Revealed: Attorney-General's drive for data retention law

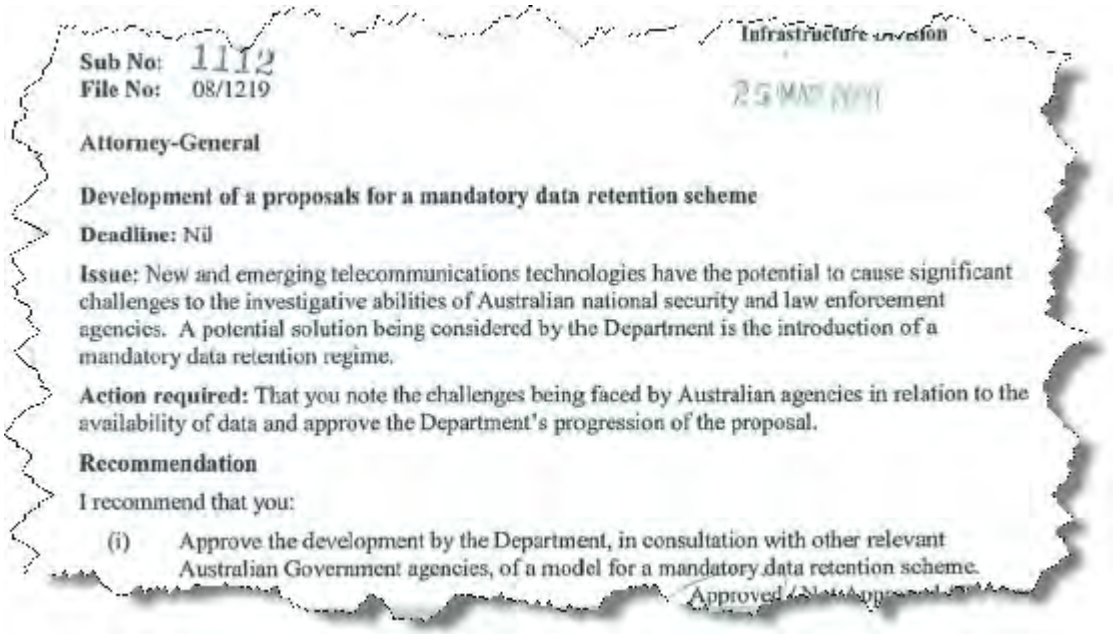
By Bernard Keane| Oct 03, 2013

The Attorney-General's Department pushed hard for data retention the moment Labor was elected, according to new documents released to *Crikey* under FOI.

The Attorney-General's Department began pushing for a two-year data retention regime virtually the moment the Rudd government was elected, newly obtained documents reveal, and the Department's secretary appears to have misled a Senate committee about his own role in the development of the plan.

Heavily redacted documents obtained by *Crikey* under freedom of information laws provide further detail of AGD's strategy to convince the new government to implement a two-year data retention scheme, with the support of a wide range of agencies. Under AGD's proposal, telecommunications companies and ISPs would have been forced to retain all data about Australians' telecommunications and internet usage other than content and browsing history. The Joint Committee on Intelligence and Security earlier this year declined to recommend a data retention scheme after being asked to consider it along with a number of other national security reform proposals by former attorney-general Nicola Roxon.

The department approached Roxon's predecessor, Robert McClelland, when assistant secretary Catherine Smith sent him a brief in March 2008, barely four months into the Rudd government, requesting his approval to develop "in consultation with other relevant Australian government agencies … a model for a mandatory data retention scheme". Smith appeared to dismiss privacy concerns. "Any mandatory data retention scheme risks being seen as increasing the threat to privacy," her brief stated. However, the privacy implications were "perhaps not as significant as may first appear, since much of the information is already collected and stored by carriers".



Infrastructure Division

Sub No: 1112
File No: 08/1219

25 MAR 2008

Attorney-General

Development of a proposals for a mandatory data retention scheme

Deadline: Nil

Issue: New and emerging telecommunications technologies have the potential to cause significant challenges to the investigative abilities of Australian national security and law enforcement agencies. A potential solution being considered by the Department is the introduction of a mandatory data retention regime.

