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CLOUD WATCHING: STRATEGIES AND BEST PRACTICES FOR MICROSOFT 365 DISCOVERY

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The Great Cloud Migration

In 2011, Microsoft launched a new, cloud-based subscription service called Office 365 that provided their suite of Microsoft Office productivity applications. Office 365 allowed employees and organizations to utilize online, up-to-date versions of the Microsoft Office applications like Outlook, Excel, Word, and PowerPoint to create their business communications and documents. By early 2020, the range of offerings expanded beyond traditional Office applications and Microsoft transitioned to the name Microsoft 365 or M365.

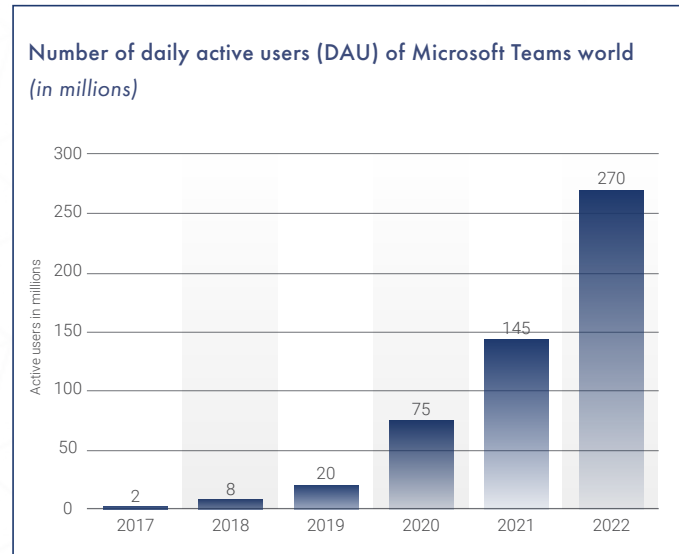
Adoption was rapid. Personal, educational, and small business licensing packages followed. By October 2019, Microsoft [surpassed 200 million commercial monthly active users](#).¹ The pandemic and the accompanying transition to remote or hybrid work only accelerated adoption and usage. As of April 2022, Microsoft reported [345 million paid seats for Microsoft 365 and a 17% year-over-year increase in revenue from Microsoft 365](#).²

Microsoft 365 is used by [over a million companies worldwide](#),³ over 870,000 of which are in the United States. As of September 2022, Microsoft 365 customers were adding [“over 100 petabytes of new content each month.”](#)⁴

Since its inception, the range of applications, features, and services available within Microsoft 365 has continually expanded and evolved. Most notably, in

2017, Microsoft rolled out a new chat and collaboration application called Teams to compete with Slack. Slack self-describes as “your digital HQ,” merging communications, information, and documents into a single collaboration solution. From its launch in 2013, Slack was the [fastest-growing workplace software ever, topping 500,000 daily users in 2015](#).⁵ Despite Slack’s four-year head start, by November 2019, Microsoft Teams had [surpassed Slack with 20 million daily users](#).⁶

This rapid growth was turbocharged by the pandemic and consequent shift to remote and hybrid work, which resulted in geometric growth for Microsoft Teams. Daily active users tripled in 2020, and then they more than doubled again in 2021. By the end of 2022, Teams had [over 270 million monthly active users](#).⁷



¹Mary Jo Foley, “A new Microsoft cloud category to watch: The Microsoft 365 number,” ZDNET (Oct. 23, 2019), available at <https://www.zdnet.com/home-and-office/work-life/that-big-microsoft-365-teams-and-outlook-outage-heres-what-went-wrong/>.

²Tony Redmond, “Office 365 Reaches 345 Million Paid Seats,” Office 365 for IT Pros (Apr. 28, 2022), available at <https://office365itpros.com/2022/04/28/office-365-number-of-users/>.

³Lionel Sujay Vailshery, “Number of Office 365 company users worldwide 2022, by country,” Statista, (Feb. 23, 2022), available at <https://www.statista.com/statistics/983321/worldwide-office-365-user-numbers-by-country/>.

