29 October 2008
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TRANSPOSITION OF DIRECTIVE 2006/24/EC - SOCIETY FOR COMPUTERS AND LAW
(PRIVACY AND DATA PROTECTION INTEREST GROUP) RESPONSE TO THE HOME
OFFICE CONSULTATION PAPER DATED AUGUST 2008

1 INTRODUCTION

The Society for Computers and Law (SCL) was created in 1973 and is the UK’s leading
organisation for IT lawyers. It is a membership organisation which uses its wide
membership base, encompassing leading lawyers from all firms dealing with IT law and
allied matters, to educate fellow lawyers. It also seeks to inform the wider public and
organisations with regulatory responsibilities about sensible approaches to IT issues
where the law is an inevitable element to be taken into account. SCL concentrates on the
development of the law and practice regulating IT. It has over 1,500 members, drawn
from private practice, industry and the academic world.

The SCL welcomes this opportunity to respond to the Home Office consultation (the
“Consultation”) on the transposition of the European Union Directive 2006/24/EC (the
“Data Retention Directive”) on the retention of communications data into English law.

2 CONSULTATION LIST OF QUESTIONS FOR RESPONSE

Our responses to the five questions set out in the Consultation are set out in the Annex to
this response.

3 OTHER COMMENTS

3.1 Purpose of Data Retention

We are concerned that the access provision in the draft Regulations is limited, although we note that the relevant provision in the Data Retention Directive is also limited. We consider that draft Reg.10 is inadequate. We note that the discrepancies in the access provisions in ATCSA, RIPA and the Data Retention Directive persist.

We understood that under Part 2 of the ATCSA the Secretary of State (for the Home Office) was required to issue a voluntary code of practice on the retention of communications data (the “Code”) (s.102(1) of the ATCSA), or could enter into agreements with communications providers, as he considered appropriate, about the practices to be followed by those providers in relation to their retention of communications data (s.102(2) of the ATCSA). The Code or agreements could contain any provisions that the Secretary of State considered necessary for the purpose of safeguarding national security or for the prevention, detection or prosecution of crimes which may directly or indirectly be related to national security (the “ATCSA Purposes”).

Art.15 of the Privacy and Electronic Communications Directive 2002/58/EC, prior to being amended by the Data Retention Directive, permitted member states to adopt legislative measures which restricted the scope of data subjects’ rights under the Data Protection Directive 95/46/EC, where to do so was necessary, appropriate and proportionate within a democratic society to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences. However, following the insertion of a new Art.15(1a) into the Privacy and Electronic Communications Directive 2002/58/EC, communications data can now be retained for the purposes set out at Art.1(1) of the Data Retention Directive, being “for the purposes of investigation, detection and prosecution of serious crime, as defined by each member state in its national law” (the “EU Purposes”).

The ATCSA Purposes were therefore more restricted than the EU Purposes. However, the grounds upon which communications data can be obtained under s.22(2) of the RIPA (the “RIPA Purposes”) are arguably broader than the EU Purposes. We therefore remain to be convinced that disclosure of communications data for RIPA Purposes is not a breach of data subjects’ rights under the Data Protection Directive 95/46/EC. If this is a breach, then it is difficult to see what direct judicial remedy is available to data subjects, as required by the Privacy and Electronic Communications Directive 2002/58/EC, to challenge the retention of their personal (communications) data for the additional RIPA Purposes.
3.2 **Sunset Clause**

We note that most legislation that sanctions the invasion of individual’s human rights in the interests of anti-terrorism, or the prevention or detection of serious crime, are temporary by nature, requiring reaffirmation by Parliament at regular intervals. In particular, we note that a clear “sunset provision” was included in ATCSA (at s.105) by the House of Lords.

Art.14 of the Data Retention Directive commits DG Justice to drawing up and publishing a report evaluating the impact on business of the Data Retention Directive. The last date for this report is 15 September 2010. We consider that a sunset clause similar to the provision at s.105 of ATCSA, by reference to the Article 14 reporting provision, should be included in the draft Regulations, with a positive resolution renewal mechanism (as per s.105 (5) of the ATCSA).

