

To the Attorney-General

Please take the below as a submission stating why access to retained data in civil proceedings should not be permissible.

In my opinion, as an Australian citizen, the government should sustain the current position of the Telecommunications Act; of prohibiting disclosure of data collected under data retention obligations in connection with civil proceedings.

When the data retention scheme was introduced, it was widely publicised that it was only for the purpose of aiding law enforcement agencies on matters of serious crime, such as terrorism, child pornography, and human trafficking (*George Brandis, ABC's Q&A, 3rd November 2014*). There was an understandable level of concern at the list of organisations that would have access to this data, including the RSPCA and Australia Post, as these organisations are not involved in investigating the abovementioned 'serious crimes'.

In order to address this concern, the list of authorised organisations was reduced to around two-dozen, and only to those who had a need to use the data in actual and serious criminal cases. The Australian Labor Party further insisted on a requirement for a warrant for data on journalists.

It appears inconsistent to now propose that the data become available for use in civil cases.

Electronic Frontiers Australia (EFA) recently reported that the FAQ on the Attorney-General's Department web site has had any references removed relating to the exclusion of data collected under data retention obligations being used in copyright enforcement.

As touched on already, the remit of the data retention scheme was for assisting in serious criminal cases, George Brandis explicitly excluded copyright and civil wrong from the data retention scheme in a statement on Q&A ABC on 3 November 2014.

In a much more detailed and firm stance, the Australian Federal Police Commissioner, 4 days earlier, outlined that the amendments were never about civil cases.

"I want to be very clear on this. The Government's introducing this to address vital needs of national security and law enforcement, not copyright. Copyright is essentially a civil matter. This is about criminal matters. So we will be using it for criminal matters. The Telecommunications Intercept Act makes it very clear that we can only do this to enforce criminal laws. Copyright breaches are civil wrongs and that's not what we're interested in."

Australian Federal Police Commissioner Andrew Colvin, ABC Radio's "AM", 31st October 2014

Based on the promises made by various departments in order to allow the proposed amendments to the Telecommunications Intercept Act to pass, it behoves you to preclude access in civil cases.

There is perception that the film industry is exerting pressure to allow such access in civil cases, so that they might discover information on copyright infringers.

According to the Creative Content Australia report, 2015 Research – Australian Piracy Behaviours 2015 Wave 7 Adults, there was a decline in "piracy" from 2014 to 2015, with one-third of those who pirated less attributing their decline to the availability of material via legal means.

All indications are that the solution to film copyright infringement is an increase in availability, not in prosecution.

When law enforcement organisation access data as evidence to an investigation, there exists a strict duty of care, including privacy guidelines, and chain of custody.

If the data becomes available for use in civil cases, it could become part of the court record. Further, the data would be made available to a regular citizen, who is not subject to a chain of custody.

The privacy of someone's data could be at risk of public disclosure through the availability of that data in civil cases, and while the Privacy Act may apply, there is no privacy tort in Australia.

It distresses me to consider that this consultation was announced on 23 December, with submissions due by 12 January (now extended to 27 January). It is common practice in Government, for displeasing announcements to be made during the Christmas and New Year's break, and for submissions deadlines to be placed inconveniently close to the time people return from their holidays.

I must assume that spokespeople of Government departments are familiar with this practice, rather than ignorant of it, and therefore conclude that your department intended this to fly under the radar.

Notwithstanding the fact that the data retention scheme was specifically intended only for national security and law enforcement purposes, the dangers of allowing civil case access are expansive and irrevocable.

It is my contention that information collected under the data retention scheme should only be accessed for investigations of the most serious crimes within the confines of existing, rigorous evidence handling processes, and never within a civil context.

Given the scheme already meets criminal case requirements as it stands, I call upon you and your department to make sure the scheme also serves the best interest of the people, and their civil liberties.

Access to retained data in civil proceedings should not be permissible

Regards
Amanda Leatherday