Submission to the Attorney-General's Department on Access to telecommunications data in civil proceedings

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I begin by thanking the Attorney-General's Department and the Department of Communications and the Arts for the invitation to submit my thoughts on the review into access to telecommunications data and metadata in civil proceedings. The consultation paper[1] that describes further information on the review clearly sets out the goals of this review. That is, the goal of this review appears to be to find supporting evidence and anecdotes that allowing civil proceedings to access telecommunications data, including data retained under the mandatory data retention regime. The three questions raised by the department ask, in order, for information on who wants to access data, why they think it would be useful to access said data in civil proceedings, and what sorts of proceedings should be allowed to access this data.

I note that there is no mention of privacy in these leading questions. No mention of liberty, of freedoms, of the right to your own data.

I am unaware of the timeline for this review, but I can only assume that this is to be the only time where submissions from the public are accepted. It is telling, then, that the very guidelines for the review ask three specific questions that would promote the use of private telecommunications data in civil proceedings, and zero that look for input from stakeholders with privacy concerns viz. the general public.

With this in mind, I choose to ignore the questions posed, and instead use my submission to point out the flaws in the proposal to use retained data in civil proceedings.

The case for the existing data retention regime

When discussing the existing data retention regime, the Attorney-General, Senator the Hon George Brandis QC clearly stated[2] that

> Civil wrongs have nothing to do with this scheme.

Instead, Brandis said that the

> retention regime applies only to the most serious crime, to terrorism, to

[1] Attorney-General's Department, *Consulation paper - Access to retained data in civil proceedings* <https://www.ag.gov.au/Consultations/Pages/Access-to-telecommunications-data-in-civil-proceedings.aspx>.

[2] *National Security: Finding A Balance* , (3 November 2014) <http://www.abc.net.au/tv/qanda/txt/s4096883.htm>.

> international and transnational organised crime, to pedophilia . . . only the highest levels of crime.

Brandis would affirm these claims again in January 2015[3]. Former Prime Minster Tony Abbott[4] also joined in, asking us to "think of the children", while AFP Commissioner Andrew Colvin said[5] that

> The Government's introducing this to address vital needs of national security and law enforcement, not copyright

Two years ago the rhetoric was in full swing, claiming that privacy issues were not a concern as retained data would not be available to civil proceedings. Only months later, on the 3rd of March 2015, the Government accepted the recommendations of the Parliamentary Joint Committee on Intelligence and Security, which the consultation paper uses as the sole reason for this review. The speed of this back flip is remarkable. The only argument put forward by the government for privacy was that retained data would only be used for "the most serious crime", "terrorism" and other scary ideas. To paraphrase President Bartlett, I'm aiming to produce recommendations for the review here, so my recommendation is this.

Recommendation 1: Return to every privacy question relating to the data retention regime that was brushed off by saying that the data won't be used in civil proceedings, and answer them without resorting to fear mongering or the now-invalid "data won't be used in civil proceedings" excuse.

Is retained data about a person?

According to a recent Federal Court ruling[6], data retained under the retention regime is not necessarily "about a person" and therefore the Australian Privacy Principles[7] do not necessarily apply. I note that I believe this is the Federal Court being (rightly) picky about the wording. As retained data does not specifically include a name, but only an account identifier, the Federal Court says that the Australian Privacy Principles need

[3] Claire Reilly, *Brandis: Data retention an "urgent priority" after Paris terror attacks* (12 January 2015) <https://www.cnet.com/au/news/brandis-data-retention-an-urgent-priority-after-paris-terror-attacks/>.

[4] Naomi Woodley, *Metadata scheme to cost under $400m per year, says Tony Abbott* (18 February 2015) <http://www.abc.net.au/worldtoday/content/2015/s4182282.htm>.

[5] Will Ockenden, *Concerns metadata trove will be used for many civil cases* (31 October 2014) <http://www.abc.net.au/pm/content/2014/s4119217.htm>.

[6] *Privacy Commissioner v Telstra Corporation Limited* (Unreported, FCAFC, 19 January 2017).

[7] *Privacy Act 1988* (Cth).

not apply. If this is so, then how can we ask whether retained data can be used in civil proceedings?

The question of whether telecommunications data is personal information is not new. In the US, judges have declared that IP addresses do not identify a person[8]. However, in the EU regulators have said that IP addresses are personal data[9]. The Australian government cannot have its cake and eat it too. Why should retained data be allowed as evidence in civil cases against a person, when the same person would not even be allowed to view their own retained data without the case against them. This is a problem which needs to be clarified before the government takes any further steps to minimise the privacy of Australians.

Recommendation 2: Clarify explicitly whether retained data is personal information or not.

