



Australian Government
**Australian Commission for
Law Enforcement Integrity**

**PARLIAMENTARY JOINT COMMITTEE ON
INTELLIGENCE AND SECURITY**

REVIEW OF THE MANDATORY DATA RETENTION REGIME

Supplementary Submission by the
Australian Commission for
Law Enforcement Integrity

19 February 2020



INTRODUCTION

1. The Australian Commission for Law Enforcement Integrity (ACLEI) welcomes the opportunity to make a supplementary submission to the Review of the Mandatory Data Retention Regime by the Parliamentary Joint Committee on Intelligence and Security.
2. In this supplementary submission ACLEI seeks to provide the Committee with additional statistical information and case studies which demonstrate the adverse impact on future ACLEI corruption investigations which would be caused by any reduction in the mandatory metadata retention period.

BALANCING DISPARATE CONCERNS

3. ACLEI appreciates the complex considerations which surround the mandatory retention of metadata. Undoubtedly, many people who create metadata, through the simple use of telecommunications devices, and who have no say in its retention, would prefer that the data not be retained at all. We understand that many other people feel quite strongly that metadata should not be made available to law enforcement agencies, and that to do so intrudes on privacy to an unacceptable level.
4. It is out of an appreciation and respect for people's privacy, and our desire to uphold people's rights and the law, that we strive so strongly to adhere to the laws and policies which govern access to metadata, and to access and deal with metadata in a way which guarantees that our intrusion into people's privacy is kept to a minimum and that any metadata which we access is retained in a secure environment.
5. ACLEI does this through processes we have put in place to ensure that careful consideration is given to each request for metadata, firstly by the investigator or analyst making the request, and then by the senior officers who have the power to authorise the carrier or provider to release the metadata. We ensure that metadata returned to ACLEI by the carrier or provider conforms precisely to the parameters of the respective request, with any data which falls outside those parameters being securely quarantined where it is accessible by only two ACLEI officers and only for the purpose of inspection by the Commonwealth Ombudsman. Any such events are reported in writing to the Commonwealth Ombudsman as soon as they are discovered. ACLEI ensures that metadata is stored securely in protected systems or in physically secure environments. All these processes and the records which are generated are subject to rigorous inspection by the Commonwealth Ombudsman.

ACLEI'S CONTINUING NEED FOR ACCESS TO HISTORICAL METADATA

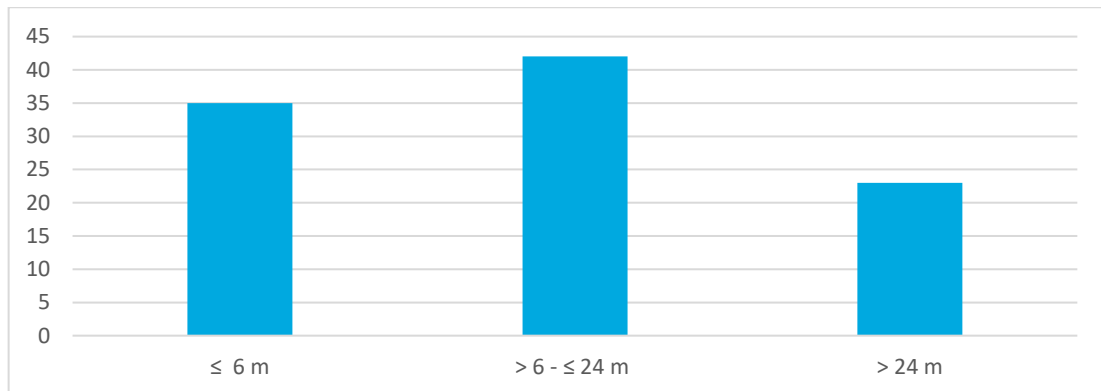
6. While ACLEI appreciates that technological advancements are leading to changes in the way in which people communicate, including the increased take up of readily available encryption, our experience shows that the analysis of metadata continues to benefit our investigations. This is particularly the case where metadata is still available from periods when the ability for corrupt and criminal actors to easily access end-to-end encryption was not as easy as it is today.
7. Since providing our original submission in June 2019, ACLEI has had the opportunity to analyse additional statistical information regarding our use of metadata. This analysis has highlighted the importance of what might be termed historical metadata to support our corruption investigations.

