LAKE V. CITY OF PHOENIX: IS METADATA A PUBLIC RECORD?

Scott W. Cockerham

INTRODUCTION

In *Lake v. City of Phoenix*,[1] the Arizona Court of Appeals faced the question of whether metadata[2] embedded within an electronic document is accessible under Arizona's public-records statute.[3] Lacking a statutory definition of "public record," the court relied on Arizona common-law definitions from *Mathews v. Pyle*[4] and *Salt River Pima-Maricopa Indian Community v. Rogers*.[5] The majority viewed metadata as a mere "by-product" of the underlying public document, and held that it was not independently accessible under the statute.[6] Judge Patricia K. Norris took the opposite view in a dissenting opinion.[7] She argued that metadata was "integral to the original electronic documents," and as such, should be accessible just like a paper copy.[8] This Case Note addresses several post-*Lake* questions. First, which opinion correctly interprets metadata's relationship to an electronic document? Second, how will *Lake* impact this issue in other jurisdictions? Finally, how does the federal government's interpretation of metadata requests under the federal Freedom of Information Act (FOIA) compare to the current law in Arizona?[9]

---

1. 1 CA-CV 07-0415, 2009 WL 73256 (Ariz. Ct. App. Jan. 13, 2009).
2. Metadata is generally defined as "information describing the history, tracking, or management of an electronic document." *Id.* at *2 n.3 (quoting O'Neill v. City of Shoreline, 187 P.3d 822, 824 (Wash. Ct. App. 2008)). It includes "all the contextual, processing, and use information needed to indentify and certify the scope, authenticity, and integrity of active or archival electronic information or records." *Id.* at *2 (quoting *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age,* at 80 (2005), *available at* http://www.thesedonaconference.org/content/miscFiles/TSG9_05.pdf).
3. ARIZ. REV. STAT. ANN. §§ 39-121 to 39-121.03 (2008). This is Arizona's version of the Freedom of Information Act.
4. 251 P.2d 893 (Ariz. 1952).
5. 815 P.2d 900 (Ariz. 1991).
6. *Lake*, 2009 WL 73256, at *4.
7. *Id.* at *11 (Norris, J., concurring in part and dissenting in part).
8. *Id*. at *13.
9. 5 U.S.C. § 552 (2006).

I. FACTS AND PROCEDURAL HISTORY

In 2006, Phoenix Police Officer David Lake reported "serious police misconduct" to his superiors, including Lieutenant Robert Conrad.[10] He was demoted soon after.[11] Lake suspected that his demotion was retaliatory, so he wanted to take a closer look at his performance records.[12]

On March 24, 2006, Lake requested notes by seven police lieutenants documenting his performance between January 1, 2005 and January 1, 2006.[13] The City produced a hard paper copy of Conrad's notes, and when Lake examined them, he began to suspect that they were back-dated.[14] To Lake, the hard copy was "essentially useless."[15] Without information about the document's true creation date, its access dates, the identities of the people who accessed it, and the print date, it would be impossible to judge the notes' authenticity.[16] He specifically requested the metadata in November 2006, but the City refused.[17]

In December 2006, Lake filed a special action in superior court alleging that the City failed to produce records responsive to four of his requests,[18] that it intentionally delayed production of other records, and that it intentionally withheld public records because he had filed an Equal Employment Opportunity Complaint against the City.[19] Lake requested an order compelling prompt disclosure of all pertinent records.[20]

The superior court denied jurisdiction and determined that Lake was not entitled to relief.[21] Lake appealed the order to Division One of the Arizona Court of Appeals.

