

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

WILLIAM THORPE, *et al.*,

Plaintiffs,

v.

VIRGINIA DEPARTMENT OF
CORRECTIONS, *et al.*,

Defendants.

Civil Case No. 2:20-cv-00007-JPJ-PMS

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL THE
PRODUCTION OF DOCUMENTS**

INTRODUCTION

For years, Defendant Virginia Department of Corrections (“VDOC”) has claimed that, subject to certain exceptions, it could not produce emails pre-dating 2018 because, when it migrated employees’ email accounts from Outlook to Gmail in March of that year, it did not retain copies of any emails that had cycled out of employees’ inboxes before the transition. In December 2020, however, Plaintiffs learned that the agency tasked with migrating VDOC’s emails—the Virginia Information Technology Agency (“VITA”)—retained a copy of VDOC’s pre-2018 emails, but that—after asking VDOC whether it should continue to retain those emails—VITA *deleted* the emails, destroying hundreds, if not thousands, of potentially responsive documents.

After years of discovery, Plaintiffs have learned that VITA retained *yet another copy* of VDOC’s emails, this time on back-up drives. Plaintiffs have asked VDOC to restore the drives and produce responsive documents, but VDOC has refused. Although Plaintiffs have diligently worked to resolve this dispute without Court intervention—including by allowing VDOC time to review other repositories of documents before determining whether a review of back-up drives is necessary—it is now apparent that the back-up drives are the *only* source of certain categories of responsive documents responsive. VDOC’s continued refusal to review the drives and produce responsive documents is therefore untenable.

VDOC offers two explanations for its refusal to restore the back-up drives, neither of which has merit.

First, VDOC claims that the drives, which are in the possession of VITA and/or its third-party contractor, Unisys, are not within VDOC’s control. This is incorrect. Both Virginia law and the parties’ agreements give VDOC the right and the authority to obtain the relevant drives.

Indeed, VDOC has already demonstrated its ability to obtain the back-up drives by producing a few hundred documents from them, notwithstanding its objection to producing more.

Second, VDOC contends that restoring the drives would be disproportionate to the needs of the case. This argument also fails. Federal Rule of Civil Procedure 26(b)(1) spells out the factors that inform proportionality, including “the importance of the issues at stake . . . , the amount in controversy . . . , [and] the importance of the discovery in resolving the issues.” Fed. R. Civ. P. 26(b)(1). Here, Plaintiffs raise significant constitutional and statutory claims for damages and equitable relief that would require Defendants to reform or terminate the Step-Down Program to cure serious and ongoing civil rights violations.

To the extent that VDOC claims that restoring the back-up drives is expensive—which, to be clear, Plaintiffs dispute—VDOC has only itself to blame. As explained below, VITA retained an archive of VDOC emails in a more easily accessible format until it destroyed them in January 2020. Had VDOC instructed VITA not to destroy the archive—which VITA did *after* this case was filed and *after* asking VDOC whether the archive should be preserved—VDOC could have easily produced the relevant documents. That production is harder now as a result of VDOC’s own decision-making is not a basis for withholding documents. *See, e.g., Wagoner v. Lewis Gale Med. Ctr., LLC*, 7:15cv570, 2016 WL 3893135, at *3 (W.D. Va. July 14, 2016) (“[T]he Court cannot relieve Defendant of its duty to produce those documents merely because Defendant has chosen a means to preserve the evidence which makes ultimate production of relevant documents expensive.”).

For these and other reasons, Plaintiffs’ Motion to Compel should be granted.

