October 2016

When Asked to Restore Information From Backup Tape, Amended Federal Rules Offer Relief to Those Who Do Their Homework

While recent cases from some courts have questioned the ability to avoid discovery on information stored on backup tape,[1] other courts may recognize that retrieving archived information from backup tapes can still be unduly burdensome. However, to avoid the cost of restoring backed-up information, you must be prepared with the right facts to oppose a motion to compel.

In the case of *Elkharwily v. Franciscan Health System*, Case No. 3:15-cv-05579 (W.D. Wash. July 29, 2016), a physician filed litigation for defamation and discrimination after he lost his appeal related to his termination of hospital privileges. In discovery, the plaintiff sought emails and text messages between the plaintiff and the defendant's employees, agents or attorneys, and also messages and emails about the plaintiff between the defendant and other third parties. The defendant queried the active email of five custodians and produced a very small set of documents. The defendant argued that though it engaged in a monthly archive of its email to backup tapes as part of its "disaster relief program," under Federal Rule of Civil Procedure 26(b)(1)'s new guidelines of proportionality, and Rule 26(b)(2)'s not reasonably accessible standard, the plaintiff's request was overbroad and unduly burdensome. The defendant did not dispute the backup tapes may have some responsive information, but argued that those archived emails were costly to restore, were of minimal discovery value and were not reasonably accessible. Further, the defendant argued that the plaintiff's requests were not targeted or specific. The defendant estimated any retrieval and restoration of email from those tapes would require "1,400 hours in labor and $157,500 in costs." The plaintiff did not dispute the defendant's estimated cost, or provide argument as to any belief that there were critical documents on those tapes. Rather, the plaintiff argued in reply that he had put the defendant on notice of his claim, and that the defendant was at fault for allowing the emails to transition from an active environment to a less accessible format.

The court, relying on the facts presented by the defendant regarding the cost of restoration, retrieval and searching of the archived email, agreed with the defendant that requiring production of the archived information "would result in an undue burden and cost." The court then analyzed whether the plaintiff made his required showing — whether there was good cause to compel the production at the defendant's expense, despite the archived emails' inaccessibility. The plaintiff was not successful; he could not provide any description as to the content of the archived information or specific individuals involved in the email he sought from the backup tapes. He had no evidence that any relevant emails were even likely to exist. Further, his claim that the defendant should have preserved these emails was disputed by evidence from the appeals record and the defendant's attorneys' billing records. Despite this failed showing, the court, insisting that the archived emails were " 'discoverable' under amended Fed. R. Civ. P. 26(b)(1)," which limits discovery to information "proportional to the needs of the case." Accordingly, the court ordered the defendant to "facilitate access" to the archived emails, if the plaintiff requested it, but

[1] See e.g. *United States ex rel Guardiola v. Renown Health,* No. 3:12-cv-00295-LRH-VPC, 2015 WL 5056726 (D. Nev. Aug. 25, 2015) (holding that a company's decision to archive email on backup tape older that six months even when it had no duty to preserve precluded it from arguing that the information was not reasonably accessible). When Backup Tapes Become Discoverable – A Costly Lesson in the Importance of Information Governance

ruled that the plaintiff would be responsible for the expense of retrieval and restoration, payable in advance. Review costs would still be borne by the defendant.

This case is further evidence that litigants should continue to take advantage of the amended Federal Rule of Civil Procedure 26 to argue that unduly burdensome requests for otherwise discoverable data are not proportional. The central way to resist expensive discovery and "fishing expeditions" is to present specific, credible evidence of the cost or other burden associated with the discovery request. Unsubstantiated statements will not defeat a motion to compel. However, this case could have turned out much differently if the court had found the defendant was obligated to preserve the emails at the time they were backed up to tape. In that event, the defendant would likely have been obligated to bear the entire cost of retrieving and restoring those emails. To minimize the risk that discovery will become unnecessarily expensive, companies must design a preservation strategy that will minimize the chance of relevant information's accessibility being degraded. Email and data archiving should occur on a cycle that makes sense for the company's business and regulatory needs, with the knowledge that when a preservation duty is triggered, data in an active environment should be preserved in an accessible format.

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