN207] Arizona case law has defined "other matters" as "includ[ing] documents which are not required by law to be filed as public records, but which relate to matters essential to the general welfare of taxpayers." [FN208] Indeed, the statute does not appear to require that the ESI be a record, much less a public record, to be subject to inspection.

Moreover, given the use of the word "custody" in the definition of what must be produced as public record, this statute seems to place Arizona in the third category of statutes, defined above, rather than the fourth category. Because metadata is in the state officer's custody, it probably should be produced. However, given the ambiguity and varying interpretations of Arizona Revised Statutes § 39-121, the Arizona Supreme Court looked primarily at purpose and policy considerations in making its ruling. The remaining paragraphs in this section will review the purpose and policy arguments supporting and opposing the production of metadata.

The government advanced several purpose and policy arguments in its Petition for Review to the Arizona Supreme Court. Its brief noted that metadata is not a record because "[m]etadata is not received by a governmental agency, but is in-

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

stead stored on a computer without any volitional act or knowledge of receipt by the governmental agency." [FN209] Furthermore, it argued metadata should not be produced because "when typing, an officer is unaware of all the metadata being created with each key stroke and doesn't intentionally cause the storage of draft words, phrases or sentences within the contextual metadata of the word processing system." [FN210]

The government and amici went on to argue that "if all metadata, as a global category, are public records, then the undue burden of public record identification, production, and preservation is exacerbated." [FN211] Additionally, "once [the metadata is] recovered, the City would need to pay for each item recovered to be reviewed to determine if the item of metadata contains any confidential or private information requiring redaction," causing an "administrative nightmare." [FN212] In conclusion, the Petition for ***93** Review noted that "as valuable as the concept of 'open government' is, it must be tempered with the freedom of public servants to breathe and think, and the ability of government to function without crippling burdens of time, expense and harassment." [FN213]

On the other hand, Officer Lake and amici relied on several policy arguments to support their contentions. Specifically, Officer Lake's Petition for Review argued that metadata was part of the requesting document that cannot be separated from the file itself. [FN214] Thus, Lake's specific metadata request relating to his supervisor was deemed more than a request for some "raw data whose purpose is a mere tool to create records." [FN215] The amici further supported Officer Lake's position by contending that the "production of records in their native format will actually be cheaper and faster than printing or copying hundreds or even thousands of pages of hard copy documents," [FN216] that Arizona open records laws lead to an informed citizenry, [FN217] and that narrowing the definition of public records leads to concealing information relating to the government's conduct. [FN218] The Arizona Supreme Court concurred with Officer Lake, leading to the unanimous reversal of the court of appeals' decision.

D. Lake v. City of Phoenix: Applying the Sedona Conference Cooperation Proclamation

The Sedona Conference Cooperation Proclamation insists that as more information becomes available and as discovery becomes more costly, cooperation is the only way that discovery can continue without the costs spiraling out of control, forecasting the breakdown of the civil justice system if costly adversarial discovery remains as the status quo. [FN219] In this Proclamation, the Sedona Conference created awareness; announced this call to action; and discussed several "toolkits," including resources for practitioners, courts, and even administrators to avoid costly electronic ***94** discovery disputes. [FN220] The Sedona Conference Cooperation Proclamation has already gained wide acceptance among federal judges [FN221] and courts. [FN222]

Since this Proclamation has been released, at least one commentator has interpreted it and taken it further. In Bull's-Eye View of Cooperation in Discovery, [FN223] Professor Gensler notes that there are three levels of cooperation: (1) the outer layer, or that required by the federal rules; (2) the middle layer, or the voluntary cooperation based on issues or arguments that have already been decided by federal courts; and (3) the inner layer or bull's-eye, which consists of discovery calculated "to achieve targeted and efficient discovery." [FN224]

At the outer layer, the federal rules require some cooperation. The parties must engage in a Rule 26(f) meet and confer conference; [FN225] must participate in discovery in good faith; [FN226] and must not make disclosures as a means to harass, manipulate, or drive up the cost of litigation. [FN227] At the middle layer, the federal courts have decided hundreds (perhaps thousands) of e-discovery opinions. [FN228] Based on the expected decision of the court, parties can voluntarily cooperate and compromise, rather than engage in costly court battles that have already been addressed by other courts. [FN229] And at the inner layer, parties may cooperate and target discovery to attain meaningful information and reach the merits of the case without making the costs of discovery prohibitive. [FN230] This requires a non-adversarial approach, knowledge of case law, an effective use of the Rule 26(f) conference, and "an iterative process keyed off targeted initial inquiries." [FN231] Arguably, this approach can be adopted in the open records context.