I. BACKGROUND

Plaintiffs are eleven current or former VDOC inmates who have been forced to spend between 3 and 24 years in solitary confinement at Virginia’s Red Onion State Prison (“ROSP”) or Wallens Ridge State Prison (“WRSP”). Plaintiffs’ counsel began investigating claims in mid-2018, and filed this lawsuit on May 6, 2019. ECF No. 1; *see also* Ex. 1 at 3 (Pls.’ Aug. 2018 Email Exchange with VDOC). In their complaint, Plaintiffs assert claims under the Eighth and Fourteenth Amendments, the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (“ADA”), and the Rehabilitation Act, 29 U.S.C. § 701, *et seq.* (“RA”). *Id.* at ¶ 231 *et seq.*

A. Defendants Profess to Have Limited Emails Predating 2018.

Plaintiffs served an initial set of document requests on October 18, 2019. Since then, Plaintiffs have served four additional sets of requests. Each set seeks the production of responsive documents from August 1, 2012—the date the Step-Down Program was implemented—to the present day.

VDOC agreed to produce documents responsive to certain of Plaintiffs’ requests but noted that it faced challenges with producing pre-2018 emails. Specifically, VDOC represented that it maintained a policy prior to 2018 of allowing email to cycle out of employees’ inboxes based on certain storage capacity limits, and when the agency transitioned from Outlook to Gmail in 2018, VITA—the state agency charged with managing the transition—migrated only the emails that were in VDOC employees’ inboxes at the time of transition. Ex. 2 at 3 (VDOC Jan. 17, 2023 Ltr. to Pls.). Emails that had automatically cycled out of employees’ inboxes (*e.g.*, because of capacity limits) were not migrated. On January 16, 2020, VDOC stated that neither it nor VITA retained

any back-up copies of pre-2018 emails. *See* Ex. 3 at 3–4 (Jan. 24, 2020 Ltr. Memorializing Parties’ Meet and Confer).¹

B. VDOC Confirms that Back-Up Drives Do Exist but Agrees to Produce Emails for Only One Custodian.

In July 2020, Plaintiffs learned that, contrary to VDOC’s assertion, VITA *had* saved VDOC emails, on a back-up system called the Archived Exchange Environment (“AEE”). *See* Ex. 4 at 1 (Pls.’ July 13, 2020 Email Exchange with Northrop Grumman); Ex. 5 at 1–2 (SAIC Sept. 30, 2020 Ltr. to Pls.). After some back-and-forth, Plaintiffs confirmed that VITA had maintained these emails for nearly two years after the migration, until January 9, 2020. Ex. 6 at 2 (VITA Change Request). At that time, however, VITA—after asking VDOC whether it should continue to retain those emails²—permanently deleted the emails from the AEE. *See* Ex. 7 at 2 (VITA Governance Case Details) (September 19, 2019 entry describing outreach to state agencies through VITA Legal regarding agencies’ documents held in the AEE). VITA deleted these emails after Plaintiffs filed this lawsuit and after Plaintiffs served their document requests on VDOC.

These were not the only responsive documents that VDOC and VITA deleted after this lawsuit began. In December 2021, VDOC informed Plaintiffs that it had deleted still *more* emails responsive to Plaintiffs’ document requests. Ex. 8 at 1 (VDOC Dec. 30, 2021 Ltr. to Pls.). Specifically, on December 30, 2021, VDOC notified Plaintiffs that Unisys, one of VITA’s contractors, had deleted the emails of Earl Barksdale, a former warden at ROSP and one of the

¹ VDOC did retain a limited number of pre-2018 emails that employees had manually saved in .PST files. Ex. 2 at 3 (VDOC Jan. 17, 2023 Ltr.). But employees were not required to manually save emails in .PST files, and Defendants’ document production makes clear that many employees *did not* manually save such emails.

² VDOC claims that it never received notice from VITA regarding the planned decommissioning of the AEE, yet VITA asserts it contacted stage agencies well in advance of the deletion. *See* Ex. 7 at 2. VDOC has refused to produce its communications with VITA on this or any other topic.

parties’ agreed-upon custodians. *Id.* at 2. According to VDOC, Mr. Barksdale’s emails were placed on legal hold in 2019, but when VDOC tried to collect and review the emails in September 2021, it could not locate them. *Id.* VITA investigated the issue and discovered that, in 2021, Unisys deleted over 1,000 email accounts—including Mr. Barksdale’s—so that the account licenses could be issued to new users. *Id.* VDOC claims that neither VITA nor Unisys “reached out to VDOC about this plan to delete accounts or seek confirmation that the accounts were no longer needed.” *Id.* at 3.

