

# Institute for Development of Freedom of Information



## Regulating Secret Surveillance in Georgia (April-December, 2016)

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## Summary

The report covers the period between April-December, 2016. For more comprehensive information about the process before March 2016 please see our previous reports: *Regulating Secret Surveillance in Georgia in 2013-2015*<sup>1</sup> and *Secret Surveillance in Georgia in June 2015 – March 2016*.<sup>2</sup>

Recent surveys show<sup>3</sup> that public perception of surveillance has not changed dramatically in Georgia since 2013. There is still a perception that law enforcement agencies have technical capacity to wiretap and are using this capacity in illegal ways.

Although there has been some progress in terms of investigation of cases of illegal surveillance, the emergence of new cases after the change of government in 2012 has increased doubts on continuing systemic practice of illegal surveillance, lack of willingness from the government to limit its power, and indicates a lack of efficient and comprehensive reform in this area.

As a result of the reform aimed at decoupling security and intelligence agencies from the Ministry of Internal Affairs (MIA), a new institution State Security Service was created to be in charge of security issues. However, even though, according to the election program of Georgian Dream for 2012 Parliamentary Elections, the functions of State Security Service were supposed to be limited to intelligence gathering, analysis, systematization and realization, and it was explicitly stated that criminal prosecution must not be a function of the security service, it was still given investigative and police functions.<sup>4</sup>

Civil society has criticized the reform for potential duplication of functions between the MIA and the State Security Service, as well as for limited resources for civic or parliamentary oversight on newly created State Security Service.

According to the two-key system, which went into force on March 31st 2015, law enforcement agencies have to obtain electronic permission from the Personal Data Protection Inspector, in addition to a court order, prior to conducting surveillance. Considering the high level of public trust in the institution Personal Data Protection Inspector, the new system can be assessed positively. However, as it was revealed, the existence of the two-key system does not eradicate the risks of illegal secret surveillance, as security services still possess technical capacity to carry out surveillance and counterintelligence activities bypassing courts and Personal Data Protection Inspector.

In April 2016, the Constitutional Court of Georgia ruled that technical access of State Security Service to telecom operators' networks, allowing unfettered monitoring of communication and collection of communications metadata, was unconstitutional. March 31, 2017 was set as a deadline for preparing fundamental legislative amendments and ensuring institutional and technical base for a new system. For this

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<sup>1</sup>"Regulating Secret Surveillance in Georgia: 2013-2015", *Institute for Development of Freedom of Information (IDFI)*, 9 June 2015, <https://idfi.ge/en/regulating-secret-surveillance-in-georgia-2013-2015>

<sup>2</sup>"Secret Surveillance in Georgia: 2015 – 2016", *Institute for Development of Freedom of Information (IDFI)*, 7 April 2016, <https://idfi.ge/en/regulating-secret-surveillance-in-georgia>

<sup>3</sup> The Caucasus Research Resource Centers (CRRC). (2013-2015) "Survey on Public Policies". Accessed 05 January, 2017. <http://caucasusbarometer.org/en/ti2015ge/codebook/>  
<http://caucasusbarometer.org/ge/ti2013ge/codebook/>

<sup>4</sup> "Bidzina Ivanishvili – Georgian Dream", *Election Program for 2012 Parliamentary Elections*, accessed on 20 October, 2016, p. 18, <http://www.ivote.ge/images/doc/pdfs/ocnebis%20saarchevno%20programa.pdf>

purpose, civil society organizations (CSOs) involved in the campaign ‘This Affects You’ have prepared a package of legislative changes, further reforming regulation of surveillance in Georgia.

The draft law envisioned the establishment of three new bodies/institutions: 1. Special Agency of Surveillance; 2. Parliamentary Supervisory Council of the State Security Service; and 3. Independent Investigation Mechanism.<sup>5</sup> At the same time, the draft law proposed a significant increase of the oversight powers of the Personal Data Protection Inspector in regards to secret surveillance. However, the draft law was not submitted to the Parliament before 2016 October Parliamentary elections.

Furthermore, the two-key system does not ensure complete control of the court on secret investigative actions, since law-enforcement authorities still have the possibility to carry out counterintelligence or secret investigative activities (secret audio and video recording, movie and photo recording, using TV cameras and other electronic devices) without court approval. Moreover, law-enforcement agencies also have the right to launch electronic surveillance with the written consent of at least one party of the communication, in order to obtain counterintelligence information. Human Rights Education and Monitoring Center (EMC), a Tbilisi-based NGO, filed a lawsuit in the Constitutional Court against these legal provisions on November 16, 2015.<sup>6</sup>

Also, in April 2016, the Constitutional Court ruled that there is no control mechanism over real time access to Internet traffic in the legislation. The only leverage the Personal Data Protection Inspector has in this regard is his/her power to inspect the lawfulness of data processing by a data controller/a data processor.

## Background Information: Regulation of Secret Surveillance since 2013<sup>7</sup>

Personal data protection and control of illegal surveillance and wiretapping were high on the Georgian political agenda during and after the 2012 Parliamentary Elections, when information on up to 29,000 illegal video and audio recordings was revealed.

The new government after the 2012 parliamentary elections promised to ensure protection of personal data and control illegal surveillance and wiretapping practices. A package of legislative amendments<sup>8</sup> on surveillance related changes to five different laws was submitted<sup>9</sup> to the Parliament in July 2013, however, it

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<sup>5</sup> “New System of Surveillance”, *This Affects You Too*, Last accessed October 17, 2016. Available at: <http://esshengexeba.ge/contentimage/infographic.pdf>

<sup>6</sup> *EMC demands Articles of the Law on Counterintelligence Activities be recognized as unconstitutional*, Human Rights Education and Monitoring Center (EMC), Last accessed December 1, 2016. Available at: <https://emc.org.ge/2015/11/12/sakonstitucio-sarcheli-emc/>

<sup>7</sup> This is a brief overview intended to create background for the recent developments. For more comprehensive information about the process since 2013 please see the previous reports: *Regulating Secret Surveillance in Georgia: 2013-2015* (<https://idfi.ge/en/regulating-secret-surveillance-in-georgia-2013-2015>) and *Secret Surveillance in Georgia: June 2015 – March 2016* (<https://idfi.ge/en/regulating-secret-surveillance-in-georgia>)

<sup>8</sup> Parliament of Georgia, Package of Legislative Amendments on Surveillance, <http://parliament.ge/ge/law/24/23>

<sup>9</sup> The authors were:

1. First Deputy Chairman of Legal Affairs Committee and member of the Georgian Dream Coalition MP Shalva Shavgulidze;
2. Chief Specialist of the Legal Issues Committee of the Parliament of Georgia Lika Sajaia;
3. Editor-in-Chief of the Rezonansi Newspaper Lasha Tugushi;

was not until August 2014 that the first part of the changes were passed. Due to this delay, in March 2014 several civil society organizations (CSOs) started a campaign This Affects You – They Are Still Listening, advocating for legislative amendments for ensuring the protection of privacy.

During the process, the most important division of opinion concerned limiting direct access of law enforcing agencies to telecommunications data. On the one hand, the Ministry of Internal Affairs, supported by the Government of Georgia and a part of Member of Parliament (MPs), remained strongly opposed to the suggested changes limiting this access. On the other hand, the President, CSOs united in the This Affects You campaign and another group of MPs strongly advocated for the limitation of direct access to this data.

The legislative amendments on surveillance were finally adopted in August 2014, however, the clause regulating direct access to telecommunications data via the Lawful Interception Management System, or the so called “black boxes”,<sup>10</sup> was removed from the draft law. Instead, it was agreed that a special commission would decide upon a mechanism for regulating this issue by November 2014.

Discussions on how to regulate access to telecommunication data were revived in September 2014, with four different proposals being presented by various actors, including two separate ones by the Georgian Dream Coalition, one by a group of CSOs, and one by the President.

After multiple discussions, extensions of the deadline and two vetoes from the President, the Parliament adopted the government-supported draft law. According to the adopted draft law, the Ministry of Internal Affairs has retained its direct access to telecom operators’ servers, however, after obtaining a court warrant the Ministry requires authorization, including a technical one, from the Personal Data Protection Inspector’s Office in order to carry out surveillance through the so called two-key system.<sup>11</sup>

The Ministry of Internal Affairs had time until March 31, 2015 to ensure functioning of the two-stage electronic system.<sup>12</sup> From March 31, 2015 the so called two-key system was launched and the Personal Data Protection Inspector took obligation to check whether the decision of the court (or, in urgent cases, of the Prosecutor’s Office) to conduct surveillance is properly implemented.

This Affects You campaign continued advocating for depriving security agencies of direct access to telecom operators’ networks after adoption of the government-supported draft law and filed a lawsuit in the Constitutional Court against the Parliament of Georgia. Another lawsuit on the same issue was submitted to the Constitutional Court on January 30<sup>th</sup>, 2015 by the Public Defender.

Most recently, This Affect You campaign was relaunched on March 14<sup>th</sup>, 2016, following the distribution of several sex tapes and related public protests. Furthermore, a discussion started between the Parliament, law-

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#### 4. Journalist ZviadKoridze

<sup>10</sup> A system enabling surveillance of telecommunication services via direct access to telecommunications data

<sup>11</sup>The two-key control mechanism – Key refers to direct access to telecom operators’ servers. In the two-key system although the Ministry of Internal Affairs retains its direct access to telecom operators’ servers, after obtaining court warrant the Ministry shall require authorization, including technical one, from Personal Data Protection Inspector’s Office in order to carry out surveillance.

