

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Group 3

Program 1.6

Question No. 30

Senator Xenophon asked the following question at the hearing on 24 February 2014:

Senator XENOPHON: How do Australian authorities go about requesting overseas telecommunications carriers and carriage service providers for information that they may have about Australians?

Ms Smith: Generally that is done through mutual assistance arrangements. However, some US providers have offices in Australia, so they provide cooperation to law enforcement. Generally it is a matter for mutual assistance.

Senator XENOPHON: Please provide, on notice, details of which treaties govern this process. Could you also, on notice, provide how many times this has occurred in the past five years and to which foreign countries.

Mr Wilkins: The latter we may not be able to do, but we can certainly do the former.

Senator XENOPHON: Why not? Because it is classified?

Mr Wilkins: It may be. Who knows? Before we look at that, there may be some restrictions on what we can tell you.

Senator XENOPHON: I am not asking about the content. I am just asking about what the protocols are.

Mr Wilkins: I am saying there may be some restrictions on even that. But we will have a look at it.

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

Q (i): How do Australian authorities go about requesting overseas telecommunications carriers and carriage service providers for information that they may have about Australians?

A (i):

Mutual Assistance process

In general, telecommunications information (content and non-content subscriber data) on Australians held by overseas telecommunications carriers and carriage service providers is obtained by the Australian Government under the formal Mutual Assistance process. Mutual assistance is the process countries use to obtain government-to-government assistance in criminal investigations and prosecutions. Accordingly, mutual assistance requests to obtain telecommunication or carriage service content or data are not made by Australian law enforcement agencies directly to the overseas telecommunications carrier or carriage service provider, but by the Australian Government to the government of the country in which those records are located. The government of the foreign country will then, in accordance with its domestic laws and procedures, obtain and provide the records to the Australian Government, which then in turn provides the information to Australian law enforcement agencies.

Informal processes

Outside of the mutual assistance process, Australian law enforcement agencies may be able to seek some telecommunications information on an informal basis, either through police channels or directly from a foreign service provider. There is no formal process to be followed, or specific request form to be utilised, by Australian law enforcement agencies when seeking to access telecommunications information in this way. The process used by Australian law enforcement agencies depends on whether the information sought is content or non-content subscriber data, and the laws and domestic process of the foreign country.

Requests for content information – Budapest Convention

If Australian law enforcement agencies seek content information, from countries that are parties to the Council of Europe Convention on Cybercrime (the Budapest Convention), Australian law enforcement agencies may issue ‘preservation notices’ on service providers in those countries. A preservation notice allows an agency in one country to request that a service provider in another Convention country protect stored communications held in its jurisdiction in anticipation of a formal mutual assistance request. As stored communications such as emails and SMS messages can be quickly deleted pursuant to normal business practices, timely preservation is critical. The process regarding the preservation of data is a matter for each provider, so the Australian law enforcement agency would need to contact the provider directly to clarify the information they hold and whether/how it can be preserved.

Requests for non-content subscriber data

For non-content subscriber data, Australian law enforcement agencies may directly seek the assistance of:

- their international counterparts on a police-to-police basis. Police-to-police assistance is voluntary, but may allow Australian agencies to access data to further their investigations into cybercrime offences under the Commonwealth Criminal Code, and/or
- an overseas provider where the request is consistent with both Australian and overseas legal requirements.

Q (ii): Please provide details of which treaties govern [mutual assistance arrangements in relation to the acquisition of offshore data]. Could you also provide how many times this has occurred in the past five years and to which foreign countries. What are the protocols?

A (ii):

Treaties

Australia has a number of bilateral and multilateral mutual assistance treaties to facilitate mutual assistance in criminal matters. These treaties provide a basis for Australia obtaining evidence from foreign telecommunications carriers and carriage service providers. In the absence of a treaty, Australia can also make mutual assistance requests to any country under the *Mutual Assistance in Criminal Matters Act 1987* (Cth).

These bilateral and multilateral treaties are implemented domestically in Australia through regulations. These treaties are available through the Department of Foreign Affairs and Trade treaties database and are listed at **Attachment A**.

Number of times assistance provided

Records held by the Attorney-General's Department (AGD) indicate that over the five year period to 24 February 2014, Australian law enforcement agencies, prosecutorial agencies or defendants in criminal matters asked the Attorney-General and Minister for Justice to make a total of 411 mutual assistance requests to foreign countries to obtain telecommunication or carriage service content or data.

Australia will not necessarily have made a mutual assistance request in all 411 instances. That is, while AGD's database indicates that 411 outgoing mutual assistance requests were opened, the database does not identify whether 411 requests were made (we note that to identify the number of matters that resulted in obtaining telecommunications information would require manually assessing hundreds of files). In some cases, for example, preliminary enquiries may have indicated that the foreign country did not hold the identified records, or the Australian criminal investigation may have been subsequently discontinued. Mutual assistance requests are often made for a range of material or other assistance, and may be subject to revision at various points during the mutual assistance process. This figure is also not indicative of the number of requests that resulted in the successful provision of telecommunication or carriage service content or data to Australia.

Of the mutual assistance requests that were made during this period, some may have sought telecommunication or carriage service content or data held by foreign service providers, but others may have sought that content or data from a foreign law enforcement agency that had already lawfully obtained these records for the purpose of a domestic investigation or proceedings.

AGD database records do not distinguish between requests made in respect of Australian citizens or other persons.