VDOC assured Plaintiffs, however, that the deletion of Mr. Barksdale’s emails was immaterial because, when investigating the deletion, Unisys discovered back-up drives, on which they found “snapshots of VDOC employee mailboxes,” including Mr. Barksdale’s. *Id.* at 3–4. VDOC asked VITA to restore Mr. Barksdale’s emails, and VITA obliged. *Id.* On May 11, 2022, VDOC subsequently produced more than 160 responsive documents from Mr. Barksdale’s files, including 68 documents from 2015 and 60 documents from 2016. *See* Ex. 9 (VDOC Production Letter).

C. VDOC Refuses to Restore the Back-Up Drives and Produce Documents for Any Other Custodian.

Upon learning that back-up drives existed—and that VDOC was capable of producing documents from them—Plaintiffs asked VDOC to restore all other custodians’ emails, which VDOC had previously represented had been destroyed, in light of the apparent production gaps. Ex. 10 at 3 (Pls.’ Dec. 15, 2022 Ltr. to VDOC). This time, however, VDOC refused. Among other things, VDOC argued that restoring the back-up drives would not be proportional to the needs of the case because VDOC was already searching “more reasonably accessible sources” for pre-2018 emails. Ex. 8 at 4 (VDOC Dec. 30, 2021 Ltr. to Pls.). Plaintiffs raised the issue with the Court on February 16, 2021 but, based on VDOC’s representations, Plaintiffs agreed to review

VDOC's additional productions before determining whether VDOC should be required to restore the back-up drives. *See* Ex. 11 at 2 (Feb. 18, 2021 Email Exchange).

In the months since VDOC's assurance, it has become clear that VDOC's other "sources" have not produced a material number of emails pre-dating 2018. To date, VDOC has produced 39,255 documents in the case, but only 3,149 of these documents—barely 8%—predate 2018.³ Accordingly, contrary to VDOC's assurance, there is no other "source" of pre-2018 emails that can be searched more easily than the back-up drives.

Having honored Defendants' request to wait until other document repositories were searched before determining whether Defendants needed to restore and review the back-up drives—and having received a scant number of documents from Defendants pre-dating 2018—Plaintiffs reiterated their request for VDOC to restore the back-up drives on December 15, 2022. Ex. 10 at 3 (Pls.' Dec. 15, 2022 Ltr. to VDOC). VDOC once again refused. This time, VDOC claimed that the back-up drives were not within its possession, custody, or control; the drives were unlikely to contain "highly relevant" information; and that the burden of restoring the drives would be disproportional to the needs of the case. Ex. 2 at 5 (VDOC Jan. 17, 2023 Ltr. to Pls.); Ex. 12 at 1 (VDOC Feb. 24, 2023 Email). When pressed on the burden in subsequent correspondence, VDOC claimed it would cost \$24,500 to restore and index the back-up drives. Ex. 12 at 1 (VDOC Feb. 24, 2023 Email).⁴

³ VDOC continues to produce documents, with its 54th volume produced to Plaintiffs on Sunday, March 12, 2023.

⁴ Plaintiffs raised the present dispute in connection with its motion to amend the scheduling order, filed on January 27, 2023. ECF No. 249, at 7–8. Since then, Plaintiffs have conferred with Defendants to understand the costs associated with restoring the back-up drives. Ex. 12 at 1 (VDOC Feb. 24, 2023 Email).

Because the back-up drives contain relevant and important information—and because VDOC’s refusal to restore and review the drives does not comport with its discovery obligations—Plaintiffs filed the instant motion.

II. ARGUMENT

Federal Rule of Civil Procedure 26(b)(1) requires the production of “any nonprivileged matter that is *relevant* to any party’s claim or defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1)). When a court determines whether a party should be required to produce responsive documents, the party “resisting discovery, not the party moving to compel discovery, bears the burden of persuasion.” *Eramo, v. Rolling Stone LLC*, 314 F.R.D. 205, 209 (W.D. Va. 2016).

