

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.)	

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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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.	No. 4:13-cv-00360 – JEG TEMPORARY RESTRAINING ORDER
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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.



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

UNITED STATES DISTRICT COURT FOR
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Story County, Iowa, by and through its)	
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)	
Defendant.)	

**MOTION FOR A TEMPORARY RESTRAINING ORDER TO PREVENT
DEFENDANT’S DISCLOSURE OF FEDERAL RECORDS BELONGING TO THE
FEDERAL FIRST RESPONDER NETWORK AUTHORITY**

Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, plaintiff, the United States of America, on behalf of its agency the First Responder Network Authority (“FirstNet”), by and through the United States Attorney for the Southern District of Iowa, hereby requests that this Court enter a temporary restraining order to enjoin defendant Story County, Iowa, by and through its Board of Supervisors, from disclosing federal records of the First Responder Network Authority (“FirstNet”), an independent authority within the National Telecommunications and Information Administration (NTIA), 47 U.S.C. § 1424(a).¹ In support of this motion, the United States respectfully refers the Court to its accompanying memorandum of points and authorities and supporting declarations and exhibits.

¹ 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. NTIA is the President’s principal advisor on telecommunications and information policy issues.

Respectfully submitted,

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UNITED STATES DISTRICT COURT FOR
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Story County, Iowa, by and through its)	
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**MEMORANDUM OF LAW IN SUPPORT OF AN EMERGENCY APPLICATION BY
THE UNITED STATES FOR A TEMPORARY RESTRAINING ORDER TO PREVENT
DEFENDANT’S DISCLOSURE OF FEDERAL RECORDS BELONGING TO THE
FEDERAL FIRST RESPONDER NETWORK AUTHORITY**

Plaintiff, the United States of America, on behalf of its agency the First Responder Network Authority (“FirstNet”), by and through the United States Attorney for the Southern District of Iowa, submits this memorandum of law in support of its application for a temporary restraining order to enjoin defendant Story County, Iowa from disclosing federal records of the First Responder Network Authority (“FirstNet”), an independent authority within the National Telecommunications and Information Administration (NTIA), 47 U.S.C. § 1424(a).¹ FirstNet was established to provide emergency first responders a nationwide, high-speed network dedicated to public safety. *Id.* § 1422. The Story County Board of Supervisors’ intended release of the federal records at issue could detrimentally impact this effort and the ability of first responders to react to national and local emergencies.

¹ NTIA is an operating unit of the United States Department of Commerce. 47 U.S.C. § 902; *see also* 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. NTIA is the President’s principal advisor on telecommunications and information policy issues.

Defendant Story County intends to release the records at issue by close of business on Tuesday, August 20, 2013, in response to a request under Iowa's Public Records Law, Iowa Code § 22.2, received by the County of Story. These records are electronic communications received and sent by Paul H. Fitzgerald, a member of the FirstNet Board. While Paul Fitzgerald is also the Sheriff of Story County, the records at issue were sent or received by Sheriff Fitzgerald solely in his capacity as a member of the FirstNet Board. The records are, therefore, *federal* records and not the records of Story County. Because they are not records "of or belonging" to the County of Story, they are not subject to Iowa's Public Records and Freedom of Information Statute. Iowa Code § 22.1(3). Moreover, disclosure of these records without the consent of FirstNet poses a serious threat of irreparable harm to the United States. Congress has expressly exempted FirstNet from the disclosure requirements of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. *See* 47 U.S.C. § 1426. Sheriff Fitzgerald in his capacity as a member of the Board of FirstNet participates in internal deliberations with other Board members in evaluating public safety concerns and options. The confidentiality of this potentially sensitive information would be irretrievably lost if released thereby necessitating the issuance of a temporary restraining order in order to preserve the status quo to allow the Court sufficient opportunity to fully adjudicate the merits of the government's claims.

STATEMENT OF THE CASE

A. Statutory Background

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. The establishment of this network fulfills a

fundamental need of the public safety community and a key recommendation of the 9/11 Commission. *See* The 9/11 Comm’n Report: Final Report of the Nat’l Comm’n on Terrorist Attacks Upon the U.S. at 397 (July 22, 2004), available at <http://www.9-11commission.gov/report/911Report.pdf>. 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.” 47 U.S.C. § 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).

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). In making the appointments of the twelve individuals, “the Secretary of Commerce shall – (i) appoint not fewer than 3 individuals to represent the collective interests of the States, localities, tribes, and territories; (ii) seek to ensure geographic and regional representation of the United States in such appointments; (iii) seek to ensure rural and urban representation in such appointments; and (iv) appoint not fewer than 3 individuals who have served as public safety professionals.” *Id.* § 1424(b)(2)(A).²

In establishing FirstNet, Congress made the clear decision not to subject FirstNet 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 disclose agency records. Pursuant to 47 U.S.C. § 1426(d), Congress provided that,

² The individuals should meet not less than one of the following criteria: (1) knowledge and experience in the use of Federal, State, local and tribal public safety or emergency response; (2) technical expertise and fluency regarding broadband communications, including public safety communications; (3) expertise in building, deploying, and operating commercial telecommunications network; and (4) expertise in financing and funding telecommunications networks. *Id.* § 1424(b)(2)(B).

Any action taken or decisions made by the First Responder Network Authority shall be exempt from the requirements of—

* * *

(2) chapter 5 of title 5, United States Code (commonly referred to as the Administrative Procedures Act).

Id.

B. Factual Background

One of the members of the FirstNet Board is Paul H. Fitzgerald, who was appointed by the then Acting Secretary of Commerce on August 20, 2012. Declaration of Paul H. Fitzgerald (“Fitzgerald Decl.”), ¶ 2, (attached as Exh. 1). *See also* Declaration of Uzoma Onyeije (“Onyeije Decl.”), ¶ 3 (attached as Exh. 2). 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. *See* Onyeije Decl. ¶ 6. When performing his FirstNet duties and activities, Sheriff Fitzgerald acts 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); Fitzgerald Decl. ¶ 3.

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. Fitzgerald Decl., ¶ 6. He also communicates on matters of concern and exchanges views with other members of the FirstNet Board. *Id.*, ¶ 8. 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. *Id.*,

¶ 9. Beginning shortly after their appointments, FirstNet Board members were provided NTIA.gov federal email addresses, but did not widely or consistently use them until June 2013. *Id.* ¶ 9. 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. *Id.* Use of the County email account for these federal purposes did not violate any restrictions on the use of the County's records systems. *Id.*

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 pursuant to the Iowa's Public Records and Freedom of Information Act of "all emails [Sheriff Fitzgerald] sent and received by Sheriff Paul Fitzgerald over the period between March 1 and June 30." Declaration of Milton Brown ("Brown Decl."), ¶ 4 (attached as Exh. 3). 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." *Id.*, ¶ 4; *see also* Fitzgerald Decl. ¶ 10. Thus, the request was explicitly narrowed to encompass only the communications Sheriff Fitzgerald had as a member of the FirstNet Board. 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).

When apprised of this request by Mr. Romm, FirstNet, acting through Kathy Smith, Chief Counsel of NTIA, contacted the Iowa State Attorney General's Office to ensure that any records generated or received by Sheriff Fitzgerald as a member of the FirstNet Board would be

protected, consistent with federal law. Brown Decl. ¶ 5. By email dated August 8, 2013, Deputy Attorney General, Julie Pottorff, whose office is charged with the enforcement of the State Public Records Law, concluded and informed Jessica Reynolds, Assistant Story County Attorney, that the subject records are federal records relating to Sheriff Fitzgerald's duties as a member of the board directors of FirstNet and access should be determined under federal law rather than the state Public Records Law. *Id.*, ¶ 6. Despite additional communications from the State's Attorney General's Office to the Story County Attorney's Office, wherein the State's Deputy Attorney General encouraged the County to "have the disclosure of emails related to the federal position determined at the federal level," Exhibit 4 to Brown Decl., (email dated August 13, 2013, at 5:01 p.m., addressed to Ms. Pottorff and to Milton Brown of NTIA), Ms. Reynolds advised:

Today the Story County Board of Supervisors voted to release the requested records to Politico at 9:00 a.m. on Monday, August 19, 2013. I am notifying you all so that you have time to take whatever action you feel is necessary.

Exhibit 5 to Brown Decl.

On August 16, 2013, following telephone conversations with attorneys from the Department of Justice and an Assistant United States Attorney for the Southern District of Iowa, County Attorney Steven 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.

On late Friday afternoon, August 16, the County provided the Department of Justice copies of what it represents is the set of records that it intends to release. Because of the volume of the records at issue and need for multiple levels of review, the United States has not had

adequate time to conclude its review of the documents.³

Because attempts to resolve this issue with the County have proven unsuccessful, the United States seeks a temporary restraining order against Story County acting by and through its County Board of Supervisors, County Attorney Stephen Holmes, and any and all other persons or officials acting on their behalf, to prohibit the disclosure of the emails and communications sent or received by Sheriff Fitzgerald in his capacity as a member of the FirstNet Board. The United States has authority to bring suit to enforce its property rights in federal court. *See United States v. Napper*, 887 F.2d 1528, 1530 (11th Cir. 1989) (suit by the United States seeking return of documents loaned to law enforcement officials during an investigation); *United States v. California*, 332 U.S. 19 (1947); *Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1851).

STANDARDS FOR ISSUANCE OF A TEMPORARY RESTRAINING ORDER

The factors to be considered for issuance of a temporary restraining order are the same factors considered in regard to a motion for a preliminary injunction. *Wachovia Secs. L.L.C. v. Stanton*, 571 F. Supp. 2d 1014, 1031 (N. D. Iowa 2008); *Doe v. Miller*, 216 F.R.D. 462, 468 (S.D. Iowa 2003). The district court must consider four factors:

(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981) (en banc). In considering these factors, the court must determine whether “the balance of equities so favors the

³ Based on its preliminary review, the federal records include documents containing procurement sensitive information, draft Board resolutions and minutes or other predecisional documents and legal advice to the Board. For example, the records sought include interim budget recommendation dated March 18, 2013, marked as confidential; procurement sensitive updates and various emails regarding predecisional matters including budget, minutes and draft resolutions; legal advice to Board members; and proposed personnel, procurement and management actions.

movants that justice requires the court to intervene to preserve the status quo until the merits are determined.” *Id.*. And, “[w]hile ‘no single factor is determinative,’ the probability of success factor is the most significant.” *Home Instead, Inc. v. Florance*, – F.3d –, No. 12-3521, 2013 WL 3583942 at *2 (8th Cir. July 16, 2013), *quoting Dataphase*, 640 F.2d at 113, and *Barrett v. Claycomb*, 705 F.3d 315, 320 (8th Cir. 2013).

ARGUMENT

I. The United States Is Likely to Prevail on Its Claim that the Records at Issue Are Federal Records and Not County Records Subject to Iowa’s Public Records Law

The fundamental legal question before the Court is whether the emails and other electronic records of Sheriff Fitzgerald, received and created in connection with his work as an appointed Board member of FirstNet, are federal records exempt from disclosure or are County records subject to disclosure under this State’s Public Records Law. Pursuant to established law, there is no question that the records at issue are Federal records. The Federal Records Act, 44 U.S.C. §3301, defines the term “records” to include,

all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.

Id. (emphasis added). The emails at issue clearly fall within this broad definition. They are documentary materials, in electronic form, that were made or received by Sheriff Fitzgerald in connection with FirstNet business, which is a Federal function. Fitzgerald Decl., ¶¶ 5 and 8.

Contrary to defendant’s presumptive assertion, the fact that the records were created or received on the Sheriff’s county email account does not make them records of Story County.

The physical location of a record is not determinative as to whether or not a “record” is a record of a federal agency. See *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 157 (1980) (“It requires little discussion or analysis” to conclude that “mere physical location of papers” does not “confer status as ‘an agency record’ [over an official’s] personal books, speeches, and all other memorabilia.”). Thus, for example, in *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380 (8th Cir. 1987), the Government sought to retrieve tribal court records that had been removed from a tribal court and stored in the tribal archives. The United States asserted that such materials were the records of the Bureau of Indian Affairs and the Eighth Circuit agreed. Citing to the definition of records under 44 U.S.C. § 3301, the Eighth Circuit found that “[t]he records of C.F.R. courts [the tribal courts established under federal regulations] are agency records and belong to the United States.” 827 F.2d at 383. Regardless that such records were in the possession of the tribal government, they were records of the United States. *Id.*

That the communications at issue here are records of the United States is further supported by the decision of the District of Columbia Circuit in *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978), a FOIA case. In that case, the requester sought disclosure of Congressional records, which are not covered by FOIA. The court said, “[a]t the outset, we reject plaintiffs’ argument that an agency’s possession of a document per se dictates that document’s status as an ‘agency record.’” 607 F.2d at 345. Rather, what is determinative is whether the record was “made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business....” 44 U.S.C. §3301.

Media Research Center v. U.S. Dep’t of Justice, 818 F. Supp. 2d 131 (D.D.C. 2011), specifically applied this principle to documents stored in a government email domain. In that

case, plaintiff asserted that emails created or received by Solicitor General Elena Kagan in her capacity as a nominee to the Supreme Court were agency records under the FOIA because they were created or received on her Department of Justice's email account. *Id.* at 140. The district court rejected this claim, holding that their status as agency documents depends on the purpose for which the documents were created and the agency's use of the documents for its official business. *Id.* Because the emails were created and received by Ms. Kagan in her personal capacity as a Supreme Court nominee and not in her role as the Solicitor General, the court found that they were not federal agency records.

These authorities squarely apply here. The emails and other records at issue were sent or received by Sheriff Fitzgerald as a member of the FirstNet Board, not in his capacity as the Sheriff of Story County, and they relate to the activities and functions of FirstNet, not the activities and functions of Story County. They are, accordingly, federal records, and are subject to the custody and control (even if not in possession) of FirstNet.

This view of these emails and other FirstNet records is fully consonant with Iowa's Public Records Law, Iowa Code § 22.1 *et seq.* (2013) The Iowa Public Records Law provides that, "[e]very person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record." *Id.* § 22.2(1). A public record is defined as "all records, documents, tape, or other information, stored or preserved in any medium, *of or belonging to* this state or any county, city, township, school corporation, political subdivision, nonprofit corporation...." *Id.* §22.1(3) (emphasis added).

In its review of this provision in *City of Dubuque v. Dubuque Racing Ass'n, Ltd.*, 420 N.W.2d 450 (Iowa 1988), the Iowa Supreme Court addressed and resoundingly rejected the argument that is apparently advanced in this case by the Story County Board of Supervisors, *viz.*,

that the location of a document is dispositive of whether it was a “public record” for purposes of the Iowa Public Records Law. In *City of Dubuque*, the Dubuque Racing Association, or DRA, was a private, non-profit corporation licensed to conduct pari-mutuel wagering on dog races. Several officials of the City, including the assistant city manager, served as members of the DRA board. The assistant city manager kept copies of the DRA’s board meeting minutes in the City’s offices. Subsequently, the DRA made its meetings minutes confidential, and a local newspaper sought access to the copies of the meeting minutes kept by the assistant city manager. Rejecting the argument that these meeting minutes were public records subject to disclosure under the state’s public disclosure statute, the court found,

This decision [whether the DRA board meeting minutes were public records] does not turn on the physical location of the documents in question, rather, the appropriate inquiry is whether the documents are held by the city officials in their official capacity. * * * Simply because members of a city council serve on the board of directors of a private nonprofit corporation, the affairs of the corporation do not become the affairs of the government.

420 N.W.2d at 453. The Iowa Supreme Court then examined the relationship between the City and the DRA, finding that although members of City government were on the DRA board, no law or contractual provision obligated the DRA to produce its meeting minutes to the City, nor was the City a regulator of the DRA. Accordingly, the court held that, “[a]lthough members of the city council and the city manager may also serve as directors and committee members of the DRA, minutes of the DRA meetings are not documents that belong to the city.” 420 N.W.2d at 454.

In the instant case, the records at issue do not bear upon or reveal the functions or operations of either the Sheriff’s Office or the County. Sheriff Fitzgerald holds these records not in his capacity as Sheriff of Story County, but solely in his official capacity as a Special Government Employee of FirstNet and an appointed member of its Board. Consequently, there

is a substantial likelihood that the United States will succeed on the merits of its claims that the materials sought by Mr. Romm are not “public records” subject to Iowa’s Public Records Law, but, rather, are federal records of FirstNet and are expressly exempt from disclosure by law.

II. The United States Will Suffer Irreparable Harm in the Absence of a Temporary Restraining Order.

“Irreparable harm occurs when a party has no adequate remedy at law, typically its injuries cannot be fully compensated through an award of damages.” *Rogers Group, Inc. v. City of Fayetteville*, 629 F.3d 784, 789 (8th Cir. 2010) (quoting *Gen. Motors Corp. v. Harry Brown’s, LLC*, 563 F.3d 312, 319 (8th Cir. 2009)). Courts have consistently recognized that the injury that United States seeks to prevent here – the disclosure of sensitive federal records pending resolution or appeal of a disclosure order– clearly constitutes an irreparable injury. *See, e.g., HHS v. Alley*, 129 S. Ct. 1667 (2009); *Rosenfeld v. Dep’t of Justice*, 501 U.S. 1227 (1991); *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306 (1989). In granting stays of orders to disclose documents, courts have recognized that the agency’s right to contest the disclosure “will become moot” and thus “entirely destroy [a party’s] rights to secure meaningful review” unless such a stay is granted.” *Providence Journal v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979). As the D.C. Circuit explained under analogous circumstances, “[d]isclosure followed by appeal . . . is not adequate in [privilege] cases – the cat is out of the bag.” *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998). *Accord Providence Journal*, 595 F.2d at 890 (“Once the documents are surrendered pursuant to the lower court’s order, confidentiality will be lost for all time. The status quo could never be restored.”). That is exactly the type of irreparable injury presented here. Once the information is released, it cannot be recalled.