In Lake, the parties did not cooperate. The City refused the requests, and the plaintiff filed a special action to compel the

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

production of the ***95** metadata. [FN232] Instead, Officer Lake went so far as to claim that the police department and the City were retaliating against him. [FN233] If the parties discussed this matter and listened to what the other side wanted, the parties could have mediated this dispute. If necessary, Officer Lake could have narrowed his request to the specific records that were attainable, or the City could have volunteered that the records and the metadata related to specific information be inspected at Officer Lake's convenience. Instead, this matter became contentious, time consuming, and costly, as both parties have most likely trumped the value of the initial litigation on attorney's fees with the present appeals.

V. A Matter for the Legislature?

The legislature has an opportunity to address this issue, if it chooses. This section will provide a few suggestions that the legislature can take to protect cities and agencies, while still allowing for the production of metadata, including (1) clarifying the enabling statute, (2) distinguishing between a record and a public record, and (3) making provision for cooperation.

First, the legislature should clarify Arizona Revised Statutes § 39-121. Section 39-121 provides that "[p]ublic records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours." [FN234] "Other matters" has been interpreted by case law; however, this provision has not been interpreted in relation to metadata, as the Lake decision only answered if certain types of metadata are public records in Arizona. Therefore, the legislature could clarify this statute's meaning. If the legislature desires that all metadata and other electronically stored information be included, it should specifically say so to eliminate any confusion.

Second, the legislature should definitively make the distinction between a record and a public record in relation to all electronically stored information. This distinction can be clarified by noting, similar to other states, that "public records" includes all records, including system metadata, and excluding personal or private information or other information specifically exempted.

Third, the legislature should set standards for cooperation. Public records requests should not be used as a "second discovery" at the expense ***96** of the government. Similar to the outer layer of the Bull's Eye model (specific rules allowing for cooperation), the government should set forth some standards to prevent records from being destroyed and to allow for the preservation and production of public records to keep government records accessible to the public. Moreover, the Carlson case discussed that there is a proportionality test that can be employed to weigh the value of the public record. [FN235] But the government should go further. The legislature should set forth other rules that allow for cooperation, including allowing questionable records or records that are difficult to produce be reviewed on a case-by-case basis through a mandatory meet-and-confer conference.

Similar to the middle layer (predictable results), the legislature should define its rules in a manner that produces expected results. In open records law, there is little to stop records from being produced in a harassing manner or from a requesting party from significantly overburdening the government, aside from the proportionality test outlined in the Carlson case, as a public record has a presumption in favor of production. There needs to be some mechanism to determine what open records requests are reasonable, especially as more and more information is stored on the computer without the user's knowledge.

Finally, similar to the inner layer, the preservation and production of certain records should be calculated to produce the requested documents needed in a timely manner. This requires cooperation and the needs for the implementation of certain procedures. The best way to allow this is to require the parties to cooperate and to narrow, limit, and define the scope of the records in questionable cases, especially those that involve electronically stored information where the cost of production is high or preservation obligations may be burdensome.

More importantly, perhaps, is the need for state and local government agencies to have electronic record management procedures (and resources) in place to respond quickly and efficiently to future open records requests involving ESI. This will require the government to identify what data sources need to be preserved; to review the requested records for privilege, relevance, and private records; and to produce records responsive to the open records requests. Moreover, these records will

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

need to be structured appropriately from the point of creation, and managed in a way that will allow for proper identification and redaction before production.

Therefore, establishing guidelines, planning for production, and cooperating appear to be key ways to save the expense of a trial and to prevent unnecessarily high costs associated with the production of ESI. The ***97** legislature should look to The Sedona Conference Cooperation Proclamation, the law review article mentioned above, and the eleven court opinions that have endorsed this Proclamation as a good first step to have the parties manage, define, and limit the scope of the open records request to keep the costs of production down.

