

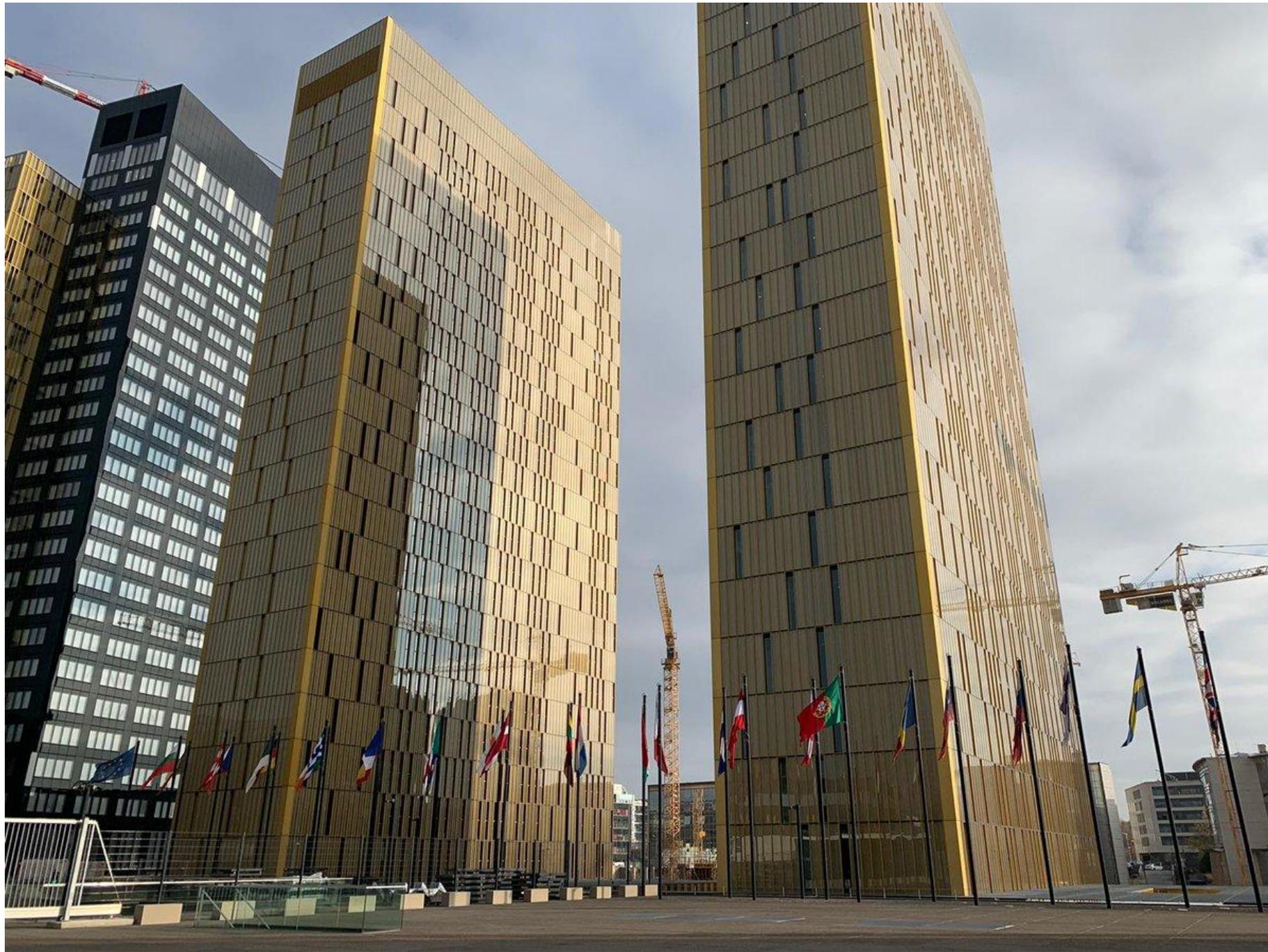
# Data retention and encryption: Has the pendulum swung too far?

