

NEWSLETTERS

Discovery From Data Storage Providers: Building A Silver Lining Into Your Cloud Storage Contract

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Many companies use cloud technology, especially cloud storage providers, to reduce IT management costs and rid themselves of the headache of overseeing the software and hardware needed to perform certain services internally, while gaining the ability to expand quickly. Indeed, it is estimated that by 2014 cloud storage will be a \$148.8 billion industry and people will process over 50 percent of computing workloads in the cloud constituting one third of all internet traffic.

See Cindy Pham, "E-Discovery in the Cloud Era: What's a Litigant to do?" 5 *Hastings Sci. & Tech. L.J.* 139 (2013); David D. Cross and Emily Kuwahara, "E-Discovery and Cloud Computing: Control of ESI in the Cloud."

But, handing your data over to a third-party does not come without a price. Savvy litigants are beginning to head straight to these third-party cloud providers to subpoena corporate records during discovery. This can pose serious problems for the data owners including:

- Vendors can produce your records without reviewing and withholding for privileged, work product protected, trade secret, or otherwise confidential information and designations.
- Vendors with no vested interest in the litigation will likely respond to all the requests without an eye toward what is relevant or required under the rules resulting in mass overproduction.
- Vendors may charge you, their customer, a high price for collecting and producing the data they are storing for you.
- Vendors may not have maintained the metadata for each set of data, exposing you to a claim of spoliation.
- A vendor's deletion or backup schedule may have erased responsive data, exposing you to a claim of spoliation.
- Differences in the productions you and your vendor make in response to the same requests can lead to claims of spoliation or concealment.

See Ashish S. Prasad, "Cloud Computing and Social Media: Electronic Discovery Considerations and Best Practices," *The Metropolitan Corporate Counsel*, February 2012 Volume 20, No. 2.

The Silver Lining: The remedy, of course, for most of these potential

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problems is negotiating your contract with cloud computing providers with an eye toward discovery. First, make sure your contract contains express commitments regarding the storage and retention of your data. You and your provider should be on the same page regarding how long data is to be maintained and what types of associated file data should be preserved so that you avoid any untimely deletion.

Second, make sure your contract requires immediate notice (within 48 hours) to you of any subpoena or document request received by your provider targeting any of your data.

Third, the contract with a cloud services provider should set forth that you, through your attorneys, have the right to review all documents and data prior to production. Your agreement should also give you the right to require the provider to withhold any documents from production that you designate as either subject to a privilege or not-relevant or not responsive.

Fourth, the cost of collecting and assembling data for review and production from a cloud can be high because of the way in which the data is stored. Therefore, you will want to designate who bears the expense of the collection and production of your data so you aren't surprised by a large bill later.

Finally, I would also caution you to think carefully about whether the cloud is really the cheaper alternative it appears to be. If your business involves frequent litigation or due-diligence necessitating the documents at issue, the cost of accessing and producing these documents from the cloud may override the initial savings. Similarly, think strategically about low-value data you can store cheaply in the cloud versus potentially privileged, trade secret, and confidential information you may want to designate for local, albeit more expensive, storage which is solely in your control.

For more information about these topics, please contact Meredith Thornburgh White, a member of the firm's Commercial Litigation Practice Group, in our Indianapolis office at (317) 231-6417 or mwhite@btlaw.com.

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