

A State Enforcer Perspective On Cloud Computing

Adam Miller
Deputy Attorney General IV
Adam.Miller@doj.ca.gov
California Department of Justice
March 12, 2010

How Does Cloud Computing Affect Law Enforcement?

- No new paradigm for state, federal & int'l enf.
- Cloud Computing should not affect ability of law enforcement to obtain documents/data
- cross-border business more complicated
- There may be different and conflicting state, federal & Int'l regulation
- Data mining of competitor or consumer info
 - Antitrust/UCL/Consumer privacy violations?

California Investigative Authority

- Cal. Government Code §§ 11180 et seq.
- Broad administrative subpoena authority, e.g.:
- “ the state attorney general's investigation of alleged conduct such as ‘price fixing, monopolization, divisions of markets, and restraint of trade,’ [and] state investigations into possible violations of California statutes that were in harmony with federal antitrust laws were deemed to be permissible and not preempted.” (*In re Wholesale Electricity Anti-Trust Cases I & II* (2007) 147 Cal.App.4th 1293, 1312, quoting *Younger v. Jensen* (1980) 26 Cal.3d 397, 409 [Alaska natural gas w/in AG jurisd.])

California Investigative Authority

- **Administrative investigation akin to grand jury:**
- “As has been said by the United States Supreme Court, the power to make administrative inquiry is not derived from a judicial function but is more analogous to the power of a grand jury, which does not depend on a case or controversy in order to get evidence but can investigate ‘merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.’ *Brovelli v. Super. Ct. of L.A. County* (1961) 56 Cal.2d 524, 529
- Only constitutional limitations (e.g., 4th A) and privileges (e.g., A/C) apply:
- “Insofar as the prohibition against unreasonable searches and seizures can be said to apply at all to an administrative subpoena for the records of a corporation, it requires only that the inquiry be one which the agency demanding production is authorized to make, that the demand be not too indefinite, and that the information sought be reasonably relevant. “ *State ex rel. Dept. of Pesticide Regulation v. Pet Food Exp. Ltd.* (App. 3 Dist. 2008) 165 Cal.App.4th 841, 853-854 (quoting *Brovelli, supra*)

Jurisdictional Issues

- AG may inquire “not only into the existence of violations but also into questions of California’s jurisdiction”
Younger, 26 Cal.3d 397 at 405.
- Scenarios:
 - 1. In-state Co. doing business w/CA residents?
 - 2. In-state Co. doing business w/non-residents?
 - 3. Out-of-state Co. doing biz w/CA residents?
- Presumption against extra-territoriality only applies as to conduct that occurs outside CA, *see People ex rel DuFauchard v. U.S. Financial Management, Inc.* (Cal.App.4 Dist. 2009) 169 Cal.App.4th 1502, 1516

Jurisdictional Issues: O-O-S Co.

- How does a Out-of-State Co. “purposely avail”?
- CA Courts look at *Zippo* sliding scale analysis of spectrum of Out-of-state online behavior
 - *E.g., Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1062-1064
- Scenarios:
 - 1. Co. contracts with residents and engages in repeated/knowing transmission of files over Internet.
 - 2. interactive Web sites where users exchange information with the host computer (possibly with or w/o contract).
 - 3. Co. simply posts information on site accessible to users in foreign jurisdictions.

Confidentiality of Data

- Records typically sought are business records
- GC secs. 11180.5 & 11183 protects conf. data
- Gov. Code sec. 6254(f) – investigation or complaints records are exempt from CA PRA
- Federal law, e.g., ECPA, may apply
- E.g., if CA seeks consumer data from ISP, ECPA requires “an administrative subpoena”, possibly w/notice, order or search warrant

Multistate Investigations

- Multistate AGOs coordinate with feds
- CA Gov. Code sec. 11180.5 permits sharing
- Other states CID statutes/confidentiality protection are similar but not identical to CA
- Useful to obtain waivers from subject of investigation to facilitate sharing
- Benefits target as alternative may be multiple CIDs and production of documents/data
- Direct access to CC data, mirror or HDD?

Additional Concerns & Resources

- CC vendors servicing CA agencies may have unique obligations regarding data/notice, e.g.:
 - CA Gov. Code § 11015.5. Electronically collected PI; user notices; distribution
- See also CA Senate Office of Research:
 - Consumer Privacy and Identity Theft: A Summary of Key Statutes and Guide for Lawmakers, Saskia Kim, January 2008
 - <http://tinyurl.com/ye2z64g>