

Traveling to the U.S.: Prepare for Confiscation and Backup Your Data

November 10, 2008

Any traveler to the United States should prepare to be without his or her laptop, cell phone, PDA, Blackberry, iPod, MP3 and other electronic equipment. In addition, any traveler to the United States should make backup copies of any documents taken to the United States.

The reason is that under new sweeping powers by rules (as opposed to legislation and regulations), the U.S. Department of Homeland Security and U.S. Customs and Border Patrol may seize travelers' hard drives, flash drives, cell phones, iPods, pagers, beepers, video and audio tapes, books, pamphlets and other written materials at the border and hold them for unspecified periods. Such seizures may be carried out without suspicion of wrongdoing or "probable cause" that a crime has been or will be committed.

While the rules require the U.S. agents to take measures to protect business information and attorney-client privileged material, it will not be easy to get them to listen and any argument may not end favourably for the traveler. Some of the first cases that have gone through the U.S. courts involved seizures from lawyers.

The good news is that the rules require that the U.S. Government destroy any copies of the data if a review is completed and no probable cause exists to keep the information. However, there will be no way for the individual traveler to ensure that all copies of their information were destroyed.

The U.S. Government is looking for any type of criminal activity or contravention of U.S. law, whether or not it is terrorism related, evidence of money laundering, corruption, improper exports, customs contraventions and such.

It will come down to simple risk management. If you are going to vacation in the U.S., do not bring electronic devices and data with you. If you must have your electronic devices and documents with you on your vacation, or if you are traveling for business, you will have to take steps to make sure that something you need is not seized. The obvious piece of advice is to be a good citizen, but often officials cannot tell the difference between one who is upright and the criminals, and some criminals are great actors. They may pick you even if you have never done anything wrong in your life and there is nothing improper in your possession.

Assuming you may be selected for search and seizure when entering the United States, do not travel with something that you cannot do without. Make backup copies of any data that you take to the United States. Where possible, remove any information you do not need at the time you will be crossing the border into the United States. For example, backup information from your Blackberry to your desktop before leaving for the airport. Then delete the information from your Blackberry. You will be able to retrieve it when you return home. Some enterprise servers may allow you to park information and retrieve it electronically after you clear the U.S. customs controlled area (and, for example, are in your hotel).

If you must travel with a laptop, have a laptop dedicated for travel purposes and keep only the information you need for the trip to the United States on your laptop. Backup all important documents on a desktop in your office (or on an external backup system).

Lawyers who must travel to the United States for their clients need to take steps to protect client information. One suggestion would be to put the documents on a thumb drive and seal the thumb drive in a sealed and marked "Attorney-Client Privilege" envelope. This may not prevent the officers from opening the envelope and looking at the documents, but it may allow you to ask for the sealed envelope to be opened by a judge and, failing that, it may protect you from a claim by the client if the U.S. Government seizes the documents.

Cyndee Todgham Cherniak is counsel in the International Trade Group in Toronto. Contact her directly at 416-307-4168 or cyndee@langmichener.ca.

This article appeared in the Lang Michener LLP InBrief Winter 2008/2009. To subscribe to this publication, please visit our [Publications Request page](#).