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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Daniel David Rigmaiden,  
10 Plaintiff,

No. CV-12-01605-PHX-SRB (BSB)

**ORDER**

11 v.

12 Federal Bureau of Investigation, et al.,  
13 Defendants.  
14

15 Plaintiff has filed a Motion for Leave to Take Discovery and Interrogatories, and  
16 Make Requests for Admissions, and Submit Subpoenas Prior to Responding to  
17 Defendants' Cross Motion for Summary Judgment (motion for discovery). (Doc. 101.)  
18 Defendants have filed a response opposing this motion, and Plaintiff has replied.  
19 (Docs. 106, 107.) For the reasons below, the Court denies Plaintiff's motion for  
20 discovery.

21 **I. Procedural Background**

22 In July 2012, Plaintiff filed the complaint in this matter, asserting claims under the  
23 Freedom of Information Act (FOIA) related to three separate FOIA requests he made in  
24 2011 related to "stingray" technology.<sup>1</sup> These FOIA requests were directed to the  
25 Federal Bureau of Investigation (FBI) and the Executive Office for United States  
26 Attorneys (EOUSA). (Doc. 1.) The case was assigned to an expedited track and the  
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28 <sup>1</sup> Stingray technology refers to portable wireless device locators used by law enforcement to locate wireless devices such as cell phones. (Doc. 84 at 1.)

1 Court entered a scheduling order that set a deadline for filing dispositive motions.  
2 (Doc. 35.)

3 On July 23, 2013, Plaintiff filed a thirty-six page motion for partial summary  
4 judgment (Doc. 36), with a sixty-six page supporting statement of facts and his first and  
5 second declarations. (Docs. 36, 37, 38, and 39.) The Court struck Plaintiff's motion for  
6 failure to comply with Local Rule 7.2(e)(1), but granted Plaintiff leave to refile his  
7 motion. (Doc. 41.) The Court also amended the scheduling order to extend the  
8 dispositive motions deadline by sixty days. (*Id.*) The Court did not strike Plaintiff's  
9 supporting statement of facts (Doc. 37), or his first and second declarations. (Docs. 38,  
10 39, and 46.)

11 On September 4, 2013, Plaintiff filed another motion for partial summary  
12 judgment (Doc. 42), his third declaration (Doc. 43), and his first supplemental statement  
13 of facts. (Doc. 44.) On November 7, 2013, Plaintiff filed his fourth, fifth, and sixth  
14 declarations (Docs. 58, 59, and 60), and his second supplemental statement of facts.  
15 (Doc. 57.) He also filed a "notice of support" for his supplemental filings. (Doc. 61.)  
16 On November 12, 2013, the Court struck Plaintiff's first and second supplemental  
17 statements of fact, and his third, fourth, fifth and sixth declarations. (Doc. 63.) The  
18 Court stayed the briefing schedule and provided Plaintiff the opportunity to proceed with  
19 his pending motion for partial summary judgment, or to withdraw that motion and file  
20 one motion to address all of the issues raised in his multiple filings. (*Id.*) In response,  
21 Plaintiff filed a motion to withdraw his pending motion for partial summary judgment  
22 (Doc. 68), and the Court granted that motion. (Doc. 69.) The Court also amended the  
23 scheduling order to extend the deadline for filing dispositive motions (Doc. 70), and then  
24 further amended the scheduling order to allow the parties to file staggered dispositive  
25 motions. (Doc. 76.)

26 On February 4, 2014, Plaintiff filed a motion for partial summary judgment  
27 (Doc. 84), supporting statement of facts (Doc. 85), and a first and second declaration.  
28 (Docs. 87 and 87.) On March 14, 2014, Defendants filed a cross motion for summary

1 judgment and a response to Plaintiff’s motion for partial summary judgment. (Docs. 91  
2 and 92.) On April 2, 2014, Defendants filed a motion for leave to file a supplemental  
3 memorandum and declaration, or to withdraw a portion of their argument in their cross  
4 motion for summary judgment. (Doc. 97.) The Court granted that motion. (Doc. 103.)  
5 The Court also granted Plaintiff’s motion for an extension of time to file his response to  
6 Defendants’ cross motion for summary judgment and his reply in support of his motion  
7 for partial summary judgment, and extended that deadline from April 17, 2014 to May  
8 19, 2014. (Docs. 94, 95.) Plaintiff filed the pending motion for discovery on April 3,  
9 2014 (Doc. 101), and it was fully briefed when Plaintiff filed his reply on May 5, 2014.  
10 (Doc. 107.)

