

STANLEY A. TWARDY, JR.
Attorney at Law

One Canterbury Green
Stamford, CT 06901-2047
T: (203) 977-7368 F: (866) 458-1037
satwardy@daypitney.com

January 27, 2015

VIA UPS

The Honorable Lamar Smith
Chairman
Committee on Science, Space and Technology
United States House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Eddie Bernice Johnson
Ranking Member
Committee on Science, Space and Technology
United States House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith and Ranking Member Johnson:

We represent Datto, Inc., (“Datto”) and write further to our January 15, 2016 letter in response to Chairman Smith’s letter to Datto Chief Executive Officer Austin McChord dated January 14, 2016.

In your January 14 letter, the Committee requested Datto’s “assistance in improving the National Institute of Standards and Technology (NIST), Framework for Improving Critical Infrastructure Cybersecurity (the Framework) and the Federal Information Security Act (*sic*) (FISMA).”¹ The Committee also requested “documents and information relating to work your company performed for a former government official,” identified later in the letter as former

¹ We assume the reference is to the Federal Information Security Management Act of 2002, Pub. L. No. 107-296 tit. X, 116 Stat. 2259 (codified primarily at 44 U.S.C. §§ 3531-3538) and Federal Information Security Management Act of 2002, Pub. L. No. 107-347 tit. III, 116 Stat. 2946 (codified primarily at 44 U.S.C. §§ 3541-3549) repealed and replaced by Federal Information Security Modernization Act of 2014, Pub. L. No. 113-283, 128 Stat. 3073 (codified primarily at 44 U.S.C. §§ 3551-3558).

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COMMITTEE ON SCIENCE
& TECHNOLOGY

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Secretary of State Hillary Clinton.² As you know, a similar request was made of Datto by Chairman Ron Johnson of the U.S. Senate's Homeland Security and Government Affairs Committee.³ As we explained in our reply⁴ to Chairman Johnson's letter and as we reiterate here, Datto's response to such requests for information is governed by Datto's data privacy policies and its contractual confidentiality requirements.

The relevant terms of those requirements as stated in a typical Datto Reseller Agreement include:

"Confidential Information" means any information, whether oral, written, electronic, or in any other format, and whether technical or business in nature, regarding this Agreement, Datto's products or business, including the Product, information regarding a party's products, services, Marks, software, intellectual property, equipment, pricing, marketing and business plans, other information not generally known to the public and any other information received under circumstances reasonably interpreted as imposing an obligation of confidentiality; provided that, "Confidential Information" shall not include any of such information which: (i) was publicly available at the time of disclosure by the disclosing party; (ii) became publicly available after disclosure through no fault of the receiving party; (iii) was known to the receiving party prior to disclosure by the disclosing party; or (iv) was rightfully acquired by the receiving party after disclosure by the disclosing party from a third party who was lawfully in possession of the information and was under no legal duty to the disclosing party to maintain the confidentiality of the information.

Required Disclosures. Either party may disclose Confidential Information to the extent disclosure is based on the good faith written opinion of such party's legal counsel that disclosure is required by law or by order of a court or governmental agency; provided that, the party that is the recipient of such Confidential Information shall use all commercially reasonable efforts to maintain the confidentiality of the Confidential Information by means of a protective order or

² Letter from The Honorable Lamar Smith to Mr. Austin McChord, dated January 14, 2016. It is our understanding that your request contemplates a voluntary response, and that no subpoena has issued pursuant to the *Rules Governing Procedure, Committee on Science, Space and Technology, U.S. House of Representatives, 112th Congress*, available on-line at <https://science.house.gov/sites/republicans.science.house.gov/files/rules.pdf> (last visited Jan. 22, 2016).

³ Letter from The Honorable Ron Johnson to Mr. Austin McChord, dated October 5, 2015 and attached hereto as Exhibit A.

⁴ Letter from Stanley A. Twardy, Jr., Esq., to the Honorable Ron Johnson, dated October 19, 2015 and attached hereto as Exhibit B.

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other similar protection and shall give the owner of such Confidential Information prompt notice in order that it have every opportunity to intercede in such process to contest such disclosure and shall use all commercially reasonable efforts to cooperate with the owner of such Confidential Information to protect the confidentiality of such Confidential Information. The owner of such Confidential Information reserves the right to obtain a protective order or otherwise protect the confidentiality of such Confidential Information.

