

Client Alert

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When Backup Tapes Become Discoverable – A Costly Lesson in the Importance of Information Governance

Companies should remember that their information governance practices may have significant financial repercussions if they become involved in litigation. One court in the District of Nevada recently took a novel approach to analyzing the accessibility of emails stored on backup tape. In *United States ex rel Guardiola v. Renown Health*,ⁱ the United States District Court for the District of Nevada opined that Renown's business practice of retaining email older than six months on backup tape foreclosed it from successfully arguing that the emails were shielded from discovery as not reasonably accessible because of burden or cost. The court also refused to shift to the requesting party the cost of restoration and review of the email at issue. A key element to this decision was the court's perception that Renown's email archival practices were out-of-date, and it also considered the use of backup tapes for recordkeeping without consideration to "the risk of litigation and corresponding discovery obligations" as indicative of a failure to "implement a sensible email retention policy." What is unique about this decision is that the court focused on Renown's business decisions on how to manage its information in the *absence* of pending discovery, and determined those pre-litigation business decisions were the critical factor to prevent the company from avoiding discoverability of documents archived per those decisions.

In this case, Renown opposed Relator's motion to compel production of email from a "gap period" during which, pursuant to Renown's email retention policy, emails older than six months were stored solely on backup tape prior to any duty to preserve documents. Renown argued that restoration of the backup tapes containing those emails would cost more than \$248,000, which would include data processing and contract review expenses, and that the restoration, review and production of email from tape with this price tag rendered that data inaccessible.

The court found an earlier line of case authority supporting the proposition that information stored on archival backup tapes is generally not reasonably accessible as "far from dispositive." The court rejected the suggestion that data kept on backup tapes was inaccessible, particularly given today's technology, stating "undue burden is fact specific and no format is inaccessible per se." It instead analyzed whether the requested production constituted an undue burden or an undue cost. Because the restoration would be conducted by an outside vendor and utilize minimal resources within the company, the court found there was no burden placed on the company itself.

As to the question of undue cost, the court determined that only the cost of the physical restoration could be considered, and dismissed inclusion of related review and storage costs. Considering the physical restoration cost of approximately \$136,000, the court determined the restoration not unduly costly primarily for two reasons: (1) \$136,000 was a fraction of Renown's annual revenues of \$2.6 billion and (2) Renown **electd** to use disaster recovery tapes to store archival data.

The court cited *Starbucks Corp. v. ADT Sec. Servs., Inc.*ⁱⁱ for the premise that a party cannot be relieved of its duty to produce documents merely because the party chose a means to preserve the evidence that makes ultimate production of relevant documents expensive. The court also cited the Sedona Conference, arguing that "[o]rganizations seeking to preserve data for business purposes or litigation should, if possible, consider employing means other than traditional disaster recovery backup tapes. They should not be used for record keeping." In sum, the court held that to the extent a restoration cost of

\$136,000 was attributable to Renown's "failure to earlier implement a sensible email retention policy and its choice to use an archival/backup solution that did not maintain ESI in an indexed or otherwise searchable manner," Renown bore the responsibility of the cost and it was not unreasonable.

Though finding the data reasonably accessible, the court nevertheless decided to consider the factors for whether good cause existed to order production under the balancing test of Federal Rule of Civil Procedure 26(b)(2)(B): (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources. Weighing each factor, the court concluded there was good cause for the discoverability of the emails on the backup tapes. The court then considered those same factors and found cost shifting was unwarranted.

Many courts would consider data kept on backup tapes as not reasonably accessible unless there was a showing that negligent or reckless action after the duty to preserve arose caused the data to be stored solely on archival media. This court, however, heavily focused on Renown's business decisions on how to manage its discovery *in the absence of pending litigation* as the justifying factor for causing the data to be discoverable. The opinion fails to discuss some important questions, including:

- whether data was regularly restored from backup tape for non-disaster recovery purposes;
- whether the emails sought could be considered records that should have been retained active in the company longer than six months under Renown's retention policy; and
- whether a more minimal approach would be appropriate, including sampling a portion of the tapes to confirm whether the communications sought by Relator would likely be contained in those email communications.

This aggressive approach by the court should caution all companies to be vigilant as to their email and document retention practices. The decisions that companies make to manage their information could prop them up for success or failure in handling litigation. Without proper guidelines to determine how data is organized, collected, and disposed of, companies may very well face a discovery dilemma like Renown. A data management strategy, carefully considered and employed, can proactively simplify the eDiscovery process, reducing those costs and reducing the risk of spoliation claims or litigating motions over archival data discoverability, while also helping to secure sensitive information.

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ⁱ No. 3:12-cv-00295-LRH-VPC, 2015 WL 5056726 (D. Nev. Aug. 25, 2015).

ⁱⁱ No. 08-cv-900-JCC, 2009 WL 4730798, at *6 (W.D. Wash. Apr. 30, 2009).