## 11 **II. Plaintiff’s Motion for Discovery**

12 In the pending motion for discovery and supporting declaration, Plaintiff argues  
13 that he needs to take discovery to properly respond to Defendants’ cross-motion for  
14 summary judgment and he seeks leave to do so pursuant to Fed. R. Civ. P. 56(d).  
15 (Docs. 101 and 102.) As set forth below, Plaintiff seeks discovery for the following two  
16 reasons: (1) to authenticate documents submitted with his motion for partial summary  
17 judgment (Doc. 102 at ¶¶ 4-12); and (2) to discover information about the manner in  
18 which Defendants produced documents in response to his FOIA requests. (*Id.* at ¶¶ 13-  
19 16.)

20 First, Plaintiff explains that he needs discovery to authenticate documents that he  
21 submitted with his motion for partial summary judgment.<sup>2</sup> (Doc. 102 at ¶ 1.) Plaintiff  
22 states that “placing these documents into evidence is vital” to the arguments he intends to  
23 assert in response to Defendants’ cross motion for summary judgment. (*Id.* at ¶ 3.)  
24 Specifically, Plaintiff asserts these documents support his response to Defendants’  
25 argument that certain privileges apply to the documents sought in Plaintiff’s FOIA

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27 <sup>2</sup> Plaintiff states that “[u]nder Fed. R. Evid. 901 and/or Fed. R. Evid. 902, I  
28 believes [sic] I have properly authenticated the documents to which Defendants object.  
However, because Defendants do not agree, I now seek discovery, interrogatories,  
subpoenas, and admissions of evidence under the Federal Rules of Civil Procedure.”  
(Doc. 102 at ¶ 6.)

1 requests. (*Id.*) Therefore, Plaintiff seeks discovery to authenticate documents submitted  
2 with his statement of facts in support of his motion for partial summary judgment.  
3 (Doc. 102 at ¶¶ 7-12.)<sup>3</sup>

4 Second, Plaintiff seeks discovery to obtain information about Defendants’  
5 document processing software and systems, and their capabilities regarding the format of  
6 documents produced in response to FOIA requests. (Doc. 102 at ¶¶ 13-16.) He asserts  
7 that he needs this discovery to counter Defendants’ arguments about their document  
8 production capabilities, specifically whether they can produce documents in native  
9 format with metadata intact. (*Id.* at ¶ 13.)

### 10 **III. Federal Rule of Civil 56(d)**

11 Rule 56(d) of the Federal Rules of Civil Procedure permits a party to resist a  
12 summary judgment motion by “show[ing] by affidavit or declaration that, for specified  
13 reasons, it cannot present facts essential to justify its opposition” to the motion. A party  
14 may invoke Rule 56(d) to ask the court to deny the summary judgment motion outright or  
15 delay consideration while the party completes necessary discovery.

16 A party relying on Rule 56(d) must offer specific reasons that it needs additional  
17 discovery to oppose a summary judgment motion. The affidavit must set out “the  
18 specific facts it hopes to elicit from further discovery” and show that “the sought-after  
19 facts are essential to oppose summary judgment.” *Family Home & Fin. Ctr., Inc. v. Fed*  
20 *Home Loan Mtg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008); *see State of Cal., on Behalf of*  
21 *Cal. Dept. of Toxic Substances Control v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998)  
22 (explaining that for a continuance under Rule 56(f), predecessor to 56(d), parties must  
23 show “(1) that they have set forth in affidavit form the specific facts that they hope to  
24 elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after  
25 facts are ‘essential’ to resist the summary judgment motion”).

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28 <sup>3</sup> Plaintiff asserts that he needs discovery to authenticate the documents submitted  
with his statement of facts (Doc. 85) at ¶¶ 1, 2, 3, 6, 7, 8, 9, 12, 13, 19, 20, 24, 25, 27, 29,  
30, 33, 34, 36, 37, 40 and 41. (Doc. 102 at ¶ 2.)

