

## METADATA UNDER FOIA

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States' open-records statutes have been on the book for decades. For instance, Illinois' Freedom of Information Act (FOIA) first took effect in 1984.<sup>1</sup> In that past quarter century, technology has made a few advancements.<sup>2</sup> During that time, we've gone from typewriters and carbon paper to Net books and instant messaging. While few would disagree that our technological achievements have added to our quality of life, it has posed some challenges to local officials trying to administer open-records laws. Conceptually, FOIA and other open-records laws were designed around the idea that "records" consisted primarily of paper documents. The concept behind those laws becomes less valid in an increasingly paperless world. Nowhere is this more evident than in the idea of "metadata."

Cases from Arizona and Washington have recently ruled that metadata from word-processing and spreadsheet programs is subject to disclosure under the states' open-records statutes. If these rulings are adopted elsewhere, there could be significant impacts on the ways in which public records are created, maintained and disclosed. This article discusses the definition of metadata, reviews the cases from other states concerning the issue, discusses some potential issues concerning the application of open-records laws to metadata, and examines whether metadata could qualify as a record under Illinois' FOIA.

### WHAT IS METADATA?

The definition of "metadata" is somewhat fluid and can fluctuate depending upon the context in which it is used. The most common definition of "metadata" is that it is "data about data."<sup>3</sup> While this definition has the benefit about being succinct, it is not overly useful for a legal analysis. We tend to think of metadata as purely a function of electronic records, but it is a much broader concept. Examining this broader concept may help determine whether metadata is subject to disclosure under FOIA.

The fundamental concept of metadata is that it is information about a thing—without being part of that thing, itself.<sup>4</sup> To get a better idea of what this means, let's look at a few non-electronic examples of metadata. The novel *Moby Dick* begins with the famous line, "Call me Ishmael." But outside of the actual text of the novel, there's also information about the novel: the title, the author, the publication dates, the edition information, the ISBN number, even the picture on the front cover of the book. All of this is information about the novel, but its not part of the novel itself. All of this information is metadata. Another example



is a card catalog in a library. A card catalog contains information about the details and location of the books in the library, but is not part of those books.<sup>5</sup>

Things get a bit fuzzier, however, when we talk about electronic documents. It is easy to comprehend that a card in a card catalog is not part of the book that it describes—it is clearly a separate entity. But computer programs compress the distance between the metadata and the data that it describes. The program file that creates and stores the document is often the same program file that also creates and stores the metadata. This can make it difficult to comprehend where the document ends and the metadata begins. When it comes to electronic documents, courts have defined "metadata" as "information describing the history, tracking or management of an electronic document."<sup>6</sup> This could include a wide range of information depending on the type of program that is used to create the document. For example, in an email, metadata could include such things as the "To," "From," "Subject," and "Date" fields of an e-mail. In a Microsoft Office document, the metadata could include:

- comments, revision marks from tracked changes, versions, and ink annotations;
- document properties and personal information; and
- headers, footers and watermarks.<sup>7</sup>

For websites, metadata could include the page title, keywords, description, publish date, review date, expire date and author.<sup>8</sup>

As a basic rule, the very definition of "metadata" requires that it be information that is separate and apart from the information that it describes.

### METADATA RULINGS IN OTHER STATES

Courts in two states have ruled that at least some forms of metadata are subject to disclosure under those states' open-records laws. The states are Washington and Arizona.

#### THE WASHINGTON CASE

In the case of *O'Neill v. City of Shoreline*, a Washington appellate court determined that an e-mail's metadata, which was attached to a public official's e-mail, was subject to disclosure under the state's open-records statute.<sup>9</sup> In this case, the metadata consisted of the To, From, Date, & Subject fields, the sender's IP address and other data embedded in the e-mail.

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During a city council meeting, the deputy mayor mentioned that she had received an e-mail from two citizens concerning a zoning issue. One of the persons identified was in the audience, but had not sent the e-mail. She requested to see a copy. The deputy mayor forwarded the e-mail from her personal computer to a public account, and the original metadata was stripped off in the process. The requester was given a copy of the forwarded e-mail, but requested to see the original, which had since been deleted from the deputy mayor's computer. The Washington Court of Appeals held that requested metadata is a "public record" within the Public Records Act and is subject to disclosure.