Here, VDOC refuses to produce responsive documents from its back-up drives on three separate grounds, asserting that: (1) responsive documents on the drives are not “highly relevant” to the parties’ claims and defenses; (2) the back-up drives are not in VDOC’s possession, custody, or control; and (3) restoring the back-up drives is disproportional to the needs of the case. None of these arguments has any merit.

A. Pre-2018 Documents Are Relevant to the Issues in Dispute.

There can be no serious dispute that documents pre-dating January 1, 2018 are relevant to the issues in dispute. As explained above, the Step-Down Program—which is at the heart of this lawsuit—was implemented in August 2012. Since then, the program has been amended multiple times, including three times prior to 2018. Defendants contend that these amendments improved the Step-Down Program, but the nature of these amendments—and the extent to which they actually impacted Defendants’ practices—is hotly contested. Emails and other documents pre-dating 2018 are Plaintiffs’ primary source of information about these changes.

VDOC does not dispute the relevance of pre-2018 documents. Instead, it contends that it should not be required produce them from its back-up drives because, in VDOC's estimation, they are not "highly relevant" to the case. Ex. 12 at 1 (VDOC Feb. 24, 2023 Email). But "highly relevant" is not the operative standard. Federal Rule of Civil Procedure 26(b)(1) requires the production of "any nonprivileged matter that is *relevant* to any party's claim or defense." Fed. R. Civ. P. 26(b)(1) (emphasis added). Evidence is relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. The information on VDOC's hard drives plainly meets this standard; VDOC has not carried its burden to show otherwise. *See Eramo*, 314 F.R.D. at 209 (holding that party "resisting discovery, not the party moving to compel discovery, bears the burden of persuasion").

B. The Back-Up Drives Are in VDOC's Possession, Custody, or Control.

VDOC next contends that it should not be required to restore the back-up drives because the drives are purportedly not in the agency's possession, custody, or control. Instead, VDOC argues that the drives are in the possession, custody, or control of VITA and/or its third-party contractor, Unisys. VDOC's argument is meritless.

It is well-established that "[c]ontrol does not require a party to have actual possession of the [relevant] documents." *Vaughn v. Grand Brands, LLC*, 2:19cv596, 2020 U.S. Dist. LEXIS 176744, at *9 (E.D. Va. Sept. 25, 2020). Instead, "documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a

non-party to the action.” *Id.* (internal quotation marks and citation omitted). Here, VDOC has both the “right” and the “practical ability” to obtain the back-up drives.⁵

With respect to VDOC’s “right” to obtain the drives, there can be no dispute that VDOC has both a statutory and a contractual right to obtain the drives from VITA and/or Unisys. To the extent the drives are in VITA’s possession, Virginia law specifies that VDOC remains the custodian of the drives, notwithstanding their physical possession by VITA’s contractor, Unisys. *See* Va. Code Ann. § 42.1-85B (“Each agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of such agency. The agency shall be responsible for ensuring that its public records are preserved, maintained, and accessible throughout their lifecycle.”); *see also* Ex. 13 at 1–2 (VITA Jan. 20, 2021 VITA Subpoena Response) (“Under Virginia law, VITA does not have central authority over the retention or management . . . [and] is not a custodian of other Virginia executive branch agency emails, documents, communications, or ESI.”). To the extent the drives are in Unisys’s possession, the parties’ contract specifies that Unisys must provide them to VDOC or VITA upon request. *See* Ex. 14 at 1.4(iv) (Master Services Agreement Excerpt) (requiring Unisys to “timely provid[e] access to VITA Data to Customers”).

VDOC has also demonstrated its “practical ability” to obtain the back-up drives. Indeed, VDOC previously produced emails from Mr. Barksdale from the very same drives that are the subject of this motion. VDOC does not even attempt to explain how it was able to obtain Mr.