VI. Conclusion

The high profile nature of Lake v. City of Phoenix brings the issue of the production of metadata through open records requests to the forefront. This decision keeps government transparent, allows for easier access to information, and ensures the "the real record" may be validated. However, there are still questions left unanswered. The purpose of open records law is to attain the requested documents without litigation. The legislature could set up guidelines to account for identifying, preserving, and producing information to limit costs and exposure for the failure to produce.

[FNa1]. David W. Degnan is an associate attorney at Koeller, Nebeker, Carlson & Haluck, LLP. All thoughts and comments do not necessarily represent those of Koeller, Nebeker, Carlson & Haluck, LLP.

[FN1]. See Jason Baron & John Paul, Information Inflation: Can the Legal System Adapt?, 13 RICH. J.L. & TECH. 10 (2007).

[FN2]. In re Bristol-Meyers Squibb Securities Litigation, 205 F.R.D. 437, 440 n.2 (D.N.J. 2002) ("According to a University of California study, 93% of all information generated during 1999 was generated in digital form, on computers. Only 7% of information originated in other media, such as paper.").

[FN3]. See John H. Jessen, Special Issues Involving Electronic Discovery, 9 KAN. J.L. & PUB. POL'Y 425, 428 (2000) (explaining that 100,000 employees could write approximately 22 million email messages in only one week's time).

[FN4]. These are commonly referred to as thumb drives. See PML v. Hartford Underwriters Ins. Co., No. 05-CV-70404-DT, 2006 WL 3759914, at *7 (E.D. Mich. Dec. 20, 2006) (discussing thumb-drives).

[FN5]. See Kenneth J. Withers, Ephemeral Data and the Duty to Preserve Discoverable Electronically Stored Information, 37 U. BALT. L. REV. 349 (2008).

[FN6]. Michael R. Arkfeld, Arkfeld on Electronic Discovery and Evidence § 1.2(A) (2d 2007).

[FN7]. See generally Withers, supra note 5.

[FN8]. Textsfromlastnight.com is a hilarious example of text messages that were written without considering the possibility of future litigation. See generally Texts From Last Night, www.textsfromlastnight.com (last visited Sept. 13, 2009).

[FN9]. See generally Withers, supra note 5.

[FN10]. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004); Zubulake v. UBS Warburg LLC, 382 F. Supp. 2d 536 (S.D.N.Y. 2005).

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN11]. See Lake v. City of Phoenix, 207 P.3d 725, 732-34 (Ariz. Ct. App. 2009).

[FN12]. Brief of Amicus Curiae First Amendment Coalition of Arizona, Inc., et al., Lake v. City of Phoenix, 207 P.3d 725, (Ariz. Ct. App. 2009) (No.1 CA-CV-7-0415), available at http://www.ananews.com/flyers/amicus_brief2009.pdf [hereinafter First Amendment Amicus Brief].

[FN13]. See infra section II.

[FN14]. See infra section III.

[FN15]. See infra section IV.

[FN16]. See infra section V.

[FN17]. See generally Lake v. City of Phoenix, 207 P.3d 725 (Ariz. Ct. App. 2009).

[FN18]. Id. at 725, 738 (majority and dissent opinions, respectively).

[FN19]. State Bar of Ariz. Ethics Op. 07-03 (Nov. 2007).

[FN20]. See Griffis v. Pinal County, 156 P.3d 418, 421 (Ariz. 2007) (en banc).

[FN21]. See infra note 230.

[FN22]. See infra note 236.

[FN23]. Lake, 207 P.3d at 725, 728.

[FN24]. Id. at 730.

[FN25]. Id. at 728.

[FN26]. Id.

[FN27]. Id.

[FN28]. Lake v. City of Phoenix, 207 P.3d 725, 728 (Ariz. Ct. App. 2009). The fact that the EEO complaint had already been filed will be significant later in the analysis.

[FN29]. The seven Lieutenants will be referred to as Officer Lake's supervisors.

[FN30]. Lake, 207 P.3d at 729.

[FN31]. Id.

[FN32]. Id. at 734-35.

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN33]. Id. at 735.

[FN34]. Id. at 736.

[FN35]. Id.

[FN36]. Id. at 736.

[FN37]. Id. at 728.

[FN38]. Id.

[FN39]. Id.

[FN40]. Id. at 729-30.

