

**Institute for Development of Freedom of Information**



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of Freedom of Information**

**Regulating Secret Surveillance in Georgia  
(January-August, 2017)**

**Authors:**

Giorgi Beraia

Tamar Iakobidze

Teona Turashvili

**Contact Information:**

#3 A. Griboedov St.

Georgia, 0180, Tbilisi

**Tel:** + 995 32 2 92 15 14

**Email:** [info@idfi.ge](mailto:info@idfi.ge)

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## Introduction

In April 2016, the Constitutional Court of Georgia ruled that the technical access of the State Security Service to telecommunication operator networks was unconstitutional. This access allowed unlimited monitoring of communication and data collection. According to the ruling, the existing legislation failed to ensure control of real time acquisition of information in the internet.

The Constitutional Court set March 31, 2017 as the deadline for changing the law and preparing the institutional and technical base required for the new system. In accordance with this decision, the Parliament of Georgia adopted legislative amendments on March 22, 2017 that changed the organization of technical infrastructure used for secret online surveillance. According to these amendments, **surveillance shall be carried out by LEPL Operative-Technical Agency, which is subordinate to the State Security Service.**

The amendments were criticized by non-governmental organizations within the This Affects You campaign, the Public Defender, the President of Georgia, telecommunications companies and opposition parties. The President went as far as to veto the amendments, which the Parliament overturned. This was followed by constitutional complaints being filed against the new amendments by nearly 300 citizens (as part of the This Affects You campaign), the Public Defender, and political parties European Georgia, United National Movement, Republicans and Free Democrats. At the time of writing, the complaint is being reviewed by the Constitutional Court Plenum. These admissibility hearings will decide whether the consideration on the merits of the complaint will be launched.

## Timeline of Events

### Timeline of adoption of regulations on secret surveillance (2013-2017):<sup>1</sup>

**September 2012** – Video and audio recordings of personal lives obtained through illegal secret surveillance are leaked. The recordings were collected illegally by various law enforcement agencies mainly in 2003-2012. According to media reports, a total of 29,000 video and audio recordings were made.

**September 2012** – The leak results in a large scale public outcry. Regulation of illegal surveillance becomes one of the main promises of the coalition Georgian Dream.

**October 2012** – New Prime Minister Bidzina Ivanishvili pledges to create powerful legislative and executive mechanisms to prevent illegal surveillance.

**July 2013** – A package of legislative amendments on regulating illegal surveillance is submitted to the Parliament.

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<sup>1</sup> The timeline is an expanded version of: Zaza Tsaladze, The State Security Service is still Listening, Voice of America, published on March 1, 2017: <https://www.amerikiskhma.com/a/georgia-the-law-on-surveillance-causes-fears/3745244.html>

**March 2014** – NGOs launch a campaign titled This Affects You – They Are Still Listening to protest the delayed adoption of new regulations. The campaign demands strengthening the protection of privacy and restricting the government’s direct access to communication data.

**August 2014** – Parliament adopts only part of the amendments submitted in July 2013. The executive government (Ministry of Internal Affairs, Prime Minister) push back on limiting direct access to communication data. Regulation of this issue is postponed until December 1, 2014.

**October 2014** – Parliament adopts amendments to the Law on Electronic Communication, leaving one ‘key’ (or direct access) to secret surveillance in the hands of the Ministry of Internal Affairs, and giving the other, but only in relation to secret telephone wiretapping, to the Personal Data Protection Inspector.

**November / December 2014** – President vetoes the amendments. The parliamentary majority overturns the veto and the President signs the law.

**February 2015** – Public Defender files a constitutional complaint against the article of the Law on Electronic Communications which grants the key to secret surveillance to the Ministry of Internal Affairs.

**April 2015** – This Affects You campaign files a similar constitutional complaint, which is later joined with that of the Public Defender.

**July 2015** – State Security Service is separated from the Ministry of Internal Affairs.

**April 2016** – Constitutional Court declares direct access of the State Security Service to mobile operator servers unconstitutional. The Court sets March 31, 2017 as a deadline for the Parliament to bring legislative norms in line with the Constitution.