Despite misconceptions in the media, Datto's client in this matter was, and has always been, Platte River Networks ("Platte River"). On January 15, 2016, in accordance with its obligations under the Reseller Agreement, Datto notified Platte River of your January 14, 2016 inquiry, and asked whether they would object to disclosure of the information and materials requested. Counsel for Platte River responded on January 16, 2016, advising that Platte River "does object to disclosure of [the] 'information and materials requested.'" Accordingly, Datto cannot disclose any such Confidential Information absent consent from its client or unless required by law or by order of a court or governmental authority.

I. BACKGROUND

Datto is a back-end service provider to thousands of managed IT service providers – often referred to as Managed Service Providers ("MSPs") or "Resellers" such as Platte River. MSPs are often sophisticated, professional companies that provide a defined set of IT operations and services to their clients or "End-Users." Datto works almost exclusively with these MSPs to provide comprehensive and secure "hybrid cloud" backup, data recovery, and business continuity solutions that the MSPs in turn resell and administer to End-Users. To accomplish this, Datto provides hardware, software, cloud and technical services to MSPs, as more fully described below. Datto also provides MSP customers with training on how to use Datto services.

Datto's services to MSPs are generally governed by Reseller Agreements between the MSP and Datto. These contracts contain mutual and binding confidentiality clauses. As previously discussed, such a clause applies in Datto's contract with Platte River. Rarely does Datto deal directly with an End-User, and in the matter referred to in your inquiry, Datto's contractual relationship was with Platte River only. Datto was not aware of the identity of the End-User until reading allegations in the media in August of 2015.

Datto's hybrid cloud solution involves two parts: (i) a local hardware backup device, such as the Datto SIRIS device (a "Local Device"); and (ii) a replicated offsite backup.⁵ First, the Datto solution enables the MSP to take a full backup image of the End-User's IT environment that is being backed up (servers, data, etc.) and copy it onto a Local Device, which is a hardware

⁵ In this letter "local" refers to the physical location of the MSP's (or applicable End-User's) systems.

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device that is often located in the same physical location as the IT environment it is backing up (i.e. the “server room”). From there, the Local Device works as a “failover” system in the event of a business interruption that impacts the End-User’s IT environment. Second, a duplicate copy of all of the information stored on the Local Device is also placed on a replicated storage device (a “Storage Node”) that is located at a different location (i.e. “offsite”) than the Local Device.⁶ Offsite replication ensures that if the event that caused the End-User’s system to fail also impacts the Local Device (e.g. a fire or flood) the MSP can use the cloud – “Datto Cloud” or a “Private Cloud” – as an alternative failover system from the Local Device.

In most use cases, the MSP chooses for offsite replication to occur at a Datto-controlled data center facility. Datto refers to this approach as a “Datto Cloud” solution. In other use cases, MSPs may choose to replicate backed-up data offsite to a Storage Node owned and operated by the MSP at a site of its choosing. Datto refers to this approach as a “Private Cloud.”

As an alternative to a hybrid cloud approach, an MSP may opt out of offsite replication altogether and request a “Local Only” setup. In a Local Only configuration, backed-up data will not replicate beyond the Local Device. Because Datto’s technology solution is meant to be deployed as a hybrid cloud solution, to set up a Local Only solution, generally the MSP must work directly with Datto technical support to implement this. By default, absent a functioning private offsite Storage Node or the requisite communications with Datto technical support, all Local Devices replicate to the Datto Cloud.

As noted, as a back-end service provider, Datto very rarely—if ever—has any direct interaction with the End-Users served by the MSPs. The nature of Datto’s relationship with MSPs precludes Datto from knowing either the identity of End-Users or the content of the data stored on the Local Device or replicated offsite. Datto has no role in monitoring the content or source of data stored by MSP clients such as Platte River. As such, Datto would not be aware of who was Platte River’s End-User and Datto did not and does not have any knowledge concerning the content of any data that may or may not have been backed up to the Datto Cloud, or stored on the Datto SIRIS device owned and operated by Platte River.⁷

II. DATTO INVOLVEMENT IN MATTERS RELATED TO THE COMMITTEE’S INQUIRY

Datto first became aware that Platte River had been contacted by U.S. Government officials inquiring into Platte River’s involvement with former Secretary Clinton’s e-mail server through media reports on or about Sunday, August 9, 2015. Soon thereafter, Datto disconnected the replicated offsite Storage Node, and independently took prudential steps to preserve

⁶ This duplication is accomplished by the creation of multiple restore points that can be individually reconstructed to restore the dataset as it previously existed at a particular time.