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8. Broadly speaking, historical metadata can be sought in two ways:
 - a single point of time; or
 - a defined period.
9. A defined period may extend from the date of the request back as far as the relevant provider kept records, or be confined to a lesser portion thereof.
10. For reporting purposes, the age of metadata is categorised by identifying the earliest date encompassed by the metadata. For example, if metadata was sought for a continuous period from the day before a request was made and extending back three years prior to the request, the age of the metadata would fall into the 'greater than 24 months' category.

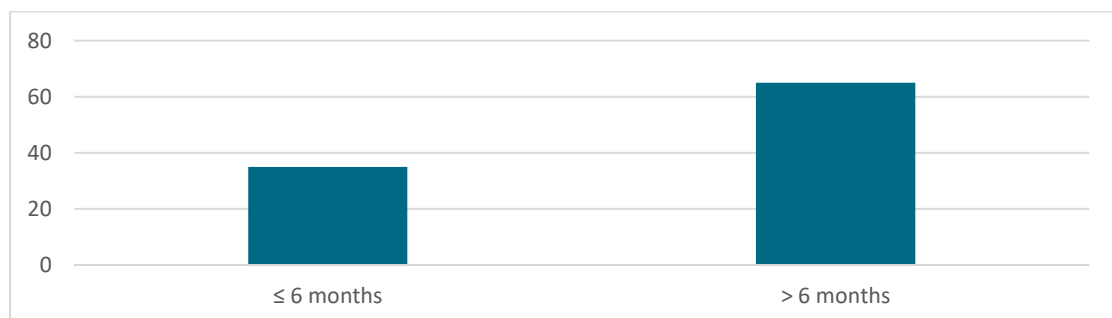
Call Charge Records

11. Since the beginning of 2016, the release of call charge records from telecommunications providers was authorised by ACLEI in relation to 790 requests for call charge records across 85 investigations. This equates to 79% of our corruption investigations.



Percentage of requests for metadata, in the form of call charge records, obtained in support of ACLEI's corruption investigations since 2016, by age of oldest information sought.

12. Of the 790 requests for call charge records, 35% (279) were for records categorised as being up to and including six months old, while 42% (334) were for records greater than six months of age and up to 24 months of age, and 23% (177) were for records greater than 24 months old.
13. This means that 65% (511) of the requests were for records which were more than six months old.

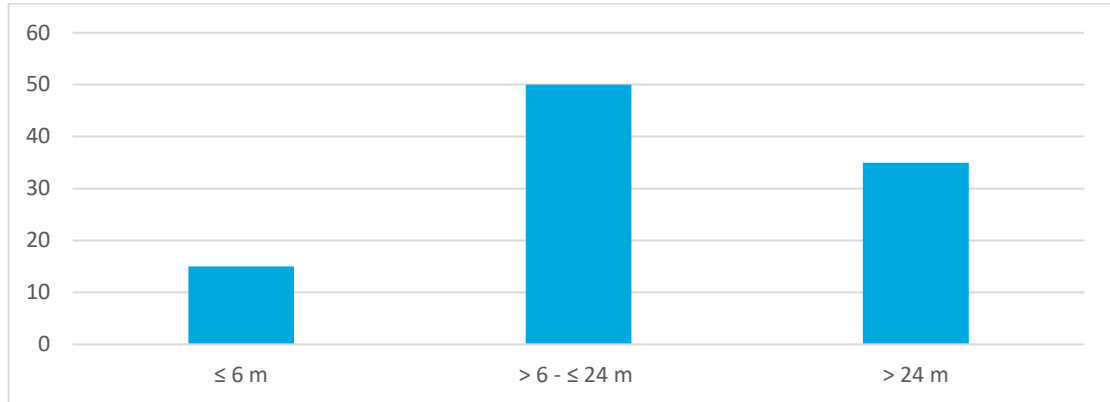


Percentage of requests for metadata, in the form of call charge records, obtained in support of ACLEI's corruption investigations since 2016, categorised as either up to or equal to six months old, or greater than six months of age.