II. THE *LAKE* DECISION

The Court of Appeals first addressed the lower court's denial of jurisdiction. Arizona Revised Statutes (A.R.S.) section 39-121.02(A) provides that "any person who has been denied access to public records may challenge the denial through a special action in the superior court."[22] The court concluded that

---

10. *Lake*, 2009 WL 73256, at *3.
11. *Id.*
12. *Id.* at *2–3.
13. *Id.* at *2. In all, he submitted eighteen public records requests to the City of Phoenix. *Id.* at *1.
14. *Id.* at *2.
15. *Id.* at *3.
16. *Id.* at *2.
17. *Id.*
18. In addition to the metadata request, Lake alleged that the City improperly withheld a police report located within the police computer system ("PACE"), that it improperly withheld emails that his commanders had written about him, and that it improperly withheld documents concerning an unfinished shooting investigation involving another Phoenix police officer. *Id.* at *6–9.
19. *Id.* at *1.
20. *Id.* Lake also "requested attorneys' fees and costs incurred in bringing the special action, as well as double damages" under A.R.S. section 12-349. *Id.*
21. *Id.*
22. *Id.*

the superior court had jurisdiction in the matter and that it had in fact exercised jurisdiction by considering the merits of Lake's claim and denying relief.[23]

A. The Majority Opinion

Judge Michael J. Brown authored the majority opinion, which held that metadata is not a public record.[24] The court began by noting that Arizona has a strong policy of public access to and disclosure of public records.[25] However, the presumption requiring disclosure only arises after the court determines that a certain record constitutes a public record.[26]

Inexplicably, Arizona's public-records statute[27] does not define "public record." Lacking a statutory definition, the court relied on Arizona common-law definitions from *Salt River Pima-Maricopa Indian Community v. Rogers*[28] and *Mathews v. Pyle*.[29] Those cases define a public record as:

> (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.[30]

According to the court, the metadata did not qualify under the first definition of public record because it was not made by Conrad in "pursuance of a duty."[31] Conrad created the notes pursuant to his duty as Lake's supervisor, but he did not actually create the metadata.[32] It was simply a "by-product" of his use of a computer.[33] Also, the metadata was not meant to "disseminate information to the public," and it was not meant "to serve as a memorial of an official transaction for public reference."[34]

The court held that the metadata did not qualify under the second *Mathews* definition either. Conrad was not "required by law" to create or maintain metadata, and he was not "required" to create or maintain metadata "to serve as a memorial and evidence of something written, said or done."[35] Conrad's obligation,

---

23. *Id.*
24. *Id.* at *6.
25. *Id.* at *3 (citing Griffis v. Pinal County, 156 P.3d 418, 422 (Ariz. 2007)).
26. *Id.*
27. ARIZ. REV. STAT. ANN. §§ 39-121 to 39-121.03 (2008).
28. 815 P.2d 900 (Ariz. 1991).
29. 251 P.2d 893 (Ariz. 1952).
30. *Lake*, 2009 WL 73256, at *3.
31. *Id.* at *4 (citing *Mathews*, 251 P.2d at 895).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*

the court reasoned, was simply to memorialize his notes.[36] He was not required to make a record of the filename, to record the name of the computer on which the document was created, to identify the server he may have accessed, to note when the file was accessed or modified, or to identify when it was printed.[37]

The third definition created a "closer question," but the court ultimately decided that it fell short as well.[38] The court generally agreed with Lake's proposition that metadata is a "written record of a transaction" in connection with the use of a computer.[39] However, in the majority's view, the "transaction" Conrad recorded was his supervisory notes relating to Lake. The metadata merely facilitated Conrad's preparation of the notes.[40]

Lake's final argument was that metadata should be a public record because it is electronic evidence that federal courts allow parties to discover in litigation.[41] The court rejected Lake's assertion on three grounds. First, the presumption in favor of disclosure did not apply because the metadata requested was not a public record.[42] Second, there was no authority suggesting that Arizona's public-records law is co-extensive with federal evidentiary rules, and there is no evidence of legislative intent to construe the statute so broadly as to mean that if a document is discoverable in connection with a lawsuit, then it must also necessarily be disclosed by an agency under the public-records law.[43] Third, both the plain language of the Arizona public-records statute and subsequent judicial interpretations "unambiguously recognize" that not all of the documents found within the custody of a public official are necessarily "public records."[44]

As a final point, the majority noted the "practical reality" that "each time a government employee logs on or off of a computer, clicks a computer mouse, pushes the characters on a keyboard, sends an e-mail, prints a document, uses the internet, talks on a phone, or enters a building with keycard access, a 'record' has arguably been generated."[45] Just because the records exist "does not mean that they . . . should fall within the definition of a public record."[46] If the legislature disagrees, "[it] may take the appropriate steps to make that change."[47]