1 Rule 56(d) only applies “where the non-moving party has not had the opportunity  
2 to discover information that is essential to its opposition.” *Roberts v. McAfee, Inc.*,  
3 660 F.3d 1156, 1169 (9th Cir. 2011) (quoting *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d  
4 832, 846 (9th Cir. 2001)). However, courts should grant Rule 56(d) motions “fairly  
5 freely” when a party has not “had any realistic opportunity to pursue discovery relating to  
6 its theory of the case.” *Burlington Northern Santa Fe R. Co. v. Assiniboine and Sioux*  
7 *Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003); see *Metabolife Int’l,*  
8 *Inc.*, 264 F.3d at 846.

9 **IV. Plaintiff’s Request for Discovery to Authenticate Documents Submitted with**  
10 **his Motion for Partial Summary Judgment.**

11 **A. Rule 56(d) Does Not Allow the Moving Party to Take Discovery.**

12 In opposition to Plaintiff’s motion, Defendants argue that Rule 56(d) does not  
13 allow Plaintiff to conduct discovery regarding documents he submitted in support of his  
14 own motion for partial summary judgment. Defendants assert that Plaintiff is the moving  
15 party and not the party responding to the motion for summary judgment, as Rule 56(d)  
16 contemplates. (Doc. 106 at 4.) On reply, Plaintiff acknowledges that the government’s  
17 argument is “true in some respects,” but he asserts that intends to rely on the same  
18 documents in support of his response to Defendants’ cross motion for summary judgment  
19 and, therefore, “those facts and evidence now have a dual purpose” and he should be  
20 considered a non-movant for purposes of Rule 56(d). (Doc. 107 at 1-2 (emphasis  
21 omitted).)

22 Thus, the parties agree that Plaintiff is not entitled to invoke Rule 56(d) to conduct  
23 discovery to authenticate documents submitted to support his motion for partial summary  
24 judgment. Indeed, the Ninth Circuit has explained that one of the factors the district  
25 court considers in allowing additional discovery is whether such discovery “would have  
26 precluded summary judgment.” *Michelman v. Lincoln Nat. Life Ins. Co.*, 685 F.3d 887,  
27 892 (9th Cir. 2012). When properly invoked, the rule acts as a “safety valve” against  
28 “swinging the summary judgment axe too hastily.” *Rivera-Torres v. Rey-Hernandez*,

1 503 F. 3d 7, 10 (1st Cir. 2007) (citations omitted). Therefore, Plaintiff is *not* entitled to  
2 discovery under Rule 56(d) to authenticate documents to support his motion for partial  
3 summary judgment. Instead, the rule provides for discovery to *defeat* a motion for  
4 summary judgment.

5 Although Plaintiff asserts that he seeks discovery to authenticate documents that  
6 serve a “dual purpose” because they will also support his opposition to Defendants’ cross  
7 motion for summary judgment, he does not identify which *specific* documents submitted  
8 with his motion for partial summary judgment are necessary for him to defeat  
9 Defendants’ cross motion for summary judgment. Under Rule 56(d), Plaintiff must set  
10 out “the specific facts [he] hopes to elicit from further discovery” and show that “the  
11 sought-after facts are essential to oppose summary judgment.” *See Family Home & Fin.*  
12 *Ctr., Inc.*, 525 F.3d at 827. He has not met this burden.

13 Instead, Plaintiff asserts that the relevant documents are cited in twenty-two  
14 paragraphs of his statement of facts in support of his motion for summary judgment.  
15 (Doc. 102 at ¶ 2 (citing Doc. 85).) These paragraphs in his statement of facts in turn refer  
16 to thousands of pages of documents, numerous websites, articles, documents submitted  
17 with his first declaration in support of his motion for partial summary judgment, citations  
18 to case law, and documents submitted in *United States v. Rigmaiden*, CR 08-814-PHX-  
19 DGC. (Doc. 85 at ¶¶ 1, 2, 3, 6, 7, 8, 9, 12, 13, 19, 20, 24, 25, 27, 29, 30, 33, 34, 36, 37,  
20 40 and 41.) Although Plaintiff asserts that he seeks discovery to authenticate documents  
21 that serve a “dual purpose,” the Court concludes that Plaintiff seeks discovery to  
22 authenticate documents to support his motion for partial summary judgment.<sup>4</sup>