Liam Herrick, Executive Director;  
Olga Cronin, Policy officer;  
Irish Council for Civil Liberties



# CJEU: 3 areas of EU law

- 1) Whether a system of universal retention of metadata for a fixed period of time is never permissible, irrespective of how robust any regime for allowing access to such data may be;
- 2) The criteria whereby an assessment can be made as to whether any access regime to such data can be found to be sufficiently independent and robust; and
- 3) Whether a national court - should it find that national data retention and access legislation *is* inconsistent with European Union law - can decide that the national law in question should not be regarded as having been invalid at *all* times but rather be regarded as invalid *prospectively* only.



# Data retention and access regime



- A member of An Garda Síochána, Revenue, Defence Forces, Competition and Consumer Protection Commission, GSOC - of specific rank and under certain circumstances - and Data Protection Commissioner can seek and obtain access from mobile phone and internet service providers to metadata relating to everyone and anyone's telephone calls, text messages, emails and communications on the internet (up to two years in respect of mobile phone traffic and location data, and up to one year in respect of internet data).
- 18,500 data requests made in 2018

# Call to safeguard privacy of communications

## Government support for data plan at odds with own policies

An EU proposal to hold onto data from phone calls, faxes, e-mails and internet use for up to seven years is causing a stir in Ireland, writes **Karlin Lillington**

**T**HE Irish Government is supporting a controversial EU proposal requiring telecommunications providers to retain all data from faxes, e-mails and internet use, phone and mobile calls for up to seven years.

The proposal from the EU Telecommunications Council is

partment did not offer a spokesperson to comment on the issue.

The proposal is strongly opposed by the Data Protection Commissioners Working Party, which sent a letter condemning the proposed changes to Sweden's acting European Council President Mr Goran

it was inadequate and toothless — found no evidence that the system had been used for industrial espionage.

"The whole emphasis in Europe seems to be on how to get access, rather than how to protect privacy," said Ms McKenna.

The proposal would violate

MEPs urged to back moves to safeguard telecoms privacy



August 3, 2001 (left)  
August 31, 2001 (above):  
[The Irish Times](#)

# Retention of mobile call records queried

By Karlin Lillington

THE Office of the Data Protection Commissioner is to seek clarification from mobile telecoms companies Eircell and Esat Digifone of their retention of call records for nearly seven years.

Access to the information effectively turns mobiles into potential "tagging devices" that provide a snapshot of an individual's daily actions.

"This is quite shocking that we have this degree of information on people's movements being stored, and shows the strong need for explicit privacy protection legislation in Ireland," said Mr Malachy Murphy, co-chairman of the Irish Council on Civil Liberties (ICCL) and convener of its e-rights group.

Both operators said they were holding customer "locator records" – which can pinpoint a phone user's location to within a

hourly, as the network automatically tracks the phone to keep it within network coverage.

"It's effectively like having a tagging device on a person," said Mr Murphy. Nearly 70 per cent of Irish people own a mobile phone.

The disclosure will be embarrassing for the Government, since the Republic has been eager to advertise its pro-privacy, pro-e-commerce regulatory environment.

The ICCL said the Republic already had weak laws regarding phone-tapping. And the long-term retention of electronic data, such as locator records, was at the heart of a major EU battle over whether to increase the surveillance capabilities of law enforcement.

A proposal from the EU's Telecommunications Council last July to retain such data was roundly rejected by both the European Parliament and the Commission. But American and British agencies are

vacancy debate, said Mr Tony Bunyan, director of European privacy group Statewatch in London.

The Office of the Data Protection Commissioner said such information was supposed to be destroyed after it was used to prepare customer bills, unless the records were permanently "atomised" so that an individual's name could never be reconnected to a given set of records.

Mr Laurence McAuley, head of regulatory affairs for Eircell, said the records were held "online" – where they were associated with a name for billing purposes – for six months.

Afterwards, the records are archived for six years but are atomised so that "we can't use them for marketing purposes". However, Mr McAuley said the company could reconnect the records to an individual name if needed and would do so if required by law enforcement.

