

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

CASSIE M., et al. :
 :
 v. : C.A. No. 07-241ML
 :
 LINCOLN D. CHAFEE, et al. :

MEMORANDUM AND ORDER

Before the Court for determination is Plaintiffs’ Sixth Motion to Compel Discovery (“Motion to Compel” or “Motion”) (Document No. 346). 28 U.S.C. § 636(b)(1)(A); LR Cv 72(a). For the reasons articulated below, Plaintiffs’ Motion is DENIED, but fact discovery is REOPENED for the limited purpose of giving Plaintiffs the opportunity, by October 31, 2013, to depose Anita Butler (“Butler”) and Judith Malin (“Malin”).

Background

On June 28, 2007, Plaintiffs filed their Class Action Complaint, alleging that Defendants had violated several federal constitutional and statutory rights of Plaintiffs. (Document No. 1-1, pp. 25-31).¹ During the course of discovery, it became apparent that Defendants had failed to implement a litigation hold until April 2012. (Document No. 347-4, pp. 3-4). Armed with this knowledge, Plaintiffs endeavored to discover what information, if any, had been lost or destroyed as a result of the absence of a litigation hold between the date the initial Complaint was filed and the date the litigation hold was put into effect. Plaintiffs’ Motion is an outgrowth of these efforts.

There are two components to the Motion. First, Plaintiffs seek an order compelling Defendants to promptly restore and produce to Plaintiffs the emails of Butler and Malin, two former casework supervisors previously assigned to Named Plaintiff Danny B., that have been destroyed and that now exist only on backup tapes. (Document No. 346, p. 1). Second, Plaintiffs request an order compelling Defendants to supplement

¹ Plaintiffs have twice amended their Complaint. (Document No. 12; Document No. 115).

their responses to their Fourth Set of Interrogatories. Id. Each component will be addressed in turn. Additional background is provided when relevant.

Analysis

I. Restoration and Production of Destroyed Emails

Before tackling the arguments of the parties with respect to this component of the Motion, a brief sketch of the factual background is required to put the issue into its proper focus. At some point after the filing of the Complaint but before implementation of the litigation hold, Butler and Malin left their employment at the Department of Children, Youth and Families (“DCYF”); their email accounts were subsequently destroyed. (Document No. 346, p. 1; Document No. 346-1, pp. 6, 15; Document No. 367, pp. 4-5). The emails of Butler and Malin currently exist, if at all, only on backup tapes. (Document No. 346-1, p. 6; Document No. 367, p. 13). Restoration of these emails from the backup tapes will cost \$35,000.00, (Document No. 346-1, p. 7; Document No. 367, p. 12), and Defendants estimate that production of the emails will carry additional costs as a result of the necessary consulting fees and review of the restored emails. (Document No. 367, p. 12).²

Although the email accounts of Butler and Malin can only be potentially recovered from backup tapes, Defendants assert that, through the utilization of expanded searches of the email accounts of other DCYF employees, including direct caseworkers of the Named Plaintiffs, they have “collected and reviewed

² In their papers, the parties disputed whether this \$35,000.00 figure applies to the restoration of only the email accounts of Butler and Malin or to the restoration of four other destroyed email accounts as well. (Compare Document No. 346-1, p. 7 (“Defendants estimated that the cost of restoring the emails for all six workers would be \$35,000.”), with Document No. 367, p. 12 (“The cost of restoring these two individuals alone would amount to \$35,000.”)). The Affidavit of Dana Conneally (“Conneally Affidavit”), a partner at Evidox Corporation, the organization retained by Defendants to assist with electronic discovery in this case, states that “[t]he estimated cost of just the restoration of this data is an estimated \$35,000,” (Document No. 367-4, p. 4), but it is not clear from the Affidavit whether “this data” refers to only the Butler and Malin email accounts or to other accounts as well. In any event, at the telephonic hearing on this Motion, Defendants asserted that the cost of restoring even one email account would be \$35,000.00. Plaintiffs did not contest this assertion at this time. Therefore, I am left with no other choice but to accept Defendants’ representation that restoration of the destroyed email accounts carries a fixed cost of \$35,000.00 irrespective of whether one, two or all six destroyed accounts are restored.

approximately 4,450 e-mails or attachments that were sent to or from Judith Malin and 2,322 that were sent to or from Anita Butler.” (Document No. 367, p. 4).