In this case, potentially significant harm could result if Story County were to publicly release the records at issue without FirstNet consent. Sheriff Fitzgerald in his capacity as a

member of the Board of FirstNet participates in internal deliberations with other Board members in evaluating public safety concerns and options. The disclosure of such deliberations would jeopardize the ability of FirstNet Board members to consider and frankly deliberate about the needs, concerns and options for establishing a nationwide public safety broadband network for first responders. The chilling effect of such disclosures is real, as demonstrated by Sheriff Fitzgerald's experiences in seeking information from and having such discussions with the public safety community. Those with whom he communicated did so only with the expectation and often upon the assurances of confidentiality. Fitzgerald Decl., ¶ 11. The release of the records at issue would discourage and potentially silence full and frank discussions not only among Board members themselves, but with those from outside of the Board with whom Board members may seek information and counsel. Onyeije Decl. ¶¶ 14-15. Such injury to the functions of FirstNet cannot be adequately compensated by any award of damages.

The need to shield these communications and other information gathered by the FirstNet Board from public disclosure is exemplified by Congress' decision to exempt FirstNet from FOIA. *See* Section 6206(d)(2) of Pub. L. 112-96. This exemption includes the emails and notes Sheriff Fitzgerald created, sent or obtained as a member of the FirstNet Board. To allow the County to disclose this information in contravention of Congress' decision that FirstNet records not be subject to FOIA would undermine Congress' explicit intention to protect these records from public disclosure.

III. The Balance of Equities Clearly Favors the Issuance of a Temporary Injunction, as No Harm Would Inure to Story County or Its Officials by the Issuance of a Temporary Injunction

The next *Dataphase* factor requires "balanc[ing] between this harm and the injury that granting the injunction will inflict on other parties." *Dataphase*, 640 F.2d at 113. This factor is

an equitable one, requiring that the court consider “whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.” *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 370 (8th Cir. 1991) quoting *Dataphase, supra*. In this instance, the County and its officials would suffer no harm, let alone irreparable harm, should the court enjoin its disclosure of these records.

First, as these are federal records the County has no interest or claim to these records, nor would disclosure fulfill any purpose of the State’s Public Records Law; it would “not facilitate public scrutiny of the conduct” of either the County or its officials. *See Dubuque Racing Ass’n.*, 420 N.W.2d at 454. Second, although the Public Records Law does contain significant penalties for a violation of its requirements, Iowa Code § 22.10, the act also provides that a,

Good-faith, reasonable delay by a lawful custodian in permitting the examination and copying of a government record is not a violation of this chapter if the purpose of the delay is any of the following:

* * *

c. To determine whether the government record in question is a public record, or confidential record.

Id. § 22.8(4). In this instance there should be no doubt but that the subject records are not Iowa “public records” within the meaning of the act. *See* Iowa. Stat. §22.1(3); *City of Dubuque*, 420 N.W.2d at 454; and discussion *supra* at 11. Moreover, even assuming that the Iowa Public Records Law applied to these records, there is a very strong likelihood that they would be exempt as confidential in whole or in part under one or more provisions of the state law. *See, e.g.*, Iowa Code § 22.7(18) (confidential communications received from persons outside of government); (50) (information concerning security procedures or emergency preparedness information); (65) (tentative, preliminary, draft, or research material). Accordingly, the balance of equities decidedly tilts in favor of protecting these emails and communications from

disclosure.

IV. The Public Interest Is Served By The Issuance of a Temporary Restraining Order Preventing the Disclosure of the Records.

The final *Dataphase* factor is consideration of the public interest in the issuance of an injunction. Here disclosure of the records without the consent of FirstNet would not be in the public interest. While FirstNet has made certain information about its activities available to the public by posting it on FirstNet's website, other information remains confidential and its release likely would seriously impede FirstNet's ability to create a nationwide broadband network to be used by first responders in the event of national emergencies and national disasters. Congress clearly identified the public interest and pronounced a public policy of nondisclosure when it took the unusual step of exempting the records of FirstNet from the disclosure requirements of FOIA. 47 U.S.C. § 1424(d)(2). In contrast, no discernible public interest would be advanced were the County to release these emails, as their disclosure would not facilitate public scrutiny of either the County or the position of Sheriff inasmuch as they are unrelated to the functions of either.

CONCLUSION

For the foregoing reasons, the United States respectfully asks this Court to grant its motion for a temporary restraining order enjoining Story County from releasing the records.

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

NICHOLAS A. KLINEFELDT
United States Attorney

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Facsimile: (515) 473-9282
E-Mail: bill.purdy@usdoj.gov

Attorneys for the United States

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
Des Moines Division

United States of America,)	
)	
Plaintiff,)	
)	
v.	)	Civil Action No. XXXXXXXX
)	
Board of Supervisors of Story County, Iowa,)	
and Stephen Holmes, Story County Attorney,)	
)	
Defendants.)	

DECLARATION OF PAUL H. FITZGERALD

I, Paul H. Fitzgerald, hereby declare as follows, pursuant to 28 U.S.C. § 1746:

1. I am the duly elected Sheriff of Story County, Iowa.
2. On August 20, 2012, I was appointed by the United States (Acting) Secretary of Commerce to the Board of the First Responder Network Authority (FirstNet), a federal instrumentality created pursuant to Pub. L. No. 112-96, 126 Stat. 156 (February 22, 2012). Attached hereto, as Exhibit 1, is a copy of my appointment letter. My appointment to, and functions as a member of, the Board of FirstNet are independent of my position and role as Sheriff of Story County.
3. When I was appointed as a member of the FirstNet Board, it was my understanding that I would become a federal government employee as a new FirstNet Board member. I am compensated as a federal employee for my expenses, travel, and time to serve on the FirstNet Board, and have had to file necessary financial disclosure forms with the Commerce Department.
4. FirstNet was established as an independent authority within NTIA to build, deploy and operate as a single nationwide interoperable public safety broadband network.
5. In my capacity as a member of the FirstNet Board, and in order to function more effectively and efficiently as a member of that Board, I have had communications, including email communication that occurred between March 1 and June 30 of 2013, with members within the public safety community in order to elicit from them areas of concern as well as advice regarding the organization, structure and development of a First Responder Network. Many of these communications have been with individuals and consulting firms located outside of Iowa. These substantive communications did not relate to my duties as Sheriff of Story County.
6. These communications as a member of the FirstNet Board have been both of a technical nature as well as on policy considerations to enable me to better understand the needs and areas of concern within the public safety community so as to share this information in deliberations

and make informed decisions as a member of that Board. The need for complete and frank discussions is of paramount concern both to me and of those with whom I have spoken.

7. It is my understanding and belief that most, if not all, persons with whom I communicated regarding FirstNet matters by email between March 1 and June 30 of 2013, believed those communications to be confidential. On at least two occasions, I was requested to and did enter into non-disclosure agreements with those with whom I was seeking information and advice. From my conversations and exchanges with these individuals and consultants, I know they would not share or provide their information, thoughts, opinions and insights with me regarding FirstNet if they understood these communications would be made public.

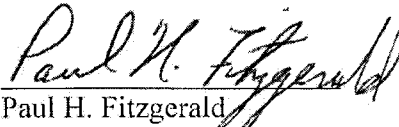
8. There are also communications and exchanges with other members of the FirstNet Board. I consider these to be internal deliberations and thought processes of the Board. Many of these are expressions of frank and open opinions about the Board deliberations. If these communications were to be disclosed, they could slow our progress in implementing the First Responder Network, limit future frank and open deliberations and expose pre-decisional information that will damage relationships with partners, state entities, and stakeholders.

9. Many of these communications and exchanges were performed using my email account at the Story County Sheriff's Office. Any notes of such communications and exchanges were stored within the Story County computer system. Until June 2013, emails were sent by FirstNet staff to me on both a FirstNet address but also my County email account. Consequently, I would reply using the County system and use my County email account for other FirstNet related communications. Beginning in June 2013, FirstNet staff exclusively use the FirstNet email account for communications. Use of these systems for these communications is not violative of any restriction on the use of the County's records systems.

10. On or about July 29, 2013, I was made aware of a request from Mr. Tony Romm, who identifies himself as a "technology reporter" for the publication "*Politico*," based in Washington, D.C. Mr. Romm seeks disclosure of my emails between March 1 and June 30 of 2013 on "any matters surrounding [my] involvement with FirstNet, [my] conversations with wireless companies or device makers, or on the topic of wireless communications generally."

11. In addition to the reasons discussed above, I am opposed to the disclosure of my emails as I consider these communications to be the records of FirstNet and not records of or belonging to either myself or Story County. I consider these communications to also reflect my internal deliberations and thought processes as I have tried to obtain information and advice I believe is essential to my duties as a member of the FirstNet Board.

I declare under penalty of perjury that the foregoing is true and correct.


Paul H. Fitzgerald

Executed on August 16, 2013.

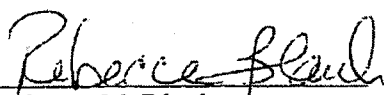
Exhibit 1 to Declaration of Paul H. Fitzgerald

Tracking No.: 12-026089

SECRETARY'S DECISION: Appointment of Board of Directors for the First Responder Network Authority

I hereby appoint the following individuals to the First Responder Network Authority Board of Directors for terms beginning August 20, 2012:

Approve	Disapprove	Candidate	Term (No. of Years)
		Tim Bryan	3
		Charles Dowd	2
		F. Craig Farrill	3
		Paul Fitzgerald	2
		Samuel Ginn (Chair)	2
		Jeffrey Johnson	1
		William Kever	1
		Kevin McGinnis	3
		Ed Reynolds	2
		Susan Swenson	1
		Teri Takai	1
		Wellington Webb	3


 Rebecca M. Blank
 Acting Secretary of Commerce

8/14/2012
 Date



UNITED STATES DEPARTMENT OF COMMERCE
The Secretary of Commerce
Washington, D.C. 20230

August 14, 2012

Mr. Paul H. Fitzgerald
Sheriff, Story County
907 Clayton Road
Colo, IA 50056

Dear Sheriff Fitzgerald:

I am pleased to appoint you as an inaugural director of the First Responder Network Authority (FirstNet). FirstNet is a landmark initiative to advance America's public safety capabilities by establishing and operating a state-of-the art nationwide, interoperable broadband network for use by America's men and women who ensure our public safety. The success of this initiative is a high priority for the Department of Commerce, in which you will play a critical role.

Your term will begin on August 20, 2012, and end August 20, 2014. You will be considered a Special Government Employee tasked with meeting the requirements of FirstNet contained in Subtitle B of Title VI of the Middle Class Tax Relief and Job Creation Act of 2012.

Please accept this appointment through and direct any questions to Assistant Secretary Lawrence E. Strickling of the National Telecommunications and Information Administration (NTIA) at (202) 482-1830. Upon learning of your acceptance, NTIA will provide you with further information relating to your appointment.

The Department of Commerce and the country thank you for your service in this important endeavor.

Sincerely,

A handwritten signature in black ink, reading "Rebecca Blank", is positioned above the typed name.

Rebecca M. Blank
Acting Secretary of Commerce

3. The records of the Board show that Paul Fitzgerald has been a member of the FirstNet Board since August 20, 2012.
4. Mr. Fitzgerald and all other FirstNet Board members are federal government employees.
5. Mr. Fitzgerald is also the Sheriff of Story County, Iowa.
6. Mr. Fitzgerald's federal employment is independent of his position as Sheriff.
7. In my capacity as Secretary, it is my responsibility to ensure that all FirstNet Board of Directors records are maintained as required by law. Among those records are communications among FirstNet Board members and between FirstNet Board Members and outside entities and individuals regarding the establishment of the public safety broadband network.
8. FirstNet's records are exempt from disclosure under the Federal Freedom of Information Act pursuant to Section 6206(d)(2) of Pub. L. 112- 96, which established FirstNet and, thus, are not publically available.
9. Each FirstNet Board Member was assigned an NTIA.gov federal government email address on or about September 25, 2012. However, because using the NTIA email addresses required Board Members to log-in from a desktop or use an NTIA-provided Blackberry the NTIA addresses were not widely or consistently used by any of the Board Members until June 2013 when I informed FirstNet Board Members of the U.S. Department of Commerce policy prohibiting the use of outside email addresses for Department business.
10. Based on information and belief, between September 2012 and June 2013, FirstNet Board Members used outside email accounts to conduct FirstNet business.
11. Much of the information that Board members seek or receive from outside entities or individuals is provided with the expectation of confidentiality and helps inform the Board

members as they conduct their deliberations to establish the nationwide public safety broadband network.

12. Internal discussions among Board members and their staff are often deliberative and pre-decisional in nature and reflect an exchange of ideas and concerns in an open and frank manner.

13. Based on information and belief, all communications between Mr. Fitzgerald and FirstNet, NTIA and the Department of Commerce have been in his capacity as a member of the FirstNet Board.

14. To the extent that communications at issue here are disclosed publicly, the disclosure will have a chilling effect on frank and open communications among the Board members, between the Board members and their staff, between the Board members and other federal staff, and between the Board members and the Board's public safety constituents.

15. Such a result is inconsistent with Congressional intent. While Congress has imposed an openness obligation on FirstNet that requires all of its Board and Committee meetings be open to the public, no such requirement exists for FirstNet's internal deliberations. Congress wisely limited the scope of its openness requirements because premature and widespread disclosure of FirstNet's internal work product will significantly hamper the ability of FirstNet to perform its duties as directed by the Middle Class Tax Relief and Job Creation Act of 2012.


Uzoma Onyeije
Secretary, FirstNet Board of Directors

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 16, 2013.

Exhibit 1 to Declaration of Uzoma Onyeije

FIRST RESPONDER NETWORK AUTHORITY
BOARD RESOLUTION 8
Appointment of Secretary
September 25, 2012

WHEREAS, the Middle Class Tax Relief and Job Creation Act of 2012 (Act) empowers the First Responder Network Authority (FirstNet), an independent authority within the Department of Commerce's National Telecommunications and Information Administration, to "exercise, through the actions of its Board, all powers specifically granted by the provisions of this subtitle, and such incidental powers as shall be necessary;"

WHEREAS, the Act empowers FirstNet to take "all actions necessary" to build, deploy, and operate the network, in consultation with State, local, tribal, and territorial entities;

WHEREAS, FirstNet has a need for a Secretary to (1) keep, or cause to be kept, in books provided for the purpose, minutes of the meetings of the Board of Directors, and of each committee of the Board; (2) see that all notices are duly given in accordance with law and these By-Laws; (3) be custodian of the logo of FirstNet; (4) see that the books, reports, statements and all other documents and records required by law are properly kept and filed; and (5) sign such instruments as require the signature of the Secretary.

NOW THEREFORE BE IT RESOLVED that the FirstNet Board, pursuant to the Service Level Agreement with NTIA, appoints Uzoma Onyeije Secretary of FirstNet. The Secretary shall have such powers and perform such duties as outlined in Section 5.02 of the FirstNet Bylaws and assigned by either the Board of Directors or the Chairman of the Board.

I, the undersigned, Secretary of the First Responder Network Authority, do hereby certify that the above is a true and correct copy of a resolution adopted at the meeting of the Board of Directors of the First Responder Network Authority on September 25, 2012, at which a quorum was present and voted.



Uzoma Onyeije, Secretary

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
Des Moines Division

United States of America,)	
)	
Plaintiff.)	
)	
v.	)	Civil Action No. XXXXXXXX
)	
Board of Supervisors of Story County, Iowa)	
)	
)	
Defendant.)	

DECLARATION OF MILTON BROWN

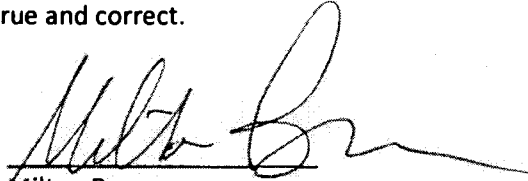
I, Milton Brown hereby declare as follows, pursuant to 28 U.S.C. § 1746:

1. I make these statements upon information that I became aware of in the ordinary course of performing my official duties and upon a review of official Departmental records. I am the Deputy Chief Counsel for the Department of Commerce's National Telecommunications and Information Administration (NTIA).
2. The First Responder Network Authority (FirstNet) is an independent federal authority within NTIA.
3. Sheriff Paul Fitzgerald of Story County Iowa is a FirstNet Board member.
4. On August 7, 2013, Sheriff Fitzgerald informed Kathy Smith, NTIA Chief Counsel, in a telephone conversation that the Story County Attorney's office had received a request from Tony Romm, a reporter with *Politico* for "emails [Sheriff Fitzgerald] 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. Sheriff Fitzgerald was forwarded a copy of Mr. Romm's request in an email from Jessica A. Reynolds of the Story County Attorney's Office on August 5, 2013. On August 7, 2013 Mr. Fitzgerald forwarded to Ms. Smith the email that he had received from Ms. Reynolds. Exhibit 1 attached hereto is a true and correct copy of that email chain.
5. On August 7, 2013, Ms. Smith contacted Julie Pottorff, Deputy Attorney General, Iowa Department of Justice via email regarding the request to the County for copies of Sheriff Fitzgerald's emails concerning FirstNet and informed her that Sheriff Fitzgerald had been appointed to the FirstNet Board by the U.S. Secretary of Commerce as a Special Government Employee (a federal employee). Ms. Smith also noted her appreciation that that the Iowa Attorney General's Office was working with NTIA Office of Chief Counsel to ensure that "the U.S. Government equities in the documents that Sheriff Fitzgerald generated or received in his

official capacity as a member of the FirstNet Board were appropriately protected." Exhibit 2 attached hereto is a true and correct copy of that email.