- In April 2002, Cabinet confidentially instructed service providers to retain traffic data for 3 years.
- DPC threatened High Court action.
- Minister for Justice Michael McDowell agreed to introduce legislation. But in 2004, domestic legislation was put on hold as Ireland put forward motion for EU-wide retention regime.
- Just before Cabinet directive was due to expire, Government introduced last-minute amendment to the Criminal Justice (Terrorist Offences) Bill, in a near empty Dail, that would allow for the retention of traffic data for three years.

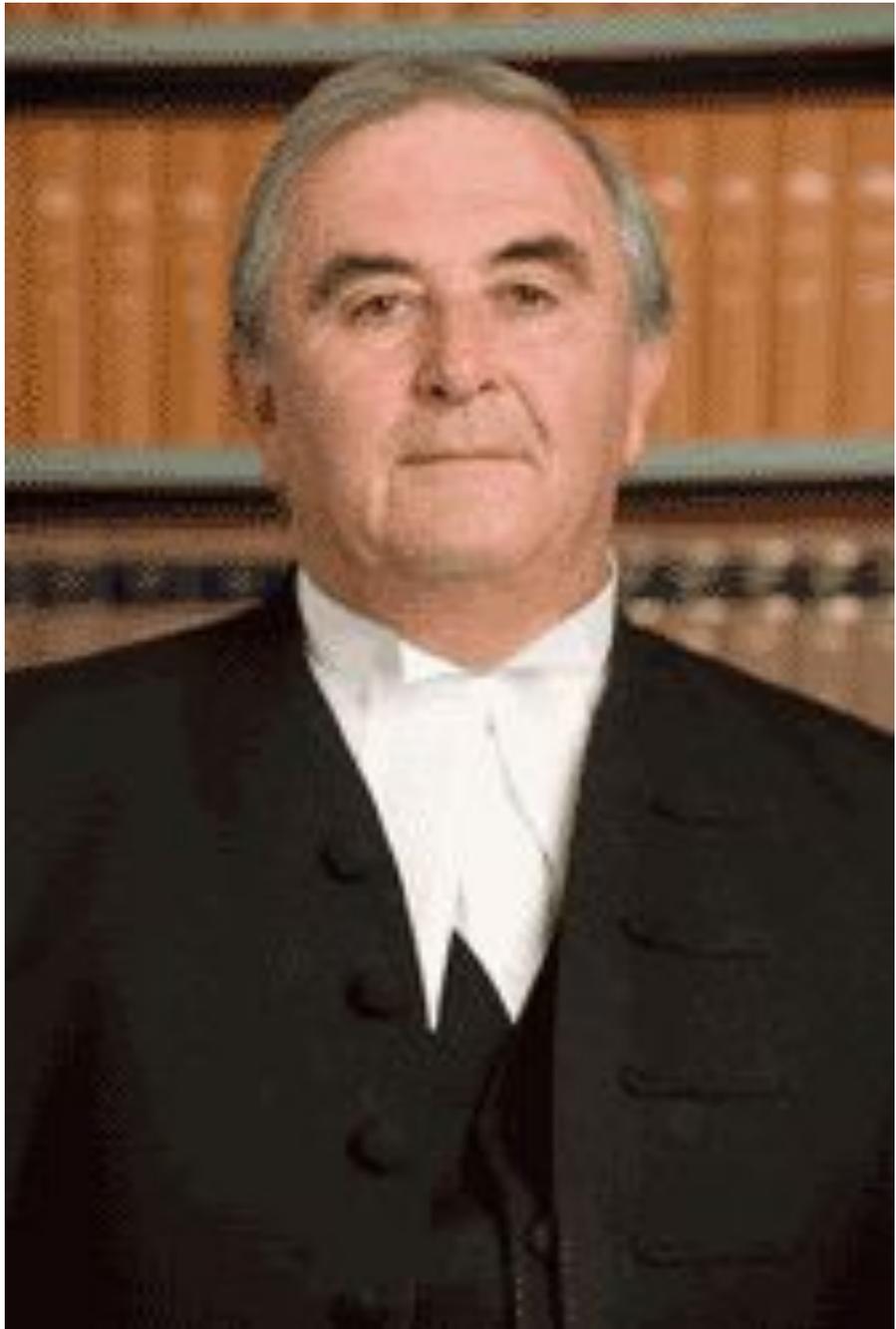
# Digital Rights Ireland

- December 2005, at Pearse Street Library in Dublin, Digital Rights Ireland was launched with UCD law lecturer and barrister TJ McIntyre as chairman. DRI was launched with the specific purpose of fighting data retention.
- Laws differed widely across EU with 15 states having no mandatory data retention regime, while Ireland had the longest retention period of three years. Following London bombings in July 2005, UK, along with other countries including Ireland, were pushing for an EU-wide agreement on mandatory storage and retention of mobile telephone and e-mail traffic.
- Early 2006, an EU directive was passed mandating telecom service providers to retain the phone and internet records of their customers for up to two years.

# ECJ declares EU directive 'invalid'



2010: In DRI case, High Court sends question to ECJ about EU directive on data retention.  