Turning to the merits of the Motion, Plaintiffs argue that Defendants had a duty to preserve documents potentially relevant to this litigation beginning on the date when they knew or should have known about the litigation, and, at the very latest, on the date the Complaint was filed in June 2007. (Document No. 346-1, p. 8). Plaintiffs further contend that the deletion of the email accounts of Butler and Malin constituted spoliation, in violation of Defendants’ duty to preserve evidence, and requests that this Court utilize either its sanction power under Fed. R. Civ. P. 37 or its inherent power over discovery matters to order Defendants to restore the emails from the backup tapes and produce relevant emails to Plaintiffs. Id. at 9-10.

Defendants offer two arguments in opposition, one procedural and the other substantive. First, they argue that the Motion should be denied as untimely because it was filed over two months after the close of fact discovery. (Document No. 367, p. 3). Second, Defendants contend that the Motion should be denied on the merits because, under the proportionality test enshrined in Fed. R. Civ. P. 26(b)(2), the relief sought by Plaintiffs is gravely disproportional to the undue burden such relief would impose on Defendants. Id.

A. Timeliness

Relying on LR Cv 26(c), Defendants claim that, because Plaintiffs filed their Motion over two months after fact discovery closed on May 31, 2013, the Motion should be denied as untimely.³ (Document No. 367, pp. 6-7). They argue that two letters – one dated May 14, 2013 and the other dated May 29, 2013 – provided Plaintiffs with all the information they needed to file their Motion. Id. at 6, 7. By waiting until months after the close of fact discovery, Defendants reason, Plaintiffs have tendered a patently untimely motion, one that

³ Local Rule Cv 26(c) provides:

Unless the Court otherwise orders, pretrial discovery must be completed by the discovery closure date. However, the parties may agree that specified discovery which has been initiated before the discovery closure date may be completed subsequent to that date, so long as such completion does not affect the pretrial schedule or any trial date established by the Court.

will “inevitably affect the pretrial schedule and the trial date established by the Court.” Id. at 6. Finally, Defendants point out that significant delay would result if Plaintiffs’ Motion was granted at this late stage. Id. at 7-8.

These arguments are unconvincing. Even assuming, arguendo, that the “discovery closure date” for purposes of LR Cv 26(c) is May 31, 2013, the date fact discovery closed, and not June 28, 2013, the close of expert discovery, Defendants belated notice of the unavailability of the Butler and Malin email accounts made it nearly impossible for Plaintiffs to file this Motion before the May 31, 2013 deadline. Contrary to Defendant’s position, the May 14, 2013 letter did not provide Plaintiffs with sufficient information to file this Motion. The letter explained that Defendants utilized “expanded search parameters” in order “to find and review e-mail from custodian accounts that were not available on the active servers at the time of the collection,” including the accounts of Butler and Malin, among others. (Document No. 367-1, p. 1). Critically, after explaining the unavailability of these email accounts, Defendants promised: “We will address this in a more comprehensive letter and will also detail our process for this aspect of the production. This letter will also list all of the FSU custodians and workers and their assignments to the named Plaintiffs.” Id. at 2.

Defendants delivered on this promise by letter dated May 29, 2013 – two days before the close of fact discovery. Even assuming Plaintiffs received this letter on May 29, 2013, it is simply unreasonable to conclude that Plaintiffs should have filed their Motion within a two-day window. Under Fed. R. Civ. P. 37(a)(1), a motion to compel discovery “must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.” Plaintiffs assert that, after receiving the letter of May 29, 2013, “Plaintiffs engaged in negotiations with Defendants over the next month in an attempt to resolve this issue without the need for Court intervention, but were unable to reach an agreement....At that point, Plaintiffs properly began preparing their Motion.” (Document No. 378, p. 4). Confronted with Defendants’ late notice, the two-month

period to confer and draft a motion to compel was reasonable under the circumstances. Therefore, the Motion is timely.⁴

B. Merits

Federal Rule of Civil Procedure 26(b)(2)(B) provides the framework to resolve the instant discovery dispute. This rule sets forth a two-step inquiry. First, “[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.” Rule 26(b)(2)(B). The party opposing the discovery request has the burden at this first step. See id.; Rule 26(b)(2)(B) advisory committee’s note, 2006 Amendment (“The responding party has the burden as to one aspect of the inquiry – whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found.” (emphasis added)); W Holding Co. v. Chartis Ins. Co. of P.R., ___ F.R.D. ___, No. 11-2271 (GAG/BJM), 2013 WL 1352426 at *4 (D.P.R. April 3, 2013).