3.3 **Supervision of Retention of and Access to Communications Data**

We consider that the draft Regulations should ensure that there is sufficient supervision of the retention of communications data by public communications providers. Whilst we note that their obligation to keep communications data secure has been made subject to supervision by the Information Commissioner (in Reg.9 of the draft Regulations), we consider that their other duties should be subject to oversight by, we suggest, the Interception of Communications Commissioner.

We also suggest that proper supervision be made of public authorities seeking communications data.

We suggest that Reg.9(2) of the draft Regulations, in only providing for supervision by the Information Commissioner for matters of “security of stored data”, has not properly implemented the provisions of Art.13(2) of the Data Retention Directive. We suggest that proper implementation can only be ensured by, as a minimum, bringing into force the provision at s.144 of the Criminal Justice and Immigration Act 2008 (introducing ss.55A to 55E of the Data Protection Act 1998), as well as providing for similar “effective, proportionate and dissuasive” enforcement powers for the Interception of Communications Commissioner.

4 **CONCLUSION**

In conclusion, we summarise our response as follows:

4.1 we consider that the draft Regulations, in so far as they seek to provide clear obligations on communications providers, are a faithful and effective transposition of the Data Retention Directive;
4.2 we consider that the Home Office has not made out a case for the retention periods set out in the draft Regulations;

4.3 we consider that the draft Regulations should include a “sunset clause”;

4.4 we consider that the laws on access to communications data will not satisfactorily ensure that access to information retained as a result of the draft Regulations will only be for the limited set of purposes described in the Data Retention Directive;

4.5 we consider that the draft Regulations do not provide for appropriate penalties that are “efficient, proportionate and dissuasive” to ensure adequate enforcement of the draft Regulations; and

4.6 we consider that an appropriate commissioner should be formally appointed to oversee the retention of communications data regime, and we suggest the Interception of Communications Commissioner.

Society for Computers and Law (Privacy and Data Protection Interest Group)
29 October 2008

CONTACTS:-
For further information about the Society’s views on the Consultation or other data protection related issues, please contact:
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### Annex to response

**Transposition of Directive 2006/24/EC**

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<thead>
<tr>
<th>Question 1.</th>
<th>Will individual public communications providers be able to interpret how the draft Regulations would apply to their business? If not, why not?</th>
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<td><strong>Answer/Comments:</strong></td>
<td>We consider that the scope of the definitions of “communications data” and “traffic data” are well understood by the electronic communications provider community, following the earlier data retention regime that exists under the Regulation of Investigatory Powers Act 2000 (“RIPA”) and the Anti-Terrorism, Crime and Security Act 2001 (“ATCSA”). We therefore consider that public electronic communications providers should not have any difficulty in interpreting the draft Electronic Communications Data Retention (EC Directive) Regulations 2008 (the “draft Regulations”) included in the Consultation.</td>
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<th>Question 2.</th>
<th>Is the data required to be retained specified clearly in the draft Regulations? If not, why not and can the specification be clearer?</th>
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<td><strong>Answer/Comments:</strong></td>
<td>As noted above, the scope of the data required to be retained is well understood by the relevant communications providers. We consider that the draft Regulations make sufficiently clear what data is to be retained.</td>
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<th>Question 3.</th>
<th>Do you agree with the Government’s approach to meet additional expenses to reduce burden and meet requirements?</th>
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| **Answer/Comments:** | We consider that the obligation on communications providers to retain communications data for longer than they would require for their own business purposes should be matched by a right to compensation for the incremental costs of implementing storage and retrieval systems for the retained data. We therefore suggest that the provision at Regulation 14 of the draft Regulations should be mandatory – the Secretary of State “shall” rather than “may”.