6. On August 8, 2013, Ms. Pottorff emailed Jessica Reynolds, Assistant Story County Attorney, to confirm a discussion they had regarding the handling of records requested by Tony Romm. Ms. Pottorff reiterated to Ms. Reynolds her belief that Sheriff Fitzgerald's emails concerning FirstNet were federal records and that access should be determined under federal law rather than the state Public Records law. She also apprised Ms. Reynolds of an Iowa Supreme Court decision which held that location of records does not determine whether the Public Records law applies. Ms. Pottorff requested that Ms. Reynolds provide Ms. Smith with the documents requested by Mr. Romm and direct Mr. Romm to Ms. Smith so his request could be responded to under federal law. Exhibit 3 attached hereto is a true and correct copy of that email.
7. On August 12, 2013, Ms. Pottorff again contacted Ms Reynolds and informed her that the Iowa Attorney General's Office had enforcement authority under the Iowa Public Records law and repeated the request of the Iowa Attorney general's Office that Story County transfer the documents in question to the United States Department of Commerce for the disclosure request to be handled at the federal level. Exhibit 4 attached hereto is a true and correct copy of that email.
8. On August 13, 2013, I received an email from Ms. Reynolds which stated that "the Story County Board of Supervisors [had that day] voted to release the requested records to Politico at 9:00 a.m. on Monday, August 19, 2013." Exhibit 5 attached hereto is a true and correct copy of that email.
9. On August 14, 2013, I made a request to Ms. Reynolds for copies of the documents related to the Politico request. Exhibit 6 attached hereto is a true and correct copy of that email.
10. On August 15, 2013, Ms. Reynolds responded the following day that copies could be provided to me on Monday at 9:00 a.m. "when we release the documents to Politico but not sooner." . Exhibit 7 attached hereto is a true and correct copy of that email.

I declare under penalty of perjury that the foregoing is true and correct.



Milton Brown

Executed on August 16, 2013.

Exhibits 1 -7 to Declaration of Milton Brown

Exhibit 1

Brown Declaration

Milton Brown

From: Paul H. Fitzgerald <PFitzgerald@storycounty.com>
Sent: Wednesday, August 07, 2013 2:07 PM
To: Kathy Smith
Subject: FW: Public Information Request -- Tony Romm, Politico

From: Jessica A. Reynolds
Sent: Monday, August 05, 2013 1:27 PM
To: Paul H. Fitzgerald
Subject: FW: Public Information Request -- Tony Romm, Politico

From: Tony Romm [<mailto:tromm@politico.com>]
Sent: Thursday, August 01, 2013 11:45 AM
To: Jessica A. Reynolds; Alissa D. Wignall
Subject: RE: Public Information Request -- Tony Romm, Politico

Hey Jessica and Alissa,

I just spoke with Stephen Holmes about limiting this request, which I'm certainly happy to do in order to expedite processing and make matters easier on you all.

So, under my new request, I'd be seeking 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.

If you have any questions, don't hesitate to ask; I'm best reached at 215.779.9597. Thanks again for the swift help on this. --Tony

Tony Romm | POLITICOPro

Technology reporter

p: 703-842-1774

c: 215.779.9597

tromm@politico.com

@tonyromm

From: Tony Romm
Sent: Monday, July 29, 2013 3:08 PM
To: awignall@storycounty.com
Subject: Public Information Request -- Tony Romm, Politico

Hi Alissa (or, to whom it may concern),

My name is Tony Romm, and I'm a technology reporter at Politico, a newspaper covering Congress and the federal government based out of Washington D.C. I'm writing to request access to a series of state records under the Freedom of Information Act and Iowa's Open Records law.

1 of 2

Specifically, I'm seeking access to all emails sent and received by Sheriff Paul Fitzgerald over the period between March 1 and June 30. Those official correspondences from the sheriff's official inbox should be eligible for disclosure under state sunshine laws. If possible, I'd request access to those documents in digital form. It'd be best if you could email the files; alternatively, a version mailed to me on a CD would suffice.

Please feel free to contact me if you have any questions about this request. If processing would require a fee, please inform me before proceeding if the cost is higher than \$50. Thanks much.

Tony Romm
Technology reporter, POLITICO
1100 Wilson Blvd, Suite 601
Arlington, VA. 22209
703.842.1774 -- tromm@politico.com

Tony Romm | POLITICOPro
Technology reporter
p: 703-842-1774
c: 215.779.9597
tromm@politico.com
[@tonyromm](#)

Exhibit 2
Brown Declaration**Milton Brown**

From: Milton Brown
Sent: Friday, August 16, 2013 4:13 PM
To: Milton Brown
Subject: FW: Politico Open Records Request for Sheriff Paul Fitzgerald, Story County, Iowa
Attachments: FW Public Information Request -- Tony Romm, Politico

From: Kathy Smith [mailto:KSmith@ntia.doc.gov]
Sent: Wednesday, August 07, 2013 5:11 PM
To: julie.pottorff@iowa.gov
Cc: McKenna, Alice
Subject: Politico Open Records Request for Sheriff Paul Fitzgerald, Story County, Iowa

Dear Ms. Pottorff: Thank you again for agreeing to speak with Alice McKenna and me about the request that Story County Sheriff Paul Fitzgerald received from Tony Romm with *Politico* who is seeking the "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." I have attached the request as Sheriff Fitzgerald sent it to me. As I understand it, Jessica Reynolds is the attorney in the County Attorney's office providing legal guidance on this request and Alissa Wignall is the person in the County's human resources office processing the request. Their email contact information is included in the attached message.

As we discussed, Sheriff Fitzgerald has been appointed by the U.S. Secretary of Commerce to the Board of the First Responder Network Authority (FirstNet) as a Special Government Employee (a federal employee). See Press Release, "Acting U.S. Commerce Secretary Rebecca Blank Announces Board of Directors for the First Responder Network Authority" (Aug. 20, 2012), available at <http://www.commerce.gov/news/press-releases/2012/08/20/acting-us-commerce-secretary-rebecca-blank-announces-board-directors->; see also FirstNet Board of Directors Recruitment Prospectus, at p. 5, available at http://www.ntia.doc.gov/files/ntia/publications/firstnet_prospectus_final.pdf.

FirstNet is established as an independent federal entity within the U.S. Department of Commerce's National Telecommunications and Information Administration (NTIA) and is charged with building, deploying, and operating a nationwide public safety broadband network. See 47 U.S.C. §§ 1424, 1426.

The Board is comprised of the U.S. Attorney General, U.S. Secretary of Homeland Security, Director of the Office of Management and Budget (Executive Office of the President), and twelve members appointed by the U.S. Secretary of Commerce. 47 U.S.C. § 1424. Since FirstNet is a federal entity, the Department of Commerce considers documents (including electronic records) generated by the FirstNet Board and FirstNet employees to be federal records.

We appreciate your willingness to work with us to ensure that the U.S. Government's equities in the documents that Sheriff Fitzgerald generated or received in his official capacity as a member of the FirstNet Board are appropriately protected as Story County processes Mr. Romm's request under Iowa law. If we may provide you with any additional information or if you have any questions, please do not hesitate to contact either Alice McKenna or me. Thank you for your consideration. Kathy Smith

Kathy Smith
 Chief Counsel
 National Telecommunications and Information Administration
 U.S. Department of Commerce
 1401 Constitution Avenue, N.W.
 Room 4713
 Washington, DC 20230

1 (of 2)

Phone: (202) 482-1816

Fax: (202) 501-8013

Email: ksmith@ntia.doc.gov

Exhibit 3
Brown Declaration**Milton Brown**

From: Milton Brown
Sent: Friday, August 16, 2013 4:17 PM
To: Milton Brown
Subject: FW: First Responder Network

From: Pottorff, Julie [AG] [<mailto:Julie.Pottorff@iowa.gov>]
Sent: Thursday, August 08, 2013 4:10 PM
To: Jessica A. Reynolds
Cc: 'Kathy Smith'; Alice McKenna (aMcKenna@doc.gov) (aMcKenna@doc.gov)
Subject: First Responder Network

Jessica:

Pursuant to our telephone conversation, I am writing to confirm our discussion regarding the handling of a public records request from Tony Romm of Politico for "emails the sheriff [Story County Sheriff Fitzgerald] 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."

I believe these records are federal records relating to Sheriff Fitzgerald's duties as a member of the board directors of the First Responder Network Authority (FirstNet) and access should be determined under federal law rather than the state Public Records Law. The Iowa Public Records Law only applies to "records, documents, tape, or other information, stored or preserved in any medium, of or belonging to this state or any county, city, township, school corporation, political subdivision . . ." Iowa Code § 22.1(3) (2012). Accordingly, the Iowa Supreme Court has decided that the location of records does not determine whether the Public Records Law applies and, so, minutes of board meetings of a private, nonprofit corporation that were maintained in city offices were not subject to the Public Records Law even when participation by city officials on the board of directors was mandated because the minutes were not related to any city function and "disclosure" would "not facilitate public scrutiny of the conduct of a public body." City of Dubuque et al. v. Dubuque Racing Association, 420 N.W.2d 450 (Iowa 1988). I think this statutory definition as interpreted by the City of Dubuque decision support the conclusion that federal law applies in this circumstance.

I have been in touch with Kathy Smith and Alice McKenna, attorneys in the federal Department of Commerce, and they agree with this analysis. (Both are copied on this email.) If you will direct Mr. Romm to Kathy Smith and will provide her the emails that Mr. Romm has requested either on a CD or what you described as a "thumb drive", she and Alice are agreeable to responding to the request under federal law. They suggest the following link to Mr. Romm for information about making request under the federal FOIA: <http://www.ntia.doc.gov/page/2011/foia-information>. Kathy Smith's contact information is set out below:

Kathy Smith
 Chief Counsel
 National Telecommunications and Information Administration
 U.S. Department of Commerce
 1401 Constitution Avenue, N.W.
 Room 4713
 Washington, DC 20230

1 (012)

Phone: (202) 482-1816
Fax: (202) 501-8013
Email: ksmith@ntia.doc.gov

These steps should appropriately shift the emails to the federal attorneys and allow them to process Mr. Romm's request under federal law. Please inform Sheriff Fitzgerald about the manner in which Mr. Romm's request will be handled.

Thank you for your prompt response in resolving this unusual situation. Please feel free to call me if you have any further questions. My direct line is: (515) 281-6672.

Julie F. Pottorff
Deputy Attorney General
Iowa Department of Justice
1305 E. Walnut St.
Des Moines, Iowa 50319
Telephone: 515-281-3349

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EXHIBIT 4

BROWN DECLARATION

Milton Brown

From: Milton Brown
Sent: Friday, August 16, 2013 4:20 PM
To: Milton Brown
Subject: FW: First Responder Network

From: Pottorff, Julie [AG] [<mailto:Julie.Pottorff@iowa.gov>]
Sent: Monday, August 12, 2013 12:06 PM
To: 'Jessica A. Reynolds'
Cc: Smith, Kathy; McKenna, Alice; Stephen Holmes
Subject: RE: First Responder Network

Jessica:

I was contacted about this by Kathy Smith and Alice McKenna. Our office (and me in particular) is often contacted about public records issues because we have enforcement authority under chapter 22. I also advise the new Public Information Board and so chapter 22 enforcement issues are likely to come to me through that route.

Ms. Smith and Ms. McKenna have expressed their willingness to work on the disclosure issues at the federal level which makes very good sense to me. Speaking from an office with enforcement authority, I think it is extremely unlikely that the county would be held in violation of its disclosure obligation by transferring these issues at the request of the Attorney General's office to the Department of Commerce where Sheriff Fitzgerald's appointment originates.

I hope the county appreciates it is in everyone's interest to have the disclosure of emails related to the federal position determined at the federal level.

Julie

Exhibit 5

Brown Declaration

Milton Brown

From: Milton Brown
Sent: Friday, August 16, 2013 4:23 PM
To: Milton Brown
Subject: FW: First Responder Network

From: Jessica A. Reynolds [<mailto:jreynolds@storycounty.com>]
Sent: Tuesday, August 13, 2013 5:01 PM
To: Milton Brown; Julie.Pottorff@iowa.gov
Cc: McKenna, Alice; Stephen H. Holmes
Subject: RE: First Responder Network

Mr. Brown, Ms. Pottorff, and Ms. McKenna,

Today the Story County Board of Supervisors voted to release the requested records to Politico at 9:00 a.m. on Monday, August 19, 2013. I am notifying you all so that you have time to take whatever action you feel is necessary.

Sincerely,

Jessica A. Reynolds
Assistant Story County Attorney
126 South Kellogg, Suite 203
Ames, Iowa 50010
Phone: (515) 232-4185
Fax: (515) 232-6405

This E-mail (including any attachments) is covered by the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521, is confidential and may contain attorney-client materials and/or attorney work product, legally privileged and protected from disclosure. If you are not the intended recipient, you are hereby notified that any retention, dissemination, distribution, or copying of this communication is strictly prohibited. Please respond to the sender that you have received the message in error, then delete it and destroy any and all copies of it.

Exhibit 6
Brown Declaration

Milton Brown

From: Milton Brown
Sent: Friday, August 16, 2013 4:24 PM
To: Milton Brown
Subject: FW: First Responder Network

From: Milton Brown
Sent: Wednesday, August 14, 2013 5:18 PM
To: 'Jessica A. Reynolds'; Stephen H. Holmes
Subject: RE: First Responder Network

Mr Holmes and Ms Reynolds: Can we get a copy of the documents related to the request?

Exhibit 7

Brown Deception

Milton Brown

From: Milton Brown
Sent: Friday, August 16, 2013 4:25 PM
To: Milton Brown
Subject: FW: First Responder Network

From: Jessica A. Reynolds [<mailto:jreynolds@storycounty.com>]
Sent: Thursday, August 15, 2013 12:03 PM
To: Milton Brown; Stephen H. Holmes
Subject: RE: First Responder Network

Mr. Brown,

We will be happy to provide copies to you on Monday at 9:00 a.m. when we release the documents to Politico but not sooner. Please use whatever means you deem necessary before Monday to seek intervention if you so desire.

Sincerely,

Jessica A. Reynolds
Asst. Story County Attorney

CC: Stephen Holmes, Story County Attorney

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

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

TEMPORARY RESTRAINING ORDER

Upon consideration of the motion by the United States of America for the issuance of a temporary restraining order to enjoin defendant Story County, Iowa, acting by and through its Board of Supervisors, 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"), and upon consideration of any opposition to such motion, it is hereby:

ORDERED that the motion brought by the United States is granted, whereby defendant Story County, Iowa, acting by and through its Board of Supervisors, 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 14 days from the date of the issuance of this Order.

So ORDERED, this ____ day of August 2013.

JAMES E. GRITZNER
CHIEF JUDGE
UNITED STATES DISTRICT COURT

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

United States of America,

Plaintiff,

v.

Story County, Iowa by and through its Board
of Supervisors,

Defendant.

Case No. 4:13-cv-00360

STORY COUNTY IOWA'S
PREANSWER MOTION TO DISMISS

COMES NOW, Defendant, Story County Iowa, by and through its Board of Supervisors pursuant to Fed. R. Civ. Procedure 12(b)(6), and hereby moves to dismiss the action because the complaint for declaratory and injunctive relief fails to state a claim upon which relief can be granted.

1. On the face of its complaint, the United States of America alleges Story County, Iowa Sheriff Paul Fitzgerald is also a paid federal employee serving on a federal board (the FirstNet Board). It further alleges that Sheriff Paul Fitzgerald's emails on his Story County, Iowa email account pertaining to the FirstNet Board are federal records and not Story County, Iowa records.
2. The United States of America offers no authority for the proposition that Sheriff Fitzgerald's federal employment status overrides the duties of Sheriff Fitzgerald as an elected Story County, Iowa official. No authority has been provided to show the interests of the electorate in Story County, Iowa have been made secondary to the interests of the United States of America in this instance.

3. The Story County, Iowa records at issue which are responsive to Politico's Iowa Code Chapter 22 request do not meet the definition of a federal record.
4. The United States of America advances a content based argument. The argument could not be advanced until Sheriff Fitzgerald provided his emails so that the United States of America could review them.
5. On the face of its complaint the United States of America alleges 47 U.S.C. 1426(d)(2) exempts the federal FirstNet Board from the federal Freedom of Information Act (FOIA) and assumes arguendo that Sheriff Fitzgerald's emails are federal records, and therefore the emails at issue are not subject to the authority of Iowa Open Records Law.
6. The United States of America admits there are fourteen other FirstNet Board members who have used outside email accounts communicating similar information. Therefore, assuming the email records are federal records, the actions of the fourteen other federal board members and Sheriff Fitzgerald are no different and waive any claimed statutory exemption.
7. On the face of its complaint the United States of America's application of 47 U.S.C. 1426(d)(2) is overbroad, as applied, and therefore unconstitutional and is in direct conflict with 47 U.S.C. 1426(b)(1)(B) as written.
8. The United States of America claims irreparable harm if the subject records are released.
9. The United States of America offers no evidence other than mere assertions that harm will result if the subject records are released. Again, this assertion flies in the face of the language found at 47 U.S.C. 1426(b)(1)(B).
10. The attempt by the United States of America to assert that Story County, Iowa records are federal records violates State sovereignty.

11. Defendant Story County, Iowa incorporates all factual assertions by the United States of America as filed in its pleadings to date.¹

12. All of the claims in the United States of America's complaint are mere unsubstantiated assertions and the complaint for declaratory and injunctive relief should be dismissed.

In support of the motion to dismiss, Story County, Iowa respectfully refers the Court to the accompanying memorandum of law.

Respectfully Submitted,

/s/Stephen H. Holmes

Stephen H. Holmes AT0003605
Story County Attorney
1315 South B Avenue
Nevada, IA 50201
Phone: (515) 382-7255
Fax: (515) 382-7270
E-Mail: sholmes@storycounty.com

ATTORNEY FOR DEFENDANT STORY COUNTY, IOWA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 30, 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:

William C. Purdy, Assistant U.S. Attorney

/s/Stephen H. Holmes

Stephen H. Holmes
Story County Attorney

¹ The United States of America in pages 6-7 and footnote 3 of Plaintiff's memorandum in support of emergency application for a temporary restraining order as filed on 8/20/2013 alleges that Story County, Iowa turned over the subject emails to the United States of America. To clarify, after Story County, Iowa refused the United States of America's request to turn over the subject emails, Sheriff Paul Fitzgerald turned over the subject emails. Sheriff Fitzgerald acted independently and not on behalf of Story County, Iowa as he is an elected official on the same level of government as the Board of Supervisors.

