

UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

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United States of America,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 4:13-cv-00360
	)	
Story County, Iowa, by and through its	)	
Board of Supervisors,	)	
	)	
Defendant.	)	

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Introduction

1. Plaintiff, the United States of America, by its undersigned attorneys, brings this civil action for declaratory and injunctive relief against Story County, Iowa, by and through its Board of Supervisors. Defendant has in its possession federal records of the First Responder Network Authority ("FirstNet"), an independent federal authority within the National Telecommunication and Information Administration ("NTIA"), which it intends to release under Iowa's Public Records Act. The United States seeks to an order declaring these records to be the property of the United States, subject to its possession and control, and an order enjoining defendant from publicly releasing these federal records.

Jurisdiction and Venue

2. This action arises under Middle Class Tax Relief and Job Creation Act of 2012, Pub. Law No. 112-96 (the "Act") (47 U.S.C. §§ 1421 *et seq.*). Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331 and 1345. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

Parties

3. The plaintiff is the United States of America, suing on its own behalf, as well as on behalf of FirstNet, an independent authority within the NTIA. NTIA is an operating unit of the United States Department of Commerce.

4. The Defendant is Story County, Iowa, acting by and through its Board of Supervisors.

Statutory Background

5. On February 22, 2012, the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 (the “Act”) (47 U.S.C. §§ 1421 et seq.) established FirstNet. The act directs FirstNet to build, deploy, and operate a nationwide, high speed public safety broadband network for emergency responders. 47 U.S.C. § 1426. In carrying out its duties, FirstNet is to “ensure the safety, security, and resiliency of the network, including the requirements for protecting and monitoring the network to protect against cyberattack.” Id. § 1426(b)(2)(A). In addition, FirstNet is to “address special considerations for areas or regions with unique homeland security or national security needs.” Id. § 1426(b)(2)(D).

6. FirstNet is headed by a Board of fifteen individuals comprised of the Secretary of Homeland Security, the Attorney General of the United States, and the Director of the Office of Management and Budget, along with twelve individuals appointed by the Secretary of Commerce. Id. § 1424(b)(1).

7. FirstNet is not subject to the requirements of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, which, subject to certain exemptions, requires federal agencies upon request to make agency records available for public inspection and copying. 47 U.S.C. § 1426(d)(2).

Factual Background

8. One of the members of the FirstNet Board is Paul H. Fitzgerald, who was appointed by then Acting Secretary of Commerce on August 20, 2012. While Paul Fitzgerald is also the Sheriff of Story County, Iowa, his appointment as a member of the FirstNet Board is entirely independent of his position as Sheriff of Story County. When performing his FirstNet duties and activities, Sheriff Fitzgerald acts solely in his capacity as a Special Government Employee. He receives pay from the Federal Government for his time spent in performing his duties on behalf of FirstNet and as compensation for travel expenses. 47 U.S.C. § 1424(g)(2).

9. Among his activities and duties on behalf of FirstNet, Sheriff Fitzgerald communicates with members of the public safety community to be served by the nationwide public safety broadband network to be built and operated by FirstNet. In these communications, Mr. Fitzgerald receives and seeks out the thoughts and advice of members of the public safety community on the needs and concerns of that community with respect to the deployment of the nationwide public safety broadband network. He also communicates on matters of concern and exchanges views with other members of the FirstNet Board.

10. Because the members of the FirstNet Board only meet face-to-face at bi-monthly meetings, many of these communications and exchanges occur through telephone conversations and emails.

11. Beginning shortly after their appointments, FirstNet Board members had NTIA.gov federal mail addresses, but did not widely or consistently use them until June 2013. Similarly, until June of this year, Sheriff Fitzgerald replied to FirstNet email by using his Story County email account, and also used his county email account for other FirstNet business. Use of his county email account for these federal purposes did not violate any restrictions on the use of the

County's record systems.

12. On July 29, 2013, Tony Romm, a reporter for the publication "Politico," a media entity based in Arlington, Virginia that focuses on national political news, contacted Story County seeking the disclosure under the Iowa's Public Record Law Act of "all emails sent and received by Sheriff Paul Fitzgerald over the period between March 1 and June 30."

13. After conversations with County Attorney, Stephen Holmes, Mr. Romm narrowed his disclosure request to those "emails the sheriff sent and received between March 1 and June 30 on any matters surrounding his involvement with FirstNet, his conversations with wireless companies or device makers, or on the topic of wireless communications generally." Thus, the request was explicitly narrowed to encompass only the communications Sheriff Fitzgerald had as a member of the FirstNet Board.