We are concerned that, although figures are quoted in the costs and benefits table of the Impact Assessment attached at Annex C to the Consultation, there is no assessment in the Consultation of how the reimbursement of public communications providers’ costs under the ATCSA voluntary code or under the Data Retention (EC Directive) Regulations 2007 has worked out in practice. |
In particular, subject to the application of any Freedom of Information Act 2000 ("FoIA") exemption that may apply, we consider that the Home Office should publish the costs to the Home Office of requiring communications data to be retained since the effective date of ATCSA and its voluntary code, by anonymised communications provider and by financial year. We also believe that the Home Office should confirm the statistics published by the Interception of Communications Commissioner, and other sources, to show the real cost per application of communications data for each of the financial years since the effective date of ATCSA and its voluntary code.

At the moment, the public is unable to judge whether the cost of requiring data to be retained is a cost-effective measure, given that there is no public source of information for the costs to the Home Office of reimbursing public communications providers. Our estimate, based upon the Home Office figures in the Consultation of £30.35m capital and £16.23m resource over 8 years, and the current (2007) figures published by the Interception of Communications Commissioner (519,260 requests for communications data made by public authorities), is that each request costs the Home Office in the region of £89. This would, therefore, appear to be a cost-effective method of assisting in the prevention and detection of serious crime and anti-terrorism, but it would be reassuring to the public if this were confirmed.

However, the cost-effectiveness of requiring data retention may not be as the above figures suggest, given that there are no publicly-available figures to show how many requests from public authorities relate strictly to anti-terrorism and the prevention and detection of serious crime (the Interception of Communications Commissioner declined to give a breakdown of the public authorities making the over half a million requests for communications data in 2007, stating that he considered doing so “would [not] serve any useful purpose”). Whilst it is clear that this was the intention of the introduction of data retention under ATCSA and its voluntary code, we note that there are suggestions that the ability of a wide range of public authorities to gain access to this retained data under the provisions of RIPA, may undermine public confidence in the data retention system. Again, public confidence in the proportionality of any requirement for the retention of communications data, and the cost-effectiveness, would be enhanced if it could be shown that the significant majority of the requests for communications data are being made by the intelligence agencies and police forces, and not by a wide variety of prosecuting authorities in pursuit of less serious criminal offences.

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<th>Question 4.</th>
<th>Do you agree the proposed approach will not have a detrimental effect upon competition?</th>
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<td>Answer/Comments:</td>
<td>We believe that the draft Regulations should not distort competition, provided that the</td>
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reimbursement of the costs of communications providers across the UK and the European Union is carried out in a harmonised way, so that no member state can be argued to be using the ability to reimburse national communications providers (of their storage and retrieval costs for the purposes of data retention incremental to their normal business purposes) to act as indirect state aid to those national communications providers.

Alternatively, if communications providers are not fully reimbursed for their incremental costs in storing communications data, then those communications providers in member states that opt for maximum retention periods will be disadvantaged with a resulting distortion in the internal market.

In addition, we note that there are provisions in the Data Retention Directive (Article 3(1)) and the draft Regulations (Regulation 13(1)) that ameliorate the impact of the data retention by reducing any duplication of communications data between communications providers within a jurisdiction. However, we are disappointed that this provision was not agreed to on an European Union-wide basis. Duplication of communications data retention (and the necessary costs of that duplication) could have been avoided if: (i) Article 3(1) of the Data Retention Directive applied across member state national boundaries; and (ii) public authorities permitted to access retention data in accordance with any member state’s laws were given the automatic right to access data held elsewhere in the European Union, where that date being accessed related to communications to or from the public authorities’ own member state.

Question 5. Do you think the draft Regulations can provide a framework that will enable implementation of the internet aspects of the Directive?

Answer/Comments:
Whilst we agree that the draft Regulations do provide a framework, we note that there is no reasoning given in the Consultation for the choice of retention period. In particular, there is no discussion or case analysis in the Consultation for the key options open to the Home Office, being, we believe, a retention period of 6 months (as under the ATCSA voluntary code), 12 months (as included in the draft Regulations) or 24 months (being the maximum permitted by the Data Retention Directive).

We consider that the Consultation should have made more of a case for the increased data retention period. In particular, we consider that, again subject to the proper application of any appropriate FoIA exemptions, the breakdown of age of communications data subject to RIPA requests should be made public in each reporting year. This may show whether the requirement for 12 months’ retention is, in fact, proportionate.