<sup>12</sup>Law of Georgia on Personal Data Protection, Article 55(1), transitional provisions:

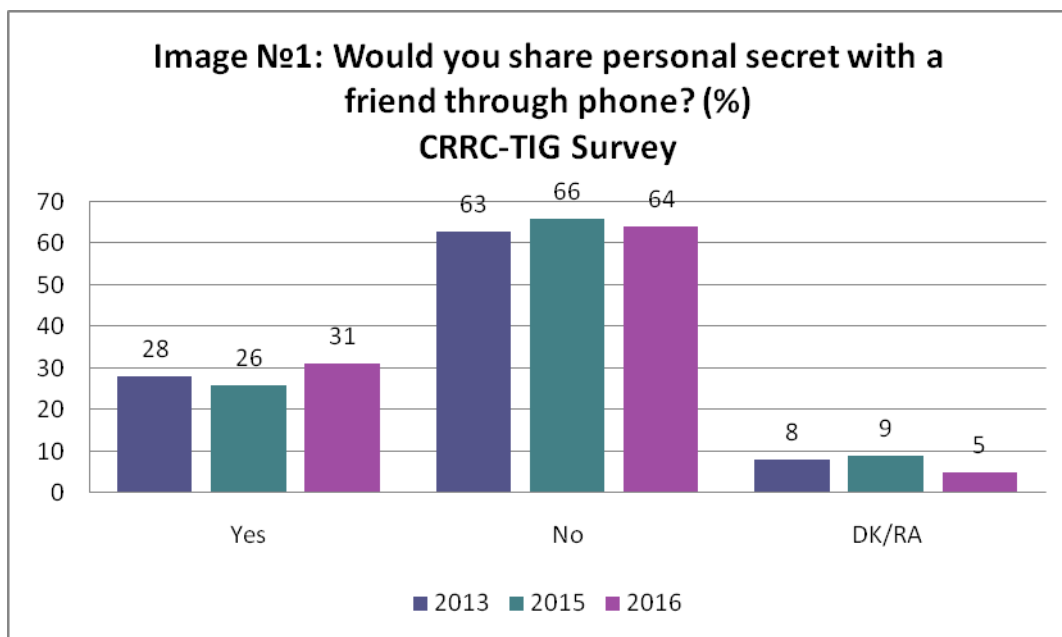
<https://matsne.gov.ge/en/document/view/1561437>; Criminal Procedure Code of Georgia 332<sup>3</sup>. Entry into force of two-stage electronic system of secret investigation (in Georgian): <https://matsne.gov.ge/ka/document/view/90034>

enforcement agencies and the Personal Data Protection Inspector on possible legislative changes to make punishment for violating privacy rights stricter.

On a positive note, the Supreme Court started proactively disclosing statistical information on surveillance since September 2014. This obligation was taken by the Supreme Court as a result of a recommendation made by IDFI and other CSOs in the framework of the Open Government Partnership (OGP) Action Plan of Georgia. OGP has recognized the commitment to proactively publish surveillance statistics in Georgia as one of the most successful and unique worldwide.

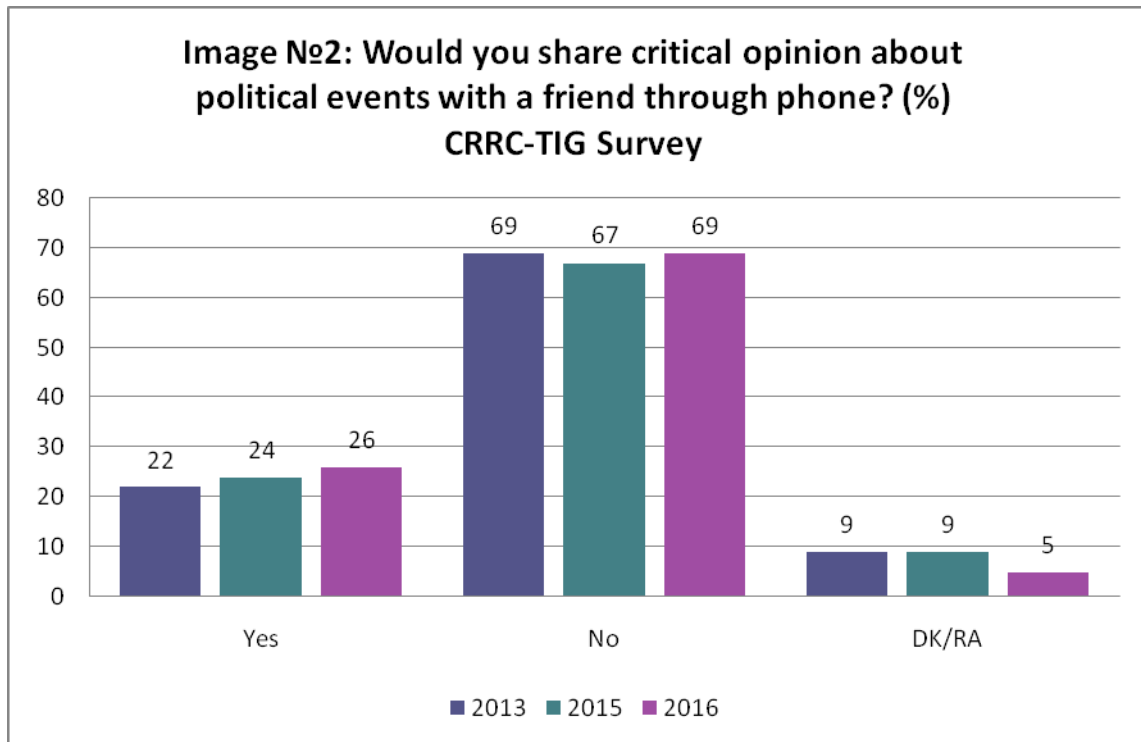
## Problem Statement – Survey on Public Perceptions about Surveillance

A recent survey has shown that public perception of surveillance in Georgia has not changed since 2013.<sup>13</sup> The majority of people – 64% in 2016 are still reluctant to share a personal secret over the phone (image №1).



<sup>13</sup> Survey carried out by CRRC Georgia for Transparency International Georgia (CRRC-TIG Survey) in April, 2015, entire dataset can be found here: <http://caucasusbarometer.org/en/ti2015ge/codebook/>  
The latest survey was conducted by CRRC Georgia for Transparency International Georgia (CRRC-TIG Survey) in March 2016. While the dataset is not available online yet, the results are publicly available: <http://esshengexeba.ge/?menuid=9&id=1120&lang=1>

Similarly, the majority of Georgian population would rather not share their critical opinions on political events over the phone (image №2).

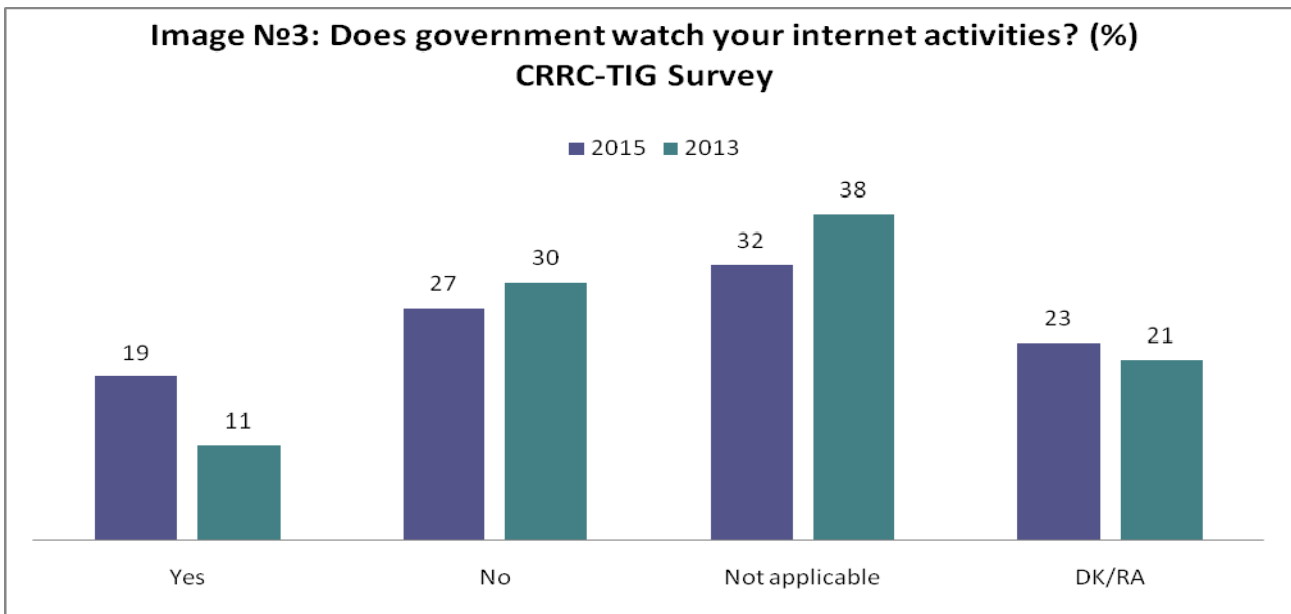


In 2016, over 60% of the Georgian population thinks that the authorities are illegally wiretapping people. **(Note that 2016 results are taken from the survey conducted by CRRC Georgia for Transparency International Georgia (CRRC-TIG Survey) in March 2016. The entire dataset of this survey is not available online yet, however, the results are publicly available only in Georgian language).**<sup>14</sup>