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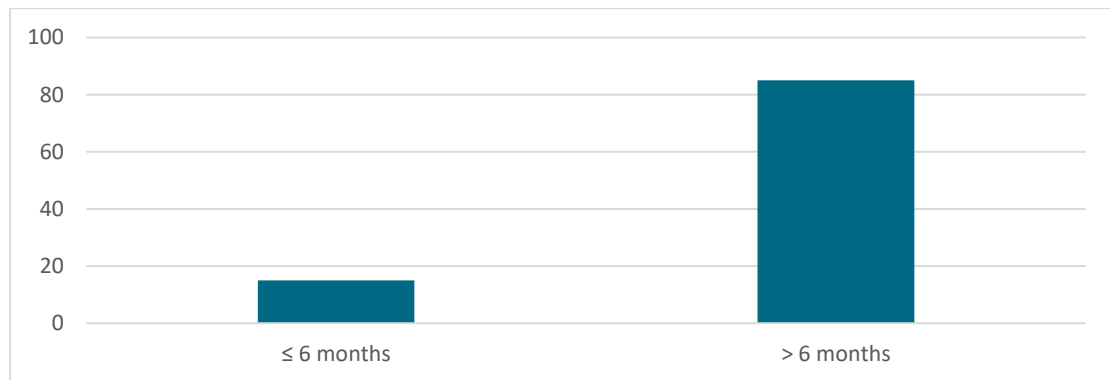
Subscriber Records

14. Since the beginning of 2016, the release of subscriber records from telecommunications providers was authorised by ACLEI on 359 occasions across 40 investigations. This equates to 37% of our corruption investigations.



Percentage of requests for metadata, in the form of subscriber records, obtained in support of ACLEI's corruption investigations since 2016, by age of oldest information sought.

15. Of the 359 requests for subscriber records, 15% (53) were for records categorised as being up to and including six months old, while 50% (181) were for records greater than six months of age and up to 24 months of age, and 35% (125) were for records greater than 24 months old.
16. This means that 85% (306) of the requests were for records which were more than six months old.



Percentage of requests for metadata, in the form of subscriber records, obtained in support of ACLEI's corruption investigations since 2016, categorised as either up to or equal to six months old, or greater than six months of age.

The Adverse Impact of a Reduction in the Retention Period

17. A reduction in the minimum period of time for which metadata was required to be kept under the mandatory data retention regime, say from the present two year period to six months, would have an adverse impact on ACLEI's corruption investigations.
18. It is likely that ACLEI would find it difficult in a majority of cases to prove the identity of subscribers to telecommunications services, where the subscription commenced and ended at any time prior to the new retention period.

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19. Given that in many cases only six months' worth of metadata would be available, ACLEI would likely find it difficult to identify a law enforcement official in circumstances where an unidentified law enforcement official had used an identified telecommunications service while engaging in corrupt conduct and that service was only connected in the official's name for a period of time which ceased, for example, 12 months before the information came to light.
20. Likewise, if the period during which the official used that service in connection with their corrupt conduct fell outside the mandatory retention period, ACLEI would have no way of accessing call charge records by which other telecommunications services called by the official could be identified. This would restrict ACLEI's ability to understand the activities of the official and identify people with whom the official had a corrupt relationship.

ADDITIONAL CASE STUDIES

21. ACLEI would like to bring to the Committee's attention the following additional case studies, which further demonstrate the importance of historical metadata to ACLEI's corruption investigations.

Additional Case Study Number 1

22. ACLEI commenced an investigation into information including claims that for more than five years, law enforcement officials had been assisting a business-owner to circumvent inspection protocols which may have impacted on commercial imports conducted by the business-owner during that time.
23. Metadata, including historical metadata, was obtained and used in the development of investigative strategies, as well as guiding the deployment of surveillance assets.
24. As a result of this investigation a law enforcement official was convicted of several significant corruption related charges. Two members of the public, who corrupted the law enforcement official, are facing several significant corruption related charges.
25. The following table shows the number of requests for metadata, in the form of call charge records and subscriber records, in this investigation, by age of oldest information sought.

Product	< 6 mths	6 – 24 mths	> 24 mths	Total
Call Charge Records	3	4	3	10
Subscriber Records	7	3	11	21
	10	7	14	31

Additional Case Study Number 2

26. ACLEI commenced an investigation into allegations including that a law enforcement official was exploiting his position in order to facilitate the importation of illicit goods into Australia by non-law enforcement associates.
27. Metadata, including historical metadata, was obtained and used in the development of investigative strategies, as well as guiding the deployment of surveillance and covert assets.

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28. As a result of this investigation a law enforcement official is facing several significant corruption-related charges, having been committed to stand trial, while a second law enforcement official has appeared in Court on a single corruption related charge.
29. The following table shows the number of requests for metadata, in the form of call charge records and subscriber records, in this investigation, by age of oldest information sought.

