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December 27, 2016

Retained data in civil proceedings consultation  
Communications Security Branch  
Attorney-General's Department  
3-5 National Circuit  
BARTON, ACT 2600

To the Attorney-General's Department and the Department of Communications and the Arts,

I write in response to the **Access to Retained Data in Civil Proceedings** consultation paper. The consultation paper puts three specific questions, which I address below.

**1. In what circumstances do parties to civil proceedings currently request access to telecommunications data in the data set outlined in section 187AA of the TIA Act?**

I am not a service provider thus cannot answer this question directly.

Nevertheless, if particular kinds of civil proceedings have given rise to requests (whether a large number or small) for data held by service providers solely for the purpose of complying with the TIA Act, that *does not imply to any extent* that disclosures in connection with such kinds of civil proceedings *should* be allowed. Put another way: exclusions for particular kinds of civil proceedings from the prohibition coming into force following the implementation phase of the Act *must not* be granted merely because requests for data and subsequent disclosure in connection with those kinds of civil proceedings occurred during the implementation phase.

**2. What, if any, impact would there be on civil proceedings if parties were unable to access the telecommunications data set as outlined in section 187AA of the TIA Act?**

Prior to the commencement of the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* on 13 April 2015, the telecommunications data outlined in section 187AA of the TIA Act either a) were not available because they were not retained by the service provider, or b) were possibly available (subject to whatever laws or regulations may apply) to parties to civil proceedings because these data (or a subset thereof) *were* collected and retained by the service provider for a purpose other than complying with the Act, thus were not subject to the prohibition of disclosure established by section 280(1B) of the *Telecommunications Act 1997* (as amended).

During the *implementation phase* of the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*, disclosure by service providers

of the telecommunications data outlined in section 187AA of the TIA Act is *not prohibited* by section 280(1B) (due to section 280(1C)(c)). The implementation phase is the period of 13 October 2015–12 April 2017 (18 months). For some or all of the implementation phase many service providers have operated under an approved *Data Retention Implementation Plan* while they develop capability to meet their data retention obligations under the TIA Act.

Given the brief time since the implementation phase began (less than 18 months) and the fact that some service providers (especially large providers) have not operated with a data retention and disclosure capability for part or most of the implementation phase, it is not likely that parties to civil proceedings have come to rely on access to the telecommunications data set as outlined in section 187AA of the TIA Act. Therefore the impact of a prohibition on the disclosure of such data is negligible.

**3. Are there particular kinds of civil proceedings or circumstances in which the prohibition in section 280(1B) of the Telecommunications Act 1997 should not apply?**

No.

The *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* is a significant incursion on civil liberties. That such data as outlined in section 187AA of the TIA Act is required by law to be collected and retained by service providers is a grave risk to all Australians and all people using Australian service providers. Expanding lawful access to this data increases the risk that data will be erroneously or unlawfully disclosed (by service providers or by parties to whom the data were lawfully disclosed), misappropriated, misinterpreted and used with malicious intent. Given the kinds of data retained and the technical nature of Internet communications, the capacity for such data to provide exculpatory evidence in civil proceedings is small compared with the risk of misinterpretation or misuse of the data and subsequent harm to the person or persons who are the subject of the data, and/or related persons.

The prohibitions on access to data retained by service providers for the purpose of complying with the TIA Act, which come into force on 13 April 2017, must not be weakened or limited in any way.

Although the question is not asked by this discussion paper, I urge the Attorney-General and the whole Parliament of Australia to repeal the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*.

Sincerely,

Fraser Tweedale