

Assistant Secretary
Communications Security Branch
Attorney-General's Department

Assistant Secretary
Infrastructure Security and Resilience Branch
Department of Communications and the Arts

Via email to: CommunicationsSecurity@ag.gov.au

27th January 2017

Re: *Access to telecommunications data in civil proceedings.*

Dear Assistant Secretaries,

Electronic Frontiers Australia (EFA) appreciates the opportunity to provide this submission in relation to this consultation. EFA's submission is contained in the following pages. EFA is happy to provide further information, if required.

About EFA

Established in January 1994, EFA is a national, membership-based non-profit organisation representing Internet users concerned with digital freedoms and rights.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties in the digital context. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of digital communications systems.

Yours sincerely,



Jon Lawrence - Executive Officer, on behalf of EFA's Policy Team

Submission: Access to Retained Telecommunications Data in Civil Proceedings

1. Introduction

EFA has been a long-standing opponent of mandatory telecommunications data retention. EFA remains unconvinced of the alleged benefits of this scheme and believes that it represents a disproportionate and unnecessary intrusion into the privacy of all Australians.

EFA does however accept that the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, introduced necessary and significant restrictions and protections relating to this data.

Specifically, EFA welcomes the restricted list of agencies that are now able to access retained telecommunications data and the fact that, to date, this restricted list has not been expanded. EFA also notes that the ACMA has reported that this has already resulted in a very welcome reduction in the number of data access requests.ⁱ

EFA also notes that the legislation for the first time introduced an express provision that applies the Privacy Act to the retention of telecommunications data.

Rather than giving consideration to the widening of access to retained telecommunications data, EFA believes the government should consider further limiting access.

Specifically, EFA believes that all access to retained telecommunications data should require a warrant in all cases.

2. Scheduling of this consultation

EFA is concerned by the scheduling of this consultation. Its announcement just two days prior to Christmas with an original submission deadline of 13th January, is consistent with a deliberate attempt to avoid public awareness of this consultation and to minimise the number of submissions received. As a result, even if this was not the intention of the scheduling decision, this has resulted in significant scepticism about the government's motives and further undermined public trust.

3. Impact on the effective operation of the civil justice system

As noted in the Consultation Paper, the primary justification for considering exceptions to the prohibition on using data that is retained only due to the requirements of the mandatory data retention scheme for civil cases, is:

...to mitigate the risk that restricting parties to civil proceedings' access to such data could adversely impact the effective operation of the civil justice system, or the rights or interests of parties to civil proceedings.

As the data in question has not been retained prior to the implementation of the mandatory data retention regime, it has therefore never been available to the civil justice system. As such, continuing with the prohibition on using such data for civil cases would simply maintain the status quo, and would therefore, by definition, not adversely or otherwise impact the effective operation of the civil justice system, or the rights or interests of parties to civil proceedings.

4. Australian Privacy Principle #3

Australian Privacy Principle #3, incorporated in the Privacy Act 1988 (Cth) states that:

"the entity must not collect personal information (other than sensitive information) unless the information is reasonably necessary for one or more of the entity's functions or activities."

The data that is the subject of this consultation - that is data that is only being retained due to the requirements of the mandatory data retention scheme - is therefore being retained in direct contravention of this principle.

EFA of course understands that there are broad exemptions from these rules that apply to law enforcement and intelligence agencies, and that those exemptions are the basis on which the mandatory data retention scheme has been built.

While those exemptions may be justifiable in relation to law enforcement and intelligence activities, they most certainly are not in relation to civil cases.

It is therefore clear that allowing access to any such retained data for civil cases would represent a serious additional undermining of the privacy rights of all Australians.

5. Mandatory data breach notification legislation

EFA notes that this consultation has been initiated in response to a recommendation (recommendation 23) of the Parliamentary Joint Committee on Intelligence and Security, in its 2014 reportⁱⁱ about the mandatory data retention legislation.

In that report, the Committee also made the following recommendation:

Recommendation 38: The Committee recommends introduction of a mandatory data breach notification scheme by the end of 2015.

Though the government committed to introduce such a scheme by the end of 2015ⁱⁱⁱ, and even though legislation to do so has been presented to the parliament on at least three previous occasions, this remains outstanding.

The Privacy Amendment (Notifiable Data Breaches) Bill 2016 that was introduced into the House of Representatives in October 2016 unfortunately involves the introduction of a significant element of discretion about reporting for organisations suffering breaches and is therefore unlikely to be effective in many cases.

EFA believes the government should remove this discretion and should move to pass this legislation promptly. The continuing failure to progress this legislation, suggests that the government does not consider the privacy rights of Australians to be a high priority.

6. Mission creep

As noted in the introduction above, the government was very clear at the time about the justifications for the introduction of the mandatory data retention scheme.

Attorney-General George Brandis told the ABC's Q&A program on 3rd November 2014 that:



*the mandatory metadata retention regime applies only to the most serious crime, to terrorism, to international and transnational organised crime, to paedophilia, where the use of metadata has been particularly useful as an investigative tool, only to as a tool, only to crime and only to the highest levels of crime. Breach of copyright is a civil wrong. **Civil wrongs have nothing to do with this scheme.** [Emphasis added]^{iv}*

Similarly, the Attorney-General's Department published the answers to a series of Frequently Asked Questions on its website, which included 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.** [Emphasis added]^v*

It should be noted the Attorney-General's Department has confirmed to EFA that the above paragraph was removed from their website in December 2016. EFA is concerned that this suggests a 'clearing-up' process in advance of a proposal to expand access to retained telecommunications data to civil cases.

EFA is particularly concerned that any decision to expand access to retained telecommunications data at this time will be just one of a number of expansions in access over time. It is in the nature of schemes such as this that, once they exist, there will be ongoing pressure from a variety of actors for access to be expanded to include them.