[FN41]. Id. at 734.

[FN42]. Id. at 735.

[FN43]. Id. at 730.

[FN44]. Griffis v. Pinal County, 156 P.3d 418, 422 (Ariz. 2007).

[FN45]. 815 P.2d 900, 907-08 (Ariz. 1991).

[FN46]. Lake v. City of Phoenix, 207 P.3d 725, 730 (Ariz. Ct. App. 2009).

[FN47]. Salt River, 815 P.2d. at 908.

[FN48]. Lake, 207 P.3d at 730.

[FN49]. Id. at 730-31 (citing Salt River, 168 Ariz. at 538-39).

[FN50]. See id. at 731.

[FN51]. Id. at 731.

[FN52]. Id.

[FN53]. Id.

[FN54]. Id.

[FN55]. Id.

[FN56]. Id.

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN57]. Id.

[FN58]. Id.

[FN59]. Id.

[FN60]. Id. at 734.

[FN61]. Id.

[FN62]. Id. at 732.

[FN63]. Id. at 740 ("I agree with the majority that not every record created is necessarily a 'public record.' Otherwise, 'a grocery list written by a government employee while at work, a communication to schedule a family dinner, or a child's report card stored in a desk drawer in a government employee's office would be subject to disclosure."') (Norris, J., dissenting).

[FN64]. Id. at 733.

[FN65]. Lake, 207 P.3d at 733 n.10 (noting that the legislature uses public records and records interchangeably); Carlson v. Pima County, 687 P.2d 1242, 1246 (Ariz. 1984) ("All records required to be kept are presumed open to the public for inspection as public records.").

[FN66]. Lake, 207 P.3d at 732.

[FN67]. Lake, 207 F.3d at 729 n.6.

[FN68]. Id.

[FN69]. Id. at 734 n.13 (referring to O'Neill v. City of Shoreline, 187 P.3d 822 (Wash. App. 2009)).

[FN70]. Lake, 207 P.3d at 734.

[FN71]. Id. at 735-37.

[FN72]. Id. at 739.

[FN73]. Lake, 207 P.3d at 739 (Norris, J., dissenting).

[FN74]. Id. at 739.

[FN75]. Id. at 739.

[FN76]. Id at 740 (emphasis in original).

[FN77]. Lake v. City of Phoenix, 218 P.3d 1004 (Ariz. 2009).

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN78]. Id. at 1005.

[FN79]. Id. at 1006.

[FN80]. Id. at 1008.

[FN81]. Id. (holding "that when a public entity maintains a public record in an electronic format, the electronic version of the record, including any embedded metadata, is subject to disclosure under our public records law").

[FN82]. Id.

[FN83]. See id. at 1004.

[FN84]. Jon Stokes, Lobbyists Beware: Judge Rules that Metadata is Public Record (Oct. 29, 2009), http://arstechnica.com/tech-policy/news/2009/10/lobbyists-beware-arizona-rules-metadata-is-public-record.ars.

[FN85]. Lake, 218 P.3d at 1008 n.5.

[FN86]. Id. at 1008.

[FN87]. Compare ARIZ. REV. STAT. ANN. § 39-101 (2005), with FED. R. CIV. P. 26, 34, 37 and advisory committee notes.

[FN88]. See ARIZ. REV. STAT. ANN. § 39-121.

[FN89]. Lake v. City of Phoenix, 207 P.3d 725, 739 (Ariz. Ct. App. 2009).

[FN90]. See Withers, supra note 5.

[FN91]. See infra Section III(A).

[FN92]. See infra Section III(B).

[FN93]. See infra Section III(C).

[FN94]. BLACK'S LAW DICTIONARY 1080 (9th ed. 2009).

[FN95]. Microsoft Corp., How to Minimize Metadata in Word 2003, http:// support.microsoft.com/kb/825576 (last visited Sept. 2, 2009).

[FN96]. THE SEDONA CONFERENCE WORKING GROUP SERIES, THE SEDONA GUIDELINES: BEST PRACTICES GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE 80 (Sept. 2005).

[FN97]. 230 F.R.D. 640, 652 (D. Kan. 2005).

[FN98]. Aguilar v. ICE, 255 F.R.D. 350, 353 n.2 (S.D.N.Y. 2008) ("TIFF is a static format similar to PDF that creates a mirror image of the electronic document.") (citations omitted).

