6 February 2017

Communications Security Branch
Attorney-General’s Department
3-5 National Circuit
Barton ACT 2600

Dear Sir or Madam,

RE: RETAINED DATA IN CIVIL PROCEEDINGS CONSULTATION

The National Children’s and Youth Law Centre at UNSW Law Faculty (NCYLC) is a leading, national community legal centre dedicated to defending and promoting the rights of children and young people under the age of 25. Each year, NCYLC provides legal advice, referrals, assistance and representation to approximately 2,000 young Australians. NCYLC also works to improve outcomes for children and young people through research, policy development and law reform.

The Cyberspace Law and Policy Community at UNSW Law Faculty (CLPC) provides a public interest focus on legal and policy issues arising from digital transactions in online and networked environments, through research and research training, education and advocacy. With collaborative multi-disciplinary research projects, it aims to explore emerging challenges in areas such as Internet governance, privacy and personal information security online, regulation of malware and cybercrime, online content regulation, and legal issues arising from threats to networked security.

NCYLC and CLPC welcome the opportunity to make a submission to the Minister for Communications and the Attorney-General’s review into access to telecommunications data in civil proceedings. We acknowledge that the revised close of submissions was on 27 January 2017. However, we respectfully request the Communications Security Branch to consider our submission.

NCYLC and CLPC respectfully submit that the Government should not remove the prohibition on the use or disclosure of telecommunications data in civil proceedings under s 280(1B) of the Telecommunications Act 1997 (Cth). The following points are made in support of this submission:
1. It is noted that the new telecommunications data retention system is a scheme of mass surveillance, the intrusiveness of which is justified on the grounds of protecting national security and law enforcement. Civil litigation was not acknowledged as a likely use of the data. There may be a public perception of impinging on citizen rights if Parliament now enables the use of this data for a quite unrelated purpose. There is no evidence base to suggest that the expanded use of telecommunications data for civil litigation will have a deterrence effect on breaches of civil laws, or that it is in the best interests of members of the public whose privacy will be intruded. Therefore, the removal of s 280(1B) will curtail rights to privacy in a way that is disproportionate to the alleged benefits of widening the data retention system.

2. Widening the disclosure and use of telecommunications data retained under the scheme for civil litigation purposes may have a disproportionate impact on children and young people in their private and family life. The following factors increase the impact on children and young people of using retained telecommunications ‘metadata’ (to use the popular term):
   2.1. In an increasingly digitized world, children and young people are amongst the largest users of mobile and electronic devices.
   2.2. It is likely to be more difficult for children and young people to foresee the consequences of their online activity. These consequences may manifest in unexpected or undisclosed contexts into the indefinite future.
   2.3. Children and young people are also often less aware than adults of their personal information security, privacy and confidentiality rights and interests, and thus less able to protect themselves.
   2.4. Given their greater vulnerability and higher risk profile, children and young people require extra respect and support for their personal information security and privacy. Exposure of their telecommunications metadata to use in civil proceedings compromises these interests.
   2.5. Although it is less common for children and young people to be involved in civil litigation, the removal of the s 280(1B) prohibition may increase the amount of civil cases where children and young people appear as parties, an outcome which is hardly desirable.

3. The scope of ‘civil proceedings’ is very broad, in terms of both potential parties and causes of action or subject matter. The use of telecommunications ‘metadata’ raises particular concerns in the context of family law proceedings where, for example, children and young people’s use patterns of mobile devices could become evidence in favour or against one or both of their parents or guardians in family disputes. This would be a disproportionate intrusion into their private life, and the revelation that their mobile device communications data could, without warning, be used against one or more of their family in such disputes would only add to the pressures of adolescence and family disputes.
4. The ‘metadata’ could also be used for defamation actions. This potentially exposes children and young people to greater risk of liability for participation in or sharing of unwise online commentary, in view of their prolific use of social media and networking services coupled with an underdeveloped understanding of the consequences of online activity and speech. In Australia there are no explicit constitutional or legal protections of free speech, or many other rights and freedoms protected overseas, so common online culture influences from other jurisdictions like the United States may leave young people unaware of the greater potential liability for defamation actions in Australia.

5. Another potential area of civil litigation where metadata may be relevant is claims of unauthorised online use of copyright material. This was not acknowledged as a likely purpose for establishing the metadata retention regime. Local entities and foreign litigants like the Motion Picture Association of America (MPAA) may seek to use civil access to telecommunications metadata to bypass the restraints which Australian civil courts have placed on their access to ISP customer data for allegations of online copyright infringement. This may also have a disproportionate impact on children and young people, who have less financial capacity to take advantage of the recent improvements in commercial access to some online content in Australia, or to pay the ‘Australia tax’ still evident in some online sectors, and who may thus more often resort to accessing materials which are the subject of claims of copyright infringement. In light of the vulnerability and higher risk profile of children and young people, we submit that the probative value of metadata in civil litigation cases is outweighed by the countervailing interest in protecting their privacy, personal information and wellbeing.

6. On a governance level, the regime for ‘metadata’ retention is already prone to ‘scope creep’, with a number of agencies having earlier been given access to data for reasons beyond the core anti-terror and law enforcement justifications. Enabling the use of telecommunications data in civil proceedings would be another endorsement of policy by incremental measures rather than by robust long term analysis. It is likely to introduce new risks or costs for data subjects that were not contemplated in the original design and public policy discussions, and lead to continued incremental expansion of the use of this data for purposes unrelated to those originally used to justify its intrusiveness.

For these reasons we submit that the retained telecommunications data should not be exposed to use for civil proceedings.
Thank you for your consideration.

Yours faithfully

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