23 **B. Authentication Discovery Would Not Defeat Summary Judgment**

24 Furthermore, even if the Court concluded that Plaintiff seeks discovery to  
25 authenticate documents to support his arguments to defeat Defendants’ cross motion for

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27 <sup>4</sup> In addition, Plaintiff states he intends to serve interrogatories on non-parties as  
28 part of the discovery he now seeks. (Doc. 102 at ¶¶ 8, 9, 10.) However, Rule 33 permits  
interrogatories to parties, not to non-parties. *See* Fed. R. Civ. P. 33. Therefore, even if  
Plaintiff properly invoked Rule 56(d), he could not serve these discovery requests on  
non-parties.

1 summary judgment — in other words that he seeks discovery as the non-movant — his  
2 motion would nonetheless fail. Rule 56(d) allows discovery for a person responding to a  
3 motion for summary judgment, if such discovery “would have precluded summary  
4 judgment.” *Michelman*, 685 F.3d at 892. Here, Plaintiff seeks discovery to respond to  
5 Defendants’ objections that he has not authenticated the documents submitted with his  
6 motion for partial summary judgment. (Doc. 102 at ¶¶ 1 and 6.) However, Defendants  
7 have also objected that these documents are immaterial and contain inadmissible hearsay.  
8 (Doc. 92-1 at ¶¶ 1 and 2.) Therefore, even if the Court granted Plaintiff’s motion and he  
9 obtained discovery to authenticate the documents at issue, that information would not  
10 address Defendants’ other objections and thus would not ensure the admissibility of the  
11 documents. Thus, the additional discovery that Plaintiff seeks would not preclude  
12 summary judgment.

13 **C. Rule 56(d) Does Not Allow Discovery to Address Evidentiary Issues**

14 Defendants further argue that Rule 56(d) does not apply because Plaintiff is not  
15 seeking discovery as contemplated by Rule 56(d), but is seeking discovery in response to  
16 Defendants’ objections that many of documents submitted in support of Plaintiff’s  
17 motion for partial summary judgment are inadmissible or immaterial. (Docs. 106 at ¶ 5;  
18 Doc. 92-1 at ¶ 1.) Thus, Defendants argue that these objections present an evidentiary  
19 issue, not a discovery matter. (Doc. 106 at 4-5.)

20 The Court agrees that Rule 56(d) is not an appropriate vehicle for Plaintiff to  
21 request discovery to address evidentiary issues with respect to documents submitted in  
22 support of his motion for partial summary judgment. Plaintiff explains that these  
23 documents are publicly available and “originated from Defendants,” or Defendants  
24 possess duplicates of the documents. (*Id.*) Because Defendants have objected to the  
25 admissibility of these documents as not properly authenticated (Doc. 91-1 at ¶¶ 1-2),  
26 Plaintiff seeks leave to conduct discovery to obtain the documents from Defendants to  
27 defeat that objection. Plaintiff explains that he “seeks to receive the evidence he already  
28 has (and has already placed on the record) but directly from Defendants so that

1 Defendants' attorney can stop pretending as if their clients' own documents don't exist as  
2 a means to convince the Court to reject them as being improperly authenticated."  
3 (Doc. 107 at 3.)

4 As Plaintiff states, he has already submitted the documents he seeks to discover in  
5 support of his motion for summary judgment. Even assuming that Plaintiff will rely upon  
6 these same documents in opposition to Defendants' cross motion for summary judgment,  
7 he does not need to conduct discovery to discover facts essential to oppose that motion.  
8 The parties' dispute regarding whether the documents are admissible and Plaintiff can  
9 properly rely upon them to support (or defend against) a motion for summary judgment is  
10 properly decided upon review of the cross motions for summary judgment and the related  
11 objections.<sup>5</sup>

#### 12 **V. Discovery Related to the Form of the Documents Defendants Produced**

13 Plaintiff also seeks discovery regarding the FBI's and EOUSA's ability to provide  
14 records in native format with metadata intact. (Doc. 102 at ¶¶ 13-16.) In opposition to  
15 this request, Defendants assert that in Plaintiff's motion for partial summary judgment he  
16 asserted that, in response to his FOIA requests, Defendants must produce documents in  
17 their native format and with metadata intact. (Doc. 106 at 8.) Thus, Defendants argue  
18 that Plaintiff is the movant on this issue and Rule 56(d) does not apply. Defendants also  
19 argue that the format of their document production, and the production of metadata, is a  
20 legal, not a factual, issue. (*Id.*)