However, even if the party opposing the discovery request can establish that the information sought is “not reasonably accessible because of undue burden or cost,” “the court may nonetheless order [the] discovery...if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C).” Rule 26(b)(2)(B); see also Rule 26(b)(2)(B) advisory committee’s note, 2006 Amendment (“The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information.” (emphasis added)); W Holding Co., 2013 WL 1352426 at *4.

⁴ Defendants’ reliance on this Court’s decision in In re Kugel Mesh Hernia Repair Patch Litig., No. 07-1842ML, 2010 WL 1253566 (D.R.I. March 24, 2010) (Kugel), is misplaced. In Kugel, this Court denied motions to compel where the discovery requests underlying the motions were made almost two months after the close of fact discovery and “at or on the eve of the [expert] discovery closure date.” Id. at *1. Those discovery requests were untimely because they were made beyond the close of fact discovery and, although not technically beyond the expert discovery closure date, “violate[d] at least the spirit of Chief Judge Lisi’s Scheduling Orders” because the defendants would have had thirty days to respond to the requests. Id. In this case, by contrast, the underlying document requests were undoubtedly made before May 31, 2013. (See Document No. 347-17, pp. 6-9 (containing a list of the final agreed upon search terms for the DCYF custodian data and dated August 13, 2012)).

The Advisory Committee's Note to Rule 26(b)(2)(B) identifies seven factors to consider when determining whether the requesting party has established "good cause" for ordering the discovery of information that is "not reasonably accessible because of undue burden or cost":

(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 the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

Additionally, "the limitations of Rule 26(b)(2)(C)" that Rule 26(b)(2)(B) requires to be considered in the "good cause" inquiry are whether:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; [and]

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Rule 26(b)(2)(C).⁵ Each step in the Rule 26(b)(2)(B) framework is addressed in turn.

1. Emails Are Not Reasonably Accessible

Relying on Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003), Defendants argue that the deleted emails of Butler and Malin, which now only exist on backup tapes, are not reasonably accessible because of undue burden or cost. (Document No. 367, pp. 13-14). Zubulake set forth a framework for determining whether electronically stored information is accessible or inaccessible. 217 F.R.D. at 318-320. That framework consists of five categories of electronically stored data, the first three of which are generally

⁵ There is significant overlap between the seven factors identified in the Advisory Committee's Note to Rule 26(b)(2)(B) and the "limitations" of Rule 26(b)(2)(C). This Court's analysis will address each of the seven factors and, along the way, will discuss each of the relevant limitations of Rule 26(b)(2)(C).

considered accessible and the remaining two of which are ordinarily considered inaccessible. Id. Although Zubulake predated the inclusion of the two-step inquiry of Rule 26(b)(2)(B) in 2006, district courts, including courts in this Circuit, continue to rely on Zubulake's framework in determining whether electronically stored information is not reasonably accessible because of undue burden or cost. See, e.g., W.E. Aubuchon Co. v. BeneFirst, LLC, 245 F.R.D. 38, 42-43 (D. Mass. 2007).

Within this framework, Defendants argue that the backup tapes containing the emails of Butler and Malin fall within Zubulake category four and are therefore presumptively inaccessible. (Document No. 367, at 14). After considering the Conneally Affidavit, I agree that the emails contained on the backup tapes are not reasonably accessible because of undue burden or cost under Rule 26(b)(2)(B). The Conneally Affidavit explains that, because the information on the backup tapes is not kept in any organized manner, the location of specific data on a particular tape cannot be determined prior to restoration. (Document No. 367-4, p. 4). In addition to the burden of determining which backup tapes contain the sought-after information, restoration is not a simple process. Id. The Conneally Affidavit represents that the restoration in this case would take a minimum of two weeks and could exceed four weeks. Id. at 4-5; see Kleen Prods., LLC v. Packaging Corp. of Am., No. 10 C 5711, 2012 WL 4498465 at *18 (N.D. Ill. Sept. 28, 2012) (“Courts generally agree that backup tapes are presumptively inaccessible.”). Even after the restoration process is complete, Defendants maintain that counsel’s review of the restored emails will add additional time before the emails are turned over to Plaintiffs. (Document No. 367, p. 12); see Rule 26(b)(2)(B) advisory committee’s note, 2006 Amendment (“[T]he producing party’s burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.”).

