

To whom it may concern:

I am writing to respond to *Consultation Paper – Access to Retained Data in Civil Proceedings*.

I would urge extreme caution in opening access to retained data in any type of civil proceeding, as it will be difficult or impossible to effectively balance the rights of the defendant and litigant, without placing an unreasonable burden on already over-burdened courts. For practical reasons, it's likely that in many cases that either the defendant's rights will be infringed, or alternatively that the litigant's questions will go unanswered. There is a very small likelihood of being able to provide only the information required by the litigant, without providing irrelevant data which infringes the defendant's rights. This will add cost to civil proceedings without any guarantee of a better outcome.

Practical obstacles to providing access to retained data in civil proceedings

It's necessary to balance the right to privacy against the rights that have been allegedly infringed in the civil proceeding. Providing access to civil litigants is very different to providing access to trusted law enforcement officers. Providing unfettered access to a civil litigant, regardless of the relevance to the case at hand, would be a clear breach of the defendant's rights. On the other hand, if the retained data is first to be filtered to include only relevant data, then a) how can this filtering be affected, b) who will conduct the filtering and c) who will bear the cost of this filtering?

This filtering could be manual or automated. Manual filtering by the courts would not, I assume, be workable. Manual filtering by a service provider would also be problematic, both for the privacy of the defendant, and due to the costs born by the service provider.

Automated filtering is likely the only option, but will likely not satisfy either litigant or defendant. Designing an automated system which can answer the questions litigants have while protecting the rights of the defendant would be difficult. A system guaranteed to protect the defendant's rights - only returning communication with a set of endpoints provided by the litigant and approved by the court - would likely not satisfy litigants. On the other hand, it would be extremely difficult to guarantee that a more advanced system - perhaps using machine learning or AI - would act in a predictable manner, and would not divulge irrelevant information.

In either case, building such an automated filtering system would incur costs. Who would bear those costs? Who would develop the system? If the system were to be developed by the service provider, who would certify that it was working correctly?

Criteria that ought to be met before any access

If the above challenges can be overcome, a framework should be put in place to clearly lay out what can be requested:

- a) The litigant ought to have a strong case, to prevent "fishing expeditions".
- b) The litigant ought to provide, and justify, and finite lists of communication end points they are interested in.
- c) A court ought to approve that list of communication end points.

- d) Any disclosure of retained data should be filtered to include only the requested, approved end points.
- e) The defendant ought to have an opportunity to review and challenge whether the all data provided is truly within the scope approved by the court, before it is released to the litigant.

Access should definitely not be granted in copyright cases

With special regard to civil litigants in intellectual property cases, I note that the Productivity Commission has recently concluded that our IP laws "[...] are skewed too far in favour of copyright owners to the detriment of consumers and intermediate users." Until IP laws are amended to achieve balance, such that Australian consumers are satisfied that their rights are protected, access to retained data should not be granted in these cases.

Regards

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