



Australian Government

Department of Communications and the Arts



Australian Government

Attorney-General's Department

National Security Division

Consultation Paper – Access to Retained Data in Civil Proceedings

Background

On 30 October 2014, the then-Minister for Communications, the Hon Malcolm Turnbull MP, introduced the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 into the House of Representatives. On 21 November 2014, the Attorney-General, Senator the Hon George Brandis QC, referred the provisions of the Bill to the Parliamentary Joint Committee on Intelligence and Security (the Committee) for inquiry and report.

In the course of the Committee's inquiry into the Bill, a number of submissions expressed concerns that retained telecommunications data would be able to be accessed by parties to civil proceedings.

In its *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, the Committee recommended that the Bill 'be amended to prohibit civil litigants from being able to access telecommunications data that is held by a service provider solely for the purpose of complying with the mandatory data retention regime.' In making this recommendation, the Committee commented that the prohibition should not apply more broadly to telecommunications data retained for other purposes, such as data retained for a service provider's business needs.

The Committee also recommended that the Bill be amended to include a regulation-making power to enable provision for 'appropriate exclusions'. In making this recommendation, the Committee gave examples of 'family law proceedings involving violence or international child abduction cases' as potential classes of matters that could be excluded from the scope of the prohibition. However, the Committee noted that it '[did] not wish to prescribe how a regulatory power would work when it comes to what should be excluded', and further recommended that the Minister for Communications and the Attorney-General review the measure and report to the Parliament on the findings of that review by 13 April 2017.

On 3 March 2015, the Government issued its response to the Committee's report, supporting all of its recommendations. To give effect to the above recommendation, the Government introduced amendments to the Bill to amend section 280 of the *Telecommunications Act 1997* to prohibit the disclosure of telecommunications data by service providers in response to subpoenas, notices of disclosure or other orders of a court in connection with civil proceedings, where the data is kept by the service provider solely for the purpose of complying with its data retention obligations under Part 5-1A of the *Telecommunications*

(Interception and Access) Act 1979 (TIA Act). This prohibition is subject to any exclusions specified in regulations, and will commence on 13 April 2017.

Issues

In essence, the legislation is designed to preserve the longstanding power of courts to order access to relevant telecommunications data in civil proceedings while limiting access to data that has been retained solely for the purposes of the data retention scheme. The Committee's recommendation to include a regulation-making power, which the Government accepted, is designed to mitigate the risk that restricting parties to civil proceedings' access to such data could adversely impact the effective operation of the civil justice system, or the rights or interests of parties to civil proceedings.

The Department of Communications and the Arts and the Attorney-General's Department are seeking the views of stakeholders with an interest in the civil justice system and privacy to support the Minister for Communications and the Attorney-General in their review of the prohibition and regulation-making power. In particular, the departments are interested in views about the following questions:

1. In what circumstances do parties to civil proceedings currently request access to telecommunications data in the data set outlined in section 187AA of the TIA Act (refer to **Attachment A**)?
2. What, if any, impact would there be on civil proceedings if parties were unable to access the telecommunications data set as outlined in section 187AA of the TIA Act?
3. Are there particular kinds of civil proceedings or circumstances in which the prohibition in section 280(1B) of the *Telecommunications Act 1997* should not apply?

The departments invite submissions by **Friday, 27 January 2017**. Submissions may be provided to CommunicationsSecurity@ag.gov.au.

The Department of Communications and the Arts is also consulting the telecommunications industry.

Attachment A

Item	Topic	Description of information
1	The subscriber of, and accounts, services, telecommunications devices and other relevant services relating to, the relevant service	<p>The following:</p> <p>(a) any information that is one or both of the following:</p> <p>(i) any name or address information;</p> <p>(ii) any other information for identification purposes;</p> <p>relating to the relevant service, being information used by the service provider for the purposes of identifying the subscriber of the relevant service;</p> <p>(b) any information relating to any contract, agreement or arrangement relating to the relevant service, or to any related account, service or device;</p> <p>(c) any information that is one or both of the following:</p> <p>(i) billing or payment information;</p> <p>(ii) contact information;</p> <p>relating to the relevant service, being information used by the service provider in relation to the relevant service;</p> <p>(d) any identifiers relating to the relevant service or any related account, service or device, being information used by the service provider in relation to the relevant service or any related account, service or device;</p> <p>(e) the status of the relevant service, or any related account, service or device.</p>
2	The source of a communication	Identifiers of a related account, service or device from which the communication has been sent by means of the relevant service.
3	The destination of a communication	<p>Identifiers of the account, telecommunications device or relevant service to which the communication:</p> <p>(a) has been sent; or</p> <p>(b) has been forwarded, routed or transferred, or attempted to be forwarded, routed or transferred.</p>
4	The date, time and duration of a communication, or of its connection to	The date and time (including the time zone) of the following relating to the communication (with sufficient accuracy to identify the communication):

Item	Topic	Description of information
	a relevant service	(a) the start of the communication; (b) the end of the communication; (c) the connection to the relevant service; (d) the disconnection from the relevant service.
5	The type of a communication or of a relevant service used in connection with a communication	The following: (a) the type of communication; Examples: Voice, SMS, email, chat, forum, social media. (b) the type of the relevant service; Examples: ADSL, Wi-Fi, VoIP, cable, GPRS, VoLTE, LTE. (c) the features of the relevant service that were, or would have been, used by or enabled for the communication. Examples: Call waiting, call forwarding, data volume usage. Note: This item will only apply to the service provider operating the relevant service: see paragraph 187A(4)(c).
6	The location of equipment, or a line, used in connection with a communication	The following in relation to the equipment or line used to send or receive the communication: (a) the location of the equipment or line at the start of the communication; (b) the location of the equipment or line at the end of the communication. Examples: Cell towers, Wi-Fi hotspots.