

# Deleted documents still discoverable through technology

01 November 2016

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One of the most onerous parts of litigation for a party is undertaking discovery or disclosure of documents relevant to the dispute. This involves collating, reviewing and determining the relevance of those documents and is a time- and resource-consuming process; one that becomes that much harder when dealing with documents that may have been archived, deleted or destroyed.

In the case of soft copies (electronically displayed or stored documents), often parties will undertake searches, including key word or date range searches to determine what documents exist on the relevant laptop, computer or other electronic device. Whilst this is considered a reasonable method, the recent case of *Hanks v Johnston (No. 3)* [2016] VSC 629 (***Hanks v Johnston***) has ordered that a party use specialised software to search backups made of documents that otherwise would not be found during a normal search or using basic search functions, such as key word or date range searches.

The case of *Hanks v Johnston* related to text messages sent by Mr Hanks that may have contained defamatory comments about Mr Johnston. During the relevant time period in which such text messages may have been sent, Mr Hanks had replaced two Apple iPhones due to damage (water damage and then dropping the replacement iPhone). Mr Hanks did not back up his iPhone to a laptop or computer, rather relying on a backup to his Apple iCloud account and configured the settings on his iPhone to delete text messages after 30 days.

During the course of discovery, Mr Hanks searched his Apple iCloud account and found no text messages that were relevant to the dispute. However, Mr Johnston was aware that particular software existed that went beyond the usual search functions available on an Apple iCloud account. The specialised software cost \$29.95 and would allow for text messages and other documents that have been lost from a previous iPhone to be recovered. Mr Johnston applied to the Court seeking orders requiring Mr Hanks to utilise such software.

The Court, whilst not criticising the reasonable nature of searches undertaken by Mr Hanks, ultimately required Mr Hanks to use the specialised software to search for further text messages that may be backed-up to his Apple iCloud account (but not viewable via normal search means), provided Mr Johnston paid the \$29.95 specialised software fee.

The case is a timely reminder that deleted documents may still be recoverable via technological means such as backups made at the relevant time. Further, in certain circumstances, Courts may require parties to go beyond reasonable search endeavours where the cost of retrieving a document is low, and the significance of the document could be high. As technology continues to develop, it is likely that the costs of doing such searches will continue to drop, allowing more Courts to justify such further searches.

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