---

36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at *5.
43. *Id.* (citing Carlson v. Pima County, 687 P.2d 1242, 1244 n.1 (Ariz. 1984) (recognizing that "[w]hether something is a 'public record' in evidentiary terms is not necessarily co-extensive with those records available for public inspection under Ariz. Rev. Stat. § 39-121")).
44. *Id.* (citing Griffis v. Pinal County, 156 P.3d 418, 422 (Ariz. 2007); Salt River Pima-Maricopa Indian Cmty. v. Rogers, 815 P.2d 900, 907–08 (Ariz. 1991)).
45. *Id.*
46. *Id.* at *6.
47. *Id*.

The court directed the City to promptly produce records responsive to Lake's other requests,[48] and remanded the case to the superior court to determine whether Lake was entitled to an award of attorneys' fees.[49] Presiding Judge Ann A. Scott Timmer concurred, but did not write separately.

B. The Dissenting Opinion

Judge Patricia K. Norris dissented from the majority's metadata holding.[50] She argued that the focus should be on whether the metadata itself is a public record, rather than whether the electronic version of Conrad's notes, which includes the metadata, is a public record.[51]

Conrad created the notes on a city computer using a Microsoft word processing program.[52] The information saved within the electronic document file consisted of text and metadata.[53] Rather than adopting the majority's view of metadata as "an electronic orphan" or a "by-product," Judge Norris characterized it as "integral to the original electronic documents."[54] When Conrad used the computer to document his notes, the metadata became part of his notes "just as did his words."[55] In producing only a paper printout, "the City kept from public inspection the full content of [Conrad's] notes which are undisputedly public records."[56]

Judge Norris also disagreed with the majority's assertion that metadata, by itself, would not pass the third *Mathews* test.[57] She reasoned that if an official recorded information with a pen in a log book, that information would "certainly qualify" as 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."[58] Electronic recordation of the

---

48. The court rejected the City's argument that a police report (which is a public record under the statute) was immune from production because it was located within the police department's PACE computer system. *Id.* at *6–7. Next, the court ordered the production of e-mails for which the City was the custodian of records. *Id.* at *8. The City admitted that its failure to produce the e-mails was "an honest mistake." *Id.* The court also rejected the City's argument that a draft report of an ongoing investigation is not a public record, "absent any argument that the records should be protected from production because of concerns regarding confidentiality, privacy, or the best interests of the state." *Id.* at *9.

49. *Id.* at *11. Pursuant to A.R.S. section 39-121.02(B), the trial court may award Lake attorneys' fees for the City's wrongful refusal to produce the police report, the emails requested, and the investigation report. *Id.* at *9. The court found no abuse of discretion in the trial court's decision that the City did not fail to promptly produce its records. *Id.* at *9–10.

50. *Id.* at *11 (Norris, J., concurring in part and dissenting in part).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at *11, *13.

55. *Id.* at *11.

56. *Id.* at *12.

57. *Id.* at *13.

58. *Id.* (citing Mathews v. Pyle, 251 P.2d 893, 895 (Ariz. 1952)).

information does not change its character as a public record.[59] Moreover, the purpose of the public records law is "to open up government activity to public scrutiny."[60] The electronic version of Conrad's notes "is precisely the type of information" the law intended to reveal, and the information metadata provides "can be crucial to ensuring government transparency."[61] Accordingly, Judge Norris "would direct the superior court to require the City to produce Conrad's notes in their electronic form with their metadata."[62]

Notably, Judge Norris declined to address whether, if metadata is a public record, a public agency would have to produce a copy of the electronic public record instead of a printout without an explicit request by the party.[63] The majority cautioned in a footnote that if metadata is considered part of the record, then it would have to be produced "every time a computerized public record is requested regardless of whether the requesting party has asked for [it]."[64]

III. IMPLICATIONS

A. Which View of Metadata Is Correct?

The majority and the dissent relied on the same cases and the same technical definitions of metadata. Yet, they drew opposite conclusions as to whether or not the metadata was actually part of the document. The majority saw it as a "by-product,"[65] and the dissent saw it as "integral to the original electronic document."[66] How can one explain these opposing interpretations?