21 The Court agrees that Plaintiff's motion for partial summary judgment asserts that  
22 Defendants must produce documents in native format with metadata intact. (Doc. 84 at  
23 11-15.) Although Defendants responded to Plaintiff's arguments in their combined  
24 response and cross motion (Doc. 91 at 9-12), this is an issue on which Plaintiff seeks

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26 <sup>5</sup> To the extent that Defendants object that certain documents are not properly  
27 authenticated, but do not contest the authenticity of those documents, their objections  
28 might not be well taken. *See Fenje v. Feld*, 301 F. Supp. 2d 781, 789 (N.D. I11.2003)  
("Even if a party fails to authenticate a document properly or to lay a proper foundation,  
the opposing party is not acting in good faith in raising such an objection if the party  
nevertheless knows that the document is authentic.")). However, the Court is not making  
any determination regarding Defendants' objections. (Docs. 91-1 and 92-1.)

1 summary judgment. As set forth above, Rule 56(d) does not allow discovery for a party  
2 to support a motion for summary judgment.

3 Furthermore, Defendants argue that metadata is not a record subject to FOIA.<sup>6</sup>  
4 (Doc. 106 at 8 (citing Doc. 91 at 9-11, Doc. 92 at 12-14).) The Court agrees that whether  
5 metadata is subject to FOIA is a legal issue. See H.R. Rep. 104-795 at 16, 19  
6 (recognizing that “the law needed to be updated to reflect the advancing use of  
7 information technology to maintain records,” but contemplating that “access should be  
8 the same whether they are on a piece of paper or a computer hard drive.” In other words,  
9 a “matter not previously subject to FOIA when maintained in a non-electronic format  
10 [wa]s not made subject to FOIA by this bill.”); *Citizens for Responsibility and Ethics in*  
11 *Washington v. U.S. Dep’t of Educ.*, 905 F. Supp. 2d at 161, 172 (D.D.C. 2012) (declining  
12 to order the production of electronic copies and/or metadata in response to FOIA  
13 request). Accordingly, Plaintiff does not need discovery regarding Defendants’ ability to  
14 provide records in native format with metadata intact to defend against Defendant’s cross  
15 motion for summary judgment.

16 Accordingly,

17 **IT IS ORDERED** that Plaintiff’s Motion for Leave to Take Discovery and  
18 Interrogatories, and Make Requests for Admissions, and Submit Subpoenas Prior to  
19 Responding to Defendants’ Cross Motion for Summary Judgment (Doc. 101) is  
20 **DENIED**.

21 **IT IS FURTHER ORDERED** that the deadline for Plaintiff to file a response to  
22 Defendants’ cross motion for summary judgment is extended from May 19, 2014 to May  
23 27, 2014. There will be no further extension of this response date or the date for  
24 Defendants to file a reply in support of their cross motion for summary judgment. Even

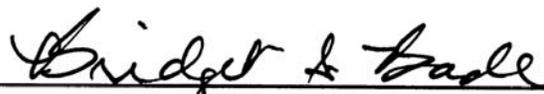
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26 <sup>6</sup> Metadata has been defined as “information describing the history, tracking or  
27 management of an electronic document.” *Wyeth v. Impax Labs., Inc.*, 248 F.R.D. 169,  
28 171 (D. Del. 2006) (quoting *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646  
(D. Kan. 2005)). Metadata includes “all of the contextual, processing, and use  
information needed to identify and certify the scope, authenticity, and integrity of active  
or archival electronic information or records.” *Autotech Techs. Ltd. P’Ship v.*  
*Automationdirect.com, Inc.*, 248 F.R.D. 556, 557 n.1 (N.D. Ill. 2008).

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if Plaintiff files additional motions or objections, the date for his response to Defendants' cross motion for summary judgment will not be extended.

Dated this 13th day of May, 2014.

  
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Bridget S. Bade  
United States Magistrate Judge