⁷ Datto’s standard contracts permit communication with an End-User, but this rarely is done, and was not in this case. In rare cases, Datto will be asked to directly assist an End-User.

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information within Datto's control which Datto believed could be subject to law enforcement or other governmental inquiry.

On September 10, 2015, Datto received a *Request for Preservation of Records* from the Federal Bureau of Investigation (FBI) requesting that Datto preserve records related to a Datto Local Device identified by the FBI. Datto informed the FBI on September 16, 2015 that Datto had disconnected and preserved an offsite Storage Node associated with the Local Device. On October 6, 2015, with the consent of Platte River and its End-User, Datto provided the Storage Node to the FBI. It is our understanding that the FBI has custody of the Storage Node.

III. RESPONSES TO DOCUMENT REQUESTS

Please note that with respect to Document Requests 1, 2 and 3, these requests call for the production of documents and materials that are Confidential Information as defined by the Datto Reseller Agreement and Datto's data privacy policies. Consequently, Datto is not authorized to disclose such information absent consent from its client, Platte River, or unless required by law or by order of court or governmental agency. As described above, Platte River has refused consent.

With respect to Question 4 ("All documents and communications referring or relating to the National Institute of Standards and Technology's Framework for Improving Critical Infrastructure Cybersecurity"), to the extent to which the immediately preceding paragraph does not apply, Datto responds as follows.

The National Institute of Standards and Technology's Framework for Improving Critical Infrastructure Cybersecurity ("Framework")⁸ is a voluntary framework developed to carry out President Obama's Executive Order⁹ directing the "development of a voluntary Cybersecurity Framework ... that provides a 'prioritized, flexible, repeatable, performance-based, and cost-effective approach' to manage cybersecurity risk for those processes, information, and systems directly involved in the delivery of critical infrastructure services."¹⁰ The Executive Order defines "critical infrastructure" as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."

⁸ *Nat'l Inst. of Standards & Tech., Framework for Improving Critical Infrastructure Cybersecurity*, Feb. 12, 2014.

⁹ *Exec. Order No. 13636, Improving Critical Infrastructure Cybersecurity, DCPD-201300091*, Feb. 12, 2013.

¹⁰ *Nat'l Inst. of Standards & Tech., Framework for Improving Critical Infrastructure Cybersecurity*, Feb. 12, 2014.

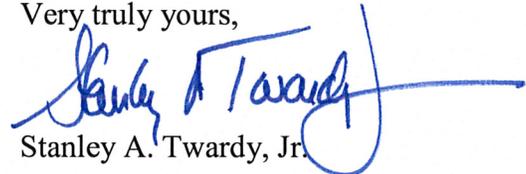
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Datto provides its backup and data recovery solutions to thousands of MSPs serving mostly small to medium sized businesses. Datto is committed to providing all of its clients with secure, reliable, and up-to-date solutions. The Framework, along with a host of other federal, industry and academic guidelines and standards offered by organizations such as the Information Systems Audit and Control Association, Payment Card Industry and the International Standards Organization, is well known to Datto, and is a valuable tool used throughout the IT industry, including Datto, as a reference document to guide internal security controls. As is clear from the Framework itself, however, it is not designed to be a contractual document or regulatory requirement, and it is not a part of Datto's contractual documentation or agreement with any of its clients.

IV. CONCLUSION

Thank you for the opportunity to assist the Committee in its work. Please do not hesitate to contact me if you have any questions.

Very truly yours,



Stanley A. Twardy, Jr.

cc: Drew Colliatie
Caroline Ingram
Professional Staff Members
Committee on Science, Space and Technology, (Majority)
United States House of Representatives
2321 Rayburn House Office Building
Washington, D.C., 20515
Via E-mail

Jonathan McGee
Legislative Assistant
Committee on Science, Space and Technology, (Minority)
United States House of Representatives
2321 Rayburn House Office Building
Washington, D.C., 20515
Via E-mail