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Recent Court Decisions Concerning Metadata and OPRA

The New Jersey Open Public Records Act does not specifically address metadata, and our courts are only beginning to explore the various security, privacy and workflow issues that metadata presents.

By **Jonathan N. Frodella** | December 23, 2020



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The New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 et seq. (OPRA), does not specifically address metadata, and our courts are only beginning to explore the various security, privacy and workflow issues that metadata presents. Metadata is “data about data,” often embedded in electronic documents, that tracks a wide array of information ranging from details regarding a document’s authorship and access history, to technical details regarding computer networks and security configurations. Disclosure of certain metadata could jeopardize computer security or reveal confidential information, so records custodians should work with their IT departments and municipal attorneys to review all metadata prior to disclosure.

Records custodians encounter metadata most often in the context of OPRA requests for email logs and computer files in their native file format. Email logs are relatively straightforward, and they are typically produced as spreadsheets populated with information pulled from emails such as the “sender,” “recipient,” “date” and “subject” (so long as the public agency is reasonably capable of extracting the information, which is not the case in some small municipalities). Email logs provide a concise overview of official email activity and allow records requestors to identify specific emails for further review. It is generally less burdensome to produce logs than it is to produce full sets of emails, and logs can help requestors narrow the scope of their subsequent requests for complete emails, which should be beneficial to all parties. Email logs can also help construct a full picture of a particular correspondence and alert requestors to other potentially relevant parties and communications for further investigation.

Our Supreme Court held that email logs are government records subject to disclosure under OPRA, and rejected the argument that custodians cannot be compelled to create logs since doing so would constitute the creation of new records, which OPRA does not require. The court explained that “[b]y OPRA’s language, information in electronic form, even if part of a larger document, is itself a government record” and that “electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record.” See *Paff v. Galloway Twp.*, 229 N.J. 340, 353 (2017). The logs are subject to standard OPRA exceptions and redactions, but the exercise of reviewing and redacting the logs can be extremely burdensome if the requestor seeks access to a large number of logs. The *Paff* court opined that, in such cases, an agency might avail itself of N.J.S.A. 47:1A-5(g) by denying access if it “would substantially disrupt agency operations,” so long as the agency first attempts to negotiate a reasonable solution with the requestor. See *Paff*, at 358.

Some email logs are too large for agencies to identify and remove all information that, if disclosed, could jeopardize security. The Superior Court recently considered this issue in *Clegg v. Township of Hamilton*, MER-L-2118-19, where the OPRA requestor sought access to the entire log files in their native *.LOG format for a period of 10 days. Typically, requestors identify specific parties and fields of information (e.g., a log of all the mayor’s incoming and outgoing emails showing the sender, recipient, date and subject) for the agency’s IT department to pull from the native *.LOG metadata files that are created by the email server. The *.LOG files track more information than standard *Paff* email logs, and the files can be enormous since they cover all email activity on the server. Further, the native *.LOG files exist in a text CSV format rather than a spreadsheet, which makes them practically incomprehensible to the average person and outrageously burdensome to review and redact.

In *Clegg*, the native *.LOG files were too large and complex for the municipality to review and redact, even when exported to a more human-readable spreadsheet format. In addition to other technical data, the *.LOG files also tracked various internal machine-generated communications and alerts regarding network security and general maintenance, as well as internal and external IP addresses. After expert testimony, the court found that the municipality was unable to review and redact the *.LOG files with sufficient confidence due to their extreme size and technical complexity, and that releasing the files would jeopardize computer security and make the municipality more vulnerable to attack by a bad actor. In light of these findings, the *Clegg* court held the municipality’s denial of access was justified under OPRA’s exception for “administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security.” See N.J.S.A. 47:1A-1.1.

Notably, the *Clegg* court held that the native *.LOG files fell within OPRA’s definition of “government record,” even though they are separate files and are not embedded in other government records, which suggests that all metadata could be subject to disclosure under OPRA, whether existing as a standalone item (e.g., the *.LOG files) or embedded in native files (e.g., an email file rather than a PDF printout of an email). This interpretation is consistent with our sister states, but it is not explicitly provided in New Jersey law. Legislative intervention might be required due to the serious security and privacy concerns presented by the release of metadata, and records custodians need more statutory guidance when handling these matters.

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