⁴Omar Shahine, “Microsoft is recognized as a Leader in the 2021 Forrester Wave for Content Platforms,” Microsoft 365 Blog (Sept. 28, 2021), available at <https://www.microsoft.com/en-us/microsoft-365/blog/2021/09/28/microsoft-is-recognized-as-a-leader-in-the-2021-forrester-wave-for-content-platforms/>.

⁵Jack Linshi, “This 1-Year-Old Startup Says It’s the Fastest-Growing Business App Ever,” Time (Feb. 12, 2015), available at <https://time.com/3705218/slack-business-app/>.

⁶Mary Jo Foley, “Microsoft says it has 20 million daily active Teams users,” ZDNET (Nov. 19, 2019), available at <https://www.zdnet.com/article/microsoft-says-it-has-20-million-daily-active-teams-users/>.

⁷Lionel Sujay Vailshery, “Microsoft Teams: number of daily active users 2019-2022,” Statista (Jan 13, 2023), available at <https://www.statista.com/statistics/1033742/worldwide-microsoft-teams-daily-and-monthly-users/>.

Preservation and Discovery Duties

Within cloud environments, the cloud provider is the technical backbone, providing access to critical enterprise applications and information storage in a streamlined, flexible, and scalable environment. IT expenses decrease while centralizing data management for key security and compliance functions. Even after an organization migrates their data to a cloud provider, however, the organization still remains responsible for fulfilling its legal duties to identify and preserve relevant information for litigation and other legal matters.

The practical scope of electronically stored information (“ESI”) identification and preservation is determined both by the actual requests from other parties and by your own information needs related to the matter. The maximum-possible scope is established by the Federal Rules of Civil Procedure (“FRCP”) or your state’s equivalent ruleset. The FRCP establishes that scope as encompassing:

- ▶ Any documents or electronically-stored information
- ▶ In your possession, custody, or control
- ▶ That are relevant
- ▶ That are unique
- ▶ That are not unreasonably inaccessible because of undue burden or cost
- ▶ That are not disproportionate to the needs of the case

The definition of “documents or electronically stored information” provided by [FRCP 34 and its accompanying committee notes](#)⁸ is expansive enough to encompass almost any sort of material in any format, which means that nothing can be overlooked based purely on its file format or its source software.

The definition of “possession, custody, or control” provided by [Rule 34\(a\)\(1\)](#)⁹ and the case law applying it means that you are responsible, not just for the materials you physically or electronically possess, but for any that you legally control – like those maintained for you by Microsoft and other cloud services providers.¹⁰

ESI spoliation remains a frequent issue, particularly with newer sources. Almost every other type of failure can be fixed with adequate time and money, but once unique, relevant ESI is gone, it’s gone.

FRCP Scope of Discovery

- ▶ Any documents or electronically-stored information
- ▶ In your possession, custody, or control
- ▶ That are relevant
- ▶ That are unique
- ▶ That are not unreasonably inaccessible because of undue burden or cost
- ▶ That are not disproportionate to the needs of the case

⁸Fed. R. Civ. P. 34, available at https://www.law.cornell.edu/rules/frcp/rule_34; Fed. R. Civ. P. 34 advisory committee’s note, available at https://www.law.cornell.edu/rules/frcp/rule_34.

⁹Fed. R. Civ. P. 34(a)(1), available at https://www.law.cornell.edu/rules/frcp/rule_34

¹⁰Please note that there are actually three distinct standards for how far “possession, custody, or control” is deemed to extend, depending on your jurisdiction: “Legal Right,” “Legal Right Plus Notification,” and “Practical Ability.” More information is available in *The Sedona Conference Commentary on Rule 34 and Rule 45 “Possession, Custody, or Control,”* 17 SEDONA CONF. J. 468, 482 (2016), available at https://thesedonaconference.org/publication/Commentary_on_Rule_34_and_Rule_45_Possession_Custody_or_Control.