EFA therefore firmly believes that the government should refrain from introducing any exceptions into the prohibition of using telecommunications data retained only for the purposes of the mandatory data retention scheme in civil proceedings.

7. Lack of clarity in data set

There remain a number of inconsistencies and a general lack of clarity in the definition of the data that must be retained under the terms of the mandatory data retention legislation. As John Stanton, CEO of the industry body Communications Alliance, told the ABC recently:

"It's a piece of legislation that really is riven by internal inconsistencies and lack of clarity".^{vi}

EFA is concerned that this lack of clarity will result in affected organisations 'over-collecting' data to ensure compliance with the law.

EFA is further concerned that it will be practically difficult for many affected organisations to readily identify whether data requested for a civil action is being retained purely for the purposes of the mandatory data retention scheme or not. Again, this creates an incentive for 'over-collection', which puts the privacy of their users at additional risk.

EFA therefore recommends that consideration be given to simplifying the distinction between data which can be accessed for use in civil proceedings and that which cannot be accessed.

8. Warrants for all access

Rather than considering the expansion of access to retained telecommunications data, EFA believes the government should be increasing the privacy protections available to Australians.

EFA believes that a warrant should be required for all access to retained telecommunications data under the mandatory data retention scheme. Such a requirement would ensure that abusive or unnecessary access to such data is minimised and would thereby provide a significant protection to the privacy rights of all Australians.

EFA notes that a majority of European Union member countries require some form of judicial warrant or similar independent authorisation for access to retained telecommunications data.^{vii} EFA therefore rejects the argument that a universal access warrant requirement in Australia would be unworkable.

9. A Privacy Tort

Australia remains one of the only advanced countries without a right to sue for breach of privacy, and while there have been numerous calls for such a right to be introduced, EFA is concerned that the federal government is yet to show any interest in doing so.

As far back as 2008, the Australian Law Reform Commission first recommended such a right be introduced^{viii}, and then in 2014, they released a report outlining how such a 'Privacy Tort' could be implemented at the federal level,^{ix} to give individuals the ability to seek redress when their privacy has been invaded.

EFA is encouraged by the fact that there is significant support for a privacy tort at the state level. Last month, the NSW Attorney-General, Gabrielle Upton called for national action on a privacy tort, and is leading a working group to progress the issue^x.

The benefits of nationally-consistent legislation in this context are self-evident and EFA therefore recommends that the federal government should start moving on this issue.

10. Questions posed in the Consultation Paper

10.1 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?

EFA understands that most current requests for telecommunications data relating to civil proceedings are for 'subscriber data' – information that links a phone number or source IP address to an account. Such information will of course be held by the telecommunications provider for operational purposes and is therefore already available for civil cases.

10.2. 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?

Per point 3 above, the subject of this consultation is data that has not been retained prior to the implementation of the mandatory data retention regime. As such it has never been available to for civil proceedings and there will therefore be no impact on such proceedings if no exceptions are introduced to the prohibition on access to this data.

10.3. 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?

EFA does not support any exceptions to the prohibition in section 280(1B).

11. Summary of recommendations

- An urgent and comprehensive parliamentary review into the efficacy and scope of the Mandatory Data Retention Scheme should be instigated during 2017.
- There should be no expansion of access to retained telecommunications data for any civil proceedings.
- Greater clarity should be provided in terms of the data set to be retained, and additionally about which aspects of the data set are accessible or not for civil proceedings.
- A comprehensive and adequate data breach notification scheme should be introduced without further delay.
- The warrant requirement for access to retained telecommunications data under the terms of the mandatory data retention scheme should be extended to all access requests.
- A parliamentary review to consider the introduction of a statutory cause of action for serious invasions of privacy (a 'privacy tort') should be instigated as a matter of urgency.

ⁱ ACMA Communications Report, 2015-2016, page 105, accessible at:

<http://www.acma.gov.au/~media/Research%20and%20Analysis/Report/pdf/ACMA%20Communications%20Report%202015-16%20pdf.pdf>

ⁱⁱ PJCS report into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, accessible at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Data_Retention

ⁱⁱⁱ Government response, accessible at: <http://www.aph.gov.au/DocumentStore.ashx?id=15f0c1fe-9e57-4b6f-9dbd-5644f2e5fbd2>

^{iv} Transcript accessible at: <http://www.abc.net.au/tv/qanda/txt/s4096883.htm>

^v Archive of page captured 28th April 2016, accessible at:

<https://web.archive.org/web/20160428205854/https://www.ag.gov.au/NationalSecurity/DataRetention/Pages/Frequentlyaskedquestions.aspx>

^{vi} *Data retention laws: Experts warn against opening up metadata to civil cases as telcos renew bid to change laws*, 6th January 2017, accessible at: <http://www.abc.net.au/news/2017-01-05/telco-industry-pushes-for-metadata-collection-changes/8162896>

^{vii} https://ec.europa.eu/home-affairs/what-we-do/policies/police-cooperation/information-exchange/data-retention_en

^{viii} For Your Information: Australian Privacy Law and Practice (ALRC Report 108), accessible at:

<https://www.alrc.gov.au/publications/report-108>

^{ix} Serious Invasions of Privacy in the Digital Era (ALRC Report 123), accessible at:

<https://www.alrc.gov.au/publications/serious-invasions-privacy-digital-era-alrc-report-123>

^x As reported in '*Only one piece of the puzzle*': Baird government calls for national privacy laws, 10th December 2016, accessible at: <http://www.smh.com.au/nsw/only-one-piece-of-the-puzzle-baird-government-calls-for-national-privacy-laws-20161207-gt6ib1>