

INQUIRY INTO THE ADEQUACY OF PROTECTIONS FOR THE PRIVACY OF AUSTRALIANS ONLINE

SENATE STANDING COMMITTEE ON ENVIRONMENT AND COMMUNICATIONS REFERENCES COMMITTEE

Responses to Questions on Notice

Attorney-General's Department

Senator Cameron asked a question at the hearing on Friday, 29 October 2010, about whether Google's scanning of email content for keywords to 'push' advertising legal in Australia?

The answer to the honourable Senator's question is as follows:

1. The Attorney-General's Department has examined the evidence Google provided to the Environment and Communications References Committee and provided an outline of the operation of relevant legislation below.
2. The paramount principle of the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) is to protect the privacy of telecommunications in Australia. The TIA Act achieves this goal by prohibiting the interception of, and other access to, telecommunications passing over the Australian telecommunications system without the knowledge of the person making the communication. The TIA Act is drafted in a technologically neutral manner in order to be able to deal with technological advancements and change as they occur.
3. The prohibitions form the foundation of the TIA Act which are subject to limited exceptions such as interception occurring under a warrant or the ability for employers to be able to perform reasonable duties to protect their computer networks. The TIA Act also strictly regulates how information collected can be used and communicated.
4. Accordingly, for an 'interception' to occur, a communication must be listened to or recorded without the knowledge of the person making the communication. Secondly, that act must have occurred during the communications passage over the Australian telecommunications system.
5. In Google's circumstances, before utilising subscription based services such as G-mail, a person must agree to Google's standard Terms of Agreement. The Department notes that these terms require the user to consent to emails and other communications being scanned, and for advertisements to be placed on the Services 'targeted to the content of information stored on the Services, queries made through the Services or other information'. These Terms of Agreement may amount to 'knowledge' that communications may be scanned and therefore the TIA Act will not apply.
6. Additionally, information obtained from Google's website indicates that Google does not scan email content for keywords while the communications are passing over the telecommunications system. This function occurs when the e-mails are open in the mailbox of G-mail users. In these circumstances, the communication has ceased to pass over the Australian telecommunications system and the TIA Act will not apply. However, other laws such as privacy laws or State and Territory surveillance laws may apply.

Senator Cameron asked a question at the hearing on Friday, 29 October 2010, about whether Electronic scanning is ‘recording by any means’?

The answer to the honourable Senator’s question is as follows:

7. As discussed above, whether a communication is ‘recorded’ or ‘listened to’ is central to the question of whether or not an ‘interception’ has occurred. Section 5 of the TIA Act relatively defines ‘record’ as being a copy whether in writing or otherwise of the whole or part of the communication.
8. Generally speaking, ‘recording’ means that some sort of enduring record, capable of being retrieved at a later time is made of the message. That is, ‘recording’ will not include merely calling a message up on a screen for immediate viewing if doing so does not create an enduring record after it is viewed.
9. Google’s evidence indicates that it uses cookies or algorithms to scan emails which do not make copies of the content of the email. If Google does not make an enduring copy of part or all of the content of communications, the TIA Act will not apply.

Senator Cameron asked a question at the hearing on Friday, 29 October 2010, about whether there is a requirement to have a Google email address if you use an Android phone?

The answer to the honourable Senator’s question is as follows:

10. There is no requirement to have a Google email address to use an Android phone and there are a range of applications that a consumer may use on an android phone, for example Hotmail. However, many android phones come with integrated Google services including Gmail.

Senator Ludlam asked a question at the hearing on Friday, 29 October 2010 about whether the Department received instructions from the Attorney-General’s office to investigate data retention or did the idea come from within the Department or the AFP?

The answer to the honourable Senator’s question is as follows:

11. The Department did not receive instructions from the Attorney-General’s Office to commence investigations into the concept of data retention in Australia. The concept of data retention has been around for some time. The Department was aware of international developments during the implementation of the 2006 European Union Directive.
12. Advice from industry was that many of the types of information which law enforcement and other agencies currently access to assist in their investigations may not be available in the future due to changes in the technology and systems being utilised by Industry. Additionally, where information will be available it may only be kept for short periods of time.
13. Similarly law enforcement agencies advised the Department that there was large inconsistencies in the availability of data across industry participants which impacted on their ability to conduct investigations.
14. Based on this advice and the international developments in this area the Department began consideration of the merits of requiring the retention of particular types of telecommunications data for specific lengths of time for national security and law enforcement purposes.