Action required: That you note the challenges being faced by Australian agencies in relation to the availability of data and approve the Department's progression of the proposal.

Recommendation

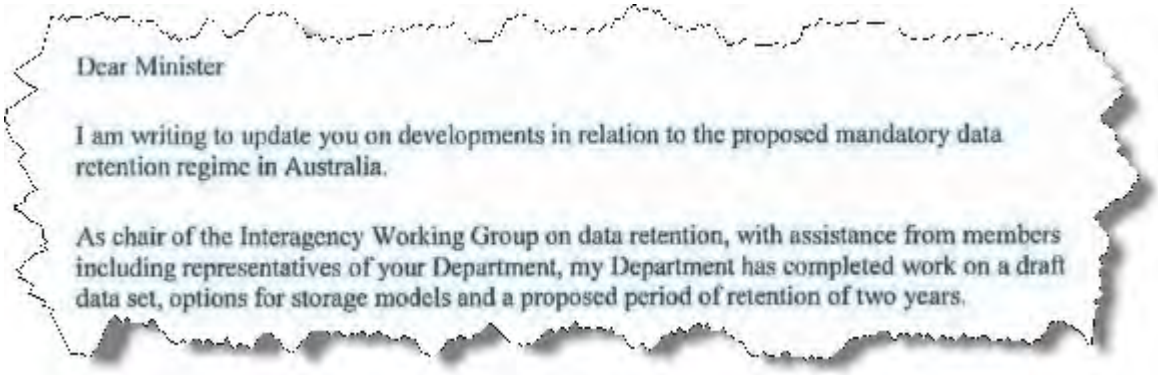
I recommend that you:

(i) Approve the development by the Department, in consultation with other relevant Australian Government agencies, of a model for a mandatory data retention scheme.

Approved / Not Approved

McClelland approved the proposal in early April and the Department set to work. An "Inter-Agency Working Group", chaired by AGD, was established, composed of the departments of Prime Minister and Cabinet, Broadband and the Digital Economy, the Australian Federal Police, the Australian Competition and Consumer Commission, the Australian Crime Commission, Australian Securities and Investments Commission, Australian Security and Intelligence Organisation, Customs and South Australian Police. Commonwealth enforcement agencies, AGD later told McClelland, "are strongly supportive of a mandatory data retention regime. State and territory agencies are equally supportive."

While AGD has redacted details of the model agreed by the working group, we know from a later letter from McClelland to former communications minister Stephen Conroy that the scheme included retention for two years (later versions of the scheme proposed "up to two years").

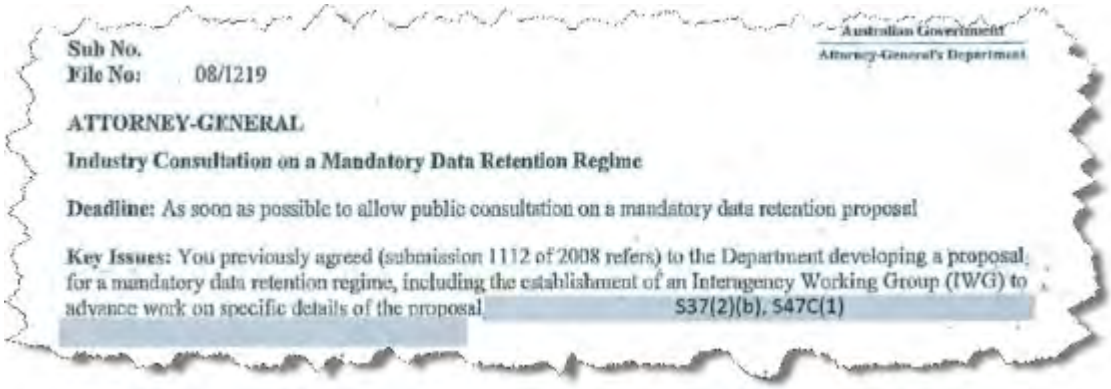


Dear Minister

I am writing to update you on developments in relation to the proposed mandatory data retention regime in Australia.

