Human Rights
Law Centre Ltd
ABN 31 117 719 267

Level 17, 461 Bourke Street
Melbourne VIC 3000
Australia

P: + 61 3 8636 4450
F: + 61 3 8636 4455
admin@hrlc.org.au
www.hrlc.org.au

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

By email: CommunicationsSecurity@ag.gov.au

25 January 2017

To whom it may concern

Consultation on Access to Retained Data in Civil Proceedings

Thank you for the opportunity to participate in the Attorney-General's Department's Inquiry into Access to Telecommunications Data in Civil Proceedings.

The inquiry concerns the extent to which parties to civil proceedings might be authorised to access the telecommunications data set outlined in s 187AA of the *Telecommunications (Interception and Access) Act* 1979 (Cth) (**metadata**) and whether the prohibition on disclosing data retained solely for the purposes of the mandatory metadata retention scheme might be lifted in certain types of proceedings.

The current metadata retention scheme violates rights to privacy and expression

There is a preliminary issue that should inform the AGD's review. Since the amendments to the *Telecommunications (Interception and Access) Act* in 2015, Australia's metadata retention laws have unreasonably infringed on Australians' rights to privacy and freedom of expression by:

1. Providing for the indiscriminate collection of metadata of all people to be retained for a period of two years; and
2. Allowing law enforcement to access to that metadata:
    a. without a warrant or any prior independent authorisation (with the exception of journalists' metadata);
    b. without a requirement that access is for the purpose of fighting serious crime; and
    c. without a requirement that a person be informed when their metadata is accessed.

The first problem is the indiscriminate collection and retention of all metadata of all people. This type of mass data collection creates a "honeypot" of information that is vulnerable to abuse and is a serious invasion of privacy. The European Court of Justice has explained why:

> "That data, taken as a whole, is liable to allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as everyday habits, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them. In particular, that data provides the means…of establishing a profile of the individuals concerned, information that is no less sensitive, having regard to the right to privacy, than the actual content of communications." [citations omitted][1]

To be consistent with privacy rights, any law concerning retention of metadata must limit the categories of data to be retained, the means of communication affected, the persons concerned and the retention period adopted.[2]

Australia's retention of all data for two years is far longer than comparable jurisdictions.[3] The Parliamentary Joint Committee on Human Rights said the blanket two year data retention is not proportionate way to achieve the ends of the legislation, especially given that the long retention period applies to all data and not just metadata sought in relation to really serious crimes.[4]

The second problem is how the retained data is accessed.

The current regime effectively allows law enforcement bodies to watch everybody, all of the time, without them knowing.[5] The European Court of Justice held that this type of regime is likely to cause people to feel that their private lives are the subject of constant surveillance.[6] It said that the impact of such a scheme could affect the way that people use electronic communications, and, consequently, the exercise of their freedom of expression.[7]

The current metadata retention scheme is a serious infringement of Australians' rights and requires immediate review and amendment to allow for limitation of the regime and for proper safeguards to be put in place.

Extending access to retained data in civil proceedings

Given that the existing regime for accessing metadata is inadequate to protect human rights, civil proceedings are unlikely to constitute a sufficient reason to justify intrusions into the right to privacy

---

[1] *Tele2 Sverige AB v Post-och telestyrelsen; Secretary of State for the Home Department v Watson and others* (C-203/15 and C-698/15), EU:C:2016:970, [99].
[2] [108].
[3] See Parliamentary Joint Committee on Human Rights report on Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, [1.188].
[4] Ibid [1.190].
[5] See comments of Edward Snowden, Oliver Milman, "Edward Snowden says Australia's new data retention laws are dangerous," The Guardian, 9 May 2015 https://www.theguardian.com/us-news/2015/may/09/edward-snowden-says-australias-new-data-retention-laws-are-dangerous.
[6] *Tele2 Sverige AB v Post-och telestyrelsen; Secretary of State for the Home Department v Watson and others* (C-203/15 and C-698/15), EU:C:2016:970, [100].
[7] Ibid.

and free speech. Comparative jurisprudence suggests that intrusions will only be justified for the purposes of detention, investigation and prosecution of serious crimes.[8]

The Consultation Paper does not indicate any particular kinds of civil proceedings in which the Attorney-General is contemplating providing access to metadata. It is difficult to provide comments in the absence of a specific proposal.

It may be that there should be consideration of access in some types of civil litigation, such as civil child protection investigations or international child abduction matters in the Family Court.

Equally, there are dangers in these proposals. It is foreseeable that access to retained metadata in civil proceedings could place some litigants at risk of serious harm. Victims of family violence, for example, could feel extremely exposed if the perpetrator were able to obtain metadata that, as the European Court said, can reveal everyday habits, places of residence and social environments.

If the government wishes to such allow access in particular types of civil litigation, it is critical that those specific amendments should be the subject of considerable public debate and discussion.

Given that there are no specific proposals to reform access in particular types of civil proceedings, our view is that access should continue to be prohibited.

Thank you for the opportunity to provide a submission.

Yours sincerely

Emily Howie

Director of Advocacy and Research

[8] *Digital Rights Ireland and Others* (C-293/12 and C-594/12), EU:C:2014:238.