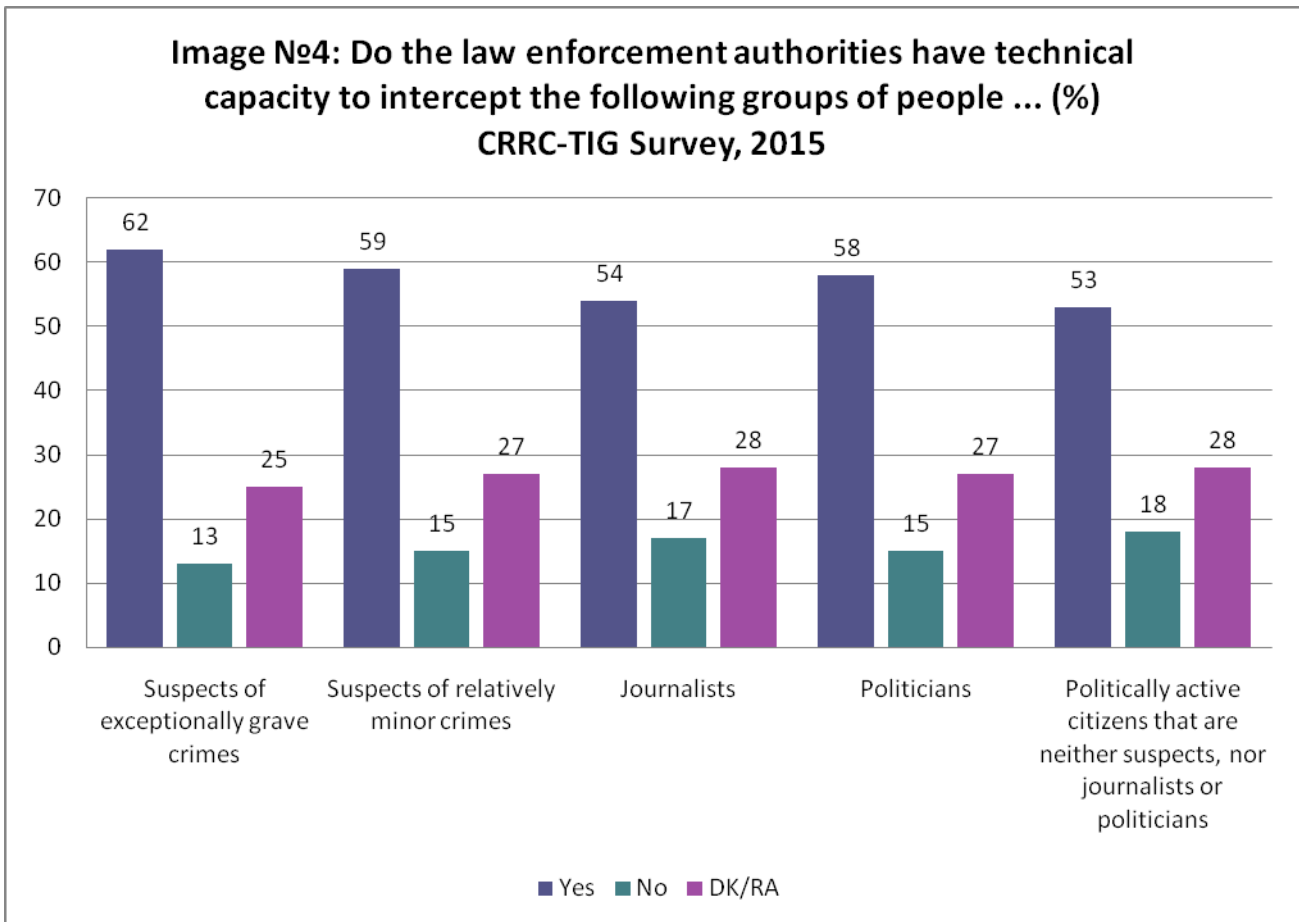
In both 2015 (image №3) and 2016,<sup>15</sup> about one third of the population thought that law enforcement agencies were not watching their internet activities illegally, while up to one fifth of the population thought that they were being watched **(note that not applicable indicates respondents with no internet access).**

<sup>14</sup>“69% would not share critical opinion about political processes in Georgia – survey results are available”, [www.esshengexeba.ge](http://www.esshengexeba.ge), 4 May, 2016, accessed on 25 October, 2016 (in Georgian) <http://esshengexeba.ge/?menuid=9&id=1120&lang=1>

<sup>15</sup> “69% would not share critical opinion about political processes in Georgia – survey results are available”, [www.esshengexeba.ge](http://www.esshengexeba.ge), 4 May, 2016, accessed on 25 October, 2016 (in Georgian) <http://esshengexeba.ge/?menuid=9&id=1120&lang=1>

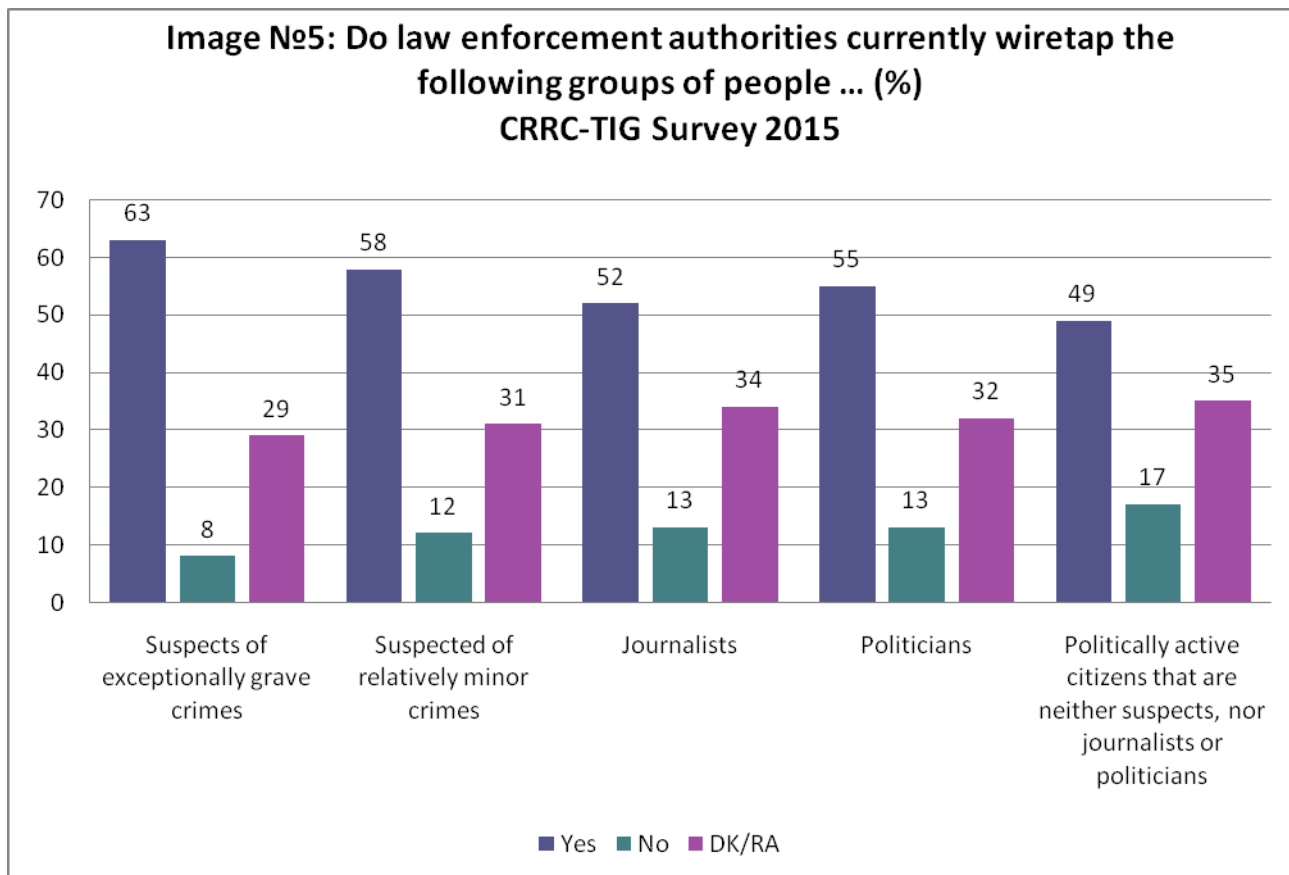


The majority of Georgians believe that law enforcement agencies have the technical capacity to wiretap various groups of people including suspects of exceptionally grave crimes, suspects of relatively minor crimes, journalists, politicians, as well as politically active citizens that are neither suspects, nor journalists or politicians (image №4).





Furthermore, the majority also believes that not only do law enforcement agencies have the technical capacity, but that they actually wiretap the abovementioned groups of people (image №5).



