Ms Anne Sheehan and Mr Brian Kelleher
via Communications Security Branch
Attorney-General's Department

Via email address: CommunicationsSecurity@ag.gov.au

Dear Ms Sheehan and Mr Kelleher

I refer to correspondence of 29 November 2016 seeking comment on proposed exemptions for civil litigants seeking to access metadata held under the scheme for retaining data in Part 5-1A of the Telecommunications (Interception and Access) Act 1979 (Cth) and I welcome the opportunity to provide the following comments.

I note that the purpose of the mandatory data retention scheme is to ensure relevant evidence is available for serious criminal and national security investigations. The bodies authorised to access this information are composed of persons who are required to undergo rigorous training, security checks, are subject to strict confidentiality obligations, and have high-level security for data storage. Allowing civil litigants to access the retained data potentially places the data at much higher risk of loss or misuse. It may lead to increased risk of:

- enabling a person’s typical pattern of movements to be tracked, facilitating harassment and criminal offences that take advantage of predicting an individual’s location at a particular point in time;
- private information being released which may generate further conflict or humiliation for the person concerned (e.g., it is capable of revealing that a person is seeking medical treatment, or has commenced a new relationship);
- a person’s metadata being disclosed to the world at large, for example to forums on the internet that encourage digitally-enabled abuse; and
- eroding public confidence in the Government’s commitment to enacting the legislation as a serious crime and national security tool.

On the other hand, there are circumstances where the metadata could be capable of forming evidence in proceedings which are not criminal but have an important public interest purpose.
Such proceedings include:

1) proceedings where a person is at risk of serious harm, and such evidence would be essential to obtaining a protection order (eg child protection proceedings, and applications for domestic and family violence orders); and

2) proceedings related to criminal proceedings where there is a strong public interest aspect to the complaint (eg crimes victims compensation proceedings, and criminal property forfeiture proceedings).

It would be common for proceedings of this nature to involve a related police investigation where metadata could be accessed and assessed for relevance in a secure environment by impartial investigators. It would be preferable for civil litigants in these situations to seek to access such information, when it is essential, from police. However, in theory, it is possible for circumstances to arise where the information would be relevant and police have not had a related investigation, or have not sought the information as part of their investigation.

I am advised that the situations where subpoenas for such information would be necessary in litigation involving the Northern Territory Government are likely to be extremely rare, and that no general need for such an exemption has been identified. The Department of the Attorney-General and Justice was not able to recall any cases where such information was sought. However, it is possible that such information would be useful in pursuing a child protection process prior to police involvement, and there may be other stakeholders in the Northern Territory’s legal community that consider such information would be relevant.

If any exemptions are to be created, these should be subject to the following limitations:

- they are necessary to prevent some kind of serious harm or other clear and justifiable public policy objective, and have safeguards to prevent access to data that is not strictly needed for this purpose;

- they require consideration of whether providing access may place a person at risk of harm (including possible harassment or intimidation), and for this to be given due consideration prior to allowing access; and

- they are subject to appropriate procedures for ensuring the information is kept securely and subject to timeframes for disposal.

Additionally, it could be considered appropriate to create an exemption that allows a civil litigant to apply for their own metadata, as this would involve minimal risk and be consistent with a consent-based approach to handling personal information.

Thank you again for the opportunity to comment.

Yours sincerely

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25 JAN 2017