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

<p>United States of America,</p> <p style="padding-left: 40px;">Plaintiff,</p> <p>v.</p> <p>Story County, Iowa by and through its Board of Supervisors,</p> <p style="padding-left: 40px;">Defendant.</p>	<p>Civil Action No. 4:13-cv-00360</p>
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
(CENTRAL DIVISION)

United States of America,

Plaintiff,

v.

Story County, Iowa by and through its Board
of Supervisors,

Defendant.

Civil Action No. 4:13-cv-00360

STORY COUNTY IOWA'S
MEMORANDUM OF LAW
IN SUPPORT OF ITS PREANSWER
MOTION TO DISMISS

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S PREANSWER
MOTION TO DISMISS**

Story County, Iowa, by and through its Board of Supervisors, submits this memorandum of law in support of its preanswer motion to dismiss the United States of America's complaint for declaratory and injunctive relief.

The United States of America attempts to prevent Story County, Iowa from releasing emails from Story County Iowa's county email system contained in the account of elected Story County official Sheriff Paul Fitzgerald. The United States of America cannot prevent the release of such email records as Sheriff Fitzgerald's emails are the property of Story County, Iowa and not the property of the United States of America. If these records are federal records and do indeed pose a "serious threat of irreparable harm to the United States" if released, as alleged, then The United States of America or its agents should have proceeded with more care with

respect to the dissemination of information that Plaintiff is claiming to be a federal record and which Story County, Iowa maintains is a county record and therefore is subject to disclosure under Iowa Code Chapter 22. In addition, the United States of America's interpretation of 47 U.S.C. 1426(d)(2) expands the intent of the federal law and is unconstitutional. The attempt by the United States of America to claim Story County, Iowa records are federal records violates the sovereignty of the State of Iowa and its governmental subdivisions.

STATEMENT OF THE CASE

A. Factual Background

1. Story County, Iowa is a subdivision of the government of the State of Iowa and organized under Chapter 331 of the Code of Iowa and the Constitution of the State of Iowa.
2. The Story County Board of Supervisors are empowered to perform both the legislative and executive functions of government at the county level.
3. Story County Sheriff Paul Fitzgerald is serving his elected term as a partisan elected county official pursuant to Iowa Code Sections 39.17 and 331.651 and is compensated monetarily for his county duties.
4. Story County Sheriff Paul Fitzgerald receives budgetary funding for his department from the Story County Board of Supervisors but is independent in all other aspects of his responsibilities and authority.
5. By the color of his elected Iowa county office Story County Sheriff Paul Fitzgerald was appointed as a member of a federal board named First Responder Network Authority (hereinafter FirstNet) and is compensated monetarily for his federal duties.

6. Sheriff Fitzgerald is first and foremost the Sheriff of Story County, Iowa and he can never suspend the authority vested in him by the electorate of Story County, Iowa. See Iowa Code Sections 69.2, 69.4, 69.14A(2)(specifying procedures and reasons for replacement of county elected officials).
7. On or about July 29, 2013 Story County, Iowa received a state open records request pursuant to Iowa Code Chapter 22 from Mr. Tony Romm on behalf of the media entity *Politico* for all emails on Story County, Iowa's email system "sent and received by Sheriff Paul Fitzgerald over the period between March 1 and June 30". See Exhibit 1.
8. On August 1, 2013 during a phone conversation with Stephen H. Holmes, Story County Attorney, Mr. Tony Romm identified his specific inquiry and agreed to limit his request to "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 to the topic of wireless communications generally." See Exhibit 2.
9. The Story County Attorney's Office, acting in the interest of the Story County Board of Supervisors searched 7,107 email records contained in Sheriff Fitzgerald's email account for the requested time period and identified 63 emails on its county email system as being responsive to Mr. Tony Romm's Iowa Code Chapter 22 open records request.
10. In the interim Story County, Iowa was contacted by the Department of Commerce and the United States Attorney's office concerning disclosure of the subject emails under Iowa Open Records Law, Iowa Code Chapter 22.
11. Deputy Chief Counsel for the Department of Commerce, Milton Brown, requested Story County, Iowa disclose the emails that the United States of America claimed to be their own records to them. See Exhibits 3 and 3A.

12. Story County, Iowa declined to provide copies of the emails in question to the Department of Commerce prior to providing the documents to *Politico*. See Exhibits 4 and 4A. The rationale behind Story County, Iowa's decision was that there appeared to be no distinction between releasing the information to the Department of Commerce and releasing the information to *Politico*.
13. After Story County, Iowa declined to provide copies of the subject emails to the Department of Commerce, Sheriff Paul Fitzgerald represented to Jessica A. Reynolds, Assistant Story County Attorney, that he was intending to provide and did, independently of the Board of Supervisors, provide a CD of all of his emails for the time period of March 1, 2013 – June 30, 2013 containing the 7,107 emails as well as the printed off copies of the 63 emails (which Story County, Iowa found to be responsive to *Politico*'s limited request) to the Department of Commerce. Prior to the release of the documents, the Sheriff informed Story County, Iowa that he had sought outside legal advice.
14. It is an undisputed fact that Story County, Iowa possessed the emails in question. Indisputably, these emails in question were located on Story County, Iowa's computer information system and were located on Sheriff Fitzgerald's official county email account. All emails in question are contained in Story County Iowa's database system and server and were at all times under either Sheriff Fitzgerald's or Story County, Iowa's information system's control.
15. At no time prior to Mr. Tony Romm's open records request, had the United States of America contacted Story County, Iowa concerning preservation of electronic records on the county system pursuant to 44 U.S.C. §3301.

16. At no time did Sheriff Paul Fitzgerald inform Story County, Iowa of the need to preserve federal records on the county system pursuant to 44 U.S.C. §3301.

17. The stated facts contained in Story County, Iowa's statement of the case are consistent with the stated facts by the United States of America.¹

STANDARD OF REVIEW

The Court shall grant a motion to dismiss for failure to state a claim under Rule 12 (b) (6) when a complaint does not contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8 (a) (2). In reviewing a complaint, the Court must "accept as true all of the factual allegations contained in the complaint," and must draw "all reasonable...inferences in favor of the plaintiff." *Danaher v. Harrington*, 838 F. Supp.2d 867, 870 (S.D. Iowa 2012) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S., 544, 555-56, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). For the Plaintiff to be entitled to relief, a complaint must include "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S., 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). The complaint is not required to give "detailed factual allegations," however, it should be more than simply a list of "labels and conclusions" or a "formulaic recitation of the elements of the cause of action." *Twombly*, 550 U.S. at 570. The Supreme Court in *Ashcroft v. Iqbal* applied a "two-pronged approach" to evaluate the factual and legal allegations contained in a motion to dismiss under Rule 12 (b) (6). *Danaher*, 838 F. Supp.2d at 870 (citing, *Iqbal*, 129 S.Ct. at 1949-50). In the first prong of

¹ With the exception of pages 6-7 and footnote 3 of Plaintiff's memorandum in support of emergency application for a temporary restraining order as filed on 8/20/2013 in which the United States of America alleges that Story County, Iowa turned over the subject emails to the United States of America. To clarify, after Story County, Iowa refused the United States of America's request to turn over the subject emails, Sheriff Paul Fitzgerald turned over the subject emails. Sheriff Fitzgerald acted independently and not on behalf of Story County, Iowa as he is an elected official on the same level of government as the Board of Supervisors.

this process, the legal allegations should be “disregarded” and “the factual allegations should be accepted as true.” *Id.* Second, the factual allegations must be examined for “facial plausibility.” *Id.*

ARGUMENT

I.

The Records at Issue Which are Responsive to Politico’s Iowa Code Chapter 22

Request Are Story County, Iowa Records

“Sunlight is said to be the best of disinfectants.” *City of Riverdale v. Diercks*, 806 N.W.2d 643, 643 (Iowa 2011)(quoting Justice Louis Brandeis, *What Publicity Can Do*, Harper’s Weekly, Dec. 20, 1913).

Iowa Code Chapter 22.1(3) defines public records as “all records, documents, tape or other information, stored or preserved in any medium, of or belonging to this state or any county, city, township...”

A document *of* the government is a document that was produced by or originated from the government. Documents *belonging* to the government would include those documents that originate from other sources but are held by public officers in their official capacity.

City of Dubuque v. Dubuque Racing Ass’n Ltd, 420 N.W.2d 450, 452 (Iowa 1988).

There is no dispute that Sheriff Fitzgerald’s emails were found on Story County, Iowa’s computer system and were sent and received from a Story County, Iowa email account. But for Sheriff Fitzgerald’s duties as Sheriff in Story County, Iowa he would not have had access to the email account in which the emails were located. Iowa law has long favored disclosure of public records under Iowa Code Chapter 22. “Disclosure is the rule, and one seeking the

protection of one of the statute's exemptions bears the burden of demonstrating the exemption's applicability." *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 45 (Iowa 1999).

"The purpose of the statute [Iowa Code Chapter 22] is 'to open the doors of government to public scrutiny [and] to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act.' " *City of Riverdale v. Diercks*, 806 N.W.2d 643, 652 (Iowa 2011) (quoting *Rathmann v. Bd. of Dirs.*, 580 N.W.2d 773, 777 (Iowa 1998)). Iowa Code Section 22 establishes "a presumption of openness and disclosure." *Gabrilson v. Flynn*, 554 N.W.2d 267, 271 (Iowa 1996); see also *Hall v. Broadlawns Med. Ctr.*, 811 N.W.2d 478, 485 (Iowa 2012).

City of Riverdale at 651.

In its memorandum of law in support of its motion for a temporary protective order, the United States of America cites *City of Dubuque v. Dubuque Racing Ass'n, Ltd.*, 420 N.W.2d 450 (Iowa 1988) in support of the proposition that "the location of a document is not dispositive of whether a record is a public record for purposes of Iowa Code Chapter 22." See p. 11 of Plaintiff's Memorandum of Law filed on 8/20/2013. However, the Court in *City of Dubuque* specifies that the appropriate inquiry is whether the possessor of the record is "acting in their official capacity as public servants..." and whether disclosure of the public records will "facilitate public scrutiny of the conduct of public officers." *Id.* at 453.

The facts in *City of Dubuque* are distinguishable from the current facts involving the Sheriff's emails because the records at issue in *City of Dubuque* were meeting minutes from a private, non-profit corporation on which several city officials served. The meeting minutes were not found on a municipal email system but rather, were in hard copy in a city office.

The ruling in *City of Dubuque* exempted the hard copy meeting minutes from disclosure under Iowa Code Chapter 22.

In this case, Sheriff Fitzgerald is corresponding back and forth via his Story County email account. The subject matter involved in the Sheriff's emails is not of a similar private, non-profit purpose as exists in the *City of Dubuque* case. Instead, the subject emails of Sheriff Fitzgerald involve a wide variety of items, and specifically to the issue here contain: FirstNet meeting schedules, comments on a media article related to FirstNet, informal communications by the Sheriff, a communication by the Sheriff on Story County, Iowa letterhead and budget related questions and discussion regarding FirstNet.

Story County maintains that the content of the emails is irrelevant except to distinguish this matter from the *City of Dubuque* case. During the time of all of these communications the Sheriff was serving as a paid elected official in Story County, Iowa. It is immaterial to this analysis that he was also simultaneously a paid (unbeknownst to Story County, Iowa) federal government employee on the FirstNet Board.

The use by Story County, Iowa elected officials of their Story County email account provides insight and information into how the elected official is discharging his or her elected duties. The record of the emails gives the electorate/taxpayers a glimpse into what their elected official is doing while discharging their duties and what types of decisions the elected official is making on behalf of the public he or she is representing. These are the precise reasons that the Iowa Open Records Law exists at Iowa Code Section 22. And these facts present the specific case for why the Sheriff's emails are Story County, Iowa records and should be released to the media under Iowa Open Records Law. The fact that Sheriff Fitzgerald is also serving on a federal board does not and can never subordinate the rights of the electorate/taxpayers in Story County, Iowa. The subject emails are the sole property of Story County, Iowa.

II.

The Records at Issue Which are Responsive to Politico's Iowa Code Chapter 22 Request do not Meet the Definition of a Federal Record

The Federal Records Act, 44 U.S.C. §3301 defines the term "records" to include

All books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.

Id.(emphasis added).

The federal government never requested that Story County, Iowa preserve any of the subject emails from Sheriff Fitzgerald's county email account concerning FirstNet .

Speaking on behalf of the Department of Commerce, Milton Brown's second declaration as filed as Exhibit 1 on 8/30/2013 states that Plaintiff is unsure what records comprise the entire:

"universe of records responsive to Politico's request that are in the possession of Story County."

Story County, Iowa cannot understand how Plaintiff can claim ownership of records when they are not sure what the records are nor do they have possession of them. And, until disclosure by Sheriff Fitzgerald the United States of America could not argue the informational value of Sheriff Fitzgerald's emails as a federal record.

It appears that the United States of America, almost as an afterthought, on page 14 of Plaintiff's memorandum of law for temporary restraining order as filed on 8/20/2013 contends that if the Court determines the emails to be records subject to Iowa Open Records

Law that the emails would be exempted as confidential records pursuant to Iowa Code Sections 22.7(18), 22.7(50), and 22.7(65). Once again, the United States of America does not supply any supporting authority for their assertions.

Although venue may still lie with this Court, Story County, Iowa urges that any determination of confidential records pursuant to Iowa Code Chapter 22 should be determined by the Iowa courts and this Court has the authority to defer such matters.

Burford v. Sun Oil Co., 63 U.S. 1098 (1943).

III.

The Federal Government Has Waived Any Ability to Restrict the Release of the Records Pursuant to 47 U.S.C. 1426(d)(2)

Should the Court determine that the records at issue are indeed federal records, Story County, Iowa contends that the United States of America has waived any ability to restrict release of the records pursuant to 47 U.S.C. 1426(d)(2) by the conduct of its agents.

When an agency freely discloses to a third party confidential information covered by a FOIA exemption without limiting the third-party's ability to further disseminate the information then the agency waives the ability to claim an exemption to a FOIA request for the disclosed information.

Watkins v. United States Bureau of Customs and Border Protection, 643 F.3d 1189, 1197 (9th Cir. 2011).

Watkins involves a confidential exception to FOIA. The United States of America is claiming the current situation involves a statutory exemption from FOIA. Story County, Iowa views the terms exception and exemption as a distinction without a difference. In fact, FOIA has an exception written into it (Exemption 3) which permits the government to withhold information "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). That is,

that the disclosure of the information concerning FirstNet to Sheriff Paul Fitzgerald on his Story County email account, and in turn, the Sheriff's disclosure(s) to certain advisor(s) covered under a non-disclosure agreement (See p. 2, number 7 of Plaintiff's Memorandum Exhibit 1, Paul Fitzgerald's declaration filed 8/20/13) has resulted in a waiver of any claimed exception or exemption. The claimed exempted information has already, in fact, been disseminated to third parties.

"Voluntary disclosures of all or part of a document may waive an otherwise valid FOIA exemption." *Dow Jones & Co., Inc. v. Dep't of Justice*, 880 F.Supp. 145, 150–51 (S.D.N.Y.1995) (citing *Mobil Oil Corp. v. E.P.A.*, 879 F.2d 698, 700 (9th Cir.1989); *Afshar v. Dep't of State*, 702 F.2d 1125, 1133 (D.C.Cir.1983); *Mehl v. E.P.A.*, 797 F.Supp. 43, 47 (D.D.C.1992)), *536 *vacated in part on other grounds by* 907 F.Supp. 79 (S.D.N.Y.1995). The FOIA requester bears "the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Afshar*, 702 F.2d at 1130 (D.C.Cir.1983); *accord Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy*, 891 F.2d 414, 421 (2d Cir.1989).

New York Times v. U.S. Department of Justice, 915 F.Supp.2d 508(S.D. New York 2013).

Sheriff Fitzgerald is only one of a fifteen member FirstNet Board. The issue of waiver has been ignored by the United States of America in its representations set forth in its complaint for declaratory and injunctive relief. The United States of America would like the Court to believe that Sheriff Fitzgerald is the only member of the Board who has disseminated information. However, by the Plaintiff's own admissions, each and every other member of FirstNet has behaved in a similar fashion. See Declaration of Uzoma Onyeije p. 2, number 10 of Plaintiff's Memorandum Exhibit 2 filed on 8/20/13 stating "Based on information and belief, between September 2012 and June 2013, FirstNet Board Members used outside email accounts to conduct FirstNet business." The United States of America's own pleadings support waiver.

The United States of America has failed to establish sufficient proof for this Court to conclude that the information at issue has not been disseminated and in fact, has provided proof

that the information has already been disseminated. There is no offered testimony or documentation of any kind pertaining to the other fourteen FirstNet Board members. In fact, because a good number of the Board's membership is made up of private sector members, (not public sector members such as Sheriff Fitzgerald) there is very likely the same information the United States of America seeks to prevent from disclosure on many privately held electronic data systems. Logically, if the United States of America's argument is to be accepted, there are federal records in the possession of numerous private hands. The United States of America's argument must fail.

Should the Court deny Story County, Iowa's assertion that the subject emails are county records and find that the subject emails are federal records, Story County, Iowa is prepared to present the subject emails to the Court under seal for an in camera review should the Court determine such a review to be appropriate pursuant to division IV below.

IV.