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN99]. Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 652 (D. Kan. 2005); Aguilar v. ICE, 255 F.R.D. 350, 353 n.4 (S.D.N.Y. 2008) ("Native format is the 'default format of a file,' access to which is 'typically involved through the software program on which it was created."') (citation omitted).

[FN100]. Williams, 230 F.R.D. at 652.

[FN101]. Id. at 647.

[FN102]. Id. at 652-53.

[FN103]. Aguilar v. ICE, 255 F.R.D. 350, 353-54 (S.D.N.Y. 2008).

[FN104]. Id. at 354.

[FN105]. Id.

[FN106]. Id.

[FN107]. Id. at 355.

[FN108]. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, SUGGESTED PROTOCOL FOR DISCOVERY OF ELECTRONICALLY STORED INFORMATION, 25-28, http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf (last visited Feb. 22, 2010).

[FN109]. Aguilar, 355 F.R.D. at 355.

[FN110]. Lake v. City of Phoenix, 218 P.3d 1004 (Ariz. 2009) (internal quotations omitted).

[FN111]. Id. at 1005 (Ariz. 2009) (internal quotations omitted).

[FN112]. FED. R. CIV. P. 26(b)(1).

[FN113]. See FED. R. CIV. P. 26(b) and 2006 advisory committee's note.

[FN114]. FED R. CIV. P. 34(b) and 2006 advisory committee's notes.

[FN115]. Armor Screen Corp. v. Storm Catcher, Inc., No. 07-81091-Civ., 2009 U.S. Dist. LEXIS 59927 (S.D. Fla. June 29, 2009) (holding that defendants' failure to meet and confer regarding the form of production showed a lack of "effort" even if the documents were produced in an unreadable format).

[FN116]. Treppel v. Biovail Corp., 233 F.R.D. 363, 374 (S.D.N.Y. 2006).

[FN117]. THE SEDONA CONFERENCE WORKING GROUP SERIES, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATION & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 61 (2d. ed. June 2007).

[FN118]. Id.

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN119]. Id.

[FN120]. Armor Screen Corp. v. Storm Catcher, Inc., No. 07-81091-Civ., 2009 U.S. Dist. LEXIS 59927 (S.D. Fla. June 29, 2009) (denying a second production of documents in a usable form to a party that failed to meet and confer).

[FN121]. Wyeth v. Impax Labs., Inc., No. Civ.A. 06-222-JJF, 2006 WL 3091331, at *2 (D. Colo. Nov. 29, 2006).

[FN122]. Nova Measuring Instruments, Ltd. v. Nanometrics, Inc., 417 F. Supp. 2d 1121, 1122-23 (N.D. Cal. 2006) (ordering a party to produce documents in electronic format pursuant to the parties agreement).

[FN123]. Columbia Pictures v. Bunnell, No. CV 06-1093FMCJCX, 2008 WL 2080419 (C.D. Cal. May 29, 2007) (ruling that the defendant should produce the internet protocol addresses that were temporarily stored in RAM starting seven days after the court's ruling was made).

[FN124]. THE SEDONA CONFERENCE WORKING GROUP SERIES, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATION & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 60 (2d. ed. June 2007).

[FN125]. See Aguilar v. ICE, 255 F.R.D. 350, 356 (S.D.N.Y. 2008) (noting that the second edition of the Sedona Principles revised the metadata section to take “into account the need to produce reasonably accessible metadata”).

[FN126]. Laethem Equip. Co. v. Deere, 2009 U.S. Dist. LEXIS 76840 (E.D. Mich. Aug. 27, 2009) (requiring each party to pay for their own discovery because the prior discovery attempts were used to drive up the costs of litigation).

[FN127]. Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640 (D. Kan. 2005).

[FN128]. Id. at 653.

[FN129]. Williams v. Sprint/United Mgmt. Co., 2006 WL 3691604 (D. Kan. Dec. 12, 2006).

[FN130]. THE SEDONA CONFERENCE WORKING GROUP SERIES, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATION & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 61 (2d. ed. June 2007).

[FN131]. See FED. R. CIV. P. 26(b)(2)(B) and (b)(2)(C).

[FN132]. Id.

[FN133]. See id.

