

**5. An opinion from the U.S. District Court for the Northern District of California requiring the plaintiffs to back up smartphones and to preserve potentially relevant ESI on gaming consoles ahead of discovery.**

In *J.T. v. City and County of San Francisco*, Case Nos. 23-cv-06524-LJC, 24-cv-00522-LJC, 2024 WL 1973471 (N.D. Cal. May 2, 2024), U.S. Magistrate Judge Lisa J. Cisneros addressed whether Plaintiffs were required to create forensic images of smartphones and gaming consoles to preserve potentially relevant ESI on the devices.

In this case involving claims of unlawful arrest on behalf of a class of plaintiffs, the parties raised several disputes regarding the scope of the parties' obligations with respect to the preservation and production of ESI. Specifically, although the parties did not dispute their obligations to preserve relevant evidence, they disagreed "as to the specific contours of that obligation." *Id.* at \*2. Among other disputes, Plaintiffs argued that Defendants failed to preserve relevant Microsoft Teams chat logs, and Defendants argued that Plaintiffs were required to create backup images of Plaintiffs' smartphones and other devices.

With respect to Defendants' Microsoft Teams records, Magistrate Judge Cisneros found that they "may be relevant to this case to the extent that any named Defendant or other employee of the San Francisco Police Department discussed the intended or actual police response to the" events at issue, including any discussion of the alleged mass arrest that included Plaintiffs and that "Defendants are therefore obligated to preserve any such messages." She noted that if any such messages had already been destroyed, Defendants must take all reasonable steps to recover them.

With respect to Plaintiffs' obligations, Magistrate Judge Cisneros explained that relevant evidence could include Plaintiffs' "location and activities (which might include location data, photographs, videos, or messages describing such activities)" and "evidence in the form of messages Plaintiffs sent describing . . . conditions or force, either during their confinement or after the fact."

With these considerations in mind, Magistrate Judge Cisneros first addressed potential evidence on the Plaintiffs' smartphones. Taking into consideration "the wide variety of potential evidence contained in a smartphone" and "the risks inherent in trusting the retention of such evidence to a small, relatively fragile device carried throughout daily life by a teenager," Magistrate Judge Cisneros found that some method of backup imaging of each named Plaintiff's phone to be reasonable and proportional to the needs of the case. Although she had not "reached a conclusion as to whether forensic imaging is necessary or if commercial backup software might be sufficient," she ordered the parties to meet and confer "to identify a specific process to preserve data from Plaintiffs' smartphones."

Magistrate Judge Cisneros also addressed Defendants' request that Plaintiffs preserve relevant evidence saved through game consoles. She explained that "[m]odern gaming often takes place online, and gaming consoles are used frequently to facilitate social networking and communication through various online gaming platforms," including Steam, Xbox Live, PlayStation Network, Twitch, YouTube Gaming, and "messaging functions included within specific games available on those and other platforms." She noted that "the duty to preserve

evidence includes an obligation to identify, locate, and maintain information that is relevant to specific, predictable, and identifiable litigation.” Accordingly, she ordered that Plaintiffs’ counsel “ask the individual Plaintiffs if they communicated about the incidents at issue in this case using any gaming console or platform, and if they did, Plaintiffs shall take steps to preserve any messages that may be relevant to the claims and relief sought.” But she noted that such steps need not include complete backup imaging of gaming devices so long as other reliable methods are available to preserve all such messages.