The differences are primarily a function of the unusual lack of guidance on this issue. Only one other reported decision addresses metadata as a public record, *O'Neill v. City of Shoreline*,[67] a 2008 Washington Court of Appeals case holding that metadata is a public record under Washington's statute.[68] However, *O'Neill* did not provide much persuasive value for *Lake* because Washington's statute differs substantially from Arizona's. Whereas Arizona's statute does not define public record, Washington's statute contains a robust definition[69] which the *O'Neill* court found to encompass metadata.

---

59. *Id.*
60. *Id.* (citing Griffis v. Pinal County, 156 P.3d 418, 421 (Ariz. 2007)).
61. *Id.*
62. *Id.* at *14.
63. *Id.* at *14 n.25.
64. *Id.* at *6 n.11 (majority opinion).
65. *Id.* at *4.
66. *Id*. at *11 (Norris, J., concurring in part and dissenting in part).
67. 187 P.3d 822 (Wash. Ct. App. 2008).
68. WASH. REV. CODE § 42.56.001-904 (2008).
69. Washington's statute defines "public record" as:

> any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. For [Washington's] office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as

Technical definitions were also of little help to the *Lake* court. *O'Neill* defined metadata as "data about data," including "information describing the history, tracking, or management of an electronic document."[70] A recent Arizona ethics opinion defined it as "information describing the document's history, tracking, and management . . . . [including] the author of the document, the changes made to the document during the various stages of its preparation and revision, comments made by the persons who prepared or reviewed the document, and other documents embedded within the document."[71] Microsoft's definition was the least helpful:

> Metadata is used for a variety of purposes to enhance the editing, viewing, filing, and retrieval of Office documents. Some metadata is easily accessible through the Word interface. Other metadata is only accessible through extraordinary means, such as by opening a document in a low-level binary file editor. Examples of metadata include: the user's name and initials, the company or organization name, the name of the computer, the name of the network server or hard disk where the document is saved, other file properties or summary information, non-visible portions of embedded or linked objects, document revisions, document versions, template information, hidden text, and comments.[72]

Although these definitions describe and provide examples of metadata, they fall short of answering the question of whether metadata is actually part of a document. The definitions' shortcomings are exacerbated by the fact that the tests the court relied on for the definition of "public record" come from a case decided in 1952, which probably could not have contemplated something as technically nuanced as metadata.[73]

Lacking dispositive precedent or technical definitions, the *Lake* court took a somewhat gestalt approach and asked, is metadata part of a document or not? The differences of opinion are explained by each side's chosen level of abstraction. The majority took a narrow approach, and viewed the metadata as a

---

> defined in [WASH. REV. CODE section 40.14.100] and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

Id. § 42.56.010.

70. *O'Neill*, 187 P.3d at 824 n.2 (citing Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 646 (D. Kan. 2005)).

71. State Bar of Ariz. Ethics Op. No. 07-03 (Nov. 2007), *available at* http://www.myazbar.org/Ethics/opinionview.cfm?id=695.

72. Microsoft Corp., How to Minimize Metadata in Word 2003, http://support.microsoft.com/kb/825576/ (last visited Apr. 5, 2009).

73. The *Lake* court cited *Salt River* (decided in 1991) along with *Mathews* (decided in 1952), but *Salt River*'s definitions all originally came from *Mathews*. Lake v. City of Phoenix, 1 CA-CV 07-0415, 2009 WL 73256, *passim* (Ariz. Ct. App. Jan. 13, 2009); Salt River Pima-Maricopa Indian Cmty. v. Rogers, 815 P.2d 900, 907–08 (Ariz. 1991); Mathews v. Pyle, 251 P.2d 893, 895 (Ariz. 1952). It is questionable whether a court in 1991 could have understood the nature of metadata either.

by-product, entirely separable from the underlying record.[74] Predictably, metadata did not fit within any of the fifty-six-year-old definitions.[75] The dissent took a broader view, and considered the metadata inseparable and intrinsic to the public record itself.[76] Framing metadata in this way, the metadata would be accessible along with the rest of the document.

