The legislative prohibition contained in section 280 of the Telecommunications Act 1997 should continue.

The scheme implemented by the Federal Government requires telecommunications providers to maintain records they would not otherwise retain. The stated purpose of such retention was to assist in the prevention of terrorist and other similar acts by enabling a limited number of authorities to access the data in appropriate circumstances.

As this is data that would not otherwise exist, civil litigants should not benefit from a legislated requirement designed to prevent the commission of a very serious crime or to find the offenders if such a crime were tragically committed.

The counter argument is that it is superficially attractive in the interests of justice to allow such records to be subject to subpoena in civil proceedings either as of right or subject to the leave of the Court.

The metadata could provide prima facie evidence of the location of a person at a particular time or the times and extent of communications between certain persons. Such information might assist a litigant to prove or disprove an allegation or allow cross-examination. The metadata obtained however would also contain much information that would be entirely irrelevant to the claim such as different locations or communications with different persons or access to websites.

Given the risks of release of personally embarrassing but irrelevant material, safeguards are certainly required.

Leave of the Court before issue of a subpoena ought therefore be a minimum requirement.

A lot of civil litigation involves small claims dealt with in a Tribunal or court of summary jurisdiction. Such matters are not serious enough to warrant the general prohibition being lifted and the decision-makers/judicial officers concerned are, respectfully, not equipped to balance the serious conflicting public policy interests involved.

It is not enough that the subject of the metadata request consent. Such consent would not be sufficiently well informed as the extent of the metadata would be unknown to the person.

There is enough concern about the misuse of such data or the general privacy implications that leave could only be sought in a Court of superior jurisdiction regardless of the value of the claim. This might fragment a proceeding but inconvenience and delay would mean the litigant seeking the information would be dissuaded from seeking leave unless it really were absolutely critical to the case they wished to establish or disprove.

There ought be a general legislative requirement that leave ought not be granted unless the Court was satisfied that other methods of obtaining the required information were not possible or so impractical as to impose an unreasonable burden on a litigant and also that the allegations made in the claim for which the information was required were sufficiently precise that the data could alter the findings of fact in the proceeding.

Upon the data being supplied, inspection by the civil litigants or their lawyers would not be allowed but the Court would appoint a person agreed by the parties or otherwise selected by

the Court from a list approved by the Attorney-General to peruse the data for information that was relevant to the claim based on the instructions of the presiding judicial officer.

While I remain convinced that the prohibition should remain, if it were to be removed, as a minimum, the protections set out above should be implemented.