

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

Review of the Mandatory Data Retention Regime

Public Hearing on Friday, 7 February 2020

Office of the Commonwealth Ombudsman

Questions on Notice

The Committee asked the following questions:

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| <ol style="list-style-type: none">1. What percentage of authorisations would be verbal versus deliberate and written?2. Are you aware of whether or not in those instances (where data was obtained outside the parameters of authority) the data was destroyed by the agencies in question?3. What percentage of the data that you sample has been destroyed prior to Ombudsman inspection?4. What proportion would you be looking at in terms of overall authorisations? |
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The response to the Committee's question is as follows:

1. What percentage of authorisations would be verbal versus deliberate and written?

Given that our Office is only able to assess a sample of records for each year, we cannot be sure of the prevalence of verbal authorisations across all agencies. However, most authorisations we assess are in written form.

Where we become aware an agency has accessed telecommunications data based on a verbal authority, we will attempt to assess compliance with the other elements of Chapter 4 of the *Telecommunications (Interception and Access) Act 1979* based on written records from the time an authorisation was made, alongside conversations with officers who were involved. Even where verbal authorisations occur, we find that in most instances the agency has also prepared a written record to capture the authorisation. In these instances it is clear when the authorisation was made and when the telecommunications data is accessed, allowing our Office to assess compliance.

At all of our telecommunications data inspections since 2018-19, we have routinely asked agencies whether they have made any verbal authorisations. In the current inspection period (2019-20), of the 20 law enforcement agencies that use the powers under Chapter 4 of the Act, the practice was identified at only five agencies, being:

- New South Wales Crime Commission
- South Australia Police
- New South Wales Police Force
- Australian Federal Police (including ACT Policing)
- Tasmania Police.

In each instance, we point to the absence of provision for verbal authorisations in the Act and advise the agency to discontinue the practice. This continues to be an issue which we are monitoring closely in our inspections.

2. Are you aware of whether or not in those instances (where data was obtained outside the parameters of authority) the data was destroyed by the agencies in question?

Where data is obtained outside the parameters of an authorisation, our Office suggests the agency quarantines the data from use and disclosure. Depending on the agency's system, this means either:

- restricting (quarantine) the data from investigators and limiting access to a number of staff, or
- destroying the data entirely.

In some instances, the agency will take steps to do this while our inspection staff are on site. In others, we seek confirmation at our subsequent inspection that the agency has acted appropriately to manage the unauthorised data.

3. What percentage of the data that you sample has been destroyed prior to Ombudsman inspection?

We identify a very small number of instances where agencies destroy data prior to our inspections, but do not specifically track this information.

Some agencies will destroy the data, or may never upload the data to a system used to manage the data. Where agencies have destroyed telecommunications data obtained under an authorisation prior to our inspection, we are unable to assess whether the telecommunications data received complied with the parameters of the authorisation.

Generally, agencies destroy data due to the information not being useful for investigative purposes or where it was unlawfully obtained and therefore the agency will destroy the data as a good practice. We do not have concerns that agencies are destroying data to obviate oversight.

4. What proportion would you be looking at in terms of overall authorisations?

Due to the significant number of authorisations agencies make each year under Chapter 4 of the Act, it is not feasible for our Office to inspect all available records. Instead, we select a small sample of records to be considered in our compliance assessment at each agency. The proportion of records this represents will vary depending on the relevant agency's total usage during the period.

Our sampling methodology is based on guidance from the Australian Bureau of Statistics, and designed to ensure a good level of confidence that the records we select are representative of the wider dataset. We also use our knowledge of the agency's business and its previous compliance record to target certain types of records for inclusion in the sample.