[FN134]. See id.

[FN135]. See id.

[FN136]. See id.

[FN137]. See id.

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN138]. THE SEDONA CONFERENCE WORKING GROUP SERIES, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATION & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 61 (2d. ed. June 2007).

[FN139]. See ARIZ. REV. STAT. ANN. § 39-121 (2008).

[FN140]. Id.

[FN141]. See, e.g., id.

[FN142]. Crossman v. DTIS, No. 08055 (Cal. City Ct. Jan. 27, 2009), http://www.sfbos.org/ftp/uploadedfiles/sunshine/Documents/08055_Kimo%20Crossman%CC20v%CC20DTIS,%CC20SFGTV%CC20&%CÆ O.pdf.

[FN143]. ARIZ. REV. STAT. ANN. § 41-1350 (2005).

[FN144]. See generally Lake v. City of Phoenix, 207 P.3d 725 (Ariz. Ct. App. 2009).

[FN145]. KAN. STAT. ANN. § 45-217(f)(2) (distinguishing public and private documents); MONT. CODE ANN. § 2-6-101(3) (dividing writing into certain classes, including public and private).

[FN146]. See, e.g., Lake, 207 P.3d 725.

[FN147]. MINN. DATA PRACTICES ACT § 13.02(7).

[FN148]. Lake, 207 P.3d at 740.

[FN149]. Id. at 728.

[FN150]. Id. (internal quotations omitted).

[FN151]. First Amendment Amicus Brief, supra note 12, at 14 (listing a number of accomplishments of journalists benefiting from using metadata in an open records request).

[FN152]. See Crossman v. DTIS, No. 08055 (Cal. City Ct. Jan. 27, 2009), http://www.sfbos.org/ftp/uploadedfiles/sunshine/Documents/08055_Kimo%20Crossman%CC20v%CC20DTIS,%CC20SFGTV%CC20&%CÆ O.pdf.

[FN153]. Id. at 1-2.

[FN154]. Id. at 2.

[FN155]. Id. at 2-3.

[FN156]. See O'Neill v. City of Shoreline, 187 P.3d 822 (Wash. Ct. App. 2009).

[FN157]. Id. at 826.

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN158]. Id.

[FN159]. Id.

[FN160]. Id.

[FN161]. Id.

[FN162]. Id.

[FN163]. Id.

[FN164]. Id.

[FN165]. Armstrong v. Executive Office of the President, Office of Admin., 1 F.3d 1274 (D.C. Cir. 1993), rev'd on other grounds, Citizens for Responsibility & Ethics in Wash. v. Cheney, 593 F. Supp. 2d 194 (D.D.C. 2009).

[FN166]. Id. at 1288.

[FN167]. Id.

[FN168]. Tennessean v. Elec. Power Bd. of Nashville, 979 S.W.2d 297 (Tenn. 1998).

[FN169]. Id. at 299.

[FN170]. See id. at 300.

[FN171]. Id. at 300.

[FN172]. Id. at 304.

[FN173]. Id.

[FN174]. Hamer v. Lentz, 132 Ill. 2d 49 (1989).

[FN175]. Id. at 53-54.

[FN176]. Id. at 55-56.

[FN177]. Id. at 56.

[FN178]. Id.

[FN179]. Seigle v. Barry, 422 So. 2d 63 (Fla. Dist. Ct. App. 1982).

[FN180]. Id. at 64-65.

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN181]. Id. at 65.

[FN182]. Id. at 66.

[FN183]. Id.

[FN184]. Gabriels v. Curiale, 628 N.Y.S.2d 882, 882 (App. Div. 1995).

[FN185]. Id.

[FN186]. Id.

[FN187]. Id.

[FN188]. The author notes that this is not a 50-state survey. The author also concedes that the definition proffered by some states do not fit into the categories defined above as nicely as the author would hope.

[FN189]. GA. CODE ANN. § 50-18-70(a) (West 2009).

[FN190]. R.I. GEN. LAWS §§ 38-2-2(4) and 38-2-3(a) (1998).

[FN191]. Crossman v. DTIS, No. 08055 (Cal. City Ct. Jan. 27, 2009), http://www.sfbos.org/ftp/uploadedfiles/sunshine/Documents/08055_Kimo%20Crossman%CC20v%CC20DTIS,%CC20SFG TV%CC20&%CÆ O.pdf.

