Evaporating the Hype CLOUD COMPUTING ISSUES FOR LOCAL GOVERNMENT ATTORNEYS

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WHAT EXACTLY IS IN THE "CLOUD"?

NOTHING!
Vapor
vacuum

CLOUD COMPUTING IS ESSENTIALLY "OUTSOURCING"

"CLOUD" = SOMETHING ON SOMEBODY ELSE'S SERVER(S) TO HELP YOU

- DATA
- APPLICATIONS
- SECURITY
- UPDATE INSTALLATIONS
- BACKUPS
- SEARCHES
- E-DISCOVERY PRODUCTION
- OTHER

Definition & Attributes of Cloud Computing – Part 1

"Cloud computing is a model for enabling ***convenient***, ***on-demand*** network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with ***minimal management effort*** or ***service provider interaction***. This cloud model promotes availability and is composed of five essential **characteristics,** three **service models**, and four **deployment models**."
National Institute of Standards & Technology Definition of Cloud Computing,
http://csrc.nist.gov/groups/SNS/cloud-computing/cloud-def-v15.doc

See also, Twenty-One Experts Define Cloud Computing | Cloud Computing Journal (Jan. 24, 2009), http://cloudcomputing.sys-con.com/node/612375



Definition & Attributes of Cloud Computing – Part 2

FIVE ESSENTIAL CHARACTERISTICS

1. *On-demand self-service*
2. *Broad network access*
3. *Resource pooling*
4. *Rapid elasticity*
5. *Measured service*





Definition & Attributes of Cloud Computing – Part 3

THREE SERVICE MODELS

1. *Cloud Software as a Service (SaaS)*
2. *Cloud Platform as a Service (PaaS)*
3. *Cloud Infrastructure as a Service (IaaS)*



Definition & Attributes of Cloud Computing – Part 4

FOUR DEPLOYMENT MODELS

1. *Private cloud*
2. *Community cloud*
3. *Public cloud*
4. *Hybrid cloud*



Virtualization

"Virtualization can be key to cloud security . . . It can enable the kind of dynamic security that's needed," Art Coviello says.



By Jaikumar Vijayan, ComputerWorld.com, February 15, 2011 01:29 PM ET
http://www.computerworld.com/s/article/9209578/Virtualization_can_be_key_to_cloud_security_RSA_chief_says (last accessed Mar. 6, 2011)

But "VIRTUALIZATION" means to reduce what the user can see; Retaining familiar interface, hiding complexities. Perhaps leading to a false sense of security??

Procurement/Contracting Issues — CAN CITY STAY LEGAL & GET CLOUD SERVICES?



- DOES STATE LAW PERMIT DATA OUTSOURCING?
- LAWFUL TOU TERMS FOR LOCAL GOVERNMENT

VERSUS

- STANDARD TERMS OF USE (TOU)/TERMS OF SERVICE (TOS)/LICENSE TERMS
- RELATIVE BARGAINING POWER
  - ALTERNATIVE SOURCES (COMPETITIVE BIDDING MAY HELP DISCOVER SUCH)
  - CITY'S SIZE (MUNICIPAL LEAGUES AND OTHERS CAN ENHANCE CITY BARGAINING POWER)
- COMPETITIVE BIDDING, SOLE SOURCE, ALTERNATIVES (STATE LISTS OR CONTRACTS?)



Procurement/Contracting Issues — PRICE

- PRICE CAP OR "FAILURE TO APPROPRIATE" OR EQUIVALENT OVER-ALL PROTECTION
- SPECIFIC PRICING FOR EACH SERVICE & EACH EVENTUALITY
- PRICE PER UNIT OF VOLUME (KB, MB, TB)
- PRICE PER SEAT (USER)
- USER TRANSFERABILITY
- HYBRID PRICING
- MOST FAVORED NATION TREATMENT



Procurement/Contracting Issues — DATA SECURITY

1. CITY MUST OWN THE DATA!!!! The best (only) hope of protection in case of vendor's bankruptcy, dishonesty, negligence. May be required by state laws?
2. VENDOR's RIGHT TO SUBCONTRACT LIMITED OR SPECIFIED AND VENDOR MUST REMAIN PRIMARILY RESPONSIBLE REGARDLESS
3. Access, editing & Retrieval – absolute right
4. Disposition during contract only as directed by City (destruction, transfer, duplicate, backup, disclose, produce)
5. Disposition of data at end of contract or if vendor bankrupt, out of business, merged, etc. – explicit vendor obligations
6. Vendor's obligations for security & in event of data breach/leak
7. Data location — Ideally keep it within state; absolutely within country (to keep substantive law & prevent other governments' intrusion).
8. Legal holds/Open Records Request Holds — contract should provide explicit vendor obligations