Given the overall lack of guidance, both interpretations are equally valid. As a policy matter, however, the dissent's interpretation is more in line with the government transparency purpose of the public-records statute.[77] In addition to its admissibility for authentication under the Federal Rules of Evidence,[78] metadata is generally discoverable under Rule 34(a) of the Federal Rules of Civil Procedure. Rule 34(a) was amended in 2006 "to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents."[79] The rule itself does not specify whether the phrase "in a form or forms in which it is ordinarily maintained" encompass an electronic document's metadata. However, *Williams v. Sprint/United Management Co.* held that:

> when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to production of metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order.[80]

Although *Williams*' breadth has been criticized,[81] it appears that metadata is generally discoverable as long as it is specifically requested.[82]

---

74. *See Lake*, 2009 WL 73256, at *4.

75. *Id.*

76. *See id.* at *11 (Norris, J., concurring in part and dissenting in part).

77. The purpose of the public records statute is "to open up *government* activity to public scrutiny." Griffis v. Pinal County, 156 P.3d 418, 421 (Ariz. 2007).

78. FED. R. EVID. 901(b)(4); *see also* Appellant's Reply Brief at 8, *Lake*, 2009 WL 73256, at *1 (citing Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 547–48 (D. Md. 2007) ("Because metadata shows the date, time and identity of the creator of an electronic record, as well as all changes made to it, metadata is a distinctive characteristic of all electronic evidence that can be used to authenticate it under Rule 901(b)(4).")).

79. FED. R. CIV. P. 34 advisory committee's note.

80. 230 F.R.D. 640, 649 (D. Kan. 2005) (interpreting proposed amendments to FED. R. CIV. P. 34 in light of *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Discovery*, at 46–47 (2005), *available at* http://www.thesedonaconference.org/content/miscFiles/7_05TSP.pdf).

81. Ky. Speedway, LCC v. NASCAR, Inc., No. 05-138-WOB, 2006 U.S. Dist. LEXIS 92028, at *24 (E.D. Ky. Dec. 18, 2006) ("The issue of whether metadata is relevant or should be produced is one which ordinarily should be addressed by the parties in a Rule 26(f) conference.").

82. *See* Autotech Techs. Ltd. P'ship v. AutomationDirect.com, Inc., 248 F.R.D. 556 (N.D. Ill. 2008) (denying motion to compel production of metadata when litigant did not ask for metadata in production requests); *Ky. Speedway*, No. 05-138-WOB, 2006 U.S. Dist. LEXIS 92028, at *24 (holding that, "[t]o the extent that plaintiff seeks metadata for a specific document or documents where date and authorship information is unknown but relevant, plaintiff should identify that document or documents by Bates Number or by other

The *Lake* majority was correct in noting that "there is no authority suggesting that Arizona's public-records law is co-extensive with federal evidentiary rules, and there is no evidence of legislative intent to construe Arizona's public-records law so broadly as to mean that if a document is discoverable in connection with a lawsuit, then it must also necessarily be disclosed by an agency under the public records law."[83] Metadata's discoverability and evidentiary value in federal court is obviously not going to dictate an Arizona court's interpretation of a state statute, but the policy underlying the federal rules' treatment of metadata should not be ignored. Metadata is discoverable because it is "an inherent part of an electronic document,"[84] and it is "obviously improper to allow a party to evade discovery obligations on the basis that the [pre-2006 amendment "documents"] label had not kept pace with changes in information technology."[85] As the federal rules recognize, metadata's unique ability to authenticate and establish context for electronic content can be crucial in litigation. This principle applies with equal force to government accountability.

The purpose of Arizona's public-records law is "to open government activity to public scrutiny."[86] The *Lake* dissent recognized that "information about who authored a document, when it was edited, and who could have accessed it," which only metadata can provide, "can be crucial to ensuring government transparency."[87] Indeed, "[t]he question of what government officials knew and when they knew it has been a key question in not only the Iran-Contra investigations, but also in the Watergate matter."[88] The majority's decision allows the government to evade its public-records obligations in the same way that the pre-2006 Rule 34 allowed civil litigants to evade discovery requests. Thus, at least

---

reasonably identifying features"); *Williams*, 230 F.R.D. at 652 ("[E]merging standards of electronic discovery appear to articulate general presumption against production of metadata, but provide clear caveat when producing party is aware or should be reasonably aware that particular metadata is relevant to dispute.").