In making its holding, the court looked at the specific language of the Washington statute. Under that statute, a "public record" contains any writing containing information relating to conduct of government or the performance of a governmental function.<sup>10</sup> A "writing" was defined as:

handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.<sup>11</sup>

The court determined that the metadata associated with an e-mail, or some portion of it, falls within the broad definition of a "writing" under the statute.<sup>12</sup> Interestingly, the court hedged its bets and was unwilling to go so far as to say that all metadata constituted a writing. It only went as far as to say that some metadata looks like some of the examples of a "writing" set forth under the statute. Having determined that at least some of the metadata was a writing, it then held that the writing related to the conduct of government or the performance of a governmental function. It shows the e-mail addresses of persons who may have knowledge of alleged government improprieties in dealing with local governmental matters. Therefore, metadata falls squarely within the statute's definition of "public record."

### THE ARIZONA CASE

Recently, the Arizona Supreme Court ruled that metadata is subject to disclosure under that state's public records laws.<sup>13</sup> The court specifically held that any public entity that maintains a public record in electronic format, then the electronic version, including any embedded metadata, is subject to disclosure under the state's public records laws.

In the case, *Lake v. City of Phoenix*, the plaintiff was a police officer who sought disclosure of notes written by his supervisor regarding his work performance. After reviewing the paper copies of the notes, the plaintiff suspected that the notes had

been backdated when prepared on a computer. Therefore, the plaintiff sought the metadata to make this determination. The city denied the request, contending that metadata is not a public record under the state's public records laws.

The Arizona Supreme Court disagreed with the city's assessment and determined that a "public record" in electronic format includes the embedded metadata because it is part of the underlying document; the metadata does not stand on its own. The court did go on to say that public bodies are not required to store documents in an electronic format, nor are they required to create new files to create metadata. Moreover, the public body is not required to specifically identify metadata—it need only provide an electronic copy with the same embedded data as the original.<sup>14</sup>

### ISSUES WITH METADATA

The requirement that metadata be disclosed poses several potential issues. First among them is the issue of inconsistent application of metadata between electronic and non-electronic documents. As we discussed, the concept of metadata is not exclusive to electronic documents. It applies to paper documents as well. But, when it comes to paper documents, the metadata is generally not considered to be part of the underlying document. For example, few would argue that a card-catalog entry is part of the book that it describes. There is a temptation, however, to treat electronic metadata as a special case. The mere proximity of the metadata to the underlying document in an electronic file appears to be sufficient reason for many to gloss over the difference and treat metadata as part of the underlying document.

Another issue is the potential inconsistent application of types of metadata in electronic documents. As we saw in the Washington case, the court was forced to hedge its bets and declare that "at least some" of the metadata was subject to disclosure. Metadata has such a broad and varying definition that it is impossible to conclude that all metadata in all forms are part of a public record. Certain versioning data or information about website users would be metadata that courts would hopefully be reluctant to require be disclosed. The absence of any bright-line rule concerning metadata will lead to ambiguity in the administration of the open-records statute.

A final issue is the disincentive that metadata disclosure requirements would have on a public body's use of technology. If a public body wants to avoid having to disseminate metadata for a document, it need only use a typewriter—or even a pencil. This practice would bring the public body back to the state of technology in 1984, when FOIA was designed and drafted.



This, of course, jettisons the efficiencies that technology brings, but it avoids the trap for the unwary that metadata can pose.

### WHAT DOES THIS MEAN FOR ILLINOIS' FOIA?

As you are hopefully aware, sweeping changes to Illinois FOIA took effect on January 1, 2010. Nothing in these new changes specifically addresses the issue of metadata. The statute, itself, is silent on the issue. Additionally, there has not yet been any case law concerning the handling of metadata. We simply do not have any direction as to how this issue will ultimately unfold in Illinois.

We might, however, expect the cases from other jurisdictions to inspire somebody to force the issue in Illinois. In the interim, there are several steps that public bodies should consider when it comes to metadata. The first step is to simply be aware of the existence of metadata in your electronic records. Knowing that metadata may be recorded in any document may help prevent the unwanted and surprising disclosure of information later. Additionally, if metadata were required to be disclosed, knowing what metadata exists will help determine whether any statutory exemptions from disclosure apply.

A second step is to control the metadata that is created. The way you create, review and edit documents determines the way that metadata is recorded. Knowing what electronic products you use and how it records metadata will give you options in controlling the creation of that metadata. For instance, many word processors will not record tracked changes as metadata if the "tracked changes" function is never turned on.

### CONCLUSION

The Illinois FOIA does not specifically define or include metadata within its coverage. We will have to wait and see if the Illinois courts include metadata in the FOIA's definition of "public record." Until the issue is clarified, public bodies should take steps to be aware of and control the metadata that they create.

