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Judge Scheindlin Sends Federal Agencies a "Message" About Their E-Discovery Obligations Under the Freedom of Information Act

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Nat'l Day Laborer Org. Network v. United States Immigration and Customs Enforcement Agency, 2012 U.S. Dist. LEXIS 97863 (S.D.N.Y. July 13, 2012).

Shira A. Scheindlin, U.S.D.J. for the Southern District of New York, has issued a forty-nine-page decision in *Nat'l Day Laborer Org. Network v. United States Immigration and Customs Enforcement Agency* [1] detailing the failure of certain federal agencies and their custodians to adequately search for and disclose some of the electronically stored information requested by the plaintiffs pursuant to their Freedom of Information Act ("FOIA") action. Specifically, Judge Scheindlin held that the defendant-agencies must now coordinate with the plaintiffs to conduct additional, specific and targeted electronic record searches to correct those prior searches she deemed inadequate or insufficient.

Plaintiffs[2] filed a FOIA action against federal agencies seeking disclosure of electronic records related to the Secured Communities inter-agency immigration policy through which the U.S. Immigration and Customs Enforcement Agency ("ICE"), U.S. Department of Homeland Security ("DHS"), Federal Bureau of Investigation ("FBI"), Executive Office for Immigration Review ("EOIR"), and Office of Legal Counsel ("OLC") obtain fingerprints from state and local arrestees in order to operate an immigration/deportation program and database. The Secured Communities initiative, which began in 2008, deviates from long-standing prior practice as it calls for local and state authorities to send fingerprints to DHS in addition to the FBI so that DHS can cross-check an arrestee's immigration status with the national criminal history database. The plaintiffs sought to uncover federal agency communications and documentation which would support their contention that local and state governments have the ability to opt-out of the Secured Communities initiative. The FOIA search the defendants conducted, the largest in ICE's history, cost hundreds of thousands of dollars, took thousands of hours to complete, and resulted in the production of tens of thousands of documents. However, the parties disputed the adequacy of the searches that were conducted in their respective summary judgment motions and cross-motions.

For a defendant-agency to demonstrate compliance with FOIA, "it must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." The search must be reasonably designed to identify and locate responsive documents, but no extraordinary measures must be taken. The search does not need to uncover all documents; however, the failure to design a search that is reasonably calculated to uncover all documents is fatal and cannot be treated as a *de minimis* error. A defendant-agency has the burden to show that its search was adequate by submitting affidavits or declarations demonstrating that a thorough search was conducted. The affidavit or declaration must: 1) identify the relevant files; 2) describe the file system; 3) state whether more searching would reveal additional requested documentation; 4) state all the custodians which are likely to have documents being searched; and 5) state what search terms were used and what type of search was conducted. A search cannot be limited to a record system that is most likely to turn up records, but rather must include all record systems likely to turn up the requested information. The reasonableness of the search is determined by what the defendant knew at the conclusion of the search rather than what is speculated at the search's inception. Judge Scheindlin held that in order for the defendants to meet their burden of establishing adequate searches under FOIA, they must: 1) record and report the search terms used; 2) explain how the search terms were combined, and 3) explain whether the full text of the relevant document was searched.

Although some of the searches were deemed adequate, Judge Scheindlin found that in many instances the defendants either: 1) failed to conduct a search; 2) conducted searches with insufficiently detailed descriptions of what search terms were used; or 3) conducted searches but did not detail the efficacy of the search terms that were used. For example, Judge Scheindlin found inadequate the FBI's treatment of a "non-response" from the Office of General Counsel to its search request as a "no records" search result. Another inadequate search was the failure of the Interoperability Initiatives Unit, which manages the collaboration between the DHS and the FBI with respect to the Secured Communities initiative, to search the files and e-mails of seven former employees. Judge Scheindlin found equally problematic the fact that on several completed searches, the defendants did not provide the search terms used or anything more than a broad conclusory description of how the search was conducted.

Judge Scheindlin opined that "[d]efendants' counsel recognizes that, for over twenty years, courts have required…affidavits [which] set forth the search terms and type of search performed…but somehow, [defendants] have not gotten the message." She went on to explain that the affidavits/declarations must, "contain reasonable specificity of detail rather than merely conclusory statements." Furthermore, Judge Scheindlin found that "most custodians cannot be trusted to run effective searches because designing legally sufficient electronic searches in the discovery or FOIA contexts is not part of their daily responsibilities." When custodians do keep track of the search terms used, Judge Scheindlin said the Court's evaluation of the search is both context and case specific.

In light of the above considerations and the fact that the defendants already devoted significant time and resources towards responding to the plaintiff's FOIA request, Judge Scheindlin ruled that the defendants must conduct additional, specific and targeted searches only for the prior searches that she deemed inadequate or insufficient. Judge Scheindlin made it clear that the defendants are not required to do anything more than that which is required of them under the FOIA. The parties are supposed to coordinate with each other to reach a mutually agreeable list of search terms and protocols. If necessary, the parties can determine whether testing is needed to evaluate and improve the search terms and protocols. Also, the parties have the discretion to decide

whether they would benefit from the use of predictive coding in the searches.

This decision undoubtedly provides significant and valuable guidance about what the Court considers an adequate search under the FOIA. Judge Scheindlin opined that compliance with the rules she set forth will ultimately result in better utilization of parties' time and resources at the outset of the discovery process.

1. Nat'l Day Laborer Org. Network v. United States Immigration and Customs Enforcement Agency, 2012 U.S. Dist. LEXIS 97863 (S.D.N.Y. July 13, 2012). Judge Scheindlin has also demonstrated her expertise in the field of e-discovery in other decisions such as Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003); Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).
2. The plaintiffs are the National Day Laborer Organizing Network, Center for Constitutional Rights, and Immigration Justice Clinic of the Benjamin N. Cardozo School of Law.