



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



DAVID LAKE v. CITY OF PHOENIX, et al.
CV-09-0036-PR

PARTIES AND COUNSEL:

Petitioner: David Lake, represented by Carolyn A. Pilch and Neil Landeen of Yen Pilch Komadina & Fleming, P.C.

Respondents: City of Phoenix, Frank Fairbanks, Mario Paniagua and Jack Harris (collectively “the City”), represented by Sandra Hunter, Assistant City of Phoenix Attorney.

FACTS:

From March 2006 through November 2006, Phoenix Police Officer Lake submitted a series of public records requests to the City. One of the requests was for all notes “documenting supervisory performance,” kept by certain Phoenix Police Lieutenants, including Lt. Robert Conrad. After receiving Conrad’s notes, Lake made a supplemental request for any metadata¹ behind the notes in an attempt to prove that Conrad had backdated the notes. The metadata that Lake sought included “the true creation date, the access date, the access dates for each time [the file] was accessed, including who accessed the file as well as print dates, etc.” The City denied the request on the basis that the record was not maintained by the City and therefore not available. The City also asserted that metadata is not a public record pursuant to *Mathews v. Pyle*, 75 Ariz. 76, 78-79, 251 P.2d 893, 895 (1952).

In December 2006, Lake filed a special action in the superior court pursuant to Arizona’s public records law, A.R.S. §§ 39-121 to -121.03, alleging the City failed to produce 18 public records and intentionally delayed production of other records. He also alleged that the City intentionally withheld public records because he had filed an Equal Employment Opportunity Complaint against the City as well as a notice of claim. Lake requested an order compelling the City to promptly disclose all pertinent records and further requested his attorneys’ fees and costs incurred in bringing the special action, as well as double damages pursuant to

¹ “Metadata” “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.” The Sedona Conference, *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. “Metadata” is not defined in standard English dictionaries, but other sources generally describe the term as “data about data,” or more specifically, “information describing the history, tracking, or management of an electronic document.” *O’Neill v. City of Shoreline*, 187 P.3d 822, 824 (Wash. Ct. App. 2008) (citing *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646 (D. Kan. 2005) (discussing the evolving state of the law concerning discovery of electronic documents and associated metadata in litigation)).

A.R.S. § 12-349 (2003). In response, the City admitted the court had jurisdiction to consider Lake's special action but denied he had been wrongfully deprived of access to public records.

The superior court initially held a status conference and ordered the parties to brief the issues. Following a hearing on February 21, 2007, the trial court took the matter of Lake's statutory special action under advisement. In a signed minute entry filed February 28, 2007, the court determined that Lake was not entitled to the relief requested. Thus, the court entered orders denying jurisdiction and denying the relief requested. Lake timely appealed.

In an opinion filed January 13, 2009, the court of appeals affirmed in part and reversed in part the superior court's order in the City's favor, and remanded the matter. The court addressed only four of the 18 records requested by Lake because Lake's opening brief discussed only "four specific requests." Opinion ¶ 5 n. 2. After examining in detail many of the facets of metadata, the court ruled in the City's favor on this issue, finding that the metadata requested by Lake is not a public record. *Id.* ¶¶ 9, 22-23. The court advanced three primary reasons for this decision: (1) metadata does not fall within any of the types of public records identified in *Mathews, id.* ¶¶ 12-15; (2) in A.R.S. § 39-121.01, the legislature used the term "record" in subsection B and the term "public record" in subsection D indicating that it distinguished between the two; thus, while the City was required to maintain metadata, it was not necessarily required to produce it upon request, *id.* ¶¶ 18-20; and (3) "practical reality." *Id.* ¶ 22. In the end, the court remanded "with directions that the City promptly produce records responsive to the Jones investigation request and the Soha request. Additionally, the superior court shall determine whether Lake is entitled to an award of attorney's fees for the City's failure to produce these documents." *Id.* ¶ 44.

Judge Norris dissented from the majority's conclusion that the metadata requested by Lake is not a public record. Judge reframed the issue as follows:

Whether the metadata by itself fits within these formulations is not the question we should be asking; the question before us is whether the electronic version of Conrad's notes, which includes the metadata, is a public record. The answer to this question is "yes."

Opinion ¶ 45. Thus, Judge Norris would hold that when an electronic document is a public record, so too is its metadata, relying on *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1285 (D.C. Cir. 1993). *See* Opinion ¶ 49. According to Judge Norris, "[t]he requested electronic version of Conrad's notes sheds 'light on how the government is conducting its business' and falls within the scope of Arizona's public records law. *See Griffis*, 215 Ariz. at 5, ¶ 12, 156 P.3d at 422." Opinion ¶ 56. "Accordingly, I would direct the superior court to require the City to produce Conrad's notes in their electronic form with their metadata and to determine whether Lake is entitled to an award of attorneys' fees because the City failed to produce those records." Opinion ¶ 57.

On February 19, 2009, Lake filed his petition for review in this Court. On March 12, 2009, the City filed its response.

ISSUE:

Is the electronic version of a public record, which includes metadata, a public record that the public has a right to inspect and obtain pursuant to Arizona's public records law?

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