Constant Change Is the New Normal

As recently as four or five years ago, your organization would have managed core application upgrades in a methodical fashion:

1. IT would test key functionality and ensure new functionality adhered to internal business needs and security requirements.
2. A cross section of the organization would receive the updated application and confirm usability for their department as part of a proof of concept. Enterprise change management teams would then organize informational and training campaigns letting employees know about the upcoming change, the date of expected release, and the impacts on their day-to-day operations.
3. IT would roll out the change to the company on their targeted release date.

These days, in your cloud-based environments, change is rapid. Applications and application features will

“**From 2000-2020, Microsoft released just seven versions of Outlook and semi-annual point releases, but in 2022 alone, Microsoft made 64 releases to the Outlook application within Microsoft 365 – more than one per week.**”

change with inadequate notice, changes may be enabled/implemented by default, and these changes may not just impact your core enterprise applications (like those used for email, calendar, or document creation) but also the underlying architecture of data locations (e.g., One Drive or SharePoint) and the compliance tools your legal or compliance departments rely upon to manage legal and regulatory requests.

For example, from 2000-2020, Microsoft released just seven versions of Outlook and semi-annual point releases, but in 2022 alone, Microsoft made 64 releases to the Outlook application within Microsoft 365 – more than one per week. Microsoft Teams had 317 releases in 2022, with [68 under development in 2023](#).¹¹ Microsoft Premium eDiscovery saw 24 releases in 2022, with [26 under development in 2023](#).¹²

Because of these more rapid changes, organizational personnel dealing with eDiscovery (e.g., legal, IT, IS, Compliance, and Records teams) will need to be more reactive and agile. Changes happen with limited notice and the teams supporting those functions must be



¹¹"Microsoft 365 Roadmap," Microsoft 365, available at <https://www.microsoft.com/en-us/microsoft-365/roadmap> (last visited Jan. 12, 2023).

¹²Id.

able to adapt quickly to the changes with updates to processes, documentation, and supporting technology.

One way an organization may increase awareness of upcoming changes is to review the [public roadmap](#)¹³ of what Microsoft has in their development pipeline. This dashboard-style site presents a glimpse into the future of features and functions the Microsoft development teams are prioritizing. An understanding of both your organization's licensing and application inventory is fundamental to properly navigating the roadmap.

Internal organizational discussions of future releases must be cross-department to ensure that all application users properly understand any risks and benefits associated with new features. The scope of these discussions is not limited to merely upcoming changes to the eDiscovery tools but to any functionality impacting enterprise documents, data sources, or applications that generate content.

The most authoritative source for release information including expected and actual release dates for your environment will be the Microsoft Message Center in the Admin Center in M365.

Microsoft's Roadmap provides insight into what changes are on the horizon, but the Message Center will tell you when it is time to prepare for those changes.

Dynamic Data

eDiscovery was traditionally a collection of "documents" where discovery professionals were told to locate the documents for Person X and gather the documents from File Share Y.

These days, defining those "documents" and the "custodian of the data" is a bit murky, reflecting the more dynamic nature of enterprise data, like:

- ▶ Document versioning
- ▶ Collaboration data
- ▶ Loop/Fluid data and other non-standard document types

Microsoft's Roadmap provides insight into what changes are on the horizon, but the Message Center will tell you when it is time to prepare for those changes.

Compounding these issues is the other new normal we discussed above: the rise of collaboration tools. The pandemic and resultant move to remote and hybrid work fundamentally shifted the way employees interact with information.

Traditionally, organizations treated enterprise email as foundational to their information management and eDiscovery programs, permitting over-retention of the data and file management within the email platform. In addition, organizations historically treated chat applications as both casual and ephemeral, requiring employees to individually retain chat transcripts on a one-off basis if at all.

In a post-2020 world, organizations must address the tectonic shift to collaboration tools like Microsoft Teams or Slack. The younger workforce shuns traditional email for these interactive, real-time tools. The fundamental question enterprise legal, compliance, and IT teams must ask is:

Are we managing the retention, preservation, and collection of information in a way that reflects and responds to the way our employees are actually using email, collaboration tools, and other communication channels?