When asked about the situation before and after the 2012 Parliamentary Elections (the survey was conducted in March 2016), 36% of respondents think that the authorities have engaged in wiretapping both before and after the elections.<sup>16</sup>

As the above data shows, despite stated policy and some attempts to regulate illegal surveillance after change of government in 2012, public perceptions have not dramatically changed since then. There is perception among population that law enforcement agencies have the technical capacity to wiretap, and are actually using this capacity in illegal ways. Such public attitudes prove that better regulation of illegal surveillance remains of high priority for Georgia.

<sup>16</sup> "69% would not share critical opinion about political processes in Georgia – survey results are available", [www.esshengexeba.ge](http://www.esshengexeba.ge), 4 May, 2016, accessed on 25 October, 2016 (in Georgian) <http://esshengexeba.ge/?menuid=9&id=1120&lang=1>

## Investigation of Illegal Surveillance Cases

Keeping public perceptions about continuing illegal surveillance in mind, it is important to both reform the system and prevent future illegal surveillance, as well as to investigate past cases. This report has been covering major cases of illegal surveillance since 2012.<sup>17</sup> The chapter below gives brief updates about investigations of some major cases of illegal surveillance.

### *Offer to newspaper editor to disseminate sex tape*

An attempt to disseminate secretly recorded video of a private life of a politician was made in January 2016 when such offer was made to an editor-in-chief of the Tbilisi-based “Kronika+” newspaper Eliso Kiladze.<sup>18</sup> The newspaper editor secretly filmed the person who approached her and notified the Chief Prosecutor’s Office. As a result of an investigation, five persons were charged with unlawful use and possession of a video depicting private life. Two persons detained for these charges were released on December 9<sup>th</sup> as the 9-month pre-trial detention had expired.<sup>19</sup> Another person detained for the same case in February 2016 was released in November 2016. According to the Prosecutor’s Office, the case involved a chain of communication among a number of persons, including former employee of MIA Constitutional Security Department. The people involved in the communication agreed to spread illegal materials for financial incentive<sup>20</sup>. According to the Prosecutor’s Office, the discovered videos were filmed before June 2012. The prosecutor also did not confirm whether the videos released in March involving opposition leaders and journalists were part of these files. According to the information released in March 2016, this arrest was not reported in January 2016.<sup>21</sup>

### *Sex tapes leaked in March 2016*

An investigation was launched soon after the leak of sex tapes in March 2016. The U.S. Federal Bureau of Investigation (FBI) has been providing technical and investigative assistance to Georgia. The Deputy Chief Prosecutor announced in April 2016 that the videos were definitely not uploaded from Georgia. As part of investigation, two dozens of homes were searched, various items, such as CDs, DVDs, computers, mobile phone devices and SIM cards were seized, and CCTV footage from a number of buildings was taken for examination. In addition, a number of inquiries have been sent to foreign countries in a form of mutual legal assistance requests.<sup>22</sup>

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<sup>17</sup> Previous reports can be found here: Regulating Secret Surveillance in Georgia: 2013-2015 - <https://idfi.ge/en/regulating-secret-surveillance-in-georgia-2013-2015> and Secret Surveillance in Georgia: 2015 – 2016 - <https://idfi.ge/en/regulating-secret-surveillance-in-georgia>

<sup>18</sup> “Five Charged over Secret Recordings of Private Lives in Case Predating Recently Released Sex Tapes”, *Civil.ge*, 15 March, 2016, accessed on 28 October, 2016, <http://www.civil.ge/eng/article.php?id=29043>

<sup>19</sup> “Zurab Jamalashvili and Irakli Pkhaladze released from detention on surveillance case”, *Interpressnews.ge* (in Georgian), 09 December, 2016, accessed on 20 December, 2016, <http://bit.ly/2gWwdod>

<sup>20</sup> “Jamalashvili and Pkhaladze charged for illegal surveillance are released from detention”, *Netgazeti.ge* (in Georgian), 30 November, 2016, accessed on 20 December, 2016, <http://netgazeti.ge/law/158521/>

<sup>21</sup> Ibid.

<sup>22</sup> “FBI Assisting Georgia in Sex Tape Probe”, *Civil.ge*, 1 April, 2016, accessed on 28 October, 2016, <http://www.civil.ge/eng/article.php?id=29078>

In April 2016, a number of former security and police officers were detained concerning illegal surveillance that took place before 2012, although the arrested denied charges.<sup>23</sup> In October 2016, two former employees of MIA Constitutional Security Department made an avowal that by direct orders from the heads of Constitutional Security Department they organized secret recording of private lives. A closed court hearing was held. Despite such confession, and detention of half a dozen former employees of the department, the former deputy head of MIA Constitutional Security Department does not confirm his connection to the secret recordings.<sup>24</sup>

#### *Leaked Video and Blocked Vimeo*

In June 2016 a number of videos depicting personal lives were shared on Facebook from Vimeo. The videos were uploaded on Vimeo about a month earlier and download was also available. Thousands of people had viewed the videos by June 2016. The next day after videos were shared on Facebook Vimeo was blocked from Georgia for subscribers of Silknet and Caucasus Online, major internet providers. According to the Prosecutor's Office these videos were the same that had already been leaked before. The Prosecutor's Office has interrogated the people on whose personal Facebook accounts the videos were shared.<sup>25</sup>

#### **Cases of illegal surveillance after 2012**

##### *Accusations from Armaz Akhvlediani*

In May 2016, Armaz Akhvlediani, former member of the political board of the Georgian Dream - Democratic Georgia party, accused government officials of wiretapping him and "many other people".<sup>26</sup> State Security Service has denied illegal wiretapping either of Armaz Akhvlediani or any other politician or person and has asked for any proof to be submitted to investigative bodies.<sup>27</sup> Armaz Akhvlediani left Georgian Dream in May 2016 and participated in 2016 Parliamentary elections as an independent majoritarian candidate in Batumi (third place with 8.03% of votes).<sup>28</sup>

##### *Claims on Pressure from Chairman of the Constitutional Court*

In July 2016, Chairman of the Constitutional Court of Georgia Giorgi Papuashvili reported about pressure, involving secret surveillance, being exerted on some judges working on high-profile court cases.<sup>29</sup> Following

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<sup>23</sup>"Ex-Senior Security Official, 4 Others Arrested for Allegedly Making Politicians' Sex Tapes", *Civil.ge*, 8 April, 2016, accessed on 28 October, 2016, <http://civil.ge/eng/article.php?id=29092>

<sup>24</sup>"Imedi Time (ImedisDro)", *Imedi.ge*, 23 October, 2016, accessed on 28 October, 2016, from 32rd minute, [http://imedi.ge/index.php?pg=shs&id\\_pr=9383&id=63&tp=0&l=1](http://imedi.ge/index.php?pg=shs&id_pr=9383&id=63&tp=0&l=1)

<sup>25</sup> "The entire platform of Vimeo is blocked after leaked videos of personal lives", *Netgazeti.ge*, 13 June, 2016, accessed on 03 January, 2017. <http://netgazeti.ge/news/122804/>

<sup>26</sup>"Armaz Akhvlediani blames Georgian Dream of illegal wiretapping", [www.interpressnews.ge](http://www.interpressnews.ge), 10 May, 2016, accessed on 24 October, 2016, <http://www.interpressnews.ge/en/politicss/78168-armaz-akhvlediani-blames-georgian-dream-of-illegal-wiretapping.html?ar=A>

<sup>27</sup>"SSS denies blackmail on Armaz Akhvlediani and his relatives", [www.interpressnews.ge](http://www.interpressnews.ge), 1 June, 2016, accessed on 24 October, 2016, <http://www.interpressnews.ge/ge/samartali/382351-sus-i-armaz-akhvlediansa-da-mis-akhloblebbe-shantazhs-gamorickhavs.html?ar=A>

<sup>28</sup>"Majoritarian MP Elections Preliminary Results", *Civil.ge*, 11 October, 2016, accessed on 20 October, 2016, <http://civil.ge/eng/article.php?id=29531>

<sup>29</sup>"Constitutional Court Chair Speaks of 'Alarming Pressure'", *Civil.ge*, 21 July, 2016, accessed on 15 October, 2016, <http://www.civil.ge/eng/article.php?id=29325>

this statement, the Prosecutor's Office opened an investigation under clauses of the criminal code dealing with meddling in the judiciary and breach of privacy.<sup>30</sup>

#### *Audio Recordings of Mikheil Saakashvili and UNM Leaders*

Another audio recording was spread in September 2016, which supposedly depicted a conversation between Mikheil Saakashvili, Georgia's ex-President and former governor of Odessa region in Ukraine, and several leading members of the UNM. In the recording, the participants of the conversation discuss a revolutionary scenario ahead of parliamentary elections and post-election protests. While UNM representatives denied authenticity of the recording, State Security Service opened investigation under the clause of criminal code involving "conspiracy to overthrow" the government.<sup>31</sup> According to the State Security Service, the origin and authenticity of the recording would be examined as well as persons, featuring in the recordings, would be questioned.<sup>32</sup>

This was the second time when the government of Georgia opened investigation on conspiracy to overthrow the government based on the leaked secret recordings. The first case concerns a conversation between Mikheil Saakashvili, Georgia's ex-President and former governor of Odessa region in Ukraine, and one of the leaders of UNM Giga Bokeria. The transcript of their conversation was posted on a dubious website Ukrainian WikiLeaks. According to the transcript, plans were arranged to attack Rustavi 2 TV personnel and then trigger mass protests against the government.<sup>33</sup> Less than a week after State Security Service announced its launch of investigation on the abovementioned information, in October 2015, wiretapped recordings of two phone conversations (one between Saakashvili and head of the Rustavi 2 TV Nika Gvaramia, the other between Saakashvili and UNM party leader Giga Bokeria) were leaked to the internet.<sup>34</sup> The recordings reveal plans on "revolutionary scenario" concerning Rustavi 2 TV ownership dispute.