47 U.S.C. § 1426(d)(2) is Overbroad and Unconstitutional

Should the Court determine that Story County, Iowa's arguments that the records at issue are not county records and that no waiver has occurred by the United States of America then Story County, Iowa contends that 47 U.S.C. § 1426(d)(2) (the section of the First Responder Network Authority statute that exempts the materials from the Freedom of Information Act (hereinafter referred to as FOIA)) is overbroad as applied and therefore is unconstitutional.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

With specific exceptions, the Freedom of Information Act requires Executive Branch agencies to make their records available “to any person” upon request. 5 U.S.C. § 552(a)(3)(A). FOIA was intended “to provide for open disclosure of public information,” *Baldrige v. Shapiro*, 455 U.S. 345, 352, 102 S.Ct. 1103, 71 L.Ed.2d 199 (1982), and it has long been understood to create a “strong presumption in favor of disclosure,” *United States Dep't of State v. Ray*, 502 U.S. 164, 173, 112 S.Ct. 541, 116 L.Ed.2d 526 (1991). “Although Congress enumerated nine exemptions from the disclosure requirement, ‘these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.’ ” *National Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C.Cir.2002) (quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976)). Accordingly, FOIA's exemptions are to be narrowly construed. *Id.* FOIA Exemption 3 permits the government to withhold information “specifically exempted from disclosure by statute[,] ... provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3). A statute need only satisfy one of these disjunctive conditions to qualify as an Exemption 3 statute. *See Association of Retired R.R. Workers v. United States R.R. Ret. Bd.*, 830 F.2d 331, 334 (D.C.Cir.1987). Before a court inquires into whether any of the conditions are met, however, it must first determine whether the statute is a withholding statute at all by deciding whether it satisfies “the threshold requirement that it *specifically exempt* matters from disclosure.” *Reporters Comm. for Freedom of the Press v. United States Dep't of Justice*, 816 F.2d 730, 734 (D.C.Cir.1987) (emphasis added), *rev'd on other grounds*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989).

Public Citizen, Inc. v. Rubber Manufacturers Association, 533 F.3d 810, 813 (D.C. Cir. 2008).

The provision in the First Responder Network Authority statute that the United States of America claims to exempt all documents responsive to Politico's Iowa Open Records request from FOIA is 47 U.S.C. § 1426(d)(2). 47 U.S.C. § 1426(d)(2) states “any action taken or decisions made by the First Responder Network Authority shall be exempt from the requirements of chapter 5 of Title 5”.

The United States of America is expanding the exception in 47 U.S.C. § 1426(d)(2) beyond its intended purpose. The United States of America's interpretation and application of 47 U.S.C. §1426(d)(2) fails because that application is overbroad as applied as it is inconsistent with the

entirety of the First Responder Network Authority statute at 47 U.S.C. § 1426(b)(1)(B) which requires :

issuing open, transparent, and competitive requests for proposals to private sector entities for the purposes of building, operating, and maintaining the network that use, without materially changing, the minimum technical requirements developed under section 1423 of this title. 47 U.S.C. § 1426(b)(1)(B).

How can the First Responder Network Authority statute require open and transparent requests for proposals on one hand but then prohibit any and all dissemination pursuant to a FOIA request of all documents dealing with FirstNet on the other? This interpretation and overbroad application of the United States of America's argument that all documents surrounding FirstNet are exempt from FOIA is overbroad as applied and, therefore unconstitutional.

Further, the United States of America has failed to demonstrate that the records in Story County, Iowa's possession would lead to irreparable harm if released. Story County, Iowa encourages the Court to conduct an in camera review of the subject emails and make a determination pursuant to 47 U.S.C. § 1426(d)(2) and 47 U.S.C. § 1426(b)(1)(B).

V.

STATE SOVEREIGNTY

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

The United States of America is overreaching and usurping the sovereignty of the State of Iowa and its governmental subdivisions when it attempts to reach into Story County, Iowa's

email system and prohibit disclosure of county email records that are subject to Iowa Open Records law.

The Constitution confers certain enumerated powers upon Congress. U.S. Const. Art. I. To the extent the Constitution does not divest the states of certain powers, they retain them. Thus, the Tenth Amendment “states but a truism that all is retained which has not been surrendered.” *United States v. Darby*, 312 U.S. 100 124, 61 S.Ct. 451, 85 L.Ed. 609 (1941). To be sure, states retain a significant amount of sovereign authority. *See Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 549, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985).

State of Oklahoma v. United States of America, 161 F.3d 1266(10th Cir. 1998).

The assertion by the United States of America that the business of the FirstNet Board conducted over the Story County, Iowa email system makes those emails a federal record is a clear intrusion into the realm of matters protected by state sovereignty.

CONCLUSION

For the foregoing reasons, Story County, Iowa by and through its Board of Supervisors respectfully requests that this Court dismiss the complaint filed by the United States of America and allow Defendant to release its email records to the press in accordance with Iowa Code Chapter 22. Sheriff Fitzgerald’s emails are Story County records and the United States of America may not violate the sovereignty of the State of Iowa and any of the other subdivisions of the State of Iowa by its assertions.

Respectfully Submitted,

/s/ Stephen H. Holmes

Stephen H. Holmes AT0003605
Story County Attorney
1315 South B Avenue
Nevada, IA 50201

Phone: (515) 382-7255
Fax: (515) 382-7270
E-Mail: sholmes@storycounty.com

ATTORNEY FOR DEFENDANT STORY COUNTY, IOWA

Original filed.

Copy to:

William C. Purdy
Assistant U.S. Attorney
110 East Court Avenue, Ste. 286
Des Moines, Iowa 50309

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 30, 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:

William C. Purdy, Assistant U.S. Attorney

/s/Stephen H. Holmes

Stephen H. Holmes
Story County Attorney

Jessica A. Reynolds

To: Jessica A. Reynolds
Subject: Public Information Request -- Tony Romm, Politico

From: Alissa D. Wignall
Sent: Monday, July 29, 2013 2:32 PM
To: Jessica A. Reynolds
Subject: FW: Public Information Request -- Tony Romm, Politico

From: Tony Romm [mailto:tromm@politico.com]
Sent: Monday, July 29, 2013 2:09 PM
To: Alissa D. Wignall
Subject: Public Information Request -- Tony Romm, Politico

Hi Alissa (or, to whom it may concern),

My name is Tony Romm, and I'm a technology reporter at Politico, a newspaper covering Congress and the federal government based out of Washington D.C. I'm writing to request access to a series of state records under the Freedom of Information Act and Iowa's Open Records law.

Specifically, I'm seeking access to all emails sent and received by Sheriff Paul Fitzgerald over the period between March 1 and June 30. Those official correspondences from the sheriff's official inbox should be eligible for disclosure under state sunshine laws. If possible, I'd request access to those documents in digital form. It'd be best if you could email the files; alternatively, a version mailed to me on a CD would suffice.

Please feel free to contact me if you have any questions about this request. If processing would require a fee, please inform me before proceeding if the cost is higher than \$50. Thanks much.

Tony Romm
Technology reporter, POLITICO
1100 Wilson Blvd, Suite 601
Arlington, VA. 22209
703.842.1774 -- tromm@politico.com

Tony Romm | POLITICOPro
Technology reporter
p: 703-842-1774
c: 215.779.9597
tromm@politico.com
[@tonyromm](#)



Jessica A. Reynolds

Subject: FW: Public Information Request -- Tony Romm, Politico

From: Tony Romm [mailto:tromm@politico.com]
Sent: Thursday, August 01, 2013 11:45 AM
To: Jessica A. Reynolds; Alissa D. Wignall
Subject: RE: Public Information Request -- Tony Romm, Politico

Hey Jessica and Alissa,

I just spoke with Stephen Holmes about limiting this request, which I'm certainly happy to do in order to expedite processing and make matters easier on you all.

So, under my new request, I'd be seeking 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.

If you have any questions, don't hesitate to ask; I'm best reached at 215.779.9597. Thanks again for the swift help on this. --Tony

Tony Romm | POLITICOPro
Technology reporter
p: 703-842-1774
c: 215.779.9597
tromm@politico.com
[@tonyromm](#)



Jessica A. Reynolds

Subject: FW: First Responder Network

From: Milton Brown [<mailto:MBrown@ntia.doc.gov>]
Sent: Wednesday, August 14, 2013 4:18 PM
To: Jessica A. Reynolds; Stephen H. Holmes
Subject: RE: First Responder Network

Mr Holmes and Ms Reynolds: Can we get a copy of the documents related to the request?

From: Jessica A. Reynolds [<mailto:jreynolds@storycounty.com>]
Sent: Tuesday, August 13, 2013 5:01 PM
To: Milton Brown; Julie.Pottorff@iowa.gov
Cc: McKenna, Alice; Stephen H. Holmes
Subject: RE: First Responder Network

Mr. Brown, Ms. Pottorff, and Ms. McKenna,

Today the Story County Board of Supervisors voted to release the requested records to Politico at 9:00 a.m. on Monday, August 19, 2013. I am notifying you all so that you have time to take whatever action you feel is necessary.

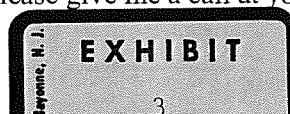
Sincerely,

Jessica A. Reynolds
Assistant Story County Attorney
126 South Kellogg, Suite 203
Ames, Iowa 50010
Phone: (515)232-4185
Fax: (515)232-6405

This E-mail (including any attachments) is covered by the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521, is confidential and may contain attorney-client materials and/or attorney work product, legally privileged and protected from disclosure. If you are not the intended recipient, you are hereby notified that any retention, dissemination, distribution, or copying of this communication is strictly prohibited. Please respond to the sender that you have received the message in error, then delete it and destroy any and all copies of it.

From: Milton Brown [<mailto:MBrown@ntia.doc.gov>]
Sent: Tuesday, August 13, 2013 10:16 AM
To: Julie.Pottorff@iowa.gov
Cc: McKenna, Alice; Jessica A. Reynolds
Subject: RE: First Responder Network

Ms. Pottorff: I work with Kathy Smith who is on vacation. I just met with Sheriff Fitzgerald who informed me that Steve Holmes, the County Attorney, does not agree with the legal reasoning regarding the disclosure of federal records. According to Sheriff Fitzgerald, Mr. Holmes plans to meet with the Board of Supervisors today to discuss the issue, and then plans to release the records. Please give me a call at your earliest convenience to discuss this. Thank you.



Milton Brown
Deputy Chief Counsel
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Room 4713
Washington, DC 20230
Phone: (202) 482-1816



Jessica A. Reynolds

Subject: FW: First Responder Network

From: Jessica A. Reynolds
Sent: Thursday, August 15, 2013 11:03 AM
To: 'Milton Brown'; Stephen H. Holmes
Subject: RE: First Responder Network

Mr. Brown,

We will be happy to provide copies to you on Monday at 9:00 a.m. when we release the documents to Politico but not sooner. Please use whatever means you deem necessary before Monday to seek intervention if you so desire.

Sincerely,

Jessica A. Reynolds
Asst. Story County Attorney

CC: Stephen Holmes, Story County Attorney

From: Milton Brown [<mailto:MBrown@ntia.doc.gov>]
Sent: Wednesday, August 14, 2013 4:18 PM
To: Jessica A. Reynolds; Stephen H. Holmes
Subject: RE: First Responder Network

Mr Holmes and Ms Reynolds: Can we get a copy of the documents related to the request?

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Cc: McKenna, Alice; Stephen H. Holmes
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Sincerely,

Jessica A. Reynolds
Assistant Story County Attorney
126 South Kellogg, Suite 203
Ames, Iowa 50010
Phone: (515)232-4185
Fax: (515)232-6405



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Milton Brown
Deputy Chief Counsel
National Telecommunications and Information Administration
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Room 4713
Washington, DC 20230
Phone: (202) 482-1816



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 SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiff, the United States of America, on behalf of its agency the First Responder Network Authority (“FirstNet”), by and through the United States Attorney for the Southern District of Iowa, hereby moves for summary judgment on the grounds that there are no disputed material facts and that United States is entitled to judgment as a matter of law. In support of this motion, the United States refers the Court to the attached Brief in Opposition to Defendant’s Motion to Dismiss and in Support of Plaintiff’s Motion for Summary Judgment, the Statement of Undisputed Material Facts, and the previously filed declarations of Paul H. Fitzgerald (ECF Doc. 2-2), Uzoma Onyeije (ECF Doc. 2-3), and Milton Brown (ECF Doc. 2-3 and 5-2).

Respectfully submitted,

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Assistant Attorney General

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United States Attorney

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Attorneys for the United States

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 15, 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

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	)	Brief in Opposition to Defendant’s
Board of Supervisors,)	Motion to Dismiss and in Support
)	of Plaintiff’s Motion for Summary
Defendant.)	Judgment

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INTRODUCTION

In this action, the United States seeks to enjoin defendant Story County (“County”) from releasing federal records that belong to the First Responder Network Authority (“FirstNet”), an independent authority within the National Telecommunications and Information Administration (“NTIA”), 47 U.S.C. § 1424(a).¹ The records at issue were sent and received by Sheriff Paul Fitzgerald in his capacity as a member of the Board of FirstNet, using his County email account. The County asserts that the records are County records and intends to release them under Iowa’s Examination of Public Records (Open Records) statute, Iowa Code Chapter 22 (2013), (hereinafter cited as “Iowa Public Records Act”). The United States seeks an order declaring these records to be property of the United States, subject to its possession and control, and an order enjoining the County from publicly releasing these federal records.²

The County has moved to dismiss this action under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. *See* ECF Doc. 7. While the motion is styled as a motion to dismiss, the County’s reliance upon facts outside of the four corners of the Complaint renders it a motion for summary judgment. Whether treated as a motion to dismiss or as a motion for summary judgment, this Court should deny the County’s motion and grant summary judgment for the United States. In the present case, there are no genuine issues as to any material fact. The only issues in dispute are legal in nature. Based on the record, arguments, and authorities, the United States is entitled to judgment as a matter of law.

The resolution of this case turns on the legal issue of whether the records at issue are federal records or County records subject to the Iowa Public Records Act. The records are

¹ NTIA is an operating unit of the United States Department of Commerce. 47 U.S.C. § 902.

² The United States refers the court to its prior briefs (ECF Doc. 2-1 at 2-7 and ECF Doc. 5-1 at 2-7), which set forth in detail the statutory background of FirstNet and the factual background for its claims.

federal records because they were created and received by Sheriff Fitzgerald in his capacity as a member of the FirstNet Board and pertain to federal functions carried out by FirstNet. The County provides no valid basis for its assertion that the records are County records subject to the Iowa Public Records Act. The fact that the records were created or received by Sheriff Fitzgerald on his County email account does not make them County records under either federal or state law. In addition, the fact that Sheriff Fitzgerald is and remains the Sheriff of Story County, Iowa, does not mean that every action taken by Sheriff Fitzgerald is taken in his official capacity as sheriff or relates to his official duties as sheriff. Indeed, the County makes no attempt to demonstrate how these records relate to any of his official duties as a sheriff.

Moreover, contrary to the County's assertion, the United States has not waived its ability to restrict release of the records. First, the waiver doctrine is not applicable here. While 47 U.S.C. § 1426(d) provides that FirstNet is not subject to the requirements of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the United States' action does not turn on whether the records would be subject to disclosure under federal law or otherwise protected by a privilege. Instead, the issue is one of ownership and control of the records. Second, even if the concept of waiver were applicable, the County has not met its burden of demonstrating that Sheriff Fitzgerald or FirstNet voluntarily disclosed the electronic communications to the County or any third party. The County's First and Tenth Amendment claims also lack merit. Courts have consistently rejected the claim that the First Amendment provides the public a right of access to government records. And the relief sought by the United States does not intrude on any powers reserved to the states by the Tenth Amendment. The United States is not seeking to restrict any right that the County may have to disclose its own records. Instead, the United States is simply asserting its ownership rights in its own records.

Accordingly, this Court should deny the County's motion to dismiss and grant summary judgment for the United States.

LEGAL STANDARDS

A. Standard for Motion to Dismiss for Failure to State a Claim

Fed. R. Civ. P. 12(b)(6) allows a defendant to challenge the legal sufficiency of plaintiff's claims. "Consideration on a motion under Rule 12(b)(6) is limited to initial pleadings, and if the court considers matters outside the pleadings, the motion must be treated as one for summary judgment under Rule 56." *Brooks v. Midwest Heart Group*, 655 F.3d 796, 799-800 (8th Cir. 2011). Failure to do so is error. *Id.* at 798. *See also Minnesota Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013) (district court committed reversible error when it dismissed complaint for failure to state a claim when it considered arguments and evidence from "some source outside the four corners of the complaint," holding that the court "should have evaluated the motion under Rule 56").

B. Standard for Motion for Summary Judgment

Fed. R. Civ. P. 56(c) provides that summary judgment shall be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011)(en banc). When presented with a summary judgment motion, the court must decide whether there is a genuine issue of material fact for trial, and may not weigh the evidence and assess the truth of any factual issues. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Nunn v. Noodles & Co.*, 674 F.3d 910, 914 (8th Cir. 2012). The facts are viewed in the light most favorable to the nonmoving party. *Nunn* at 914. The moving party has the burden of demonstrating that the record does not present any genuine

disputes concerning material facts. *Gibson v. American Greetings Corp.*, 670 F.3d 844, 853 (8th Cir. 2012). Once the moving party has established that no material issues are genuinely in dispute, the burden then shifts to the non-moving party to present evidence showing that there are specific and genuine questions of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. at 323-24; *Torgerson*, 643 F.3d at 1042. When a properly supported motion for summary judgment is made "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. at 323-324.

ARGUMENT

I. The Records Made and Received by Sheriff Fitzgerald in His Capacity as a Member of the FirstNet Board Are Federal Records.

The electronic records sent and received by Sheriff Fitzgerald in his capacity as a member of the FirstNet Board are federal records, notwithstanding their location in his County email account. The key criterion of a federal record is that it was made or received by a federal agency or its employee under federal law or in connection with transaction of federal activities.

The Federal Records Act, 44 U.S.C. §3301, defines the term "records" to include,

all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.