14. As records of FirstNet, these emails are not subject to the public disclosure under federal law, as Congress expressly exempted FirstNet from the disclosure requirements of the FOIA, 5 U.S.C. § 552. 47 U.S.C. § 1426(d)(2).

15. On August 13, 2013, Story County Board of Supervisors voted to release the requested records to Politico at 9:00 a.m. on Monday, August 19, 2013.

16. On August 16, 2013, attorneys with the Department of Justice and an Assistant United States Attorney for the Southern District of Iowa contacted Mr. Holmes by telephone to discuss the County's contemplated release of these records belonging to the United States. Based on those discussions, Mr. Holmes agreed not to disclose the records at issue until the close of business on August 20, 2013, in order to allow the United States the opportunity to seek emergency relief.

17. That same day, the Acting Associate Attorney General sent a letter to Mr. Holmes via

email expressing again the government's deep concern of the potentially significant harm that could result if Story County were to publicly release emails and other records sent by and between Sheriff Fitzgerald relating to his duties as a sworn federal official and FirstNet board member. *See* Exhibit 1. The Acting Associate Attorney General explained that these emails are the property of the United States and asked Mr. Holmes to convey to the Board of Supervisors of Story County the government's concerns about this matter with the hope that the Board might reconsider its decision to release this information. The Board declined to take such action.

Count I

18. Paragraphs 1 through 17 are hereby incorporated by reference.

19. The emails and other records sent and received by Sheriff Fitzgerald in his capacity as a member of the FirstNet Board are the property of the United States, subject to its possession and control. Such records are not Story County records and do not bear upon or reveal the functions or operations of either Sheriff Fitzgerald's office or the County of Story.

20. Because the records are federal records belonging to the United States, defendant does not have the authority to disclose the records to the public or any other entity without the consent of the United States.

Prayer for Relief

WHEREFORE, the plaintiff prays for this Court to grant the following relief:

- A. Declare that the emails and other records sent and/or received by Sheriff Fitzgerald in his capacity as a Board member of FirstNet are the property of the United States, subject to its possession and control;
- B. Enjoin defendant and any person or entity acting on its behalf from disclosing such records to the public or any other entity without the consent of the United States; and

C. Grant any other relief the Court deems appropriate.

Respectfully submitted,

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Assistant Attorney General

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Attorneys for the United States



Office of the Associate Attorney General

*Washington, D.C. 20530*

August 16, 2013

**SENT VIA EMAIL**

Mr. Steven Holmes  
Story County Attorney  
126 South Kellogg, Suite 203  
Ames, Iowa 50010

Mr. Holmes:

Thank you again for taking the time to speak with us in the Department of Justice about our deep concern of the potentially significant harm that would result if Story County were to publicly release emails sent by and between Sheriff Paul Fitzgerald relating to his participation as a sworn federal official in the work of the "First Responder Network Authority," known as "FirstNet." As you may know, Congress established this federal authority to enhance the ability of our First Responders to communicate in the event of an emergency such as the terrorist attacks on September 11, 2001. I am taking this opportunity to ask that you at your earliest convenience convey to the Board of Supervisors of Story County our concerns about this matter with the hope that the Board might reconsider its decision to release this information.

First, as Mr. Tyler explained to you on the telephone, we have concluded that the emails at issue are federal information, rather than Story County information, and are therefore not subject to Iowa's Public Records Act. We base this conclusion on the fact that Sheriff Fitzgerald was at all times acting as a special federal employee and member of the FirstNet Board when engaging in the communications at issue. Based on these facts and pursuant to established law, we believe that, if called upon to do so, we could successfully demonstrate in federal district court that Sheriff Fitzgerald's emails are the property of the federal government notwithstanding the fact that Sheriff Fitzgerald used the Story County email domain when engaging in these communications.


In addition, even if Iowa's Public Records Act were applicable, we believe that the communications at issue are exempt from publication under section 22.7(18) owing to their confidential nature. We stress in this regard the fact that Congress has determined that information relating to FirstNet is per se sensitive and therefore not subject to the federal Freedom of Information Act. Sheriff Fitzgerald in his capacity as a member of the FirstNet Board is privy to and shares sensitive information about our nation's ability to respond to potential national emergency threats and we are very concerned that information within these emails might potentially damage our first response ability if it were publicly released.