⁵ VDOC has identified the back-up drives as “physically with Unisys,” VITA’s contractor. Ex. 2 at 5 (VDOC Jan. 17, 2023 Ltr. to Pls.). But VDOC has also represented to Plaintiffs that VITA, not Unisys, restore Mr. Barksdale’s mailboxes from those back-up drives. Ex. 8 at 4 (VDOC Dec. 30, 2021 Ltr. to Pls.). Because VDOC has not clearly articulated whether it believes VITA or Unisys possess the drives, Plaintiffs address both arguments.

Barksdale's emails from the back-up drives yet cannot obtain any other custodian's emails from the same drives.

C. The Restoration of the Back-Up Drives Is Proportional to the Needs of the Case.

Restoration of the back-up drives is also “proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1). In evaluating proportionality, courts must weigh several factors, including “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” *Socol v. Haas*, 3:18-cv-90, 2021 WL 2635847, at *3 (W.D. Va. June 25, 2021) (internal quotation omitted). Expense alone is not a basis for withholding documents. *Wagoner*, 2016 WL 3893135, at *3 (“Proportionality consists of more than whether the particular discovery method is expensive.”).

Here, all of the factors relevant to proportionality weigh in favor of requiring VDOC to restore and review its back-up drives. In particular:

Importance of the issues at stake. Assessing the importance of the issues at stake requires a court to examine “the significance of the substantive issues, as measured in philosophic, social, or institutional terms.” *Arrow Enter. Computing Solutions v. BlueAlly, LLC*, 5:15-CV-37-FL, 2017 WL 876266, at *4 (E.D.N.C. Mar. 3, 2017). These issues include, among other things, the advancement of “public policy” and the ability to “vindicate vitally important personal or public values.” *Id.*; see also *Oxbow Carbon & Minerals LLC, v. Union Pac. R.R.*, 322 F.R.D. 1, 7 (D.D.C. 2017).

This putative class action raises issues of paramount importance by seeking to end VDOC's unconstitutional Step-Down Program and vindicate the fundamental rights of putative class

members. This factor weighs in favor of production. *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 321 (S.D.N.Y. 2003) (“For example, if a case has the potential for broad public impact, then public policy weighs heavily in favor of permitting extensive discovery. Cases of this ilk might include toxic tort class actions, environmental actions, so-called ‘impact’ or social reform litigation, cases involving criminal conduct, or cases implicating important legal or constitutional questions.”).⁶

Amount in controversy. “For the ‘amount in controversy,’ the court compares the cost of discovery to the amount in controversy to determine its proportionality.” *Arrow*, 2017 WL 876266, at *4. Here, Plaintiffs are seeking damages, which could measure in the millions of dollars, as well as class-wide injunctive relief, which would require the reformation or termination of the Step-Down Program. By comparison, VDOC estimates the cost of restoring the drives to be \$24,500. Ex. 12 at 1 (VDOC Feb. 24, 2023 Email). Given the relatively low cost of restoration, this factor, too, weighs in favor of production.

Parties’ relative access to the relevant information. In considering this factor, courts look at “[i]nformational asymmetry”—situations where one party has access to relevant information that the other party does not.” *Arrow*, 2017 WL 876266, at *4. “In those cases, the burden of responding to discovery lies heavier on the party who has more information.” *Id.* (quotation marks and citation omitted).

⁶ *Zubulake* is a line of decisions which have become the foundation for e-discovery case law. Decisions from the line also holds that “if a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of ‘key players’ to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to all backup tapes.” *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 431 & n.72 (S.D.N.Y. 2004).

Here, VDOC *alone* possesses relevant emails concerning the creation and administration of the Step-Down Program up to and including 2018. As with the aforementioned factors, this factor weighs in favor of compelling the requested discovery.

Parties' resources. VDOC has never claimed that it lacks the ability or resources to restore and produce the emails stored on back-up drives. Nor could it, given that it has already restored and produced such emails for Mr. Barksdale. Plaintiffs, by contrast, represent a putative class of current and former inmates in Virginia state prisons, many of whom suffer from mental health disabilities. The disparity in resources counsels in favor of production.

