

Mr Brian Kelleher
Assistant Secretary
Infrastructure Security and Resilience Branch
Department of Communications and the Arts

Ms Anne Sheehan
Assistant Secretary
Communications Security Branch
Attorney-General's Department

Dear Mr Kelleher and Ms Sheehan,

**Re: Commissioner for Privacy and Data Protection (Victoria) –
Access to retained data in civil proceedings**

Thank you for your invitation to make a submission in response to the consultation paper regarding the review of access to retained telecommunications data by parties to civil proceedings. We welcome the opportunity to provide comment on this important issue with regard to the information privacy of Victorians and all Australians.

The mandatory data retention scheme, established by the *Telecommunications (Interception and Access) Act 1979*, is intended to ensure that Australia's law enforcement and security agencies are lawfully able to access data to aid criminal investigations of a serious nature, including matters of national security.¹ Following its *Inquiry into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) recommended that civil litigants be prohibited from accessing telecommunications data that is retained for the sole purpose of complying with the mandatory data retention scheme.

In our submission to the PJCIS, we expressed serious concerns about a mandatory data retention scheme of the nature proposed. We did not support the introduction of the scheme at that time, and we do not support a broadening of its purpose to enable access to telecommunications data by litigants in civil proceedings.

A central pillar of privacy law is that personal information collected for one purpose should not subsequently be used for a secondary purpose. The 'purpose limitation' principle grants individuals a degree of control over their own information, where the intended use of the information is communicated to those individuals. A broadening of the original intended purpose of the data retention scheme would serve to further undermine the fundamental right to privacy.

Privacy is not an absolute right, but must be balanced against other countervailing public interests, such as the right to life or safety, and even national security. In some cases, it may be appropriate for a limitation to be placed on the right to privacy where it is considered **necessary and proportionate**. As it is being implemented in its current form, the data retention scheme fails to meet this test; any expansion of this scheme would inevitably also fail in necessity and proportionality. The blanket, indiscriminate retention of metadata is in and of itself a serious interference with privacy. This view is shared by many others who made submissions to the PJCIS,

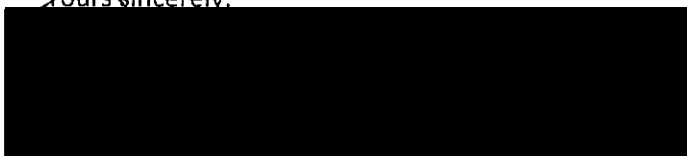
¹ Attorney-General's Department, 'Data retention', accessed 9 January 2017, <https://www.ag.gov.au/dataretention>.

as well as by the European Court of Justice in its decision to overturn the EU Data Retention Directive.²

The consultation paper refers to a recommendation made by the PJCIS – that were a prohibition on access to telecommunications data by civil litigants to be enacted, a regulation-making power be introduced to enable ‘appropriate exclusions’ to the proscription. Given the extremely invasive nature of the data retention scheme, access to individuals’ metadata should only be granted in the most serious of circumstances. It is difficult to conceive of a civil matter of such consequence as to necessitate access to what is effectively a comprehensive surveillance system.

Once again, thank you for the opportunity to make a submission to this review. We look forward to watching with interest as this discussion progresses.

Yours sincerely,



DAVID WATTS

Commissioner for Privacy and Data Protection

² Court of Justice of the European Union Press Release No 54/14, *The Court of Justice declares the Data Retention Directive to be invalid*, 8 April 2014.