83. *Lake*, 2009 WL 73256, at *5.

84. *Williams*, 230 F.R.D. at 652.

85. FED. R. CIV. P. 34 advisory committee's note.

86. Griffis v. Pinal County, 156 P.3d 418, 421 (Ariz. 2001).

87. *Lake*, 2009 WL 73256, at *13 (Norris, J., concurring in part and dissenting in part). *The Sedona Guidelines* further explain the importance of metadata:

> Certain metadata is critical in information management and for ensuring effective retrieval and accountability in record-keeping. Metadata can assist in proving the authenticity of the content of electronic documents, as well as establish the context of the content. Metadata can also identify and exploit the structural relationships that exist between and within electronic documents, such as versions and drafts. Metadata allows organizations to track the many layers of rights and reproduction information that exist for records and their multiple versions. Metadata may also document other legal or security requirements that have been imposed on records; for example, privacy concerns, privileged communications or work product, or proprietary interests.

The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age, at 80.

88. Armstrong v. Executive Office of the President, 810 F. Supp. 335, 341 n.12 (D.D.C. 1993), *aff'd in part, rev'd in part, and remanded by* 1 F.3d 1274 (D.C. Cir. 1993).

from a policy standpoint, the dissent's opinion is more in line with the government-transparency rationale underlying the public-records statute.

*B. Public Access to Government Metadata Post-*Lake

Lake is one of the most important government-disclosure cases decided in Arizona in years. As one of only two reported cases to opine on the public accessibility of metadata, one wonders how significant the decision will be outside of the state. The short answer: not very. To the extent that the case is a policy statement, it has value outside Arizona. It is intrinsically significant as a direct rejection of an attempt to obtain metadata for an otherwise publicly accessible document. But unlike *O'Neill*, *Lake*'s overall persuasive value is substantially limited by the Arizona-specific nature of its holding.

Arizona's public-record statute is generally unremarkable in that it allows "any person" access to public records in the custody of any public officer.[89] Most states do the same.[90] Uniquely, however, the statute does not define "public record;" Arizona courts rely on state common-law definitions to fill in the gap.[91]

If the issue of whether metadata is a public record comes up in another state, Arizona's common-law definitions will not be persuasive. Public-records statutes are state specific, and as *O'Neill* illustrates, the inquiry will be whether metadata qualifies as a public record under that particular state's statutory definition.[92] Although *Lake* has value as a decision rejecting public accessibility of government metadata, its persuasive value outside of Arizona is minimal.

In contrast to *Lake*, *O'Neill* appears to have a great deal of persuasive value. Like most states, Washington has a statutory definition of "public record."[93] Looking to the plain language of the statute, the *O'Neill* court held that the metadata at issue qualified as a public record because: (1) it contained information that "relates to" the conduct of government or the performance of a governmental function; and (2) it was "sufficiently similar" to the examples of "writing" in the statute.[94]

---

89. *See* ARIZ. REV. STAT. ANN. § 39-121 (2008).

90. A handful of states limit access to various groups. *E.g.*, ALA. CODE § 36-12-40 (2008) (limiting access to state citizens); LA. REV. STAT. ANN. § 44:31(B)(1) (2008) (limiting access to people over the age of majority); 65 PA. CONS. STAT. § 67.102 (2008) (limiting access to United States citizens).

91. *See Griffis*, 156 P.3d at 421.

> Although the phrase "public records and other matters" is not expressly defined by statute, A.R.S. § 39-121.01.B[] requires that "[a]ll officers and public bodies shall maintain all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by monies from the state or any political subdivision of the state."

Id.; *see* Salt River Pima-Maricopa Indian Cmty. v. Rogers, 815 P.2d 900 (Ariz. 1991); Mathews v. Pyle, 251 P.2d 893 (Ariz. 1952).