#### *Audio recording of Paata Burchuladze and Nika Gvaramia*

In September 2016, shortly before Parliamentary elections, an audio recording of a phone conversation between the leader of a political block State for the People, Paata Burchuladze, and head of Rustavi 2 TV, Nika Gvaramia, was leaked to the internet.<sup>35</sup> While Georgian Dream representatives commented on the audio as a proof of ties between State for the People and UNM, opposition parties as well as This Affects You campaign representatives condemned continued illegal eavesdropping and criticized lack of reform in this area. Representatives of UNM accused State Security Service of illegal surveillance, while the State Security Service has denied its involvement. The MIA states that it had launched an investigation on this case.

#### *Investigation of Illegal Surveillance Cases – Summing Up*

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<sup>30</sup>"Prosecutor's Office Probes into Alleged Pressure on Constitutional Court", *Civil.ge*, 26 July, 2016, accessed on 16 October, 2016, <http://civil.ge/eng/article.php?id=29334>

<sup>31</sup>"After Leaked Audio Recording, Security Service Launches 'Coup Plot' Probe", *Civil.ge*, 27 September, 2016, accessed on 15 October, 2016, <http://civil.ge/eng/article.php?id=29466>

<sup>32</sup>Ibid.

<sup>33</sup>"Security Service Says Probe Opened into Alleged 'Conspiracy to Overthrow' Govt", *Civil.ge*, 24 October, 2015, accessed on 28 October, 2016, <http://www.civil.ge/eng/article.php?id=28690>

<sup>34</sup>"Wiretapped Recordings of Saakashvili Discussing Rustavi 2 TV Leaked", *Civil.ge*, 30 October, 2015, accessed on 28 September, 2016, <http://www.civil.ge/eng/article.php?id=28713>

<sup>35</sup>"Govt Accused of Leaking Wiretapped Recording of Burchuladze and Rustavi 2 TV Head", *Civil.ge*, 14 September, 2016, accessed on 13 October, 2016, <http://www.civil.ge/eng/article.php?id=29438>

Investigation of cases of illegal surveillance that had happened before 2012 and eradication of this systemic practice was one of the major pre-election promises of the Georgian Dream before 2012 October elections. However, despite some attempts to investigate and punish those associated with illegal surveillance, not all past cases have been closed. On the contrary, a number of newer cases, which took place after the change of government, have set an additional alarming tone. Such cases have strengthened doubts about the continuation of a systemic practice of illegal surveillance, lack of willingness from the government to limit its power, and point to a lack of efficient and comprehensive reform in this area. It is also important to keep in mind that not all recordings made before 2012 have been destroyed and they are still used for political goals, as it became evident in March 2016. The doubts about surveillance are clearly reflected on public attitudes. Recent polls show that the Georgian public believes that the government has the ability to and is actually illegally wiretapping its citizens. The only solution in this situation is a comprehensive institutional reform, the launch of which requires more pressure from civil society.

## **Institutional Regulation of Illegal Surveillance - Reform of Ministry of Internal Affairs**

Following the infamous cases of illegal surveillance and wiretapping by the government during UNM rule, the institutional and legal regulation of surveillance was high on the government agenda. One of the main institutional changes aimed at solving the problem of illegal surveillance was to reform the law-enforcement system. Since illegal surveillance before 2012 had a systemic character, with many top-officials being involved, a comprehensive reform was needed to ensure protection of privacy in the future. In 2004, shortly after the Rose Revolution, the interior and security ministries of Georgia merged into one entity, forming a powerful centralized system. As one of its main pre-election promises in 2012, the Georgian Dream Coalition declared its plans to decouple the two ministries. Work on the reform of the Ministry of Internal Affairs (MIA) started in December 2014.

The bill on decoupling security and intelligence agencies from the MIA was signed into law in July 2015, and went into force on August 1, 2015. According to the reform, which was implemented in 2015, security and intelligence agencies were decoupled from the MIA and a separate, State Security Service, was created. According to then Interior Minister and now head of the newly created State Security Service Vakhtang Gomelauri, the declared goal of the reform was to “provide for a de-concentration of excessive power within [a single ministry] and to have a positive effect on efficient protection of human rights”.<sup>36</sup>

### ***Scope of the reform***

The areas of activity of the newly created State Security Service have been defined as counter-terrorism, counter-intelligence, anti-corruption, special operations as well as operative-technical activities, which is in charge of surveillance operations.

According to the pre-election promise from the Georgian Dream, the reform of MIA would divide security services from the structure of MIA, which would be limited to intelligence gathering, analysis, systematization

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<sup>36</sup>“Govt to Propose Decoupling Security Agencies from Interior Ministry”, *Civil.ge*, 7 May, 2015, accessed on 12 October, 2016, <http://www.civil.ge/eng/article.php?id=28250>

and realization. It was explicitly written in the pre-election program of the Georgian Dream that criminal prosecution must not be a function of the security service.<sup>37</sup>

However, the actual reform has empowered the counter-intelligence, counter-terrorism, security and anti-corruption units of the new agency with investigative functions, the right to carry out detentions as well as the right to use special technical means of the police.

### ***Criticism of the reform***

The reform was met with considerable criticism from the civil society sector. One of the main concerns raised by these stakeholders is about potential duplication of functions between the MIA and the State Security Service. Namely, according to civil society representatives, giving the State Security Service investigative and law enforcement powers poses risk of abuse of power, as well as duplication of police power.<sup>38</sup>

The reform was also criticized for its scope, which was limited to separation of security services from the MIA, which left other significant challenges associated with the Ministry unanswered. Namely, these challenges include politicization of the Law Enforcement System, risk of political influence on the police, lack of guarantees in terms of transparency and accountability, lack of possibility to ensure impartial investigation of the offences committed by Law Enforcement System, etc.<sup>39</sup>

Part of civil society representatives also criticized the reform process itself. According to EMC, the decision to have the Crisis Management Council lead the reform process was wrong, as it had no experience in participatory policy making. Furthermore, the process was criticized for not ensuring effective engagement of non-government stakeholders during preparation of the scope of reform. Namely, the inter-departmental commission created by the government to work on MIA reform only consisted of government representatives; other interested parties could only get updates through the media. A working group created at a later stage due to insistence from the civil society sector was not sufficiently involved in discussion with the representatives of the government.<sup>40</sup>

The former Interior Minister and current head of State Security Service Vakhtang Gomelauri also confirmed that the decoupling was only mechanical and further reforms would be needed both in the MIA and in terms of state security.<sup>41</sup>

The 2016 pre-election program of the Georgian Dream gives little ground to believe that the above promise will be acted upon by the government. According to the 2016 pre-election program, ensuring privacy and eradicating illegal surveillance are mentioned as one of the main achievements of the administration since

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<sup>37</sup>"Bidzina Ivanishvili – Georgian Dream", *Election Program for 2012 Parliamentary Elections*, accessed on 20 October, 2016, p. 18, <http://www.ivote.ge/images/doc/pdfs/ocnebis%20saarчевno%20programa.pdf>

<sup>38</sup>"President Signs Interior Ministry Reform Bill into Law", *Civil.ge*, 15 July, 2016, accessed on 13 October, 2016, <http://www.civil.ge/eng/article.php?id=28435>

<sup>39</sup>"EMC's assessment of the reform process and reform concept of the Ministry of Internal Affairs", *Human Rights Education and Monitoring Center (EMC)*, 7 May, 2015, accessed on 20 October, 2016, <https://emc.org.ge/2015/05/07/human-rights-education-and-monitoring-centers-emc-assessment-of-the-reform-process-and-reform-concept-of-the-ministry-of-internal-affairs/>

<sup>40</sup>Ibid.

<sup>41</sup>"MIA reform: mechanical division of entities or deconcentration of power?", *Netgazeti.ge*, 2 June, 2016, accessed on 12 October, 2016, <http://netgazeti.ge/news/41336/>

2012.<sup>42</sup> Furthermore, the 2016 program is praising achievements of the MIA reform, claiming that after the reform the repression-based police system was transformed into a preventative force; a high standard of personal data protection was implemented; and State Security Service was created independently from MIA, with a highly professional team and a head appointed by the Parliament.<sup>43</sup>

As for the further reform of MIA, the election program only promises to “strengthen mechanisms of permanent communication with non-government organizations, academic circles, the media and business” in the context of MIA. Also, according to the 2016 election program, “independent and effective functioning of State Security Service and strengthening of its resources will be ensured”.<sup>44</sup> There are no further specifications of shortcomings or limitations of the reform so far and no plans to meet these challenges in the future.

## The Two-Key System in Practice

As an attempt to regulate access of law enforcement agencies to surveillance, the so called two-key system for the authorization of wiretapping was introduced. According to the two-key system, which went into force on March 31<sup>st</sup> 2015, law enforcement agencies have to obtain permission from the Personal Data Protection Inspector, in addition to a court order, prior to conducting surveillance. However, the MIA retained direct access to telecom servers and the two-key system was not applied to the internet traffic.