Id. (emphasis added). The records at issue clearly fall within this broad definition. They are electronic records that were made or received by Sheriff Fitzgerald in his capacity a member of the FirstNet Board. ECF Doc. 2-2 at 1-2 (Declaration of Paul Fitzgerald, ¶ 5-8). FirstNet is a

federal agency, 47 U.S.C. § 1426, and Sheriff Fitzgerald is a Special Government Employee when he is performing his duties as a member of the FirstNet Board. 47 U.S.C. § 1424(g)(2).

The County presents no valid argument to demonstrate that the records at issue are not federal records. Indeed, the County does not contest that the records relate to the activities of FirstNet. Instead, the County argues that the records do not meet the definition of a federal record because the United States does not possess the records and never requested the County to preserve any of the emails from Sheriff Fitzgerald's county email account. ECF Doc. 7-1 at 10-11.

Neither argument has any merit. First, as explained in United States' prior briefs, the physical location of a record is not determinative as to whether or not a "record" is a record of a federal agency. *See* ECF Doc. 5-1 at 9-11. Indeed, the Eighth Circuit Court of Appeals has specifically recognized that the United States does not need to possess the records to claim ownership. *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380 (8th Cir. 1987). In that case, the United States sought to retrieve tribal court records that had been removed from a tribal court and stored in tribal archives. The United States asserted that such materials were the records of the Bureau of Indian Affairs (a federal agency within the Department of the Interior) and the Eighth Circuit agreed. Citing to the definition of records under 44 U.S.C. § 3301, the Eighth Circuit found that "[t]he records of C.F.R. courts [the tribal courts established under federal regulations] are agency records and belong to the United States," regardless of the fact that they documents were in the possession of the tribal government. 827 F.2d at 383. Story County has made no attempt to distinguish this case from *Red Lake Band*.

Second, the County's contention that the United States has not requested the County to preserve the FirstNet emails maintained by Sheriff Fitzgerald on his county email account is

disingenuous. When it became apprised of the fact that Sheriff Fitzgerald had maintained records which he had created or received in his capacity as a member of the FirstNet Board on his county email account, the United States took appropriate steps to protect them, including initiation of this lawsuit. *See* ECF Doc. 2-4 (Declaration of Milton Brown, ¶¶ 5-7, 9) (describing NTIA communications with Iowa Deputy Attorney General Julie Pottorff, who requested the County to provide NTIA with copies of the records and to refer the request for the records to NTIA, and NTIA's request to the County for a copy of the records).³

Accordingly, the records at issue are federal records and United States, not the County, should determine whether the documents should be disclosed.

II. The Records Made and Received by Sheriff Fitzgerald in His Capacity as Member of the FirstNet Board Are Not County Records Subject to Iowa Public Records Act.

None of the arguments made by the County supports its contention that that records sent or received by Sheriff Fitzgerald in his capacity as a member of the FirstNet Board are County records subject to Iowa Public Records Act. *See* ECF Doc. 5-1 at 11-12. The County offers two grounds for its contention. First, it contends that the records are County records because they were found on the County's email system. ECF Doc. 7-1 at 4 and 9. Second, Story County asserts that the records are County records because "Sheriff Fitzgerald is first and foremost the Sheriff of Story County, Iowa, and he can never suspend the authority vested in him by the electorate of Story County, Iowa." ECF Doc. 7 at 3; *see also* ECF Doc. 7-1 at 8.

Both arguments lack merit. First, as previously explained (ECF Doc. 5-1 at 11-12), the Iowa Supreme Court has explicitly rejected the argument that the location of the document

³ In any case, the United States' ownership of the records at issue does not turn on whether the records qualify as records which must be preserved under the Federal Records Act. The fact that a document created or received by a federal employee in his official capacity does not need to be preserved does not mean it somehow becomes a County record.

determines whether it is a “public record” for purposes of Iowa Public Records Act. *City of Dubuque v. Dubuque Racing Ass’n, Ltd*, 420 N.W.2d 450 (Iowa 1988). In *City of Dubuque*, the Dubuque Racing Association (“DRA”) was a private, non-profit corporation licensed to conduct pari-mutuel wagering on dog races. The terms of the lease of the land by the City to the DRA required three positions on its board to be reserved for city council members and one position reserved for the city manager or the city manager’s designee, which in this case was the assistant city manager. The assistant city manager kept copies of the DRA’s board meeting minutes in the City’s offices. A local newspaper submitted a request under the Iowa Public Records Act to the City for access to the copies of the meeting minutes kept by the assistant city manager. The Iowa Supreme Court held that meeting minutes were not records subject to disclosure under the Iowa Public Records Act. The court explained that “the issue before us is whether the minutes of the DRA *belong to* the City.” 420 N.W.2d at 453. The court held:

This decision does not turn on the physical location of the documents in question, rather, the appropriate inquiry is whether the documents are held by the city officials in their official capacity. * * * Simply because members of a city council serve on the board of directors of a private nonprofit corporation, the affairs of the corporation do not become the affairs of the government.

Id. The court held that, “[a]lthough members of the city council and the city manager may also serve as directors and committee members of the DRA, minutes of the DRA meetings are not documents that belong to the city.” *Id.* at 454.

In its memorandum, the County seeks to distinguish *City of Dubuque* on the ground that records in that case “were not found on a municipal email system but rather were in hard copy in a city office,” ECF Doc. 7-1 at 8.⁴ That the records in this case are maintained in an electronic

⁴ The County also tries to find some significance to the fact that the records in that case belonged to a private, non-profit organization. ECF Doc. 7-1 at 8. But, that the records here belonged to

format is a distinction without a difference. There is no rational distinction between an electronic record on an email system and hard copy document in a city filing cabinet. As the Iowa Supreme Court stressed, its analysis of whether the DRA minutes are public records is not determined by the physical location of the minutes. *City of Dubuque*, 420 N.W.2d at 453. That the document is electronic and stored on a government email system does not change that analysis.⁵ In *Media Research Center v. U.S. Dep't of Justice*, 818 F. Supp. 2d 131 (D.D.C. 2011), the court specifically addressed this issue in the context of the federal FOIA. In that case, plaintiff asserted that emails created or received by Solicitor General Elena Kagan in her capacity as a nominee to the Supreme Court were agency records under the FOIA because they were created or received on her Department of Justice's email account. *Id.* at 140. The district court rejected this claim, holding that their status as agency documents depends on the purpose for which the documents were created and the agency's use of the documents for its official business. *Id.* Because the emails were created and received by Ms. Kagan in her personal capacity as a Supreme Court nominee and not in her role as the Solicitor General, the court found that they were not federal agency records. The County has offered no argument why the same rationale should not apply here.

The County's contention that the content of the records is irrelevant because Sheriff Fitzgerald was a paid elected official during the time that he created or received the emails also has no merit.⁶ As recognized in *City of Dubuque*, the appropriate inquiry is whether the

a private non-profit organization were irrelevant.

⁵ The format of the document is also irrelevant for determining whether a document is a federal record. The FRA's definition of records includes materials "regardless of physical form or characteristics." 44 U.S.C. § 3301.

⁶ In its memorandum, the County asserts that Sheriff Fitzgerald was appointed as a member of the FirstNet Board "by the color of his elected Iowa county office." ECF Doc. 7-1 at 2. This

government employees are “acting in their official capacity as public servants.” 420 N.W.2d at 453. Contrary to the County’s assertion, the fact that Sheriff Fitzgerald is the sheriff does not mean that every action taken by Sheriff is taken in his official capacity as the Sheriff and relates to his “elected duties.” The official powers and duties of a Sheriff in Iowa are outlined in Iowa Code, §§ 331.652 and 331.653. The County makes no attempt to demonstrate how the records at issue relate to any of Sheriff Fitzgerald’s official powers and duties as sheriff. Indeed, the County cannot. The request made by *Politico* was amended to seek only those communications made by Sheriff Fitzgerald in his position as a member of the FirstNet Board. ECF Doc. 2-4 at 1 (Declaration of Milton Brown, ¶ 4).⁷

In short, contrary to the County’s assertion, the records at issue are not County records

assertion is erroneous as a matter of law. As previously explained (ECF Doc. 5-1 at 4), the Secretary of Commerce appoints twelve individuals to the FirstNet Board. 47 U.S.C. § 1426(b)(1). In making the appointments, the Secretary shall “(i) appoint not fewer than 3 individuals to represent the collective interests of States, localities, tribes, and territories; (ii) seek to ensure geographic and regional representation of the United States in such appointments; (iii) seek to ensure rural and urban representation in such appointments; and (iv) appoint not fewer than 3 individuals who have served as public safety professionals.” *Id.* § 1424(b)(2)(A). ECF Doc. 5-1. The statute does not require that the appointees currently serve as governmental or public safety officials, merely that they can represent those interests or have the relevant experience. Thus, Sheriff Fitzgerald’s appointment not only contributed to the Secretary’s fulfillment of the requirement that at least three members of the Board represent the collective interests of state, local, and tribal governments, but also the requirement that three members have public safety experience. In addition, his appointment helped to fulfill the requirements for geographic diversity and rural representation. *See* Press Release, “Acting U.S. Commerce Secretary Rebecca Blank Announces Board of Directors for the First Responder Network Authority” (Aug. 20, 2012), *available at* <http://www.commerce.gov/news/pres-releases/2012/08/20/acting-us-commerce-secretary-rebecca-blans-announces-board-directors>; *see also* NTIA Fact Sheet: First Responder Network Authority (FirstNet), *available at* <http://www.commerce.gov/news/fact-sheets/2012/08/20/fact-sheet-first-responder-network-authority-firstnet>.

⁷ Contrary to the County’s suggestion, it is not true that, under state law, all records relating to a sheriff’s exercise of his official duties under state law are public records. *See Iowa Attorney General Opinion No. 72-9-11*, 1972 WL 262440 (Iowa A.G.) (records relating to a sheriff’s appointment of special deputies not paid by the County do not fall within the definition of “public records”); *Clark v. Banks*, 515 N.W.2d 5 (Iowa 1994) (a sheriff has no obligation to maintain the justification forms for a firearm permit).

and, therefore, are not subject to disclosure under the Iowa Public Records Act. They do not bear upon or reveal the functions and operations of either the Sheriff's Office or the County. Sheriff Fitzgerald holds these records not in his capacity as Sheriff of Story County, but solely in his official capacity as a Special Government Employee of FirstNet and an appointed member of its Board.

III. The United States Has Not Waived its Ability to Prevent the County from Disclosing the Records Created or Received by Sheriff Fitzgerald in his Capacity as a Member of the FirstNet Board.

The County argues that even if the records at issue are federal records, the United States is not entitled to relief because it has waived its ability to restrict release of the records pursuant to 47 U.S.C. § 1426(d)(2) because Sheriff Fitzgerald used his county email to conduct FirstNet business. ECF Doc. 7-1 at 11-13. This argument fails in several respects.

First, the County's argument misconceives the basis for the United States' action. While 47 U.S.C. § 1426(d)(2) provides that FirstNet is not subject to the requirements of the federal FOIA, 5 U.S.C. § 552, the action of the United States does not turn on whether FirstNet did not adequately safeguard its records, or whether the records at issue would be subject to release under FOIA. Instead, the issue is one of ownership. The United States has the authority to enforce its property interest in its records. *See United States v. Napper*, 694 F. Supp. 897 (N.D. Ga. 1988), *aff'd*, 887 F.2d 1528 (11th Cir. 1989) (action by the United States seeking return of documents loaned to local law enforcement officials during a murder investigation). As the court recognized in *Napper*, "[t]he question before the court is who owns, and is entitled to possession of, the documents," not whether the documents are exempt from disclosure under the FOIA. 694 F. Supp. at 900. As the owner of the records, the United States (not the County) has the right to determine whether and to whom they should be disseminated. Even if the documents

at issue had been disseminated to third parties, as the County contends, it does not change the status of the documents as federal records. They are still federal records, not County records. To the extent that *Politico* and others seek disclosure of such federal records, the County should refer the disclosure request to FirstNet for its consideration under federal law. Then the requester would be free to pursue whatever rights he had to access the records, if any, directly with FirstNet.

Second, the County's waiver argument conflates FirstNet's categorical statutory exception from the FOIA, set forth in 47 U.S.C. § 1426(d)(2), with the FOIA's exemption provisions set forth at, 5 U.S.C. § 552(b). While 5 U.S.C. § 552(b) provides that a federal agency may withhold a document in whole or in part to the extent it is protected by one or more of the nine exemptions, 47 U.S.C. § 1426(d)(2) is materially different in nature. It provides that FirstNet is not subject to the requirements of FOIA. Case law holding that an agency's official public disclosure of a record otherwise protected under one of the FOIA's nine disclosure exemptions may constitute a waiver of that exemption is not relevant here.⁸ And the County has not cited any cases holding that the voluntarily release of information by an entity not subject to the FOIA somehow waives its statutory exception from the requirements of the FOIA.⁹

Third, even if the concept of waiver were applicable to 47 U.S.C. § 1426(d)(2), the County has not demonstrated any official public disclosure of the records at issue. Contrary to

⁸ See, e.g., *Watkins v. United States Bureau of Customs and Border Protection*, 643 F.3d 1189, 1197 (9th Cir. 2011).

⁹ See also *Judicial Watch v. Secret Service*, 726 F.3d 208 (D.C. 2013) ("It is therefore undisputed that a requester could not use FOIA to compel the President or his advisors to disclose their own appointment calendars or visitor logs.") (Records created by the Executive Office of the President, which is not subject to the FOIA, did not become FOIA records simply because the Secret Service, which is subject to the FOIA, had access to them, and voluntary disclosure of certain types of records by the Office of the President, does not negate Congress' decision to exempt such records from the FOIA.).

County's assertion (ECF Doc. 7-1 at 12), the United States does not bear the burden of showing that the records at issue have not been officially disclosed to the public. Instead, courts have consistently held that it is the party asserting a waiver who bears the burden of demonstrating that the withheld information has been officially disclosed. *See, e.g., Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 61 (D.C. Cir. 2003) (holding that the requester bears the burden of showing a waiver); *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, (D.C. Cir. 2003) (*quoting Ashfar v. U.S. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983)) ("it is established that 'a plaintiff asserting a claim of prior disclosure must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld.'")

Here, the County has offered no evidence of any official disclosure of the records at issue to the County or any other third-party, much less the public. While Sheriff Fitzgerald used his County email account to send and receive the documents, there is no evidence that Sheriff Fitzgerald voluntarily disseminated the records to other employees in the County.¹⁰ Although the County was able to download the emails from his county email account, it did so over the objections of the Sheriff. Moreover counsel for NTIA, then acting on behalf of FirstNet, clearly took the position that these were federal records to be addressed under Federal, not state, law. ECF Doc. 2-4 (Declaration of Milton Brown, ¶ 4). The County's unilateral actions in retrieving these communications from Sheriff Fitzgerald's county email account, and handling them as

¹⁰ In its memorandum, the County asserts that other FirstNet Board members disseminated their FirstNet emails to third parties. ECF Doc. 7-1 at 12. This claim is based on a misreading of the Declaration of Uzoma Onyeije (ECF Doc. 2-3). Mr. Onyeije stated that other FirstNet Board members may have used non-NTIA email addresses for FirstNet business. *Id.* at ¶ 10. Transmission of official email messages on a system not operated by a federal agency is not prohibited by federal records management law or regulation. Federal law still treats such official email messages as federal records. *See* 36 C.F.R. § 1236.22. Thus, the fact that some FirstNet Board members may have used another email account does not indicate that they ever disseminated their FirstNet records to third parties.

county records in the face of such objections, is not a voluntary disclosure by either the Sheriff or FirstNet.¹¹

Moreover, even if the use of the County email account could be treated as a disclosure to the County, courts have held that an agency's carelessness or mistake in permitting access to certain information is not equivalent to a waiver, especially where the agency takes steps to correct the matter. *Hersh & Hersh v. U.S. Dep't of Health and Human Services*, No. C 06-4234, 2008 WL 901539, *7-9 (N.D. Cal. March 31, 2008) (explaining that "documents made publicly available on the docketing system were inadvertently produced [and] cannot form the basis for a waiver argument"); *Astley v. Lawson*, No. 89-2806, 1991 WL 7162, *8 (D.D.C. Jan. 11, 1991) (holding inadvertent placement of document into a public record did not waive exemption when it was remedied upon the agency's awareness of the mistake).

Thus, the County's assertion that the United States has "waived" its ability to restrict the release of the records at issue has no merit.

IV. Section 1426(d)(2) Does Not Violate the First Amendment

The County's claim that United States' application of 47 U.S.C. § 1426(d)(2), which provides that FirstNet is not subject to FOIA, is overbroad as applied and violates the First Amendment is fundamentally flawed in several respects.¹² First, as previously explained, this

¹¹ *Watkins v. United States Bureau of Customs and Border Protection*, 643 F.3d 1189, 1197 (9th Cir. 2011), is inapposite. In that case, the requester sought to compel Customs and Border Protection ("CBP") to produce copies of the notices it had issued to trademark owners regarding merchandize seized at certain ports. In that case, unlike here, the agency had voluntarily disclosed the notices to trademark owners. Indeed, the disclosure of the notice to an aggrieved trademark owner was mandated by 19 U.S.C. § 1526(e), and the government imposed no restriction on the owner's use of the information. 643 F.3d at 1197. Based on those facts, the court held that CBP had waived any claim of confidentiality under exemption 4 of the FOIA. *Id.*

¹² It is questionable whether the County even has standing to raise a First Amendment challenge. First, it is axiomatic that the Free Speech Clause of the United States Constitution restricts

action by the United States does not turn on whether the records at issue are subject to the FOIA. *See supra* at 5-8. Instead, the issue is one of ownership – namely that the documents are federal records, not County records.

Second, the County's claim is predicated on the erroneous assumption that the First Amendment provides the public with a right of access to government information. Courts have consistently held that "the First Amendment does not 'mandate[] a right of access to government information or sources with the government's control.'" *Center of Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 924 (D. C. Cir. 2003) (quoting *Hochins v. KQED*, 438 U.S. 1, 15 (1978)). *Accord North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 209 (3d Cir. 2002) (under the First Amendment "there is no general right of public access to government proceedings or information).