92. *See* O'Neill v. City of Shoreline, 187 P.3d 822, 826–27 (Wash. Ct. App. 2008).

93. WASH. REV. CODE § 42.56.010(2) (2008).

94. *See* 187 P.3d at 827. A "writing" includes:

Sixteen other states have similar "relating to" language in their definitions of public record,[95] and at least eighteen more have similar examples to those listed in Washington's definition of "writing."[96] Based on these facial similarities,

---

> 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.

WASH. REV. CODE § 42.56.010(3).

95. *See* ALA. CODE § 36-12-40 (2008) ("pertaining to"); CAL. GOV'T CODE § 6252(e) (West 2008) ("relating to"); CONN. GEN. STAT. § 1-200(5) (2008) ("relating to"); DEL. CODE ANN. tit. 29, § 10002(g) (2008) ("relating in any way to"); IDAHO CODE ANN. § 9-337(13) (2008) ("relating to"); MD. CODE ANN., STATE GOV'T. § 10-611(g)(1)(i) (LexisNexis 2008) ("in connection with"); N.C. GEN. STAT. § 132-1 (2008) ("in connection with"); N.D. CENT. CODE, § 44-04-17.1(15) (2008) ("use in connection with public business or contains information relating to public business"); OR. REV. STAT. § 192.410(4)(a) (2007) ("relating to"); 65 PA. CONS. STAT. § 67.102 (2008) ("in connection with"); R.I. GEN. LAWS § 38-2-2(4)(i) (2009) ("in connection with"); S.D. CODIFIED LAWS § 1-27-9(2) (2009) ("in connection with"); TENN. CODE ANN. § 10-7-301(6) (2008) ("in connection with"); TEX. GOV'T CODE ANN. § 552.002(a) (Vernon 2007) ("in connection with"); W. VA. CODE § 29B-1-2(4) (2008) ("relating to"); WYO. STAT. ANN. § 16-4-201(a)(v) (2008) ("in connection with").

96. *See* ARK. CODE ANN. § 25-19-103(5) (2008) ("writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium"); COLO. REV. STAT. § 24-72-202(7) (2008) ("books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics," and "digitally stored data, including without limitation electronic mail messages"); FLA. STAT. § 119.011(12) (2008) ("documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material"); GA. CODE ANN. § 50-18-70(a) (2008) ("documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, or similar material"); 5 ILL. COMP. STAT. 140/2(c) (2009) ("records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, recorded information and all other documentary materials, regardless of physical form or characteristics"); KY. REV. STAT. ANN. § 61.870(2) (LexisNexis 2008) ("books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics"); LA. REV. STAT. ANN. § 44:1(2)(a) (2008) ("books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers, and all copies, duplicates, photographs, including microfilm, or other reproductions thereof, or any other documentary materials, regardless of physical form or characteristics, including information contained in electronic data processing equipment"); ME. REV. STAT. ANN. tit. 1, § 402(3) (2008) ("written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained"); MICH. COMP. LAWS § 15.232(h) (2008) ("handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content"); MISS. CODE ANN. § 25-61-3(b) (2008) ("books,

public-records statutes in at least thirty-four other states could plausibly be read to include metadata within their definition of public record.

C. Metadata in the Freedom of Information Act

Lake also prompts the question, how does the federal government interpret metadata requests under the Freedom of Information Act?[97] FOIA requires government agencies to "provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format,"[98] and to "make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system."[99] Neither FOIA nor its interpretive decisions directly address whether metadata qualifies as "electronic form or format," and the issue of whether a metadata search would "significantly interfere with the operation of the agency's automated information system" remains an open question. In short, FOIA's statutory ambiguity makes the issue even less clear than it is at the state level.