The first results of the two-key system in practice can be assessed by looking at the first reports prepared by both State Security Service and Office of the Personal Data Protection Inspector, analyzed below.

### ***First Report of the State Security Service***

In December 2015, the State Security Service presented its first report to the Parliament of Georgia,<sup>45</sup> covering the period between August, 1, 2015 and December, 31, 2015. A part of the report specifically addressed protection of personal data as well as access to public information.

The report mainly discussed introduction of the two-key system and following cooperation with Office of the Personal Data Protection Inspector. Namely, according to the State Security Service, representatives of the technical group of the Office of the Personal Data Protection Inspector had a possibility to fully study the technical documentation concerning secret surveillance and taping of phone conversations. As a result of cooperation between the two institutions, the procedures for usage of the two-key system have been improved and some technical shortcomings were eliminated. In addition, according to the State Security Service, the technical group also had access to internal legal documents regulating procedural and organizational issues concerning secret surveillance. Finally, according to the report, the Office of the Personal Data Protection Inspector was inspecting operative-technical department of the State Security Service, which is tasked with checking technical, organizational and procedural issues concerning secret surveillance, usage of data banks and taking information from computer systems or communication channels.

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<sup>42</sup>“Election Programme – 2016 Parliamentary Elections”, *Georgian Dream*, accessed on 4 November, 2016, p. 4, <http://41.ge/program>

<sup>43</sup>Ibid, p. 8, <http://41.ge/program>

<sup>44</sup>Ibid, Pp.8-9, <http://41.ge/program>

<sup>45</sup>“Report of State Security Service of Georgia, 01.08.2015-31.12.2015”, *State Security Service of Georgia*, accessed on 20 October, 2016, <http://ssg.gov.ge/page/info/reports>



## ***First Report of the Office of the Personal Data Protection Inspector***

According to legislative amendments made in November 2014, the so called two-key system was launched on March 31, 2015, and the Personal Data Inspector took obligation to check whether the decision of the court (or in urgent cases of the Prosecutor's Office) to conduct surveillance is properly implemented. The first results of the monitoring carried out by the Office of the Personal Data Protection Inspector (April-December, 2015) are summarized in the Annual Report 2015.<sup>46</sup>

In order to implement new functions, a special structural division – Law Enforcement Body Oversight Unit was formed within the Office of the Personal Data Protection Inspector. The goal of the oversight unit is to ensure efficient monitoring of covert investigative activities of law enforcement bodies through analyzing the information provided by the Court, the Prosecutor's Office and e-communication companies, as well as through the electronic control system,<sup>47</sup> two-step electronic system<sup>48</sup> and special data bank electronic control system.<sup>49</sup> Furthermore, the IT department of the Office of the Personal Data Protection Inspector started a 24-hour service in order to ensure monitoring through the two-step electronic system.

Before allowing secret wiretapping, the Office of the Personal Data Protection Inspector checks the existence of a court ruling or a decree of the prosecutor, as well as correspondence of information provided in these rulings/decrees with the electronic request initiated by an operative-technical department of the State Security Service. The Inspector only allows secret wiretapping if it does not find any discrepancies. In addition, the Inspector also controls the duration of surveillance and halts access to the surveillance channel as soon as the deadline expires.

According to the Annual Report of the Office of the Personal Data Protection Inspector, **there were approximately 4 cases a month (April-December, 2015) when the Inspector did not allow secret wiretapping due to flaws such as no indication of the duration of surveillance or discrepancy of the data.** Furthermore, in 2015 there were 26 cases when protocols on destroying materials that were illegally known or obtained through investigative activities were not presented on time. However, these protocols were provided by the Prosecutor's Office upon request of the Office of the Personal Data Protection Inspector.

The Office of the Personal Data Protection Inspector is also in charge of monitoring cases when electronic communication companies provide law-enforcement agencies with identification data of e-communication

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<sup>46</sup>"Report on the State of Personal Data Protection and Activities of the Inspector of Georgia 2015", *Office of the Personal Data Protection Inspector*, accessed on 13 October, 2016, <http://bit.ly/2gC3VAY>

<sup>47</sup>Electronic Control System – combination of technical and software solutions to ensure that the logging of data by an authorized body monitoring system commands are processed with cryptographic methods, the logging of data of commands performed by the Legal Interception Management System are automatically communicated to the Personal Data Protection Inspector, these data are processed with cryptographic methods and that the results are automatically collated; Source: Law Of Georgia On Personal Data Protection,

<https://www.matsne.gov.ge/ka/document/view/1561437?impose=translateEn>

<sup>48</sup>A Two-Step Electronic System – approach for performing covert investigative actions by giving electronic consent to conduct a covert investigative action; Source: Law Of Georgia On Personal Data Protection,

<https://www.matsne.gov.ge/ka/document/view/1561437?impose=translateEn>

<sup>49</sup>Special Data Bank Electronic Control System – combination of technical and software solutions to ensure that the data logging operations performed within the copied data banks of an authorized body provided in Article 83(1)(b) of the Law of Georgia on Electronic Communications are automatically communicated to the Personal Data Protection Inspector.; Source: Law Of Georgia On Personal Data Protection,

<https://www.matsne.gov.ge/ka/document/view/1561437?impose=translateEn>



(not in real time).<sup>50</sup> According to the law, e-communication companies must notify the Inspector about such cases within 24 hours. **In 2015, the Office of the Personal Data Protection Inspector has checked 20 cases when e-communication companies provided law-enforcement agencies with identification data of e-communication and has found 6 cases with possible violations of law.** Namely, the Personal Data Protection Inspector has found that in 6 cases the Ministry of Internal Affairs and e-communication companies processed identification data of e-communication in violation of existing rules. The Ministry of Internal Affairs had requested communication companies to provide data such as telephone number, IMEI code, demographic data of a user and other details of a SIM card, etc. The Personal Data Protection Inspector concluded that based on the preconditions given in the Law on Operational and Investigative Activities there was insufficient justification to disclose the above-mentioned data in those 6 instances, and that IMEI code can be considered as personal data.

Even though it was not possible to impose administrative penalty in the abovementioned cases due to the statute of limitation of two months, according to the decision of the Inspector, **the Ministry of Internal Affairs and e-communication companies were ordered to process identification data of electronic communication according to the law. Furthermore, the illegal practice of requesting identification data of electronic communication based solely on a letter has been eradicated.**

Furthermore, in July 2016, the Office of the Personal Data Protection Inspector has summarized its activities over the past three years.<sup>51</sup> According to this information, in the period between July 2013 and July 2016 a total of 115 institutions were inspected, including 58 public institutions. In the same period, **out of the breaches revealed in both private and public sectors, there were 9% of cases when rules of audio-video surveillance were violated, in 8% of cases rules of data collection by law enforcement bodies were violated, while in 27% of cases data processing principles and legal grounds were violated.**

### ***Summing up the Two-Key System***

The two-key system has been in practice for about 1,5 years now, which is not enough to assess its effectiveness. Considering the high level of public trust in the impartiality of Office of the Personal Data Protection Inspector, the starting period of this system in practice can be assessed positively. In June 2016, Tamar Kaldani was elected by the Parliament of Georgia for second term as the Personal Data Inspector,<sup>52</sup> which lasts until 2019. However, sustainability and effectiveness of the two-key system will largely depend on future inspectors as well as new regulations following decision of Constitutional Court of Georgia (see more below). Also, as it was revealed, the existence of the two-key system does not eradicate the risks of illegal

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<sup>50</sup> Identification Data - data necessary for tracing and identifying a communication source; data necessary for identifying a communication addressee; data necessary for identifying communication date, time and duration; data necessary for identifying the type of a communication; data necessary for identifying user communication equipment or potential equipment; data necessary for identifying the location of a mobile communication equipment (Law of Georgia on Electronic Communications)

<sup>51</sup>“3 Years of Activities of the Office of the Personal Data Protection Inspector”, *Office of the Personal Data Protection Inspector*, 12 July, 2016, accessed on 14 October, 2016, <https://personaldata.ge/en/inspektoris-apatatis-3-tslis-sagmianoba-tsifrebshi/622>

<sup>52</sup>“Parliament of Georgia Elected Tamar Kaldani as the Personal Data Protection Inspector”, *Office of the Personal Data Protection Inspector*, 22 June, 2016, accessed on 12 October, 2016, <https://personaldata.ge/en/sagartvelos-parlamentma-personalur-monatsemta-datsvis-inspektorad-tamar-galdani-airchia/611>

secret surveillance, as security services possess technical capacity to carry out surveillance and counterintelligence activities bypassing courts and Personal Data Protection Inspector.

Concerns remain about the duplication of functions between the Ministry of Internal Affairs and the State Security Service, politicization of the Law Enforcement System, risk of political influence on the police, lack of guarantees in terms of transparency and accountability, lack of possibility to ensure impartial investigation of offences committed by law enforcement authorities and subsequent need for more comprehensive reform of law enforcement agencies.

## This Affects You Campaign

### New Legislative Changes after Decision of the Constitutional Court

Despite the introduction of oversight mechanisms over law enforcement agencies in the form of the two-key system, according to which, the Ministry of Internal Affairs (MIA) requires a technical permission from the Personal Data Protection Inspector to start legal surveillance, civil society organizations still had some concerns. First of all, they argued that law enforcement agencies should be deprived of direct access to telecommunications data and the right to store metadata for up to 2 years. Additionally, they claimed that the two-key control mechanism should be applicable to internet traffic as well.