In addition to the technological and physical burdens associated with restoration of these backup tapes, there is also a significant financial burden involved. At the telephonic hearing, Defendants represented that restoration of the emails of Butler and Malin, or either one of them, from the backup tapes would cost approximately \$35,000.00. Moreover, Defendants further assert that “[t]he cost estimate [of \$35,000.00]

grows exponentially when the consulting fees and hours of counsel's review are factored in." (Document No. 367, p. 12); see Rodriguez-Torres v. Gov't Dev. Bank of P.R., 265 F.R.D. 40, 44 (D.P.R. 2010) ("[T]he Court determines that the ESI requested is not reasonably accessible because of the undue burden and cost. The Court finds that \$35,000.00 is too high of a cost for the production of the requested ESI in this type of action. Moreover, the Court is very concerned over the increase in costs that will result from the privilege and confidentiality review....").

Plaintiffs take issue with Defendants' claim that the emails are not reasonably accessible; they assert that, had Defendants implemented a litigation hold in a timely manner, the emails of Butler and Malin would not have been destroyed and no restoration (along with its accompanying burdens and costs) would be required. (Document No. 378, p. 9). However, a similar argument that fault for the information's accessibility should be considered in the first step of the Rule 26(b)(2)(B) inquiry was rejected in Major Tours, Inc. v. Colorel, 720 F. Supp. 2d 587, 619 (D.N.J. 2010):

Nothing in the plain language of Rule 26(b)(2)(B) requires such a threshold determination of who is at fault for the data having become inaccessible. The Rule states, "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." One could argue that "undue" should be interpreted to mean "not a result of the party's own negligence," but the more natural reading of "undue" is simply that the burden or cost outweighs the potential benefit. Moreover, the Rule permits an order of production if the party shows good cause, which is where one would expect the analysis of the party's culpability in the inaccessibility to lie.

I agree that a party's culpability for inaccessibility of electronically stored information should be assessed under step two of the Rule 26(b)(2)(B) inquiry: whether good cause exists to order the discovery of information that is not reasonably accessible because of undue burden or cost.

For these reasons, I find that Defendants have met their burden to show that the emails of Butler and Malin, which now exist only on backup tapes, are not reasonably accessible because of undue burden and cost under Rule 26(b)(2)(B). However, this conclusion does not end the inquiry; rather, restoration of the emails may still be ordered if Plaintiffs can demonstrate good cause for such an order.

2. Plaintiffs Have Not Shown Good Cause

The first factor in the seven-factor good cause analysis – the specificity of the discovery request – weighs in Plaintiffs’ favor; the discovery request pertains to the email accounts of only Butler and Malin, and only a handful of specific search terms would be used to search the emails. Additionally, as Plaintiffs’ Complaint alleges that foster children were subjected to abuse and neglect, in violation of federal and constitutional statutory rights, the issues at stake in this litigation are very important, requiring that the sixth factor also be weighted in Plaintiffs’ favor. See also Rule 26(b)(2)(C)(iii) (identifying “the importance of the issues at stake in the action” as a factor to be considered in determining whether the burden or expense of the proposed discovery outweighs its likely benefit).

Plaintiffs argue that courts assess a party’s culpability for the present inaccessibility of previously accessible information under the third factor, which considers the failure to produce relevant information that likely existed but no longer is available on more easily accessed sources. (Document No. 346-1, p. 14; Document No. 378, p. 10). Plaintiffs assert that this third factor should weigh heavily against Defendants because “there is no other source from which the emails of the two workers assigned to Danny B. can be obtained, due to Defendants’ failure to comply with their unambiguous obligation to preserve relevant evidence in this case.” (Document No. 346-1, p. 14).