Clouding the issue further is that metadata's discoverability under the Federal Rules of Civil Procedure has no effect on its accessibility under FOIA.[100]

---

records, papers, accounts, letters, maps, photographs, films, cards, tapes, recordings or reproductions thereof, and any other documentary materials, regardless of physical form or characteristics"); N.J. STAT. ANN. § 47:1A-1.1 (West 2009) ("paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof"); N.M. STAT. ANN. § 14-2-6(E) (LexisNexis 2008) ("documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics"); N.Y. PUB. OFF. LAW § 86 (Consol. 2008) ("reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes"); OKLA. STAT. tit. 51, § 24A.3(1) (2008) ("book, paper, photograph, microfilm, data files created by or used with computer software, computer tape, disk, record, sound recording, film recording, video record or other material regardless of physical form or characteristic"); S.C. CODE ANN. § 30-4-20(c) (2007) ("books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics"); UTAH CODE ANN. § 63G-2-103(22) (2008) ("book, letter, document, paper, map, plan, photograph, film, card, tape, recording, electronic data, or other documentary material regardless of physical form or characteristics"); VA. CODE ANN. § 2.2-3701 (2008) ("writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics"); WIS. STAT. § 19.32(2) (2008) ("handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts and optical disks").

97. 5 U.S.C. § 552 (2006).

98. *Id*. § 552(a)(3)(B).

99. *Id*. § 552(a)(3)(C).

100. *See* Pleasant Hill Bank v. United States, 58 F.R.D. 97, 99 (W.D. Mo. 1973).

As with Arizona's statute, one's right to information under FOIA is "not in any way enhanced by the fact that he is a litigant in a court action."[101]

The most relevant federal case is *Armstrong v. Executive Office of the President*.[102] Among other issues, the D.C. Circuit Court of Appeals considered whether the Executive Office of the President and the National Security Council were complying with their statutory obligation to preserve government records when they maintained only paper printouts of government e-mails.[103] The court held that the printouts were insufficient insofar as they failed to include embedded information found only in the electronic versions.[104]

Judge Norris cited *Armstrong* in *Lake* to support her proposition that paper copies of electronic records are inadequate public records disclosures.[105] Although *Armstrong* stands for the general proposition that paper copies are not equivalent to original electronic documents, the case can only be taken so far. First, *Armstrong* was not about metadata, and metadata is not mentioned anywhere in the opinion. Second and more importantly, *Armstrong* is just about record-keeping requirements; the court did not address whether the public could have even acquired the e-mails at issue, much less their metadata.[106]

In sum, metadata's availability under FOIA remains an open question. The most that can be taken from *Armstrong* is that federal courts are at least willing to recognize that paper printouts of electronic records are inadequate.

CONCLUSION

Lake v. City of Phoenix is a classic example of a decision based on opposing levels of abstraction. The majority framed metadata as a discrete by-product of a public document.[107] As such, it stood almost no chance of recognition as a public record under the fifty-six-year-old common-law definitions in *Mathews*.[108] The dissent took a broader approach, and framed metadata as intrinsic to the document itself.[109] Viewed in this way, the metadata is just as accessible as any other part of the document. Due to the lack of statutory, case law, and technical guidance, neither view is inherently better. However, when considered in conjunction with the government transparency rationale underlying the statute, the dissent's view appears superior, at least from a policy standpoint. Regardless, until *Lake* is appealed to the Arizona Supreme Court or the state legislature intervenes

---

101. Han v. Food & Nutrition Serv. of U.S. Dep't of Agric., 580 F. Supp 1564, 1567 (D.N.J. 1984); *see* Lake v. City of Phoenix, 1 CA-CV 07-0415, 2009 WL 73256, at *5 (Ariz. Ct. App. Jan. 13, 2009).

102. 1 F.3d 1274 (D.C. Cir. 1993). The statute at issue was the Federal Records Act, 44 U.S.C. §§ 2101–2120 (2006).

103. *Armstrong*, 1 F.3d at 1277.

104. *Id.* at 1284–85.

105. *See Lake*, 2009 WL 73256, at *12 (Norris, J., concurring in part and dissenting in part).

106. *See id.* at *6 n.12 (majority opinion).

107. *Id*. at *4.

108. Mathews v. Pyle, 251 P.2d 893 (Ariz. 1952).

109. *Lake*, 2009 WL 73256, at *11 (Norris, J., concurring in part and dissenting in part).

and defines public record, government metadata will remain publicly inaccessible in Arizona.