If not, now is the time to start modifying workflows and behavior. Retention policies must align with the operational reality of how employees generate and

¹³Id.

store information. Acceptable use policies may require updates to reflect that “chat” content is discoverable. The eDiscovery program must include appropriate workflows for proper review and production of these materials.

The email paradigm is over – change your thinking and adapt.

Know Your Organization

In-house and outside counsel have long understood that deep institutional knowledge is critical to the

successful management of individual legal or compliance matters, as well as the success of the discovery program as a whole. Key categories of institutional knowledge include:

1. Enterprise technology (including your Microsoft licensing)
2. How employees are generating information
3. How legal teams can respond to requests for information

Understanding Enterprise Technology

Licensing is complex and specific to your organization. Organizations may have multiple license types across different groups of employees, utilizing a hybrid approach to balance cost and employee needs.

The chart below illustrates some of the key differences in functionality and tools included with different Microsoft enterprise licenses. Organizations may provide different license types across their business units (e.g., Frontline for customer facing teams, E3 or E5 for back-office functions). Other organizations may provide the same license to all enterprise users. As you can see each has different features and limitations:

Solution	Feature	Microsoft 365 E5	Microsoft 365 E3	Microsoft 365 F3/F1
Discover & Respond	Content Search	X	X	X
	Standard eDiscovery (incl. Hold and Export)	X	X	
	Premium eDiscovery	X		
	Custodian management (mapping content to custodian)	X		
	Custodian communications	X		
	Deep crawling/indexing	X		
	Review data (query data, tags, smart tags, dashboard) and annotate (redact)	X		
	Analyze data (near Duplicate Identification, Email Threading, Themes)	X		
	Non-Office 365 ingestion and processing (e.g. OCR)	X		
	Advanced eDiscovery Export (download, export, add to another review set)	X		

Your IT staff can help you understand “who has which license” but may not be well versed in the differences between the licenses, especially compliance and retention functionality within Microsoft Purview. Earlier, we discussed how cloud computing disrupts the standard software deployment lifecycle. Cloud providers release new functionality at swift speeds and the new features may affect compliance and enterprise risk functions and processes.

Your Microsoft representative is the best source of up-to-date information on the differences between the licenses and their included functionality.

Understanding Employee Behavior

Understanding how your employees create, use, and manage information is foundational to eDiscovery and information management programs. Legal and technical teams need to know:

1. **Where** information is to properly identify, preserve, and collect
2. **How** that information can fit within a larger discovery response program

Are all data types natively searchable? Does this department generate or manage proprietary data formats or data formats with limited accessible text? Can we remediate this file type in a processing workflow? How can we best organize this data for review? What are the production requirements for the matter, and can we meet those obligations for this data type?

Once you’ve fostered a deeper understanding of how employees use information and data (and how that can vary by business unit or geographic region), it is critical to reassess legacy data retention policies through that lens. Ensuring your organization’s data management policies are consistent with, and reflective of, your employees operational reality may require updates to retention schedules, acceptable use limits, and other key organization policies.

Finally, licensing may play a role here as well. The license assigned to the user may influence the types of content users create and the legal department’s ability to perform certain compliance and discovery-related tasks.

Understanding Response Options

The end-user license drives compliance and eDiscovery capability, functionality, and output, so a working knowledge of licensing is no longer the sole responsibility of the IT department. In-house and outside counsel need to understand, at a high level, internal processes for managing eDiscovery within M365 and how employee-level licenses impact the information end-users generate.

License choice determines collection, processing, and review capability. Each tool has functional

Key Questions

- ▶ Are all data types natively searchable?
- ▶ Does this department generate or manage proprietary data formats or data formats with limited accessible text?
- ▶ Can we remediate this file type in a processing workflow?
- ▶ How can we best organize this data for review?
- ▶ What are the production requirements for the matter, and can we meet those obligations for this data type?

and practical limitations that require appropriate workarounds that vary from enterprise to enterprise (and, perhaps, from department to department). Organizations must assess which combination of risk and reward best fits the organization's needs.

So where does this leave legal, compliance, and technology professionals? Oftentimes, legal or compliance teams are notified of new features post-implementation. They then scramble to understand the technology and scope of the feature to develop compensating risk controls.