Plaintiffs are correct that some courts examine a party’s failure to preserve the accessibility of documents under this third factor. See, e.g., Major Tours, Inc. v. Colorel, No. 05-3091(JBS/JS), 2009 WL 3446761 at *3 & n.3 (D.N.J. Oct. 20, 2009), aff’d, 720 F. Supp. 2d 587 (D.N.J. 2010). In this case, it is undisputed that Defendants failed to implement a litigation hold until April 2012, almost five years after Plaintiffs filed their Complaint. (Document No. 347-4, pp. 3-4). Had they done so, the email accounts of Butler and Malin, casework supervisors of Named Plaintiff Danny B. who left DCYF after Plaintiffs filed this action, would likely not have been destroyed, and the instant discovery dispute would not be before this

Court. Defendants' failure in this regard is very unfortunate, and I weigh it heavily against Defendants in the good cause analysis.

However, a party's failure to preserve evidence does not automatically constitute good cause for ordering discovery of not reasonably accessible information under Rule 26(b)(2)(B). See Major Tours, Inc., 720 F. Supp. 2d at 620 ("No part of the reasoning or holdings in the Zubulake cases supports the rule that negligent spoliation requires discovery of backup tapes regardless of the other circumstances of the case. Indeed, those cases affirm the longstanding rule that 'the determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge and is assessed on a case-by-case basis.'" (quoting Fujitsu Ltd. v. Fed. Exp. Corp., 247 F.3d 423, 436 (2nd Cir. 2001)); id. ("The [Federal] Rules [of Civil Procedure] compel exactly this discretionary balancing of costs and benefits of discovery, not a bright line requirement of production, no matter how burdensome, how likely to succeed, or how necessary to the litigation, if a party fails to adequately preserve every byte of previously accessible data."); see also United States ex rel. McBride v. Halliburton Co., 272 F.R.D. 235, 241 (D.D.C. 2011) ("When, however, a party cannot produce information despite an asserted obligation to keep it, it does not thereby lose the right to argue that any additional search cannot be justified by a balancing of the factors identified in Rule 26(b)(2)(C)(iii).").

In this case, although the destruction of the email accounts of Butler and Malin after the lawsuit was filed weighs heavily against Defendants, it is not appropriate to give this spoliation conclusive weight in the good cause inquiry. For starters, there is no allegation that the destruction of the email accounts was intentional. See Major Tours, Inc., 2009 WL 3446761 at *3 n.3. Moreover, for reasons discussed below, other factors in the good cause analysis weigh against ordering restoration of the email accounts. Therefore, I find that this third factor weighs against Defendants, but that, in the circumstances of this case, Defendants' spoliation is not so serious that the fact of spoliation alone calls for restoration of the email accounts at Defendants' expense.

On the other side of the ledger, the second, fourth and fifth factors – which examine: the quantity of information available from other and more easily accessed sources; the likelihood of finding relevant, responsive information that cannot be obtained from other more easily accessed sources; and predictions as to the importance and usefulness of the further information, respectively—all seem to militate against ordering Defendants to restore the email accounts from the backup tapes.

Plaintiffs contend that “critical information regarding Danny B.’s experience in DCYF custody [is] contained in worker emails [and] is not available from any other source.” (Document No. 346-1, p.12). Plaintiffs give several examples of emails relating to Danny B. or other Named Plaintiffs that contain information not available from any other source, including the RICHIST system and the children’s case files. Id. at 12-14. Additionally, Plaintiffs stress that, because Butler and Malin “were assigned [to Danny B.’s case] during key events in Danny’s life, [including several different placements and alleged physical and sexual abuse,] it is especially critical that all of their relevant emails be restored so that all information about these events is produced to Plaintiffs.” Id. at 15.

I am not persuaded by these arguments. After learning that the email accounts of Butler and Malin no longer existed on the active servers, Defendants expanded the agreed-upon search terms in an effort to “identify communications that would have been found in the custodian mailboxes had they been available on the active servers at the time of collection.” (Document No. 367-4, p. 3). In addition to these expanded search terms, searches of the email accounts of other caseworkers of the Named Plaintiffs have turned up “approximately 4,450 emails or attachments that were sent to or from [Malin] and 2,322 that were sent to or from [Butler].” (Document No. 367, p. 4). In other words, the universe of emails of Butler and Malin that have not yet been uncovered remains rather small: only emails between Butler or Malin and third parties or DCYF employees who were not part of the parties’ agreed-upon custodian list where the Named Plaintiff’s assigned caseworkers were not included on the email in some manner or provided with the email at some later time. Defendants assert that, because both Butler and Malin were supervisors, “much of the information

[from their emails] was likely produced through the e-mails preserved within the social case worker's e-mail.”
Id. at 12.