- If retained data is not personal information, legislation should clearly state that there is no link, legal or otherwise, between account holder and retained data.
- If, however, the government thinks that retained data can relate to a specific person or group of people, then they should clearly stipulate that retained data is personal information, and therefore the Australian Privacy Principles must apply and people should be allowed to see the data retained on them.

The mis-use of civil proceedings for mud slinging

When police access our retained data, we expect that the data will be used only in the pursuit of justice, and will not be leaked anywhere. However, civil proceedings will open up access to said data to far more people. In particularly emotional cases (including divorce cases), even the knowledge that ones data is open to the other party can cause distress. In a divorce settlement, a potentially violent partner could very well have access to the list of people their partner was in close contact with. This despite such a list not being relevant to the trial at hand.

Access to retained data can, and has been shown to open up the whole life of the

[8]Kevin Parrish, *An IP Address Does Not Identify a Person, Rules Judge* (6 May 2012) <http://www.tomshardware.com/news/torrent-download-Piracy-IP-address-porn,15548.html>Ms. Smith, *IP address does not identify a person, judge tells copyright troll in BitTorrent case* (24 March 2014) <http://www.networkworld.com/article/2226598/microsoft-subnet/ip-address-does-not-identify-a-person--judge-tells-copyright-troll-in-bittorrent-ca.html>.

[9]Aoife White, *IP Addresses Are Personal Data, E.U. Regulator Says* (22 January 2008) <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/21/AR2008012101340.html>.

person observed, both in Germany[10] and in Australia[11]. Giving such information regarding a person to a party litigating against them is horrifying. Not only would this totally undermine the privacy of the individual, it could make the courts far weaker. Settlement offers that threaten to "go public" on a persons personal activities are not new[12], but neither are they wide-spread. However, if litigators are allowed to see the complete retained data of an individual, what are the chances of them finding some dirty laundry to air?

Recommendation 3: The government must ensure that any access to retained data in civil proceedings is strictly limited only to evidence which is relevant to the trial. Such restrictions, I assume, will include having an objective and neutral third party decide which data is relevant, and the costs of establishing and running such a system must be included in any proposal to extend access to retained data.

Why aren't Members of Parliament held to similar standards?

The use of retained telecommunications data in civil proceedings opens up a chapter in our society where individuals will have fairly detailed information about their telecommunications potentially used in courts against them. However some of our representatives in government, including current Prime Minister Turnbull[13] and Attorney-General Brandis[14], despite nominally working for the public, have refused to release ministerial diaries to the public.

Who a minister speaks with, and an overarching topic for said discussion, are some of the most basic pieces of information a public could have regarding what our representatives are doing. We the public have the job of voting for our representatives. If a representative is spending 38 hours a week removing regulations on corporations in the hopes of a golden parachute from politics, that is information that is vital to the

[10] *Tell-all telephone | Data Protection | Digital | ZEIT ONLINE* , (2011) <http://www.zeit.de/datenschutz/malte-spitz-data-retention>.

[11] Will Ockenden, *How your phone tracks your every move* (16 August 2015) <http://www.abc.net.au/news/2015-08-16/metadata-retention-privacy-phone-will-ockenden/6694152>.

[12] Richard Abowitz, *The Porn Piracy Crackdown: How the Studios Are Suing Thousands* (2 April 2011) <http://www.thedailybeast.com/articles/2011/04/02/the-porn-piracy-crackdown-how-the-studios-are-suing-thousands.html>.

[13] *Turnbull withholds diary from day-one as PM* , (23 January 2017) <http://www.skynews.com.au/news/top-stories/2017/01/23/turnbull-withholds-diary-from-day-one-as-pm.html>.

[14] Rick Snell, *Brandis diaries case shows how Freedom of Information has been deliberately neglected* (20 January 2017) <https://theconversation.com/brandis-diaries-case-shows-how-freedom-of-information-has-been-deliberately-neglected-64962>.

public. As often mis-attributed to Jefferson[15],

> an educated citizenry is a vital requisite for our survival as a free people.

In other words, how can Australians possibly be properly informed during elections, when our representatives hide the manner in which they represent us? And why is it that this proposal, and many like it, always erode the privacy of the general populace but never dare shine a light on what our representatives do?

Recommendation 4: Explicitly include ministerial diaries as retained data, and allow voters to see what their representatives are doing on their behalf by giving voters access to retained data of their representatives. If this sounds like an invasion of privacy, maybe reconsider the idea of data retention.

[15] *An educated citizenry is a vital requisite for our survival as a free people (Spurious Quotation) | Thomas Jefferson's Monticello*, <https://www.monticello.org/site/jefferson/educated-citizenry-vital-requisite-our-survival-free-people-spurious-quotation>.