2011: Communications (Retention of Data) Act 2011 signed into law.  
2014: In DRI case, ECJ declares EU directive "invalid".

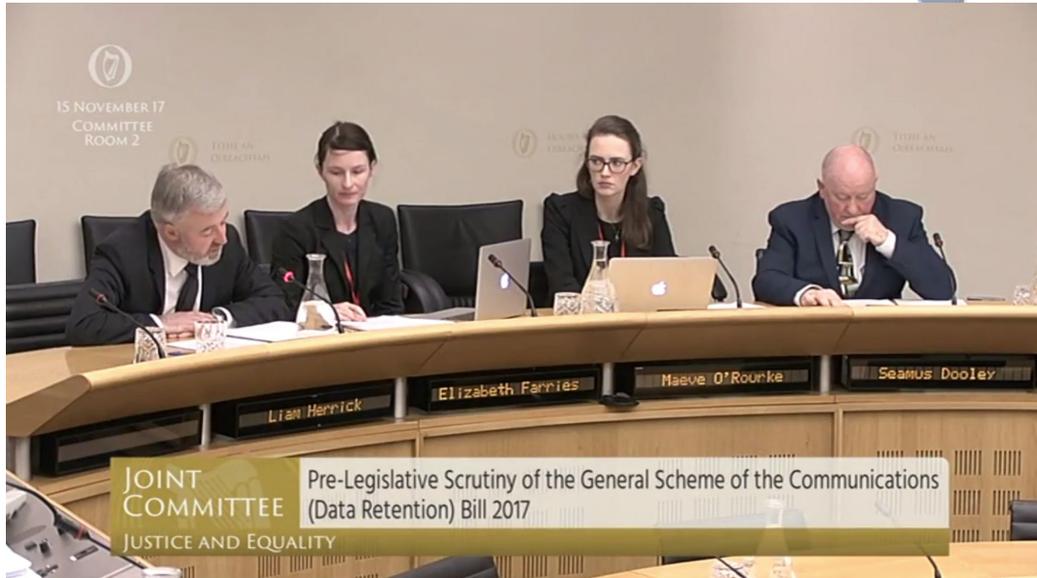


# Murray Review

- January 2016: *The Irish Times* reports GSOC accessed records of a number of journalists - without the journalists' knowledge or consent.
- Former Chief Justice John Murray appointed to carry out review of the law surrounding Ireland's data retention and access practices.
- Found that Ireland's data retention laws amounted to "a form of mass surveillance of virtually the entire population of the State".
- Key concern of national constitutional courts and international courts is need to ensure that statutory data retention scheme respects the principle of proportionality.

# Recommendations

- Explicit protection of journalist sources
- Strict necessity
- Targeted data retention
- Limited retention period
- Limited third party access
- Precise definitions of data being collected
- In cases of urgency, require a judge or oversight body
- Notification
- Compensation
- Complaint notification reasons
- Complaint reporting
- Establish an independent supervisory body
- Judicial remedy



ICCL at Justice Oireachtas committee: November 15, 2017

# Breaking encryption

- Recent calls to allow police authorities intercept encrypted communications.
- End-to-end encryption prevents any third party from reading messages sent between sender and recipient.
- ICCL has written to Ireland's MEPs outlining concerns.