Moreover, even after the agreed-upon search terms were expanded, the responsive rate was a minuscule 0.51%. (Document No. 367-4, p. 3). Plaintiffs champion this low responsive rate as indicative of sufficiently narrow search terms that locate only relevant emails. (Document No. 346-1, p. 14). However, I conclude that this figure cuts the other way; the overwhelming majority (over 99%) of documents in the email accounts of the agreed-upon custodians are not responsive to Plaintiffs' discovery request. Plaintiffs have offered no reason to believe that the searches of the email accounts of Butler and Malin would yield responsive emails at an appreciably higher rate. When this very low responsive rate is considered along with the significant time and costs involved in the restoration process and the fact that all but a small universe of emails of Butler and Malin have already been uncovered, the requested restoration seems to be significantly more burdensome than beneficial.

For these reasons, I find that, because any of the emails between Butler or Malin and any DCYF employee on the agreed-upon custodian list, and any email of Butler's or Malin's where such an employee was either copied on an email or forwarded an email not addressed directly to such an employee, have been uncovered by Defendants and produced to Plaintiffs, the quantity of information available from other and more easily accessed sources is likely quite substantial and that much of this information has already been produced. See also Rule 26(b)(2)(C)(i)-(ii). Additionally, given the low responsive rate and the small universe of currently unproduced responsive emails, I conclude that the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources is slight. See also Rule 26(b)(2)(C)(iii). Moreover, as much of the responsive information contained in the email accounts of Butler and Malin has likely already been produced, I conclude that any further information will likely be unreasonably cumulative or duplicative and not important and useful. See also Rule 26(b)(2)(C)(i). Therefore, factors two, four and five of the seven-factor good cause analysis and many of the considerations

of Rule 26(b)(2)(C) weigh in favor of Defendants. I am of the opinion that Plaintiffs will be able to adequately explore the email practices of Butler and Malin to ensure that they likely have all relevant and responsive emails. See Part I.C, infra.

The final factor – the parties’ resources – favors Defendants, if only slightly. To be sure, Plaintiffs are minor children in foster care who have no or very few resources, and the State of Rhode Island has substantial resources. However, those resources are not unlimited. Defendants have already expended significant resources on electronic discovery in this case. (Document No. 367-4, at 5). The \$35,000.00 cost for restoration, exclusive of costs associated with privilege and relevancy review of the documents, is very high, especially when the scope of previously unproduced information responsive to Plaintiffs’ discovery requests appears to be so small.

On balance, Plaintiffs have failed to shoulder their burden of establishing good cause to justify court-ordered restoration of the email accounts from the backup tapes. While the importance of the issues raised in the litigation cannot be gainsaid and Defendants’ failure to timely implement a litigation hold, which would have obviated the need to resort to the restoration issue in the first place, weighs heavily against Defendants, the high cost of restoration, the low responsive rate, and the small universe of emails that have not already been produced convince me that: (1) the discovery sought is cumulative and duplicative; (2) much of the information has already been produced from other sources (i.e., email accounts of other custodians) that are more convenient, less burdensome, and less expensive; and (3) the burden of the restoration outweighs its likely benefit. See Rule 26(b)(2)(C). Accordingly, I deny Plaintiffs’ Motion to Compel insofar as it requests restoration of the destroyed email accounts from backup tapes.⁶

C. Fact Discovery is Reopened

⁶ To the extent Plaintiffs are requesting that this Court order restoration of the emails as a sanction under Rule 37 for Defendants’ spoliation of this evidence instead of requesting that this Court order restoration and production of these emails under the Rule 26(b)(2)(B) framework, this request is denied for the reasons articulated above.

Although Plaintiff's Motion has been denied, I find that the interests of justice in this case warrant the reopening of fact discovery for the limited purpose of giving Plaintiffs the opportunity to depose Butler and Malin concerning their email practices and their recollection as to the recipients and contents of any non-privileged emails relevant to the case of Named Plaintiff Danny B.

