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LEGAL ALERT



Legal Alert: Arizona Court of Appeals Rules That Metadata Is Not Subject to Public Records Request

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In a 2-1 decision issued just this week, Division One of the Arizona Court of Appeals found that metadata associated with electronic documents was not subject to a public records request under Arizona's public records law. See *Lake v. City of Phoenix*.

Metadata is information describing a document's history, tracking, and management, and also includes hidden information such as track changes, comments, and other information. This information is automatically created by most software without any input from the user. Some metadata is easily accessible through the Microsoft Word interface, while other metadata is accessible only through extraordinary means, such as by opening a document in a low-level binary file editor.

In this case, Phoenix Police Officer David Lake filed an EEOC Complaint and submitted a series of public records requests to the City. Because he suspected that the City was backdating documents, the officer requested the metadata relating to some of the documents he requested, including the true creation date and the access dates for each time the file was accessed, including who accessed the file as well as the dates it was printed. The City denied the request, and Officer Lake brought a lawsuit.

The Court of Appeals held that metadata is not a "public record" under Arizona's public records law and therefore was not subject to a public records request. The Court reasoned that metadata is not made pursuant to any duty or requirement, nor is it a "written record of transactions of a public officer." One or more of these characteristics is necessary in order for a document to be a "public record."

Rather, the court said that only the document is the public record. The metadata is separate from the words that the author chose to include in the document. If the court found that metadata was included as part of the document in this case, then every public records request for a document created on a computer would have to have to include the metadata associated with the document. This would be too expansive of an interpretation of the law.

The court also observed that the mere possession of something by a public officer, such as metadata, does not make it a public record. Courts look to the nature and purpose of the document or information to determine if it is a public record. The nature and purpose of metadata does not fall within the

court's interpretation of a public record.

The court noted that although metadata is not subject to public records requests in Arizona, it can be, and often is, obtained by parties in litigation.

The officer's attorney has indicated he would be filing a petition for review with the Arizona Supreme Court, which has discretion whether to take the appeal.

If you have any questions regarding this Alert, please contact the authors, Troy Foster, tfoster@fordharrison.com, 602-627-3504 or Justin Pierce, jpierce@fordharrison.com, 602-627-3505 or the Ford & Harrison attorney with whom you usually work.