Product	< 6 mths	6 – 24 mths	> 24 mths	Total
Call Charge Records	10	4	0	14
Subscriber Records	6	11	4	21
	16	15	4	35

Additional Case Study Number 3

30. ACLEI commenced an investigation into allegations that a law enforcement official had released information to a member of the public, who had in turn passed it to a person of interest in a criminal investigation. ACLEI commenced a second investigation following receipt of allegations that the law enforcement official in the first investigation, and a second law enforcement official had misused their positions and agency resources for personal benefit.
31. Metadata, including historical metadata, was obtained and used in the development of investigative strategies, as well as guiding the deployment of electronic surveillance.
32. As a result of this investigation a (now former) law enforcement official is to appear in Court on a corruption-related charge, as well as a non-corruption-related criminal charge, while a second law enforcement official has resigned their employment.
33. The following table shows the number of requests for metadata, in the form of call charge records and subscriber records, in this investigation, by age of oldest information sought.

Product	< 6 mths	6 – 24 mths	> 24 mths	Total
Call Charge Records	7	1	0	8
Subscriber Records	0	14	0	14
	7	15	0	22

Additional Case Study Number 4

34. ACLEI commenced an investigation into information that a law enforcement official may have been assisting a criminal syndicate over a period of time by facilitating the syndicate’s importations of cocaine into Australia in air cargo.
35. Further information was received to the effect that the syndicate had been responsible for other importations dating back a number of years.
36. While no law enforcement official matching the description originally provided was identified, through the analysis of metadata dating back to 2014, which had been retained by a carrier in excess of the requirements of the metadata retention regime, the investigation was able to better understand the make-up of the syndicate and the way in which it operated, including the importation methodology that was being used.

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37. ACLEI worked on this investigation with another agency which was responsible for acquiring the majority of the metadata used, meaning that ACLEI cannot provide the entire statistical picture. The following table represents the metadata in the form of call charge records and subscriber records obtained by ACLEI, the number of requests for metadata, in the form of call charge records and subscriber records, made by ACLEI in this investigation, by age of oldest information sought.

Product	< 6 mths	6 – 24 mths	> 24 mths	Total
Call Charge Records	10	2	0	12
Subscriber Records	1	14	0	15
	11	16	0	27

Additional Case Study Number 5

38. ACLEI commenced an investigation into allegations that a law enforcement official was exploiting their position to enable a member of the public to import material which may not otherwise have been cleared to enter Australia.
39. The law enforcement official pleaded guilty to two counts of abuse of public office and one count of using a forged document with the intention that it be accepted as genuine by a Commonwealth public official. The official was convicted and sentenced to a total effective sentence of 12 months' imprisonment to be released forthwith, conditional upon complying with a good behaviour order for two years.
40. After the conclusion of the investigation, ACLEI received information about a second law enforcement official who was alleged to have an undeclared improper relationship with a criminal entity. The criminal entity had been linked to importations of large quantities of illicit goods, and had previously been convicted for attempting to corrupt a Commonwealth law enforcement official.
41. The historical nature of the allegations against the second law enforcement official meant that in order to fully investigate the matter, historical metadata would need to be gathered to assist in proving or disproving the allegation. Historical metadata was available to ACLEI, as the carrier concerned had retained metadata for periods in excess of the requirements of the metadata retention regime. Without access to the historical metadata in relation to the second law enforcement official, the second investigation would have been significantly constrained.
42. While evidence to prove corrupt conduct on the part of the second law enforcement official was not obtained, evidence was identified sufficient to enable the second law enforcement official's employee to commence an administrative investigation under the Australian Public Service Code of Conduct.
43. Due to the first investigation being conducted prior to the introduction of the mandatory data retention regime, detailed statistics have not been able to be compiled.

CONCLUSION

44. ACLEI appreciates the difficult task which the Parliamentary Joint Committee on Intelligence and Security has in trying to find an appropriate balance across the wide range of views on the retention of and access to metadata.

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45. Based on our experience, ACLEI is convinced of the appropriateness of a mandatory data retention regime, the need for carriers and carriage service providers to retain metadata for at least two years (and preferably longer), and the ability for law enforcement agencies to be able to access that data to assist in the performance of their duties, including for the enforcement of criminal law.
46. ACLEI believes that the legislative controls surrounding access to metadata and the comprehensive inspection regime administered by the Commonwealth Ombudsman, are sufficient safeguards against inappropriate access to, and use of, metadata.