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For these reasons we respectfully ask that you prevail upon the Board of Supervisors to reconsider its decision to release this information. We understand that you have agreed with Assistant United States Attorney Bill Purdy that you will not release the information before close of business on Tuesday, August 20, 2013 to allow us time to go into federal court, if necessary, in order to protect federal interests. We appreciate this courtesy.

Thank you for your consideration of these matters.

Sincerely,

A handwritten signature in cursive script, appearing to read "Elizabeth G. Taylor".

Elizabeth G. Taylor  
Acting Associate Attorney General



IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

UNITED STATES OF AMERICA,  Plaintiff,  vs.  STORY COUNTY, IOWA, by and through its Board of Supervisors,  Defendant.	<b>No. 4:13-cv-00360 – JEG</b>  <b>TEMPORARY RESTRAINING ORDER</b>
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Before the Court is a Motion brought by Plaintiff United States of America, pursuant to Federal Rule of Civil Procedure 65(b), for the issuance of a Temporary Restraining Order to enjoin Defendant Story County, Iowa, acting by and through its Board of Supervisors (Defendant), from publicly releasing records in its possession that were sent or received by Sheriff Paul Fitzgerald in his federal official capacity as a member of the Board of Directors of the First Responder Network Authority (“FirstNet”). Plaintiff served Defendant with the Complaint and this Motion via electronic notification and thereby complied with Rule 65(b). In addition, the Court has received verification that Defendant received notice, has waived the need for a hearing prior to the issuance of a temporary restraining order, and will address the merits of any additional injunctive relief sought on a filed Motion for Preliminary Injunction or other action in the ordinary course. The Court finds that immediate and irreparable harm to Plaintiff will occur if the requested information is released as currently scheduled by 5:00 p.m. on August 20, 2013, and that this outweighs the inconvenience of a fourteen (14) day delay. See Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981) (en banc). The Court finds Plaintiff has satisfied the requirements of Rule 65(b) and that the Dataphase factors weigh in favor of granting a temporary restraining order.

For the reasons stated, the Motion brought by the United States, ECF No. 2, is **granted**. Defendant, and any other person or entity acting on its behalf, is enjoined from publicly

releasing records in its possession that were sent or received by Sheriff Paul Fitzgerald in his federal official capacity as a member of the Board of Directors of FirstNet, for a period not to exceed fourteen (14) days from the date of the issuance of this Order.

**IT IS SO ORDERED.**

Dated this 20th day of August, 2013, issued at 2:30 p.m.



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JAMES E. GRITZNER, Chief Judge  
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

United States of America,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 4:13-cv-00360
	)	
Story County, Iowa, by and through its	)	
Board of Supervisors,	)	
	)	
Defendant.	)	

**MOTION FOR A STAY OF CASE  
IN LIGHT OF LAPSE OF APPROPRIATIONS**

The United States of America hereby moves for a stay of the above-captioned case.

1. In this action, the United States of America, on behalf of its agency the First Responder Network Authority (“FirstNet”), seeks to enjoin defendant Story County, Iowa, by and through its Board of Supervisors, from disclosing information sent or received by Story County Sheriff Paul Fitzgerald while serving in his federal official capacity as member of the Board of the First Responder Network Authority (“FirstNet”), an independent authority within the National Telecommunications and Information Administration (NTIA), 47 U.S.C. § 1424(a).<sup>1</sup>
2. On September 3, 2013, based on stipulation by the parties (ECF Doc. 5-4), the Court preliminarily enjoined defendant Story County from publicly releasing to any individual or entity not a party to this action or this Court, any records in its possession that were

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<sup>1</sup> NTIA is an operating unit of the United States Department of Commerce. *See* Department Organization Order (DOO) 1-1, dated November 9, 2012 “Mission and Organization of the Department of Commerce,” and DOO 25-7, dated September 17, 2012 “National Telecommunications and Information Administration,” available at: [http://www.osec.doc.gov/opog/dmp/doos.html#ou\\_technology](http://www.osec.doc.gov/opog/dmp/doos.html#ou_technology). NTIA is the President’s principal advisor on telecommunications and information policy issues.

sent to or received by Story County Sheriff Paul Fitzgerald in his federal capacity as a member of the Board of FirstNet pending a hearing and decision on the merits of this action or until further order of the Court. ECF Doc. 6. The Court further ordered that Story County shall have until September 30, 2013, to respond to the United States' Verified Complaint and Motion for a Preliminary Injunction; that the United States shall have until October 15, 2013, to respond to any pleadings submitted by Defendant; and this Court shall set the matter for hearing on a date to follow submission of the pleadings in this matter. *Id.*