As chair of the Interagency Working Group on data retention, with assistance from members including representatives of your Department, my Department has completed work on a draft data set, options for storage models and a proposed period of retention of two years.

In June 2009, Smith went back to McClelland and urgently sought his approval to consult with industry on the model that had been developed by the working group. "Consultation with industry is essential for further consideration of the two year model for data retention," she said.



Sub No.
File No: 08/1219

Australian Government
Attorney-General's Department

ATTORNEY-GENERAL

Industry Consultation on a Mandatory Data Retention Regime

Deadline: As soon as possible to allow public consultation on a mandatory data retention proposal

Key Issues: You previously agreed (submission 1112 of 2008 refers) to the Department developing a proposal for a mandatory data retention regime, including the establishment of an Interagency Working Group (IWG) to advance work on specific details of the proposal. S37(2)(b), S47C(1)

Smith's brief was cleared by her division head, first assistant secretary Geoff McDonald, and by the secretary Roger Wilkins, who had replaced Robert Cornall in September 2008. The detail is important because if we scroll forward four years, at an Estimates hearing on May 29 this year, Wilkins was asked about industry consultation on the data retention proposal by Greens Senator Scott Ludlam, and tried hard to downplay it. He told the Legal and Constitutional Affairs committee:

"I think there were some informal discussions. I think the consultation was done without, for example, my authority."

He went on to say:

"They were interested in getting details about what it might cost or how it might work. So I would not want to elevate this concept of 'consultation' to something that has been done with the blessing of ministers or the secretary or someone like that."

Evidence to committee incorrect

However, Smith's minute, with Wilkins's signature in the "cleared by" section, shows his evidence to the committee was incorrect. In September, the department wrote to the committee to correct its evidence, advising that government authorisation had been sought and obtained for consultations. What the department's correction, almost certainly the result of *Crikey*'s FOI request, didn't include was that Wilkins also cleared the request for approval. The Secretary did sign the brief, a departmental spokesperson told *Crikey* today. "However, [t]he Secretary did not recall his clearance of this submission at Senate Estimates on 29 May 2013." The Department believes its September correction "has clarified its evidence to the Senate Committee on this matter."

Wilkins may well have forgotten "clearing" one brief among hundreds that would have come across his desk. But it fitted with his insistence to Ludlam that the "consultation" was low-key and done without approval by junior officers, when in fact the department regarded consultation as an "essential" stage in the development of a proposal that it had commenced as soon as Labor got into government. And it wanted McClelland's approval for consultation urgently.

Further, another of the documents provided to *Crikey* is a further brief from June 2009, from Smith to Wilkins himself, explaining the need for industry consultation and asking that he note the request to McClelland for approval — although the document is undated and unsigned, and may never have been seen by him.

As we knew from documents previously obtained by the Pirate Party, the former attorney-general, as recommended by the department, wrote to former prime minister Kevin Rudd prior to August 2009 seeking his approval for industry consultation.

For whatever reason, the Attorney-General's Department has sought to portray "essential" consultation with industry approved by the departmental secretary and the attorney-general and the subject of correspondence with the prime minister, as "informal" and done without the "blessing of ministers or the secretary". In fact, data

retention was an idea driven hard by AGD and authorised at the highest levels of the Rudd government.

Ends Part 1

Part 2

A-G FOI investigation: how data retention was derailed

Bernard Keane| Oct 04, 2013

The Attorney-General's department was keen to rush data retention into law before the 2010 election. Their haste derailed it, new documents reveal, writes Bernard Keane.

The haste of the Attorney-General's department in seeking to push through a data retention regime prior to the 2010 election ended up derailing the proposal, and media scrutiny and a Senate inquiry forced a change of tack from the department toward public consultation — which the Labor government baulked at.

The timeline of the push by AGD for mandatory retention of Australians' telecommunications and internet usage data has become clearer from documents obtained by *Crikey* under freedom of information laws.