Procurement/Contracting Issues — Data Retention



- Will vendor keep records for at least mandatory records retention period?
- get certification for alternative to paper record retention (does state law requre this
- Will vendor PERMANENTLY delete records when directed or per mandatory retention schedules if that is in the contract?
- Will vendor promptly institute litigation/open records holds?
- Can city search data to locate data responsive to litigation/open records matters?



- Will vendor terminate holds and re-apply "normal" records retention standards?

N.B. — THE PHENOMENON OF THE "ETERNAL LEGAL HOLD"



Procurement/Contracting Issues — AUDIT ISSUES

1. PRESERVE CITY RIGHT TO AUDIT USING THIRD PARTY CONTRACTORS (EXPERTS)
2. RIGHT TO INSPECT ONSITE VENDOR'S INFRASTRUCTURE & SECURITY PRACTICES
3. OR RIGHT TO REVIEW WRITTEN REPORTS RE VENDOR'S INFRASTRUCTURE & PRACTICES
4. RIGHT TO AUDIT VENDOR'S PERFORMANCE RECORDS AT SPECIFIED INTERVALS WITH SPECIFIED REACH-BACKS (E.G., QUARTERLY, ANNUALLY)
5. AUDIT v. SAS 70/SSAE 16 or other process attestation method

SCOPE OF AUDIT RIGHTS v. DUTY TO EXERCISE v. WILFULL IGNORANCE (FCA, HIPAA, etc.)



Procurement/Contracting Issues — SLAs/REMEDIES

SERVICE LEVEL AGREEMENTS — MUST BE OBJECTIVE & QUANTITATIVE

SLAs ON CRASH RECOVERY MOST IMPORTANT

REMEDIES – LIQUIDATED DAMAGES IF ACTUALS ARE NOT READILY ASCERTAINABLE & SUBJECT TO BONA FIDE DISPUTE (CANNOT BE PENAL IN MOST STATES) – is $ loss the proper measure for local government? Alternatives?

VENDOR WILL WANT TO LIMIT REMEDIES TO, E.G., AMOUNTS PAID)

Data Search Issues



- Is the data searchable?
- Will search method be "defensible" for e-discovery?
- Can data search results be tested through sampling?
- Is static (non-database) data uniquely identified?
- Is de-duping possible

Data Review Issues



- Can data be tagged & annotated?
- Will tags & annotations be exportable to other platforms with data?
- Can outside counsel/experts get access to city's cloud data if city so desires?
- Effective collaborative work on documents & review?
  - Simultaneous access? Trimultaneous?
  - Exchange/view others' annotations?

Data Production Issues



- Production preserves, if necessary:
  - Native ESI formats
  - Metadata (don't get me started!)
- Production can be made in commonly-used formats
- Production Can Be Prompt (Open Records, Court, HIPAA, etc. deadlines).

See: **HHS Imposes a $4.3 Million Civil Money Penalty for Violations of the HIPAA Privacy Rule (InsuranceNewsNet Feb. 22, 2011)** http://insurancenewsnet.com/article.aspx?id=248887&type=newswires (last visited Mar. 5, 2011)(failure was not giving patients their records within 30 days of demand per HIPAA regulations).

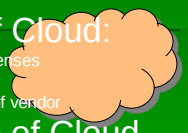
EVIDENTIARY ISSUES

- Authentication of data
- Certification of absence of records
- Who is/are the "custodian(s)"?
- Summaries (usually includes right to inspect)
- Best evidence

Trends: Cloud v. In-House Data



Favoring Use of Cloud:



- Avoid fixed employee expenses
- Convenience
- Expertise and resources of vendor

Disfavoring Use of Cloud

- Expensive services and less control over costs
- At mercy of outside vendor
- Less control of access, etc., subject to contract terms
- Terms may not be lawful for city (indemnity, venue)
- ****Law has not caught up to Cloud?

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