Importance of the discovery in resolving the issues. Plaintiffs allege that the Step-Down Program violates putative class members' constitutional rights and has caused and/or exacerbated serious mental and physical harms, which Defendants knew about. Before 2018, Defendants were engaged in creating, implementing, evaluating, and revising the Step-Down Program. Accordingly, the pre-2018 timeframe is immensely important to Plaintiffs' claims.

Plaintiffs have reason to believe that many conversations about creation and implementation of the Step-Down Program occurred via email. For example, in one of the few pre-2018 emails that Plaintiffs have received, a consultant evaluated—and criticized—the Step-Down Program. Ex. 15 (VADOC-00161726 *et seq.*). Plaintiffs have every reason to believe they would learn many more facts about the development of the Step-Down Program were VDOC required to produce documents from additional custodians.

VDOC's production of Mr. Barksdale's documents illustrates the importance of the requested discovery. As explained above, VDOC agreed to produce emails for Mr. Barksdale from back-up drives because Mr. Barksdale passed away before discovery in this case began. When reviewing the emails produced for Mr. Barksdale, Plaintiffs identified numerous responsive

documents, including: handwritten letters from inmates in the Step-Down Program detailing their struggles with the program, *see, e.g.*, Ex. 16 (VADOC-00086478) and Ex. 17 (VADOC-00086298), and correspondence identifying studies about the deleterious effects of long-term solitary confinement, Ex. 18 (VADOC-00086245). That Mr. Barksdale is deceased, while other custodians are alive, does not justify VDOC's decision to produce *only* his documents. Other custodians are equally likely to have responsive emails saved on the back-up drives, and Plaintiffs are entitled to their documents. *Wagoner*, 2016 WL 3893135, at *3.

Whether the burden or expense of the proposed discovery outweighs its likely benefit. In recent correspondence, VDOC has estimated the cost of restoring the back-up drives to be \$24,500. Ex. 12 at 1 (VDOC Feb. 24, 2023 Email). VDOC also assumes there will be some costs associated with reviewing and producing documents but has not substantiated the drives' sizes let alone the likely number of documents contained on each. *Id.* These costs are not excessive, and indeed, under similar circumstances, courts have not hesitated to order the production of documents. *See, e.g., Ashmore v. Allied Energy, Inc.*, 8:14-cv-227-JMC, 2016 WL 301169, at *3–4 (D.S.C. Jan. 25, 2016) (compelling production of documents where estimated cost of collection, review, and production was \$400,000).

To the extent VDOC argues that producing documents from back-up drives will cost more than running a standard production, VDOC has only itself to blame. When Plaintiffs served their discovery requests, VDOC had easy access to archived emails, which were stored in VITA's AEE environment. Three months after Plaintiffs served their requests, however, VDOC acquiesced in VITA's deletion of the AEE and destruction of relevant evidence. Had VDOC preserved the emails in the AEE—instead of allowing VITA to delete them—VDOC could have easily produced responsive documents. The fact that it is now somewhat more expensive to produce them is not a

basis for withholding the documents. *Wagoner*, 2016 WL 3893135, at *3 (“[T]he Court cannot relieve Defendant of its duty to produce . . . documents merely because Defendant has chosen a means to preserve the evidence which makes ultimate production of relevant documents expensive.”); *Ashmore*, 2016 WL 2898007, at *4 (quoting *Kozlowski v. Sears, Roebuck Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976)) (“Defendant may not excuse itself from compliance with [discovery] . . . by utilizing a system or record-keeping which conceals rather than discloses relevant records, or makes it more difficult to identify or locate them, thus rendering the production of documents an excessively burdensome or costly expedition.”).

CONCLUSION

For all of these reasons, the Court should grant Plaintiffs’ motion to compel Defendant VDOC to review the back-up drives and produce responsive documents.

Dated: March 17, 2023

Respectfully submitted,

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