[FN192]. MINN. STAT. ANN. § 13.02(7) (West 2009).

[FN193]. O'Neill v. City of Shoreline, 187 P.3d 822, 824 (Wash. Ct. App. 2009).

[FN194]. Id.

[FN195]. KY. REV. STAT. ANN. § 61.870(2) (West 2009).

[FN196]. Id.

[FN197]. 5 ILL. COMP. STAT. ANN. 140/2(c) (West 2009).

[FN198]. OKLA. STAT. ANN. tit. 51, § 25A.3(1) (West 2005).

[FN199]. ARIZ. REV. STAT. ANN. § 41-1350 (2005).

[FN200]. ALA. CODE § 41-13-1 (2000).

[FN201]. See generally Lake, 207 P.3d at 725.

[FN202]. IOWA CODE ANN. § 22.3A(2) (West 2009).

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN203]. See Lake, 207 P.3d at 725.

[FN204]. Salt River Pima-Maricopa Indian Cmty. v. Rogers, 815 P.2d 900, 908 (Ariz. 1991) (noting the term "public record" comprehends three alternative definitions in American case law, which were set forth in Mathews v. Pyle, 251 P.2d 893, 895 (1952)).

[FN205]. See Lake, 207 P.3d at 729-34.

[FN206]. Carlson v. Pima County, 687 P.2d 1242, 1246 (Ariz. 1984) ("all records required to be kept under A.R.S. § 39-121.01(B) are presumed open to the public for inspection as public records").

[FN207]. ARIZ. REV. STAT. ANN. § 39-121 (2009) (emphasis supplied).

[FN208]. Salt River, 815 P.2d at 908.

[FN209]. Appellee's Supplemental Br., at 3, Lake v. City of Phoenix, 207 P.3d 725 (Ariz. Ct. App. 2009) (No. 1-CA-CV 07-0415).

[FN210]. Id. at 4.

[FN211]. Id. at 14.

[FN212]. Id. at 16.

[FN213]. Id. at 19.

[FN214]. Id. at 4.

[FN215]. Id. at 3-4.

[FN216]. First Amendment Amicus Brief, supra note 12, at 11.

[FN217]. Brief for Amicus Curiae Associated Press et al., at 1, Lake v. City of Phoenix, 207 P.3d 725 (Ariz. Ct. App. 2009) (No. 1 CA-CV-7-0415).

[FN218]. Id. at 4.

[FN219]. THE SEDONA CONFERENCE WORKING GROUP SERIES, THE SEDONA CONFERENCE COOPERATION PROCLAMATION (2008), http:// www.thesedonaconference.org/content/tsc_cooperation_ proclamation/proclamation.pdf.

[FN220]. Id. at 2.

[FN221]. Id. at 4-6.

[FN222]. See, e.g., Covad Comm's Co. v. Revonet, Inc., 258 F.R.D. 5, 22-23 (D.D.C. May 27, 2009); Ford Motor Co. v. Edgewood Props. Inc., 257 F.R.D. 418, 424 (D.N.J. May 19, 2009).

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN223]. Steven S. Gensler, Bull's Eye View of Cooperation in Discovery, 10 Sedona Conf. J. 363 (Supp. 2009).

[FN224]. Id. at 363.

[FN225]. FED. R. CIV. P. 26(f).

[FN226]. FED. R. CIV. P. 37(a) and advisory committee's note.

[FN227]. FED. R. CIV. P. 26(g) and advisory committee's note; see Gensler, supra note 223, at 366-68.

[FN228]. Steven S. Gensler, Bull's Eye View of Cooperation in Discovery, 10 Sedona Conf. J. 363, 366-68 (Supp. 2009).

[FN229]. Id. at 367.

[FN230]. Id. at 365.

[FN231]. Id. at 372.

[FN232]. Lake v. City of Phoenix, 207 P.3d 725, 725 (Ariz. Ct. App. 2009).

[FN233]. Id. at 728.

[FN234]. ARIZ. REV. STAT. ANN. § 39-121 (2009).

[FN235]. See Carlson v. Pima County, 687 P.2d 1242 (Ariz. 1984).

3 Phoenix L. Rev. 69

END OF DOCUMENT

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.