



Submission to the Inquiry into Access to Telecommunications Data in Civil Proceedings

Addressed to:

Retained data in civil proceedings consultation

Communications Security Branch

Attorney-General's Department

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Contributors

This submission was prepared by Andrea Leong, Andrea Finno, Eve Slavich and James Jansson on behalf of the Science Party.

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Confidentiality

This submission does not need to be kept confidential and may be made public.

Summary

Mandatory telecommunications metadata retention was implemented in Australia in the face of evidence from Germany that it would be ineffective with regards to its intended purpose, i.e. investigating serious crimes and identifying threats to national security. Further, similar legislation was already being repealed or disallowed around the world due to its impingement on civil liberties without any significant benefit to law enforcement¹.

If the data retention scheme is to remain in place, we strongly oppose the use of data retained under the scheme in civil cases.

Recommendations

- Repeal the Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015. However, if the Act is to remain, then:
- Amend the Act to prohibit data retained solely for the purposes of the data retention scheme from being used for civil proceedings, with no provision in the amendment for exceptions to be made by regulation; and
- Reinststate a public assurance on the Attorney-General's website that data collected under the Act will never be used in civil cases.

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?

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?

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.

¹Cyrus Farivar, "EU high court strikes down metadata collection law". 4 September 2014. Accessed 27 January 2017. <https://arstechnica.com/tech-policy/2014/04/eu-high-court-strikes-down-metadata-collection-law/>

Serious crimes vs. civil proceedings

The introductory text for this parliamentary submission stated:

"The [Parliamentary Joint Committee on Intelligence and Security] considered that as the data retention regime was established specifically for law enforcement and national security purposes, as a general principle it would be inappropriate for data retained under the scheme to be drawn on as a new source of evidence in civil proceedings."

The justification for extraordinary powers to retain and search metadata without a warrant is that this will prevent the occurrence of extraordinary crimes. The Science Party believes there are substantial impacts on freedom and democracy in having the government record all actions by all people, regardless of criminal history, that were not properly considered when creating these laws. It is highly inappropriate for the government to have access to political opponents' records and their every action on the Internet. However, if we accept the premise that this monitoring is needed to prevent the worst of crimes (such as terrorism and paedophilia), then the Science Party agrees with the quoted text. We strongly oppose the use of metadata obtained via a blanket retention scheme for anything other than its intended purpose.

We support the amendment to section 280 of the Telecommunications Act 1997, to prohibit data retained solely for the purposes of the data retention scheme from being used for civil proceedings.

We recommend against including an allowance for exceptions to be made to this amendment. Such an allowance would erode public confidence in the Australian government's intentions.

Public Assurances

It is interesting to note that the website of the Attorney-General's Department amended its Frequently Asked Questions on 7 December 2016, to remove the following:

"Will data retention be used for copyright enforcement?"

The Telecommunications (Interception and Access) Act 1979 only allows access for limited purposes, such as criminal law enforcement matters. Breach of copyright is generally a civil law wrong. The Act will preclude access to telecommunications data retained solely for the purpose of complying with the mandatory data retention scheme for the purposes of civil litigation."

The removal of this point was confirmed by the Attorney-General's department to Electronic Frontiers Australia².

²Online. Accessed 23 January 2017.
<https://www.efa.org.au/main/wp-content/uploads/2017/01/AGD-copyright-FAQ-email-response.png>

We recommend that text be reintroduced to said web page to solidify the original intent of the law in that data collected to comply with the metadata retention scheme will never be used in civil cases.

To make exceptions for civil cases to access the retained data devalues the severity of the crimes for which the retention scheme was originally constructed. Civil cases should never be seen as equivalent to terrorism.

Further to our recommendations in this document **the Science Party advocates for the total repeal of the Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015** as we believe the scheme is counter to civil liberties.