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This monthly column examines issues of general concern to municipal officers. *It is not meant to provide legal advice and is not a substitute for consulting with your municipal attorney.* As always, when confronted with a legal question, contact your municipal attorney because certain unique circumstances may alter any conclusions reached in this article.

- <sup>1</sup> Illinois has the distinction of being the last state in the U.S. to pass an open-records statute.
- <sup>2</sup> 1984 saw the sale of the first Apple Macintosh computer, Sony and Phillips introduced the first commercial CD players, and Sony produced the first 3/12" floppy disk.
- <sup>3</sup> In art and philosophy circles, the word "meta" means "about (its own category)"—therefore, a "metamovie" is a movie about the process of making movies, "metafiction" is a story about devices used in fiction, and "metadata" is "data about the data".
- <sup>4</sup> See generally, Ned Batchelder, *Metadata is Nothing New*, available at <http://nedbatchelder.com/text/metadata-is-nothing-new.html>. Downloaded 11/17/2009.
- <sup>5</sup> See *id.*

- <sup>6</sup> *Williams v. Sprint / United Mgmt. Co.*, 230 F.R.D. 640, 646 (D. Kan. 2005). See also, *Understanding Metadata*, from the National Information Standards Organization (NISO) website available at [www.niso.org/publications/press/UnderstandingMetadata.pdf](http://www.niso.org/publications/press/UnderstandingMetadata.pdf). Downloaded 11/3/2009.
- <sup>7</sup> See generally, *Remove hidden data and personal information from Office documents*, available at <http://office.microsoft.com/en-us/help/HA100375931033.aspx>. Downloaded 11/17/2009.
- <sup>8</sup> See, James Robertson, *Metadata Fundamentals for Internets and Websites*, available at [www.steptwo.com.au/papers/kmc\\_metadata/index.html](http://www.steptwo.com.au/papers/kmc_metadata/index.html). Downloaded 11/17/2009.
- <sup>9</sup> *O'Neill v. City of Shoreline*, 187 P.3d 822 (Wash. App. 2008), rev. granted, 208 P.3d 551 (2009).
- <sup>10</sup> RCW 42.17.020(41) (2006).
- <sup>11</sup> RCW 42.17.020(48) (2006)(emphasis added).
- <sup>12</sup> RCW 42.17.020(48) (2006).
- <sup>13</sup> *Lake v. City of Phoenix*, Arizona Supreme Court No. CV-09-0036-PR (Oct. 29, 2009).
- <sup>14</sup> *Id.*

## MUNICIPAL CALENDAR JANUARY

Amendments to the Open Meetings Act (5 ILCS 120/) and the Freedom of Information Act (5 ILCS 140/) take effect January 1, 2010 (Public Act 96-542) and they require every public body to designate employees, officers, or members to receive training on Open Meetings Act compliance by sending a list of those individuals to the Public Access Counselor (PAC). The training must occur through an electronic training curriculum developed by the PAC within 6 months of January 1, 2010 and annually thereafter. In addition, each public body must designate one or more officials or employees to act as a Freedom of Information Officer. Within six months after January 1, 2010, all FOIA officers must successfully complete an electronic training curriculum provided by the PAC, and they must annually complete the curriculum thereafter. New FOIA officers must complete the curriculum within 30 days after assuming the position. Municipalities have until July 1, 2010, to complete these tasks.

The accounts of the house of corrections shall be closed and balanced on January 1st, and a report regarding the annual operations shall be made and submitted to the corporate authorities and to the Governor. 65 ILCS 5/11-4-5.

Candidates for office who are subject to the Illinois Governmental Ethics Act filing requirements must file a statement at the time of filing for nomination, unless they have filed such a statement within the preceding year. 5 ILCS 420/4A-105, as amended by Public Act 96-550 (effective 8/17/2009).

On or before February 1 of each year, the chief administrative officer of each unit of local government or his/her designee shall certify to the county clerk the names and mailing addresses of those persons required to file statements of economic interest pursuant to the Illinois Governmental Ethics Act. The chief executive officer or his/her designee shall set forth the names in alphabetical order by county of residence and shall certify the list to the county clerk of the counties in which those persons reside. (If the person resides outside of Illinois or in another county, the list shall be sent to the county clerk of the county where the principal office of the unit of local government with which the person is associated is located.) 5 ILCS 420/4A-106.

On or before March 1 of each calendar year, every law enforcement agency is required to submit racial profiling information and other data required to be collected from traffic stops during July through December of the previous calendar year to the Illinois Department of Transportation. 625 ILCS 5/11-212, as amended by Public Act 96-658 (effective 8/25/2009).