Yesterday we showed how AGD had begun pushing for a two year data retention regime almost as soon as Labor entered office, and the development of a proposal and secret consultation with industry was approved by the Department's executive and the former Attorney-General Robert McClelland, who sought the approval of former Prime Minister Kevin Rudd.

After McClelland gave his approval to industry consultation in mid-2009, AGD undertook two rushed consultations with industry (the Pirate Party FOId those consultations; we examined them in February) at which industry raised a range of both technical and cost concerns.

Despite failing to resolve industry concerns, it appears that just before Christmas 2009 AGD sought McClelland's approval to develop a cabinet submission on data retention, and in May 2010, following another meeting with industry, the Department sought his approval, by June, to circulate a draft Cabinet submission on the proposal.

CABINET IN CONFIDENCE

Australian Government
Attorney-General's Department

Sub No:
File No: 09/19662

ATTORNEY-GENERAL

The mandatory retention of telecommunications data by carriers and carriage service providers

Deadline: None

Key Issues: You have previously approved consultation with industry on a proposed mandatory data retention regime (SB09/1922 refers) S34(3), S47C(1) Industry has been consulted on a model agreed to by an Interagency Working Group (IWG). S34(3), S47C(1)

Both of those minutes are almost entirely redacted. Fortunately, however, AGD has made a mistake in its redactions. In 2011, Sean Parnell of *The Australian* FOId data retention documents as well, and he obtained another minute from October 2010, after the government had scraped back in, referring to the May minute. *Crikey* received the same October minute, with a key section redacted. But AGD failed to redact the same section in Parnell's document, and that crucial omission explains the December 2009 and May 2010 minutes. "You approved the release of an exposure draft of the cabinet submission outlining a mandatory data retention regime in June 2010," the October minute obtained by Parnell says.

That brief, again by Assistant Secretary Catherine Smith, goes on to state "a draft cabinet submission was circulated as an exposure draft in June 2010. Comments from other agencies indicated that further development of the regime was required in order for agreement to the proposal to be provided. Main concerns related to the financial impact of the proposal on industry and government, competitive issues and the impact of the proposal on small business."

That is, other departments derailed AGD's push for a pre-election decision to establish data retention because AGD had failed to put together an acceptable proposal or address industry concerns. They rushed it, and paid the price.

FOI rules used to fend off requests

Meantime, AGD faced other problems. News of its consultations with industry had leaked in June, and FOI requests had begun coming in from the media. The department was able to fend off most of the FOI requests under the exemption for material for the "deliberative processes of the department and the government". "The release of the information may have caused unnecessary concern," Smith told McClelland.

More seriously, in June, Greens senator Scott Ludlam had responded to the revelations by initiating an inquiry by a senate committee into the adequacy of protections of privacy online. Ludlam's inquiry clearly worried AGD. "Media articles have indicated that Senator Ludlam will be seeking the censored documents, and all

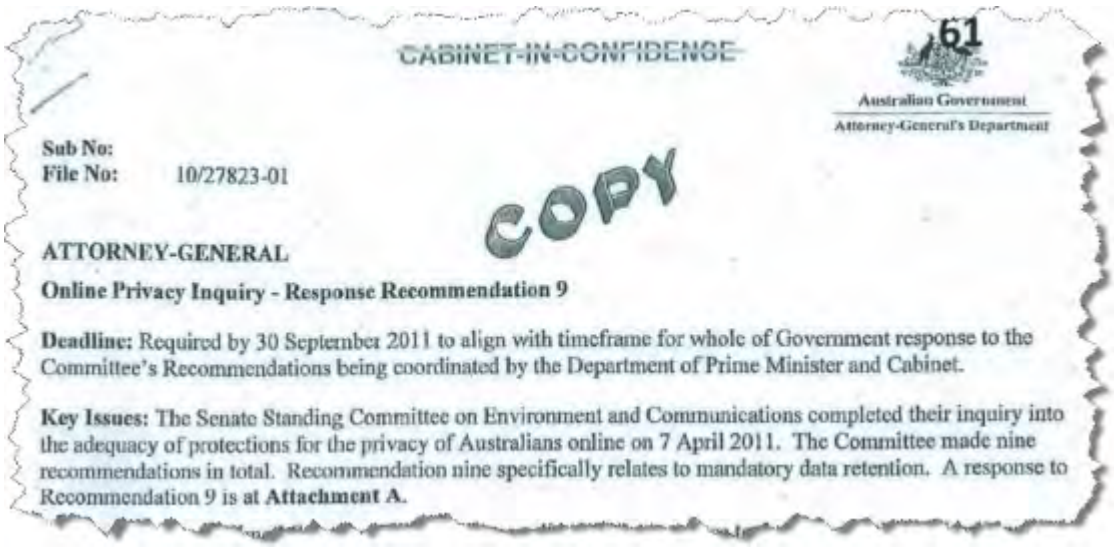
related documentation to be released publicly in an uncensored form." The department would have to appear at the inquiry and respond to the committee's report.