How can the scrambled implementation updates be reduced? Legal, compliance, and information technology teams must be proactive in how software changes and updates are communicated amongst themselves.

Legal needs a seat at the table during conversations about enterprise technology changes. Legal, compliance, and technology must work together to understand the impact of proposed technology changes. What communication or training will be required? What policies must be updated? Do any compensating control changes need to be made to retention or use policies?

Solid enterprise change management helps organizations meet risk goals. Legal and compliance must be involved in all technical deployments that impact legal or compliance risk.

“A stale data map is as useful as no data map”

Understanding Data Management

Finally, a data map will be key for legal, compliance, and IT teams with responsibility for litigation, compliance, or regulatory discovery requests. At minimum the data map should include:

- ▶ The critical business sources (e.g., email, SharePoint, and custodian computers) that are routinely collected for legal, compliance, or regulatory requests
- ▶ Contact information for questions related to each source or source type
- ▶ Whether the source contains/should contain protected information (e.g., PII, financial information)
- ▶ Preservation, retention, and collection capabilities for each data source

Routine updates to the data map are necessary because a stale data map is as useful as no data map. Organizations should designate key employees who are responsible for keeping the data map updated as new sources are identified or come online.



Organizations of a certain size or level of complexity can also benefit from a business systems map. This can be part of or distinct from the data map and identifies all business systems (including internally-developed, third-party, and cloud-based systems) that the organization uses to manage workflows.

A business systems map contains relevant technical information about the application (e.g., platform, physical location), application contacts (e.g., technical owner, data owner), and information about the types of information contained within the system (e.g., business records, aggregated financial information). Centralizing this information helps enterprise risk teams identify where to focus their limited resources.

A data map or business systems map is a major part of the enterprise plan, but data management policies

are also critical. Quality data management policies will:

1. Address the disparate data sources where enterprise data is stored, including legacy data locations and cloud data sources.
2. Reflect operational reality: How are employees using these data sources? Do enterprise policies take that into account? Consider here that collaboration tool usage is increasing rapidly. Does your organization have a policy that retains this content appropriately? Have your employees been trained in acceptable use of collaboration tools?
3. Be enforced by technology. Utilize available technology to identify and delete redundant, outdated, and trivial information, while maintaining critical information. Ensure that employees are prevented from storing information in 3rd party IT tools or less accessible formats (e.g., PST).

KEY TAKEAWAYS

1

Constant change is the new normal when it comes to cloud data, including M365.

Information in the cloud is ever changing, as are the features of the cloud itself. eDiscovery teams must be agile and reactive to these changes.

2

The email paradigm is ending – change your thinking and adapt.

Collaboration tools are ascending, and information management initiatives must center collaboration data.

3

Knowing your organization and its data is the number one stop on the road to defensible eDiscovery.

Understanding how your organization creates and manages data – and how this can evolve quickly – requires legal, compliance, and technical teams to collaborate more closely than ever.

4

Straightforward, information-related policies are key to meeting preservation and retention obligations.

- a. Policies should include the different types of data that your employees are generating.
- b. Policies should reflect the operational reality of **where** and **how** your employees are doing work.
- c. Policies should be enforced with technology.

ABOUT THE AUTHOR

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In her current role, Jennifer works with Consilio's enterprise clients on a variety of eDiscovery and data management issues including sensitive data analytics, document categorization, and Office365 cloud functionality. Jennifer frequently speaks on these topics to clients and at industry events.

Jennifer previously managed the teams responsible for Consilio's world-class operational and technology solutions, delivering fast, accurate, secure, and scalable data solutions for clients. Jennifer's broad industry experience includes technical product and service delivery, largely in the Financial Services space. In these roles, Jennifer worked closely with Legal, Records Management, and Information Security teams to drive Legal and Information Governance technology strategy, while protecting critical enterprise information. Additionally, Jennifer managed Legal Technology application development teams tasked with the delivery of patented technology to Legal, Compliance and Regulatory Audit divisions.



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