In order to remedy legislative loopholes, civil society representatives united and renewed their activities under the campaign *This Affects You*. On April 8, 2015, they filed a lawsuit in the Constitutional Court against the clauses in the Laws on Electronic Communication and Personal Data Protection as well as Criminal Procedure Code that allows the State Security Service to retain direct and unimpeded real-time technical access to the data of electronic communication companies.

Another lawsuit on the same issue was submitted to the Constitutional Court on January 30, 2015, by the Public Defender. The Ombudsman argued that “the right of state agencies to have continuous possibility to make copies of identification data and to receive contents of communication in real time violates the right to private life”.<sup>53</sup>

Additionally, on November 16, 2015, Human Rights Education and Monitoring Center (EMC), a Tbilisi-based NGO, filed a lawsuit in the Constitutional Court against two clauses of the Law on Counter Intelligence Activities of Georgia, which envisage carrying out counterintelligence/secret investigative activities (secret audio and video recording, movie and photo recording, using TV cameras and other electronic devices) without court approval and launching electronic surveillance with the written consent of at least one party of the communication in order to obtain counterintelligence information. The NGO representatives claim that these norms create opportunities for law enforcement agencies to interfere in personal life without court approval. No ruling has yet been made on the matter yet.<sup>54</sup>

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<sup>53</sup>“Constitutional Claim regarding Georgian Law “On Electronic Communications”. *Public Defender of Georgia*. February 02, 2015. Last accessed October 19, 2016. Available at: <http://bit.ly/1x7JpZi>

<sup>54</sup> *EMC demands Articles of the Law on Counterintelligence Activities be recognized as unconstitutional*, Human Rights Education and Monitoring Center (EMC), Last accessed December 1, 2016. Available at: <https://emc.org.ge/2015/11/12/sakonstitucio-sarcheli-emc/>

When it comes to the lawsuits of the Ombudsman and the campaign *This Affects You*, in April 2016, the Constitutional Court ruled that technical access of State Security Service to telecom operators' network,<sup>55</sup> allowing unfettered monitoring of communication and collection of communications metadata, was unconstitutional.<sup>56</sup> The Court confirmed the fears expressed by civil society representatives and declared, that "the State Security Service possesses technical capabilities for eavesdropping and monitoring online communications, which allow mass (actually unrestricted) collection of personal information in real time."<sup>57</sup> Moreover, Personal Data Protection Inspector's authority to grant permission to start secret state surveillance was deemed to be an insufficient external oversight mechanism by the Court.<sup>58</sup> Additionally, the Court referred to the issue of retention of metadata by the law enforcement agencies and considered the preservation of this data for two years to be an "unreasonably lengthy period of time". Therefore, March 31, 2017 was set as a deadline for preparing fundamental legislative amendments and ensuring institutional and technical capacity/bases for the new system.

Some notable circumstances are mentioned in the decision of the Constitutional Court of Georgia. First of all, according to the explanation from the representative of the State Security Service, due to lack of physical capacity and infrastructure, the two-key system is not applied to Internet traffic. The representative claimed that due to particularities of interception of Internet traffic Personal Data Protection Inspector is incapable of

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<sup>55</sup> In particular, the Operative-Technical Division of the State Security Service of Georgia has technical access to telecom operators' network.

<sup>56</sup> Decision of the First Chamber Constitutional Court of Georgia, № 1/1/625,640, 14 April, 2016, last accessed 30 November, 2016, available at: <https://matsne.gov.ge/ka/document/view/3263731#>

**In particular, the Constitutional Court of Georgia claimed the following paragraphs as unconstitutional:**

***In the Law on Electronic Communications:***

"[In order to carry out covert investigative activities, a duly authorised state body shall be entitled to] have a technical capability to obtain information in real time from physical lines of communication and their connectors, mail servers, base stations, base station equipment, communication networks and other communication connectors, and for this purpose, install, where necessary, a lawful interception management system and other appropriate equipment and software free of charge at said communication facilities." (Law on Electronic Communications, Article 8<sup>3</sup>, Conduct of covert investigative activities, paragraph 1, subparagraph A. Last accessed 30 November, 2016, available at: <https://matsne.gov.ge/en/document/view/29620>)

"[In order to carry out covert investigative activities, a duly authorised state body shall be entitled to] copy and store for two yearstheidentificationdataexistingin a communicationchannel." (Law on Electronic Communications, Article 8<sup>3</sup>, Conduct of covert investigative activities, paragraph 1, subparagraph B. Last accessed 30 November, 2016, available at: <https://matsne.gov.ge/en/document/view/29620>)

***In the Criminal Procedure Code of Georgia:***

"A two-stage electronic system for carrying out secret investigative actions - a combination of hardware and software solutions that excludes the possibility of independently executing an order for the activation of an object through the monitoring system of a law-enforcement agency without an electronic authorisation of a personal data protection inspector." (Criminal Procedure Code of Georgia, Article 3, Paragraph 31. Last accessed 30 November, 2016. Available at: <https://matsne.gov.ge/en/document/view/90034>)

"In order for the authorised state authorities to conduct secret investigative actions provided for by Article 143 1 (1)(a-b), an authorised person stipulated by the law uses technical means for real-time access to information from physical lines of communication and their connections, mail servers, base stations, communication networks and other communication connections; that person may also place and install appropriate devices and software equipment near the above communication facilities." (Criminal Procedure Code of Georgia, Article 143<sup>3</sup>, Paragraph 4. Last accessed 30 November, 2016. Available at: <https://matsne.gov.ge/en/document/view/90034>)

<sup>57</sup> "Court Rules Georgia's Surveillance Regulation unconstitutional". *Civil Georgia*. April 14, 2016. Last accessed October 18, 2016. Available at: <http://www.civil.ge/eng/article.php?id=29102>

<sup>58</sup> *ibid.*

electronic control of each computer. Most importantly, it was revealed that due to insufficient control mechanisms over wiretapping, secret surveillance could be conducted bypassing the Personal Data Protection Inspector and without court decision.

The existence of the two-key system and the electronic control system does not reduce these risks because of the following circumstances. First of all, the State Security Service not only possesses technical capacity to conduct secret surveillance, but is also responsible for installing and operating this system. This process is classified and lacks external control. Additionally, the wording of Article 8<sup>3</sup> of the Law on Electronic Communications implies installation of “other appropriate equipment and software”, apart from lawful interception management system. The norm does not specify what kind of equipment could be installed by the State Secret Service, meaning that the article could be used to justify secret surveillance as well. Meanwhile, Personal Data Protection Inspector’s electronic permission (two-key system) is only required for interception management system. Hence, the Inspector lacks the power to control wiretappings conducted through other appropriate equipment and software. With regard to Internet traffic, the Constitutional Court stated that there is no control mechanism over real time access to Internet traffic in the legislation. The only leverage the Personal Data Protection Inspector has in this regard is his/her power to inspect lawfulness of data processing by a data controller/a data processor.

Following the Court decision, members of the campaign *This Affects You* decided to continue their activities and work on the legislative proposal for the Parliament. Indeed, with the consideration of the Court decision and the best international practice in this direction, participant NGOs elaborated a draft law. Prior to this, they held consultations with parliamentary and non-parliamentary political forces. Apart from the content of the proposal, consultations were held about potential ways how to initiate the draft law in the Parliament. As civil society representatives argued, they did not want the legislative proposal being affiliated with any particular political group. Therefore, from the very beginning they offered each of the political factions in the parliament to allocate at least one person who would be included in the initiative group. After unsuccessful attempts to agree with different factions about a joint legislative proposal, the campaign decided to have the draft law be initiated by two individual MPs – Vakhtang Khmaladze<sup>59</sup> and Shalva Shavgulidze<sup>60</sup>, as they were actively involved in the reform of the secret surveillance system.<sup>61</sup> Both of them expressed interest towards this suggestion and a final agreement was reached in May.

However, this agreement did not result in a timely initiation of the draft law. Civil society representatives wanted the draft law to be initiated before July. However, as the Republican faction stated on June 17, 2016, due to a heavy workload in the Legal Issues Committee during the period between May and June, they were planning to submit the draft law in July. They argued that even though principles and ideas proposed by NGOs were acceptable to them, some implementing mechanisms still required modifications.<sup>62</sup> As a response, NGOs

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<sup>59</sup>Member of the Faction "Republicans"

<sup>60</sup> Secretary of the Faction "Free Democrats"

<sup>61</sup> For more information about their involvement in the reform, please see IDFI’s previous reports on secret surveillance: “Regulating Secret Surveillance in Georgia: 2013-2015”. *Institute for Development of Freedom of Information*. June 9, 2015. Last accessed October 18, 2016. Available at: <http://bit.ly/1BWsuJ50>

“Secret Surveillance in Georgia: 2015 – 2016”. *Institute for Development of Freedom of Information*. April 7, 2016. Last accessed October 18, 2016. Available at: <http://bit.ly/1qvHFMV>

<sup>62</sup>“Establishment of Mechanisms Need Significant Modification” – Initiation of the Law on Secret Surveillance was Delayed Until July.” *News.Ge*. June 18, 2016. Last accessed October 19, 2016. Available at: <http://bit.ly/2egNIm9>

claimed that they encountered problems when “trying to move the draft law development process to the Parliament. Specifically, despite efforts from the campaign, the process of organizing an intensive work regime with the potential initiators was delayed.” They considered the registration of the draft law in July as an unreasonable delay, since the newly elected Parliament after the October elections would not be obligated to consider draft laws registered in July.<sup>63</sup> Ultimately, the draft law was not even submitted to the Parliament before the 2016 October elections.