AGD then took, for it, an unusual decision, and a commendable one: it proposed to McClelland that they drop the secrecy and pursue a:

"… more open, transparent and consultative approach to be undertaken to acknowledge the public interest in the proposal … this approach will ensure that any public discussion is properly informed."

But by this stage the government had taken fright. McClelland didn't approve the department's proposal to develop a public discussion paper, or if he did, it was never submitted to him for approval. AGD continued to consult with industry, without making much progress in resolving concerns.

The inquiry initiated by Ludlam reported in April 2011, with a recommendation calling for an "extensive analysis" of data retention and appropriate accountability measures. AGD's focus then switched to trying to pull together an appropriate government response to the recommendation. In September 2011, five months after the inquiry report, Smith again briefed McClelland, asking him to approve a response that committed to an "open, transparent and consultative approach" that "acknowledges the public interest in these issues."



CABINET-IN-CONFIDENCE

61

Australian Government
Attorney-General's Department

Sub No:
File No: 10/27823-01

COPY

ATTORNEY-GENERAL

Online Privacy Inquiry - Response Recommendation 9

Deadline: Required by 30 September 2011 to align with timeframe for whole of Government response to the Committee's Recommendations being coordinated by the Department of Prime Minister and Cabinet.

Key Issues: The Senate Standing Committee on Environment and Communications completed their inquiry into the adequacy of protections for the privacy of Australians online on 7 April 2011. The Committee made nine recommendations in total. Recommendation nine specifically relates to mandatory data retention. A response to Recommendation 9 is at **Attachment A.**

No dice. The draft response went nowhere and in December, McClelland was replaced as AG by Nicola Roxon. The government eventually responded to Ludlam's inquiry — in November 2012, by which time Roxon had initiated an inquiry by the Joint Committee on Intelligence and Security. The text was almost exactly what AGD had proposed more than a year earlier. Roxon had eventually picked up the Department's idea of a public discussion paper, but that ended up being so ineptly

handled that it contributed to the nixing of data retention altogether by Roxon's successor, Mark Dreyfus, as another election loomed.

Lessons from all this? There's a pretty important one: it was the leaking of news about data retention consultations, the willingness of the media (including *The Australian*) to seek documents and the determination of Scott Ludlam to pursue the issue in the Senate, that forced AGD to propose a more public process than the one they had previously pursued. It also spooked the government into inactivity on the issue. It's possible that if other departments hadn't been too concerned about AGD's initial cabinet submission in June 2010, the proposal could have slipped through and been endorsed by the government.

But once that opportunity was missed, the growing public focus on data retention was critical to stopping it — for now.

ENDS Keane/Crikey

** Bernard Keane is Crikey's political correspondent in Canberra. These articles appeared first in Crikey. They are reproduced with permission.*

Some other relevant articles:

Attorney-General briefed on PRISM months before Snowden leaks
Renai LeMay on Tuesday, October 8, 2013
http://delimiter.com.au/2013/10/08/attorney-general-briefed-prism-two-months-snowden-leaks/

http://www.abc.net.au/news/2013-10-08/australia-prepared-briefing-on-prism-spying-program/5004290

http://www.abc.net.au/am/content/2013/s3864183.htm

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