To ensure that foreign service providers that have provided assistance to Australia are not identifiable for operational reasons, and in order to preserve Australia's formal international crime cooperation relationships, and to protect the confidentiality of requests which relate to Australian criminal investigations or proceedings, the Attorney-General's Department is unable to provide a list of foreign countries to which Australia has made mutual assistance requests for telecommunication or carriage service content or data.

Protocols

The protocols setting out receiving assistance from overseas telecommunications carriers and carriage service providers are set out above in (i).

Bilateral Agreements

Country	Date of signing	Nature of the agreement
Argentine Republic	30 August 1990	Treaty between the Government of Australia and the Government of the Argentine Republic on Mutual Assistance in Criminal Matters
Canada	19 June 1989	Treaty between the Government of Australia and the Government of Canada on Mutual Assistance in Criminal Matters
Finland	22 June 1992	Treaty between Australia and Finland on Mutual Assistance in Criminal Matters
French Republic	14 January 1993	Treaty between the Government of Australia and the Government of the French Republic on Mutual Assistance in Criminal Matters
Luxembourg	24 October 1988	Treaty between Australia and the Grand Duchy of Luxembourg on Mutual Assistance in Criminal Matters
Greece	4 July 2002	Treaty between Australia and the Hellenic Republic on Mutual Assistance in Criminal Matters
Hong Kong	23 September 1996	Agreement between the Government of Australia and the Government of Hong Kong concerning Mutual Legal Assistance in Criminal Matters
Kingdom of Thailand	27 July 2006	Treaty between Australia and the Kingdom of Thailand on Mutual Assistance in Criminal Matters
Netherlands	26 October 1988	Treaty between Australia and the Kingdom of the Netherlands on Mutual Assistance in Criminal Matters
Malaysia	15 November 2005	Treaty between the Government of Australia and the Government of Malaysia on Mutual Assistance in Criminal Matters
	7 December 2005	Exchange of Notes between the Government of Australia and the Government of Malaysia on the Treaty on Mutual Assistance in Criminal Matters
Monaco	13 September 1999	Treaty between the Government of Australia and the Government of His Serene Highness the Prince of Monaco on Mutual Assistance in Criminal Matters
People's Republic of China	3 April 2006	Treaty between Australia and the People's Republic of China on Mutual Legal Assistance in Criminal Matters
Republic of Austria	20 October 1988	Treaty between Australia and the Government of the Republic of Austria on Mutual Assistance in Criminal Matters
Republic of Ecuador	16 December 1993	Treaty between the Government of Australia and the Government of the Republic of Ecuador on Mutual Assistance in Criminal Matters
Republic of Hungary	25 October 1995	Treaty between Australia and the Republic of Hungary on Mutual Assistance in Criminal Matters
Republic of Indonesia	27 October 1995	Treaty between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters
Republic of India	23 June 2008	Treaty between Australia and the Republic of India on Mutual Legal Assistance in Criminal Matters
Republic of Italy	28 October 1988	Treaty on Mutual Assistance in Criminal Matters Between Australia and the Republic of Italy
Republic of Korea	25 August 1992	Treaty between Australia and the Republic of Korea on Mutual Assistance in Criminal Matters
Republic of Portugal	4 July 1989	Treaty between Australia and the Republic of Portugal on Mutual Assistance

Country	Date of signing	Nature of the agreement in Criminal Matters
Republic of the Philippines	28 April 1988	Treaty between Australia and the Republic of the Philippines on Mutual Assistance in Criminal Matters
Spain	3 July 1989	Treaty on Mutual Assistance in Criminal Matters Between Australia and the Kingdom of Spain
Israel	24 August 1994	Treaty between the Government of Australia and the Government of the State of Israel on Mutual Legal Assistance in Criminal Matters
Sweden	18 December 1998	Treaty between Australia and Sweden on Mutual Assistance in Criminal Matters
Switzerland	25 November 1991	Treaty between Australia and Switzerland on Mutual Assistance in Criminal Matters
United Kingdom	6 February 1997	Agreement between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland concerning the investigation, restraint and confiscation of the proceeds and instruments of crime
	3 August 1988	Treaty between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland concerning the investigation of drug trafficking and confiscation of the proceeds of drug trafficking
United Arab Emirates	11 February 1995 and 18 May 1995	Exchange of Letters between the Attorney-General's Department and the Home Office dated 11 February 1995 and 18 May 1995
	26 July 2007	Treaty between Australia and the State of the United Arab Emirates on Mutual Legal Assistance in Criminal Matters
United Mexican States	6 May 1991	Treaty between Australia and the United Mexican States on Mutual Legal Assistance in Criminal Matters
United States of America	30 April 1997	Treaty between the Government of Australia and the Government of the United States of America on Mutual Assistance in Criminal Matters
	30 April 1997	Exchange of Notes dated 30 April 1997

Multilateral Agreements which include mutual assistance in criminal matters obligations

Date of Australia signing	Nature of the agreement
14 February 1989	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
28 September 1992	Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime
13 December 2000	United Nations Convention against Transnational Organised Crime
15 October 2001	International Convention for the Suppression of Terrorist Bombings
21 December 2001	Protocol against the Smuggling of Migrants by Land Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime
15 October 2001	International Convention for the Suppression of the Financing of Terrorism
11 December 2002	Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime
9 December 2003	United Nations Convention against Corruption