II. Supplementation of Interrogatory Responses

In November 2012, Plaintiffs served their Fourth Interrogatories, which sought information describing "how each Defendant has preserved Relevant Documents since the filing of the Complaint" and to answer "whether any Defendant has destroyed, or otherwise failed to retain, any Relevant Documents since the filing of the Complaint, specifying which Relevant Documents any Defendant has destroyed, or otherwise failed to retain, on a document-by-document or category-by-category basis." (Document No. 347-7, p. 6).

Plaintiffs contend that Defendants' initial response to these interrogatories was not fully responsive because Defendants merely stated that they had certain document retention schedules in place prior to April 2012 and did not indicate what preservation efforts were actually taken during that time period. (Document No. 346-1, p. 20). Additionally, Plaintiffs contend that Defendants' Response did not specifically identify the documents that have been destroyed, as Interrogatory No. 2 had asked. *Id.* at 20-21. Plaintiffs assert that Defendants agreed in January 2013 to supplement by the close of fact discovery their deficient responses and that Defendants failed to provide this supplementation by May 31, 2013, the close of fact discovery. (Document No. 346, p. 2).

One day before the telephonic hearing on Plaintiffs' Motion, Defendants served supplemental Interrogatory Responses. (Document No. 395-2). Plaintiffs contend that these supplemental responses are still unresponsive and incomplete because (a) Defendants' supplemental response to Interrogatory No. 1 still does not explain what preservation efforts were undertaken before April 2012, when the litigation hold was put into place, and (b) Defendants' supplemental response to Interrogatory No. 2 only addresses the

destruction of the email accounts of Butler and Malin and does not discuss the destruction of any other document. (Document No. 395-1, pp. 2-3). Plaintiffs insist that Interrogatory No. 1 requires Defendants to explain what preservation efforts were undertaken before April 2012, the extent of oversight, if any, Defendants used to ensure document retention, how the document retention schedules were communicated to Defendants' employees, and the extent of any training Defendants provided to their employees regarding document retention. Id. at 2. Additionally Plaintiffs maintain that Defendants need to answer Interrogatory No. 2 on a document-by-document or category-by-category basis. Id. at 3.

After considering the Plaintiffs' Fourth Set of Interrogatories and Defendants Initial Responses and Supplemental Responses thereto, I find that the supplemental answers are sufficiently responsive to the interrogatories. Defendants' Initial Response to Interrogatory No. 1 explains the document retention schedules in place prior to the issuance of a litigation hold in April 2012. (Document No. 395-2, pp. 3-4). Both Defendants' Initial Response and their Supplemental Response to that Interrogatory explain how, since the litigation hold was placed into effect, Defendants have advised and continue to periodically remind their employees of the litigation hold and their preservation obligations. Id. at 4-5. These responses sufficiently answer "how each Defendant has preserved Relevant Documents since the filing of the Complaint." (Document No. 347-7, p. 6). Contrary to Plaintiffs' assertion, description of the extent of training or oversight of Defendants' employees on their preservation obligations is not required to sufficiently answer Interrogatory No. 1.

I similarly find Defendants' Supplemental Response to Interrogatory No. 2 to be sufficiently responsive. It explains how the email accounts of Butler and Malin were lost and Defendants' efforts to capture any relevant lost emails through the use of expanded search terms in their searches of the email accounts of other custodians. (Document No. 395-2, pp. 6-7). As Plaintiffs have indicated that they know from the May 29, 2013 letter of Defendants and from their depositions of various DCYF caseworkers that certain other documents were destroyed or deleted, (Document No. 346-1, p. 6 (citing May 20, 2013 letter));

id. at 21-22), I conclude that, to the extent that Plaintiffs are requesting this Court to order Defendants to again supplement their responses to reflect the destruction of these additional documents (Document No. 395-1, p. 3), the destruction of which Plaintiffs are already aware, such request is denied. Finally, Plaintiffs' persistent demand that Defendants specifically identify the destroyed documents on a document-by-document or category-by-category basis is an extreme request and one that I will not order Defendants to oblige.

For these reasons, this component of Plaintiffs' Motion is denied.

Conclusion

For the foregoing reasons, Plaintiffs' Motion (Document No. 346) is DENIED. However, fact discovery is hereby REOPENED for the limited purpose of giving Plaintiffs the opportunity, by October 31, 2013, to depose Butler and Malin concerning their email practices involving Named Plaintiff Danny B.

SO ORDERED

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
October 3, 2013