The Southern District of Iowa squarely addressed this issue in *Gartner v. U.S. Information Agency*, 726 F. Supp. 1183 (S.D. Iowa 1989). In that case, a journalist, a state legislator, and a newspaper publishing company alleged that Section 501 of USIA's programmatic authority, 22 U.S.C. §1461, which authorized the Director of the USIA to disseminate information abroad about the United States, its people and its policies, but prohibited dissemination of such information within the United States violated their alleged First Amendment right to receive information. *Id.* at 1187. This Court rejected their claim. The Court found that the First Amendment "constrains our government from acting in ways which

government regulation of private speech; it does not regulate government speech. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). Second, the County points to no injury-in-fact it would suffer if the subject records are treated as Federal records. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Notably, the County has not demonstrated that it has requested records from FirstNet under any statutory framework. As such, it has not been denied any records. Therefore, the County lacks standing to challenge the constitutionality of 47 U.S.C. § 1426(d).

infringe our right to free speech; it does not create an affirmative duty upon the government to act” by affirmatively providing information to the public. *Id.* This Court explained that:

When a member of the public seeks access to government information, the Constitution does not impose “an *affirmative* duty on the part of the government to assist in that research or to disclose government files... [such] interests are statutory in nature.” *Wolfe v. Froehlke*, 358 F. Supp. 1318, 1321 (D.D.C. 1973), *aff’d per curiam*, 510 F.2d 654 (D.C. Cir. 1974) (no first amendment right of access to a Department of Defense file that was exempt from mandatory statutory disclosure under Freedom of Information Act). *See also Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“the right to speak and publish does not carry with it the unrestrained right gather information”). In short, it is one thing to say that the government may not restrict the plaintiffs from telling the news to their readers, and quite another to argue that the government has a constitutional duty to supply the plaintiffs with the news to write about. It is for Congress to establish the extent of access to the government documents; the first amendment does not do so.

Id. at 1188 (emphasis added; footnote omitted).

Here, Congress has not provided the public with a general right of access to FirstNet documents. Instead, it has explicitly provided that FirstNet is not subject to the FOIA. 47 U.S.C. § 1426(d)(2). The County argues that the United States is expanding this provision beyond its intended purpose in a manner inconsistent with 47 U.S.C. § 1426(b)(1)(B). This provision requires that FirstNet issue competitive requests to the private sector for proposals for the construction and operation of the First Responders Network in a “transparent” manner.¹³ The

¹³ That provision states that FirstNet

shall hold the single public safety wireless license granted under section 1426 and take all actions necessary to ensure the building, deployment, and operation of the nationwide public safety broadband network, in consultation with Federal, State, tribal, and local public safety entities, the Director of NIST, the Commission, and the public safety advisory committee established in section 1425(a), including . . .

(B) issuing open, transparent, and competitive requests for proposals to private sector entities for purposes of building and operating, and

emails at issue are not competitive requests by the Board to the private sector for the purpose of building and operating the network. Rather the emails reflect internal communications among FirstNet Board members and/or with FirstNet employees. *See* ECF Doc. 7-2 (Second Declaration of Milton Brown, ¶¶ 5-7). They include discussions of legal advice, proposed budgets, draft Board resolutions and minutes, and other internal deliberations. *Id.* While some of these internal communications touch upon prospective procurement plans by FirstNet, those plans are not final, competitive requests to the private sector but internal, pre-decisional sensitive information which would prematurely reveal the agency's proposed strategy, budget or schedule for acquiring goods and services. *Id.* ¶ 5. Moreover, that Congress legislatively specified that certain actions must be "transparent" underscores that FirstNet's exception from the FOIA under Section 1426(d)(2) was a knowing policy choice.

The County's First Amendment claims, therefore, have no merit.

V. The Action by United States to Prevent Story County from Releasing Federal Records Does Not Violate the Tenth Amendment.

Similarly, there is no intrusion into Iowa's sovereignty under the Tenth Amendment by requiring the County to turn over federal records and refrain from disclosing Sheriff Fitzgerald's email exchanges as a Special Government Employee serving on the FirstNet Board. The County's argument is predicated on its erroneous claim that the records at issue belong to the County and are subject to Iowa Public Records Act. As previously explained, the fact that the records are located on the County's email system does not make them County records even

maintaining the network that use, without materially changing, the minimum technical requirements developed in section 1423.

47 U.S.C. § 1426(b)(1)(B).

under the state's own case law. *See supra* at 6-10.¹⁴ Accordingly, this is not a case in which the United States is seeking to restrict any right of the County to disclose its own records. Instead it is a case in which the United States is seeking to enforce its property rights in the records.

¹⁴ Even assuming *arguendo* there is conflict between the Iowa Public Records Law and federal law, it is the state statute that must give way. *State of Oklahoma v. United States*, 161 F.3d 1266, 1272 (10th Cir. 1998) (affirming provision of the federal Driver's Privacy Protection Act that prohibited states from disclosing personal information obtained by its department of motor vehicles holding that Congress does not "impermissibly invade areas reserved to the states under the Tenth Amendment because it exercises its preemptive authority under the Commerce Clause in a manner that displaces state law and policy to some extent").

CONCLUSION

For the above stated reasons, this Court should deny the County's motion to dismiss and grant United States' motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 15, 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

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.)	

STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 56.1, plaintiff United States of America, on behalf of its agency the First Responder Network Authority (“FirstNet”), by and through the United States Attorney for the Southern District of Iowa, hereby submits the following statement of material facts to which there is no genuine issue to be tried:

1. The First Responders Network Authority (“FirstNet”) is an independent authority within the National Telecommunications Information Administration (“NTIA”), an agency of the United States Department of Commerce. 47 U.S.C. § 1424(a).

2. Among the objectives of FirstNet is to “ensure the building, deployment, and operation of the nationwide public safety broadband network,” to “ensure the safety, security, and resiliency of the network, including the requirements for protecting and monitoring the network to protect against cyberattack” and to “address special considerations for areas or regions with unique homeland security or national security needs.” Id. §§ 1426(b)(1), (2)(A) and (2)(D); Declaration of Paul H. Fitzgerald (“Fitzgerald Decl.”) (ECF Doc. 2-3), ¶ 4.

3. The Board of FirstNet is 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. 47 U.S.C. § 1424(b)(1).

4. On August 20, 2012, Sheriff Paul Fitzgerald was appointed to the Board of the First Responders Network Authority (“FirstNet”) by the then Acting Secretary of Commerce. Declaration of Uzoma Onyeije (“Onyeije Decl.”) (ECF Doc. 2-3), ¶ 3.

5. When performing his FirstNet duties and activities, Sheriff Fitzgerald acts as a Special Government Employee of the federal government, Fitzgerald Decl. ¶ 3; Onyeije Decl. ¶ 4, and he receives pay from the federal government for his time spent in performing his duties on behalf of FirstNet and compensation for travel expenses. Fitzgerald Decl. ¶ 3; 47 U.S.C. § 1424(g)(2).

6. In his capacity as a board member of FirstNet, Sheriff Fitzgerald communicates (including by email) with other FirstNet Board members and FirstNet officials and employees regarding FirstNet activities and plans. Fitzgerald Decl. ¶¶ 8-9; Onyeije Decl. ¶ 12; Second Declaration of Milton Brown (Second Brown Decl.), ¶¶ 5-8. (ECF Doc. 5-2).

7. These communications include discussion of proposed budgets, draft Board resolutions and minutes, prospective procurement plans, legal advice and other internal communications. Second Brown Decl., ¶¶ 5-8.

8. Until June 2013, Sheriff Fitzgerald received and sent some communications regarding FirstNet activities on his Story County email account. Fitzgerald Decl. ¶ 9.

9. On July 29, 2013, a request was made to Story County by Mr. Tony Romm, as a reporter for the publication Politico, for “all emails sent and received by Sheriff Paul Fitzgerald over the period between March 1 and June 30.” *See* Exhibit 1 to County Memorandum of Law

in Support Defendant's Preanswer Motion to Dismiss ("Def. Mem.") (ECF Doc. 7-1)

10. On August 1, 2013, Mr. Romm amended his request to "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 to the topic of wireless communications generally." Exhibit 2 to Def. Mem.

11. Sheriff Fitzgerald became aware of this request, Fitzgerald Decl. ¶ 10, and informed Kathy Smith, Chief Counsel of NTIA, forwarding to her a copy of Mr. Romm's modified request. Declaration of Milton Brown, dated August 16, 2013 ("First Brown Decl.") (ECF Doc. 2-3) ¶ 4.

12. Upon being informed of Mr. Romm's request, Ms. Smith contacted Julie Pottorff, Iowa Deputy Attorney General, explaining to Ms. Pottorff Sheriff Fitzgerald's position as a member of the FirstNet Board and the federal interest in communications by Sheriff Fitzgerald as a member of that Board. First Brown Decl. ¶ 5, Exhibit 2.

13. On August 8, 2013, Ms. Pottorff contacted the Assistant Story County Attorney Jessica Reynolds and, confirming an earlier discussion, stated that Sheriff Fitzgerald's email communications as a member of the FirstNet Board were federal records "and access should be determined under federal law." First Brown Decl. ¶ 6, Exhibit 3. Ms. Pottorff further advised Ms. Reynolds that it was also the Department of Commerce's view that these were federal records. *Id.*, Exhibit 3. Ms. Potterff requested that Ms. Reynolds turn the documents over to Ms. Smith to "shift the emails to the federal attorneys and allow them to process Mr. Romm's request under federal law. *Id.*

14. On August 12, 2013, Ms. Potterff reiterated to Ms. Reynolds that federal counsel was willing "to work on the disclosure issue at the federal level" and opined that the transferring

the disclosure matter “to the Department of Commerce where Sheriff Fitzgerald’s appointment originated” would not result in a violation of chapter 22 of Iowa’s Code (Iowa’s Examination of Public Records (Open Records) statute). First Brown Decl., Exhibit 4.

15. On August 13, 2013, Mr. Milton Brown contacted Ms. Reynolds requesting an opportunity to discuss the matter. Def. Mem., Exhibit 4A. In response Ms. Reynolds emailed Mr. Brown and Ms. Potterff advising, “Today the Story County Board of Supervisors voted to release the requested records to Politico at 9:00 a.m. on Monday, August 19, 2013.” First Brown Decl., ¶ 8, Exhibit 5.

16. Later on August 13, 2013, Mr. Brown requested copies of the subject emails from Ms. Reynolds. First Brown Decl. ¶ 9, Exhibit 6. Ms. Reynolds responded on August 14th: “We will be happy to provide copies to you on Monday at 9:00 a.m. when we release the documents to Politico but not sooner.” *Id.* ¶ 10, Exhibit 7.

17. On August 16, 2013, the U.S. Department of Justice, by Acting Associate Attorney General, Elizabeth G. Taylor, wrote to the Story County Attorney, Steven Holmes, regarding the decision of Story County to disclose the email communications. Complaint for Declaratory and Injunctive Relief, Exhibit 1 (ECF Doc. 1). In her August 16th letter Ms. Taylor stated that “Sheriff Fitzgerald was at all times acting as a special federal employee and a member of the FirstNet Board” and, consequently, 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.” *Id.* Ms. Taylor therefore respectfully requested that the County Board of Supervisors reconsider their decision to release these records. *Id.*

Respectfully submitted,

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Assistant Attorney General

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United States Attorney

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Attorneys for the United States

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 15, 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)

United States of America, Plaintiff, v. Story County, Iowa by and through its Board of Supervisors, Defendant.	Case No. 4:13-cv-00360 DEFENDANT’S RESISTANCE TO PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR HEARING ON DEFENDANT’S MOTION TO DISMISS
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COMES NOW the Defendant, Story County, Iowa (hereinafter referred to as Story County), and hereby resists the Plaintiff’s motion for summary judgment as it is premature and respectfully requests a hearing on Defendant’s pre-answer motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and states the following in support thereof:

1. The United States alleges that Story County has relied on facts outside the four corners of the complaint in its motion to dismiss.
2. Story County denies such allegation and requests the Court proceed under Federal Rule of Civil Procedure 12(b)(6).
3. Should the Court find that the Plaintiff has relied on facts outside the four corners of the complaint, Story County respectfully requests that the Court exclude any facts that it finds lie outside the four corners of the complaint and

proceed under a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

4. Should the court deny Story County's motion, Story County does intend to answer and dispute certain material facts alleged by the United States.
5. Because Story County has not answered Plaintiff's complaint the United States is premature in its motion for summary judgment. Story County is entitled to answer before any motion for summary judgment is ripe to be considered by the Court.

WHEREFORE, the Defendant, Story County, Iowa, respectfully requests the Court set a hearing on Story County's motion to dismiss and respectfully requests the Court defer hearing on The United States' motion for summary judgment as premature. Should the court deny Story County's motion to dismiss Story County is entitled to answer the complaint before any action be taken upon the motion for summary judgment.

STORY COUNTY, IOWA

By: /s/Stephen H. Holmes

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ATTORNEY FOR DEFENDANT STORY COUNTY, IOWA

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

United States of America, Plaintiff, v. Story County, Iowa by and through its Board of Supervisors, Defendant.	Case No. 4:13-cv-00360 STORY COUNTY IOWA'S REPLY TO PLAINTIFF'S RESPONSE TO STORY COUNTY IOWA'S MOTION TO DISMISS
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COMES NOW, Defendant, Story County Iowa, by and through its Board of Supervisors and hereby submits the following reply to Plaintiff's resistance to Story County, Iowa's motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Story County, Iowa states the following in support of its reply:

1. Story County, Iowa denies that it has presented matters outside the pleadings and resists Story County, Iowa's motion to dismiss being considered as a motion for summary judgment pursuant to Federal Rule of Civil Procedure 12(d).
2. The United States of America claims that Story County, Iowa presented matters outside the pleadings when it (1) cited to exhibits attached to its memorandum (2) made allegations regarding the number of emails contained in Sheriff Fitzgerald's county email account during the requested time period and the number of emails responsive to the request (3) alleged that Sheriff Fitzgerald did not inform Story County, Iowa of the need to preserve federal records and (4) made a waiver argument

- pursuant to the declarations of Sheriff Fitzgerald and Uzoma Onyeije. ECF Doc 15 at 2.
3. The United States of America has irretrievably intertwined facts contained in its motion for temporary restraining order, memorandum and exhibits with its complaint. All of the above referenced documents should be considered “pleadings” for purposes of Story County, Iowa’s 12(b)(6) motion.
 4. Story County, Iowa’s position is further supported by the fact that the United States of America references the exhibits attached to the temporary restraining order in its pending motion for summary judgment. ECF Doc 12 at 1 (referring the Court to the previously filed declarations of Paul H. Fitzgerald (ECF Doc. 2-2), Uzoma Onyeije (ECF Doc. 2-3), and Milton Brown (ECF Doc. 2-3 and 5-2).
 5. Story County, Iowa addresses the United States of America’s grounds for claiming the facts alleged in Defendant’s motion to dismiss contains information outside the pleadings as follows:

EXHIBITS ATTACHED TO MEMORANDUM

6. The exhibits attached to Story County, Iowa’s memorandum are the same exhibits (facts) attached by The United States of America in its motion for temporary restraining order. ECF 2. Both the complaint and the motion for temporary restraining order were filed contemporaneously.
7. The United States of America seeks to bar Story County, Iowa from addressing the exhibits (facts) set forth in its motion for temporary restraining order by arguing that these facts were not attached to their original complaint.

8. However, the fact that Story County, Iowa did not respond or resist the temporary restraining order and the preliminary order for injunction was based upon an oral agreement that no prejudice would result to Story County, Iowa. This oral agreement preceded the temporary restraining order. This oral agreement was later memorialized by the parties. See ECF 6 at 2 (stating agreement to the preliminary injunction “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”).
9. The United States of America’s contemporaneous filing of both its complaint and motion for temporary restraining order was confusing because the United States of America simultaneously placed facts before the court in both their complaint and their motion. Story County, Iowa viewed these matters as inseparable and covered by our agreement that Story County, Iowa would not be prejudiced by not resisting the temporary restraining order and preliminary injunction.
10. Now, the United States of America argues that the only exhibits (facts) that are properly considered in a motion to dismiss are those exhibits (facts) attached to their original complaint.
11. The larger body of exhibits (facts) are declared and attached to the Plaintiff’s motion for temporary protective order. Further, the facts and exhibits supplied by the United States of America in its motion for temporary restraining order are incorporated in its own motion for summary judgment. ECF Doc 12 at 1 (referring the Court to the previously filed declarations of Paul H. Fitzgerald (ECF Doc. 2-2), Uzoma Onyeije (ECF Doc. 2-3), and Milton Brown (ECF Doc. 2-3 and 5-2)).

12. Based on the prior oral agreement, Story County, Iowa's understanding was that it would not be restricted in its ability to defend its position in any way. If this was not the United States of America's understanding then there was no meeting of the minds. It is a matter of fundamental fairness that an understanding with respect to any agreement exists. If not, the original agreement with regard to the temporary restraining order is invalid and the court should grant a hearing on the original application for temporary restraining order. Story County, Iowa does not know how to suggest to the Court to undo what has already been done except to now allow Story County, Iowa to consider all exhibits and facts pled by complaint or motion by the United States of America in Defendant's motion to dismiss.
13. However, should the Court decide that reliance upon the exhibits as attached constitutes presentation of matters outside the pleadings, Story County, Iowa respectfully requests that the Court exclude the information in the exhibits and consider Story County, Iowa's motion to dismiss. See Federal Rule of Civil Procedure 12(d) stating "If on a motion under Rule 12(b)(6) or 12(c) matters outside the pleadings are presented to **and not excluded by the Court** the motion must be treated as one for summary judgment under Rule 56" (emphasis added).
14. The same reasoning should apply in that the United States of America should be limited to the exhibits and facts contained in their complaint for the purposes of Story County, Iowa's motion to dismiss.