The draft law envisaged the establishment of three new bodies/institutions: 1. Special Agency of Surveillance; 2. Parliamentary Supervisory Council of the State Security Service; and 3. Independent Investigation Mechanism. According to the proposed changes, the Personal Data Protection Inspector would not be part of granting access to surveillance, and would only be focused on monitoring and control. Part of current functions of Personal Data Protection Inspector would be granted to a newly created Special Agency for Surveillance, which would provide the second approval to law-enforcement agencies (after court warrant) for surveillance or access to data. Therefore, the current technical capacities that State Security Service possesses will be given to Independent Agency of Surveillance.<sup>64</sup>

The draft law also proposed increasing parliamentary control over law enforcement agencies by obligating the Parliamentary Supervisory Council of the State Security Service to control and monitor surveillance process of the State Security Service. In this way, secret services were going to be directly accountable to the Parliamentary Council and the Parliament. Moreover, the draft law proposed a significant increase of the oversight powers of the Personal Data Protection Inspector in regards to secret surveillance. In particular, it empowered the Inspector with the secret surveillance suspension and fining power in case of illegal surveillance.<sup>65</sup>

Since the draft law was not submitted to the Parliament before 2016, its fate is uncertain with the new Parliament. After October 2016 elections the Georgian Dream has secured constitutional majority, which it did not possess during the previous administration. Therefore, on the one hand, the new Parliament will have much more capacity to continue institutional reform of regulation of surveillance in Georgia. On the other hand, this capacity imposes an additional responsibility on new government – the failure to effectively regulate illegal surveillance while holding constitutional majority will be proof of lack of willingness on the side of decision-makers.

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<sup>63</sup>“This Affects You campaign on the delay of the secret surveillance reform”. *Transparency International Georgia*. Last accessed October 18, 2016. Available at: <http://bit.ly/2dqm15L>

<sup>64</sup> “New System of Surveillance”, *This Affects You Too*, Last accessed October 17, 2016. Available at: <http://esshengexeba.ge/contentimage/infographic.pdf>

<sup>65</sup>Ibid.

## Official Statistics of Surveillance

Proactive disclosure of data on state secret surveillance plays a vital role in ensuring civic control over law-enforcement agencies and court system, as well as in raising public trust towards existing policies in this area. A positive development in this direction was the decision of the Supreme Court of Georgia on proactive disclosure of secret surveillance of telephone conversations and the number of considered motions. This obligation was taken by the Supreme Court as a result of a recommendation made by IDFI and other CSOs in the framework of the Open Government Partnership (OGP) Action Plan of Georgia. Furthermore, as a result of legislative changes, since August 1, 2014 the Supreme Court of Georgia also started proactively disclosing the registry of actions of secret investigation.

According to the published data, the number of motions on telephone surveillance made to the Courts of First Instance has been decreasing every year. Namely, there were more than 7,000 motions in 2011 (only in case of Prosecutor’s Office), while in 2015 there were less than 400 (total sum of all investigative bodies). According to the statistics, the percentage of granted motions has also decreased over the past years. While almost 100% of requests were being approved between 2011 and 2012, this number went down to 84% over the past three years. According to the statistics, in 2014 there were in total 1,074 motions, out of which 894 were granted. In 2015, the Courts of First Instance received only 373 motions, out of which in total 306 were approved (261 fully granted and 45 partially granted). As for the first six months of 2016, 184 motions regarding telephone secret surveillance were submitted, out of which 137 were granted, 14 were partially granted and 33 were rejected.

<b>Motions on Telephone Surveillance Received by Tbilisi City Court from the Prosecutor’s Office of Georgia (The information received by IDFI from the High Council of Justice of Georgia in 2013)</b>				
<b>Year</b>	<b>Received</b>	<b>Granted</b>	<b>Partially Granted</b>	<b>Approval Rate</b>
2011	7,195	7,187		99.86%
2012	5,951	5,939		99.80%
2013 (Jan – May)	1,400	1,259		89.93%
<b>Motions on Telephone Surveillance Received by Courts of First Instance (Data proactively disclosed by the Supreme Court of Georgia)</b>				
2014	1,074	894		83.24%
2015	373	261	45	82%
2016 (Jan – September)	296	224	25	84%

Since 2015 the proactively disclosed information also includes data about the number of duration extensions for existing motions on telephone surveillance and recording. In 2015 there were a total of 85 motions considered for duration extension, out which 72 were fully granted, 9 were granted partially, and only 4 motions were not granted. Therefore, the approval rate for motions on extension of surveillance and recording was 95%.

According to the first 9 months of 2016, a total of 150 motions were considered for duration extension, 137 motions were fully granted, 5 were granted partially and 8 were not granted. The approval rate for motions on extension of surveillance and recording was still 95%.

The complete data for secret investigative actions in 2016, including both telephone surveillance and motions on other secret actions, has not been published yet. In 2015 there were a total of 2,719 motions to both city and regional courts of Georgia, out of which 2,693 were considered. In total 2,098 motions were fully granted, 251 – granted partially, 344 motions were not granted.<sup>66</sup>

As the data as of 2014 contain information only about the second half of the year, it is impossible to draw conclusions about tendencies over the past reporting years. At the same time, the published information is not detailed and the data does not specify which public institutions made these motions in the Supreme Court. In general, the registry includes information such as the number of motions applied to the court on secret investigations, information on judgments made on these motions, information on destroying the data collected via investigation and search activities not connected with criminal behavior but containing information on personal life.

While it is indeed a step forward that the statistics on surveillance is being published proactively, there is a room for improvement in terms of transparency if the published data is organized by courts, applicant public institutions, quarters and months, and the data on surveillance which is performed via other telecommunication channels is published, and, last but not least, the data is proactively published in a more user-friendly manner.

Most importantly, **the April 2016 decision of the Constitutional Court of Georgia has clearly shown that the security services possess technical capacity to carry out surveillance activities bypassing courts and Personal Data Protection Inspector.** Therefore, it can be possible that the proactively published information does not accurately depict the existing picture of secret surveillance.

## A Summary of Ongoing Processes

**At the moment of writing of this report (December 2016) the following processes are ongoing:**

- Public perception of surveillance has not changed dramatically in Georgia since 2013. There is still a perception that law enforcement agencies have technical capacity to wiretap and are using this capacity in illegal ways.
- Investigation of cases of illegal surveillance is underway. A number of former security and police officers were detained concerning illegal surveillance, although the arrested denied charges and the final results of the investigation are unknown.
- The fact that a number of cases of illegal surveillance took place after 2012 have strengthened doubts about the continuation of a systemic practice of illegal surveillance, and have pointed out the lack of

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<sup>66</sup> For complete data in 2015 view the previous report of IDFI on secret surveillance: <https://idfi.ge/en/regulating-secret-surveillance-in-georgia>



willingness from the government to limit its power by conducting an efficient and comprehensive reform in this area.

- Reform of the Ministry of Internal Affairs (MIA) was criticized for a potential duplication of functions between the MIA and the newly created State Security Service.
- The two-key system, which has been in use for about 1.5 years, can be positively assessed due to high level of public trust in the impartiality of the Office of the Personal Data Protection Inspector. However, sustainability and effectiveness of the two-key system will largely depend on future institutional reforms.
- In April 2016, the Constitutional Court of Georgia ruled that technical access of State Security Service to telecom operators' network, allowing unfettered monitoring of communication and collection of communications metadata, was unconstitutional. As the decision of the Court showed, the existing two-key system does not ensure effective mechanism for prevention of illegal secret surveillance bypassing courts and Personal Data Protection Inspector. Therefore, fundamental changes are needed.
- March 31, 2017 was set as a deadline for preparing fundamental legislative amendments and ensuring institutional and technical capacity/bases for the new system. A package of legislative changes has been prepared by members of the civil society campaign This Affects You; however, it was not initiated in Parliament before October 2016 Parliamentary elections.
- The Supreme Court continues to proactively disclose statistics on surveillance, the practice started in September 2014 as part of an obligation (recommended by IDFI and other CSOs) taken by the Supreme Court in the framework of the Open Government Partnership (OGP) Action Plan of Georgia.

#### **Future prospects of regulation of secret surveillance in Georgia:**

- The government and the Parliament have less than 3 months until the deadline of March 31, 2017 to prepare fundamental legislative amendments following the decision of the Constitutional Court of Georgia. At the moment it is not certain whether the draft package prepared by This Affects You campaign will be initiated in the Parliament in the form intended by its civil society authors.
- After October 2016 Parliamentary elections, the ruling party Georgian Dream has secured constitutional majority, which gives the government all resources to implement fundamental reform of secret surveillance. This reform is however only possible if law-enforcement agencies limit their powers and effective system for their oversight is established. Failure to effectively ensure a system for prevention of illegal surveillance while holding constitutional majority will be proof of lack of willingness on the side of decision-makers.