

To: Communications Security Branch <CommunicationsSecurity@ag.gov.au>

Re: Retained data in civil proceedings consultation

Thank you for giving myself the opportunity to make a submission to this important decision. I understand that this submission is public and also have made the document publicly available on my site: http://puzzleduck.org/gov/Ben_Minerds-Retained_Data_In_Civil_Proceedings.pdf

Metadata and Privacy

The term metadata in this instance is misleading implying that it is somehow less informative than the content of communications, but metadata tells you more about people than sitting down and listening to their calls and provides this in a machine readable format unlike the communication content.

In Australia we have no Bill of rights or Constitution that recognises or protects the privacy of citizens and there is no form of legal redress available to people who have had their privacy violated and experienced harm by having their metadata exposed.

There are also requirements for the destruction of metadata requested by government agencies and it is of concern that no equivalent requirement exists on individuals or other parties requesting metadata. For government agencies there is also an implied or implicit duty of care with data obtained, this duty of care is not guaranteed when a litigant requests data.

Metadata and Copyright

Copyright holders have expressed their desire to access metadata and identify downloaders. Federal Judges and service providers like iiNet have already been required to hold back copyright holders (eg Dallas Buyers Club LLC v iiNet) from overstepping reasonable measures. It is also of concern that the information regarding copyright infringement on the Attorney Generals FAQ about data retention has been removed in the lead up to this consultation.

The metadata collected should be available only for the purposes of detecting, preventing and prosecuting criminal and terrorist activities as was the stated as the original objective of the legislation. This creeping scope is concerning and gives the public no reason to trust that this information will not be used to pursue and punish copyright violators.

Disadvantages for Australia

Broadening the availability and usage of retained metadata is already discouraging the usage of Australian services such as VPN, communications and email providers, in favour of services outside the Australian governments jurisdiction. This can be seen in the search trends on VPN in Australia, which continue to increase since 2015 as Australians increasingly feel under undue suspicion and surveillance. People seeking these services at this time are discouraged from using services from within Australia due to increased surveillance and cost. For example the company Fastmail have expressed a reluctance to expand into Australia given the current metadata retention legislation. This is having the effect of driving (or keeping) the information technology jobs of the future overseas.

General Safeguards on Metadata

Most other jurisdictions that have experimented with mandatory data retention schemes have found them to be ineffective or disproportionate. The government should instigate an urgent review into the efficacy of the Mandatory Data Retention Scheme during 2017 to better understand if it is even something that should be continued. There is a real cost to Australian companies and citizens and so if real benefits are not realised then it is just wasting tax payer money that could be better spent tackling serious crimes.

To help understand the volume and reasons for metadata requests the attorney general should provide regular transparent reports outlining the quantity and stated reasons for data requests both in the criminal and civil arenas.

Conclusion

Access to retained telecommunications metadata should not be available for civil litigation purposes:

- as there are no protections for citizens who have this information abused,
- there was trust in the government to use this information only for serious crimes and,
- it is in our financial interests to promote the local economy and encourage usage of Australian services

Allowing metadata availability for civil litigation purposes negativity impacts all these concerns and should not be allowed or in the least should be heavily regulated and monitored in a transparent manner to restore public and corporate trust that the system will only be used for it's stated purpose of fighting serious crime.

Regards,

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