ALLEGATIONS REGARDING NUMBER OF EMAILS CONTAINED IN SHERIFF
FITZGERALD'S EMAIL ACCOUNT

15. Story County, Iowa provided the number of emails at issue in direct response to the Plaintiff's complaint. ECF 1, #11, #12, #13, #19.
16. Plaintiff's complaint specifically references Sheriff Fitzgerald's emails and the initial request from Politico which requested all of Sheriff Fitzgerald's emails and the revised request which resulted in a smaller amount of emails requested.
17. Story County, Iowa is merely restating the facts contained in the United States of America's complaint with greater specificity.
18. However, should the Court decide that the County citing the number of emails at issue constitutes presentation of matters outside the pleadings, Story County, Iowa respectfully requests that the Court exclude the information and consider Story County, Iowa's motion to dismiss. See Federal Rule of Civil Procedure 12(d) stating "If on a motion under Rule 12(b)(6) or 12(c) matters outside the pleadings are presented to **and not excluded by the Court** the motion must be treated as one for summary judgment under Rule 56" (emphasis added).

ALLEGATIONS THAT SHERIFF FITZGERALD DID NOT INFORM STORY
COUNTY OF THE NEED TO PRESERVE FEDERAL RECORDS

19. In the United States of America's memorandum of law in support of an emergency application for a temporary restraining order, Plaintiff refers to 44 USC 3301 as the United States of America's basis for the argument that Sheriff Fitzgerald's emails are federal records in which the federal government has a property interest. ECF Doc 2-1

- at 9. The claim that the subject emails are federal property is also contained in Plaintiff's complaint. ECF 1 at 5 (#19, #20) and ECF 1-1. Story County, Iowa perceived Plaintiff was furthering the argument made in their temporary application for protective order and the argument in their complaint, both filed on the same date.
20. Story County, Iowa's factual allegations that Sheriff Fitzgerald did not inform Story County, Iowa of the need to preserve federal records is in direct response to the federal government's claims that the subject emails are federal property pursuant to 44 USC 3301. 44 USC 3301 requires record preservation.
21. Again, Story County, Iowa is merely referring to the statutory reference made by the United States of America in the motion for temporary protective order which relates to the argument set forth in the complaint. Should the court determine Story County, Iowa is prohibited from arguing matters outside the complaint, that would bar the United States of America from advancing a property interest argument pursuant to 44 USC 3301 as it is not contained in the United States of America's original complaint.
22. For purposes of Story County, Iowa's 12(b)(6) motion Story County, Iowa respectfully requests that the Court find that Plaintiff's application, memorandum and attached exhibits for a temporary restraining order (filed the same date as the complaint) be considered as "pleadings" for purposes of Federal Rule 12(b)(6).
23. However, should the Court decide allegations about the Sheriff's failure to inform Defendant of preservation is outside the pleadings, Story County, Iowa respectfully requests that the Court exclude the information and consider Story County, Iowa's motion to dismiss. See Federal Rule of Civil Procedure 12(d) stating "If on a motion under Rule 12(b)(6) or 12(c) matters outside the pleadings are presented to **and not**

excluded by the Court the motion must be treated as one for summary judgment under Rule 56” (emphasis added).

STORY COUNTY, IOWA’S WAIVER ARGUMENT WITH REFERENCES TO EXHIBITS
ATTACHED TO PLAINTIFF’S MOTION FOR TEMPORARY RESTRAINING ORDER

24. Story County, Iowa advanced a waiver argument in its motion to dismiss (ECF Doc 7-1 at 12) based upon declarations made by Sheriff Fitzgerald and Uzoma Onyeije in exhibits attached to Plaintiff’s motion for a temporary restraining order.
25. The United States of America references the exhibits attached to the temporary restraining order in its pending motion for summary judgment. ECF Doc 12 at 1 (referring the Court to the previously filed declarations of Paul H. Fitzgerald (ECF Doc. 2-2), Uzoma Onyeije (ECF Doc. 2-3), and Milton Brown (ECF Doc. 2-3 and 5-2). It is fundamentally unfair for the United States of America to deny Story County, Iowa the opportunity to consider exhibits and facts alleged in the application for temporary protective order and permit the United States of America to incorporate those same exhibits and facts in its own motion for summary judgment.
26. Again, for purposes of Story County, Iowa’s 12(b)(6) motion for reasons previously stated in this reply Story County, Iowa respectfully requests that the Court find that Plaintiff’s application, memorandum and attached exhibits for a temporary restraining order (filed the same date as the complaint) be considered as “pleadings” for purposes of Federal Rule 12(b)(6).
27. However, should the Court decide references by Story County, Iowa to the United States of America’s exhibits attached to the motion for temporary restraining order is

outside of the pleadings, Story County, Iowa respectfully requests that the Court exclude the information and consider Story County, Iowa's motion to dismiss. See Federal Rule of Civil Procedure 12(d) stating "If on a motion under Rule 12(b)(6) or 12(c) matters outside the pleadings are presented to **and not excluded by the Court** the motion must be treated as one for summary judgment under Rule 56" (emphasis added).

WHEREFORE, Story County, Iowa respectfully requests that the Court overrule Plaintiff's request to consider Story County Iowa's motion to dismiss as a motion for summary judgment and consider all exhibits and facts filed by the United States of America in its complaint and its motion for temporary restraining order and attached memorandum and exhibits as "pleadings" for purposes of Story County, Iowa's motion to dismiss. It is a matter of fundamental fairness to Story County, Iowa to do so.

Respectfully Submitted,

/s/Stephen H. Holmes

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ATTORNEY FOR DEFENDANT STORY COUNTY,
IOWA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 30, 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:

William C. Purdy, Assistant U.S. Attorney

/s/Stephen H. Holmes

Stephen H. Holmes
Story County Attorney

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

United States of America,

Plaintiff,

v.

Story County, Iowa by and through its Board
of Supervisors,

Defendant.

Case No. 4:13-cv-00360

STORY COUNTY IOWA'S
RESISTANCE TO PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

COMES NOW, Defendant, Story County Iowa, by and through its Board of Supervisors and hereby resists Plaintiff's motion for summary judgment and states the following in support thereof:

1. Story County, Iowa states that genuine issues of material fact exist.
2. By way of further response to the United States of America's Motion and in support of this Resistance, Story County, Iowa submits herewith:
 - a. Story County, Iowa's Response to Plaintiff's Statement of Undisputed Facts in Support of motion for Summary Judgment and Defendant's Additional Disputed Material Facts in Resistance to Plaintiff's Motion for Summary Judgment; and
 - b. Story County, Iowa's Statement of Additional Material Fact; and
 - c. Story County, Iowa's Brief in Support of Resistance to Plaintiff's Motion for Summary Judgment.
3. Story County, Iowa requests the opportunity to be heard at oral argument.

Respectfully Submitted,

/s/Stephen H. Holmes

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ATTORNEY FOR DEFENDANT STORY COUNTY, IOWA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 10, 2014 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:

William C. Purdy, Assistant U.S. Attorney

/s/Stephen H. Holmes

Stephen H. Holmes
Story County Attorney

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	)	Reply in Support of United States'
Board of Supervisors,	)	Motion for Summary Judgment
)	
Defendant.)	

This action centers on the federal records sent and received by Sheriff Paul Fitzgerald in his capacity as a member of the Board of the First Responder Network Authority (“FirstNet”), using his County email account. In its motion for summary judgment, Plaintiff United States of America seeks an order declaring these records to be the property of the United States and an order enjoining Defendant Story County from publicly releasing the records. In its brief in support of its resistance (ECF Doc. 24-1), the County rehashes many of the same arguments raised in its motion to dismiss (ECF Doc. 7). The United States addressed those arguments in its brief in support of the motion for summary judgment (ECF Doc. 12) and does not need to repeat them here. None of the additional arguments made by the County provide a legal or factual basis for denying United States’ motion.

1. The County attempts to refute the federal nature of the records at issue by asserting that it is a violation of the Hatch Act, 5 U.S.C. § 7323(a)(3), for Sheriff Fitzgerald “to be both a federal employee and a partisan elected County Sheriff.” ECF Doc. 24-1 at 8. Based on this assertion, the County argues that, because “[t]he Hatch Act has no authority to remove the Sheriff from his . . . county office in Iowa,” it must mean that “he cannot be a federal employee” and that

therefore “the government cannot make a legitimate claim for a property interest in the Sheriff’s county emails.” *Id.* This argument, however, is misguided in several ways.

First, the regulations that implement the Hatch Act, including the Act’s general prohibition against federal employees running for election for a partisan political office, make exceptions for persons who are employed “on an irregular or occasional basis” or as “special Government employee[s]” as defined in 18 U.S.C. 202(a). 5 C.F.R. 734.601. Such persons are subject to the Hatch Act’s prohibition against running for partisan office only “when he or she is on duty.” *Id.* Sheriff Fitzgerald is a “special Government employee” as defined under 18 U.S.C. 202(a), *see* Letter of Appointment (ECF Doc. 2-2 at 5), and he also clearly comes within the description of one who is employed with the federal government “on an irregular or occasional basis.” 5 C.F.R. 734.601. As a result, Sheriff Fitzgerald was perfectly free to run for and serve in partisan political office. *Id.*

In addition, even assuming *arguendo* Hatch Act violation occurred, Defendant cites no authority for the proposition that his appointment to the FirstNet Board was void *ab initio*, thereby purportedly stripping the records at issue in this case of their federal character and purpose. An employee who is found to have violated the Hatch Act’s prohibition against running for partisan political office is potentially subject to various penalties, including possible removal from office. 5 U.S.C. § 7326.¹ However, even if removal were appropriate in a given case, Defendant points to nothing in this statutory scheme to suggest that the duties that were undertaken by employees during their time of federal service are *ipso facto* rendered void or are somehow deprived of their federal purpose or character.

Any such penalty, moreover, would harm the public interest. The *de facto* officer

¹ The Office of Special Counsel (“OSC”) is the entity authorized to investigate alleged violations of the Hatch Act. 5 U.S.C. § 1216(a)(2). If the OSC charges an employee with a violation, those charges are adjudicated before the Merit System Protection Board. 5 U.S.C. § 1215.

doctrine is instructive regarding this point. “The *de facto* officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person’s appointment or election to office is deficient.” *Ryder v. United States*, 515 U.S. 177, 180 (1995).

The de facto doctrine springs from the fear of the chaos that would result from the multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office.

Id. (citation omitted). There is no question that the public interest, as specifically contemplated by Congress when it created the FirstNet, would be harmed if this Court were to strip these emails of their federal character. As previously established, Congress exempted the FirstNet from operation of the federal Freedom of Information Act specifically to protect the confidentiality of records such as are at issue in this litigation. 47 U.S.C. § 1426(d). Clearly, this purpose would be frustrated and the public interest thereby harmed were the Court to reach the result asked for by the County.

2. The County attempts to distinguish *City of Dubuque v. Dubuque Racing Ass’n, LTD*, 420 N.W. 2d 450 (Iowa 1988), on several grounds, none has merit. As previously explained (ECF Doc. 12-1 at 6-8), *City of Dubuque* holds that whether a record is subject to the Iowa Public Records Act “does not turn on the physical location of the documents in question, rather, the appropriate inquiry is whether the documents are held by [the County] officials in their official capacity.” 420 N.W.2d at 453. The County argues first that, “[u]nlike the case at hand, *City of Dubuque* did not involve partisan elected officials and instead involved non-partisan elected city officials.” ECF Doc. 24-1 at 9. This purported distinction, however, lacks any inherent logic and cannot be a basis on which to distinguish *City of Dubuque* from this case. The County next proclaims that, “[b]ut for Sheriff Fitzgerald’s duties as Sheriff in Story County, Iowa, he would

not have had access to the email account in which the emails were located.” *Id.* Seemingly in relation to this point, the County also posits that “Iowa law has long favored disclosure of public records under Iowa Code Section 22.” *Id.* Neither of these factors, however, distinguishes this case from *City of Dubuque*. Indeed, similar to the County’s point that Sheriff Fitzgerald’s position as Sheriff gave him access to the county email account on which the records at issue were stored, the records at issue in *City of Dubuque* would not have been stored in the city government office but for the fact that they were received by persons employed by the city who had access to that office. Also, the fact that Iowa state law favors the disclosure of public records was certainly not lost on the Iowa Supreme Court in *City of Dubuque*. *See* 420 N.W.2d at 452. Neither of these factors, however, was persuasive to the Iowa Supreme Court.

Finally, the County argues that “there is an important rational distinction” between the emails at issue in this case and hard copy documents” in that emails show “a ‘real time’ view of what the public servant is doing with their time” in contrast with the documents at issue in *City of Dubuque*, which revealed “nothing in the way of a timeline which can show to the electorate or the interested public how a public servant is utilizing their work hours.” ECF Doc. 24-1 at 10. This rather forced observation, even if accepted as true, is irrelevant to the Supreme Court’s ruling in *City of Dubuque*. There are any number of reasons why the records at issue in that case might at least arguably have been of interest to the public. The Iowa Supreme Court’s holding, however, did not turn on its balancing of the interests that might be served by the release of the records at issue. Rather, the Court determined that the records were not subject to Iowa’s Open Records Act because the race track was not an official function of the city and the city officials therefore received them when acting in a private capacity. 420 N.W.2d at 453-54. Similarly in this case, the records at issue were sent or received by Sheriff Fitzgerald when acting as a federal

officer in support of his duties on behalf of FirstNet. For this reason, they are federal records.²

3. The County next contends that there is a genuine issue of material fact regarding “the nexus between the Sheriff’s county elected official status and his appointment to the FirstNet Board.” ECF Doc. 24-1 at 12-13. The County argues “that the two positions are so intertwined that but for the Sheriff’s experience as a Sheriff for Story County, Iowa he would not be qualified to be a member of the FirstNet Board.” *Id.* at 13. Once again, however, even if this observation were accepted as true, which it is not (*see* ECF 12-1 at 8 n.6), it is not material to the issue at bar. Notably, in *City of Dubuque*, 420 N.W.2d at 451, the City’s lease to the Dubuque Racing Association (“DRA”) required that certain positions on the DRA board be reserved for city officials, which would give rise to the very same argument the County attempts to make here about the “nexus” between Sheriff Fitzgerald’s status as a county official and his position on the FirstNet Board. Thus, regardless of the Sheriff’s credentials or the varied reasons why he may have been appointed to the FirstNet Board, the dispositive issue is the fact that Sheriff Fitzgerald was acting in his federal capacity when he sent and received these records. That fact is not contradicted by any proposition advanced by the County.³

Accordingly, this Court should grant United States’ motion for summary judgment.

² The County also cites an unreported decision by a state district court, *Sebring v. Des Moines Ind. School Dist.*, Case CE71688 (Dist. Ct. Polk Cnty June 22, 2012). That case involved the disclosure of emails between the former Superintendent and her paramour, which were sent over the School District’s computer and apparently described their sexual activities. That decision is not controlling and is distinguishable. Unlike here, the emails at issue in that case remained the property of the state notwithstanding their personal content and did not belong to the federal government and relate to federal activities.

³ In its brief, the County tries to buttress its Tenth Amendment argument by citing to Exec. Order No. 13132, 64 Fed. Reg. 43255 (1999). That order has no application here because the United States is not promulgating a regulation which affects the policymaking discretion of the states. Instead, the United States is simply seeking to protect its own records. Moreover, Section 11 of Exec. Order No. 13132 states that it “is intended only to improve the internal management of the executive branch, and is not intended to create any right or benefit, substantive or procedural enforceable at law by a part against the United States, its agencies, its officers, or any person.” 64 Fed. Reg. at 43259. *See Independent Meat Packers Ass’n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975).

Respectfully submitted,

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Attorneys for the United States

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 27, 2014, 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

The undersigned further certifies that she attempted to electronically file the foregoing on January 24, 2014, but was unable to file the document due to a nationwide outage of the ECF filing system.

/s/Marcia Sowles

Marcia Sowles
Senior Counsel

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

United States of America, Plaintiff) Case No: 4:13-cv-360
v.)
Story County, Iowa, Defendant)

NOTIFICATION REGARDING VIDEO RECORDING

The parties in this case are hereby notified that the following proceeding is eligible for video recording under the Judicial Conference Committee on Court Administration and Case Management Pilot Project on Cameras (see www.uscourts.gov/multimedia/cameras).

Hearing on Motion for Summary Judgment and Motion to Dismiss

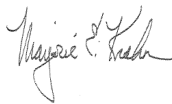
(Describe proceeding.)

Date of scheduled proceeding: 3 / 5 / 2014 (mm/dd/yyyy)

Parties should complete Form E1, PARTY RESPONSE REGARDING VIDEO RECORDING, and return it to the Clerk's Office no later than 7 (seven) days before the scheduled hearing.

1 / 30 / 2014

Date (mm/dd/yyyy)



Marjorie E. Krahn, Clerk of Court

DO NOT file Form E1 in CM/ECF. E-mail Form E1 to IASD_casemanagers@iasd.uscourts.gov.

Form E1

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

_____, Plaintiff) Case No: _____
v.)
_____, Defendant)

PARTY RESPONSE REGARDING VIDEO RECORDING

The following proceeding in this case is eligible for video recording under the Judicial Conference Committee on Court Administration and Case Management Guidelines for the Cameras Pilot Project in the District Courts (available at www.uscourts.gov/multimedia/cameras).

(Describe proceeding.)

Date of scheduled proceeding: ____/____/____ (mm/dd/yyyy)

Check the appropriate box(es) below and on the next page to indicate whether you consent to the recording of some or all of this proceeding:

I consent to the recording of this entire proceeding.

I consent to the recording of some, but not all, of this proceeding.

➔ Explain the specific parts of the proceeding for which you do not consent to recording:

Indicate reason(s) not to video record (check all that apply):

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I submit and sign this form on behalf of the party I represent and the witnesses I may call.

Signature

Name (please print)

Party you represent

____/____/____ (mm/dd/yyyy)
Date

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