3. Pursuant to a stipulation, defendant Story County filed "Story County Iowa's PreAnswer Motion to Dismiss" (ECF Doc. 7) and "Memorandum of Law in Support of Defendant's PreAnswer Motion to Dismiss" (ECF Doc. 7-1) on September 30, 2013.
4. At the end of the day on September 30, 2013, the appropriations act that had been funding the Department of Justice expired and appropriations to the Department lapsed. The same is true for most Executive agencies, including the Department of Commerce. The Department does not know when funding will be restored by Congress.
5. Absent an appropriation, Department of Justice attorneys and employees of the Department of Commerce are prohibited from working, even on a voluntary basis, except in very limited circumstances, including "emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342.
6. Undersigned counsel for the Department of Justice therefore requests a stay of the case until Congress has restored appropriations to the Department.
7. If this motion for a stay is granted, undersigned counsel will notify the Court as soon as Congress has appropriated funds for the Department. The Government requests that, at

that point, all current deadlines for the parties be extended commensurate with the duration of the lapse in appropriations.

8. Opposing counsel has authorized counsel for the Government to state that Story County has no objection to this motion.

Therefore, although we greatly regret any disruption caused to the Court and the other litigants, the Government hereby moves for a stay of the case in this case until Department of Justice attorneys are permitted to resume their usual civil litigation functions.

Respectfully submitted,

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Assistant Attorney General

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Attorneys for the United States

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 1, 2013, I electronically filed the foregoing with the Clerk of the Court using the ECF system and a true copy of the foregoing was served either electronically or by U.S. First Class mail upon the following:

Stephen Holmes, County Attorney of Story County

/s/ William C. Purdy  
William C. Purdy  
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

STORY COUNTY, IOWA, by and through its  
Board of Supervisors,

Defendant.

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**No. 4:13-cv-00360 – JEG**

**PRELIMINARY INJUNCTION  
ORDER**

On August 20, 2013, Plaintiff United States of America (Plaintiff) filed a Verified Complaint<sup>1</sup> for Declaratory and Injunctive Relief, ECF No. 1, and a Motion for Temporary Restraining Order, ECF No. 2, against Defendant Story County, Iowa, by and through its Board of Supervisors (Defendant). Based upon an agreement of the parties, the Court entered a Temporary Restraining Order enjoining Defendant for a period of fourteen days from publicly releasing records in its possession that were sent or received by Sheriff Paul Fitzgerald in his federal official capacity as a member of the Board of Directors of First Responder Network Authority (FirstNet).

The parties entered into a Stipulation for Preliminary Injunction on August 30, 2013, ECF No. 5. Based upon the Stipulation, **IT IS HEREBY ORDERED:**

Defendant Story County, Iowa, by and through its Board of Supervisors, and any individual or entity acting on its behalf, is **PRELIMINARILY ENJOINED**, directly or indirectly, from publicly releasing to any individual or entity not a party to this action or this Court, any records in its possession that were sent to or received by Story County Sheriff Paul Fitzgerald in his federal official capacity as a member of the Board of Directors of FirstNet pending a hearing and decision on the merits of this action or until further order of the Court.

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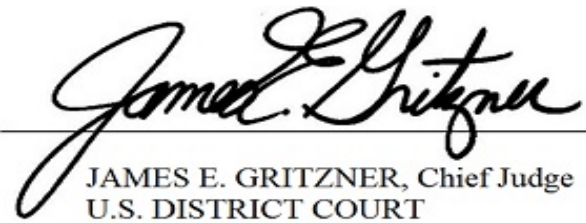
<sup>1</sup> Plaintiff separately filed a verification of the Complaint, see ECF No. 3.

**IT IS FURTHER ORDERED** that Story County, Iowa, shall have until September 30, 2013, to respond to the United States' Verified Complaint and Motion for Preliminary Injunction; that the United States shall have until October 15, 2013, to respond to any pleadings submitted by the Defendant; and this Court shall set the matter for hearing on a date to follow submission of the pleadings in this matter.

This preliminary injunction is binding on the parties for the duration of this litigation only, does not constitute a settlement or final resolution of the underlying case or admission of any facts not contained herein, and does not waive any claims, arguments, or legal theories available to either party.

**IT IS SO ORDERED.**

Dated this 3rd day of September, 2013.



JAMES E. GRITZNER, Chief Judge  
U.S. DISTRICT COURT