**January 2017** – Parliament sets up a working group with representatives of NGOs of the This Affects You campaign. However, the NGOs leave the working group after the parliamentary majority presented its draft law, leaving the key to surveillance with a new agency under the State Security Service. The President’s Administration also criticizes the draft law.

**March 2017** – Parliament approves legislative amendments creating a new LEPL Operative-Technical Agency under the State Security Service with direct access to the means to secret surveillance.

**March 2017** – President vetoes the draft law.

**March 2017** – Parliament considers the President’s comments and overturns the veto.

**April 2017** – This Affects You campaign files constitutional complaints of 283 citizens requesting the Constitutional Court declare the legislative amendments unconstitutional.

**May 2017** – This Affects You complaints are declared admissible and transferred for consideration to the full composition of the Constitutional Court.

**June / July 2017** – Constitutional Court begins its consideration on whether the new legislative amendments are similar in essence to legislative norms the Court had already declared unconstitutional. The final decision is pending.

## Official Statistics on Secret Government Surveillance in Georgia

### Wiretapping of Telephone Conversations in 2016

Since 2014, the Supreme Court of Georgia has been publishing statistics on court permits issued for secret surveillance and recording of telephone conversations.<sup>2</sup> The latest entry covers the first six months of 2017. During this period, city and district courts in Georgia considered a total of 265 motions, of which 239 were satisfied fully and 16 partially (see Figure #1). This places the approval rate at 96% for 2017, which is an increase from the average of 82-86% of previous years.

<b>Figure #1 - Motions on Telephone Surveillance Received by Tbilisi City Court from the Chief Prosecutor's Office (Information obtained by IDFI from the High Council of Justice in 2013)<sup>3</sup></b>				
<b>Year</b>	<b>Received</b>	<b>Fully Approved</b>	<b>Partially Approved</b>	<b>Approval Rate</b>
<b>2011</b>	7,195	7,187		99.86%
<b>2012</b>	5,951	5,939		99.80%
<b>2013 (January-May)</b>	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>				
<b>2014</b>	1,074	894		83.24%
<b>2015</b>	373	261	45	82%
<b>2016</b>	401	315	30	86%
<b>2017 (6 months)</b>	265	239	16	96%

For the first two years, the disclosed data did not indicate location (specific courts) and type of crime that was being countered. This changed in 2016, when the Supreme Court started publishing more detailed datasets.<sup>4</sup> According to this data, in the first six months of 2017, the highest number of motions - 197 (74%) were considered by Tbilisi City Court. The remaining 68 motions were considered by 12 other city / district courts, including Kutaisi (25 motions), Batumi (11 motions) and Rustavi (6 motions).<sup>5</sup> Almost half (122 of 265) of the motions submitted in this period requested permission for surveillance in order to investigate four types of

<sup>2</sup> This commitment to publish data was taken by the Supreme Court within the framework of the Open Government Partnership (OGP) Georgia Action Plan for 2014-2015. The commitment was a result of a recommendation made by IDFI and other CSOs. By fulfilling this commitment, Georgia became one of those rare countries where data on secret surveillance permits is being published.

<sup>3</sup> Openness of Data on Secret Surveillance, *Institute for Development of Freedom of Information (IDFI)*, March, 14, 2014, accessible at: <https://idfi.ge/ge/statistical-data-idfi-practice>

<sup>4</sup> This commitment was taken within the framework of the OGP Georgia Action Plan for 2016-2017: Commitment 13: Publication of phone tapping data according to the nature of the crime and geographic area, <http://bit.ly/2knGmxw>

<sup>5</sup> This data is available on the Supreme Court website: <http://bit.ly/2iu3QEg>

criminal offenses: **fraud** (47 motions, Article 180), **extortion** (36 motions, Article 181), **bribe-taking** (26 motions, Article 338) and **murder** (13 motions, Article 108) (see Figure #2).<sup>6</sup>

<b>Figure #2 – Motions on Telephone Surveillance and Recording in Georgia by Categories of Crime (first six months of 2017)</b>	
<b>Article of the Criminal Code of Georgia</b>	<b>Number of Considered Motions</b>
Article 180. Fraud	<b>47</b>
Article 181. Extortion	<b>36</b>
Article 338. Bribe-taking	<b>26</b>
Article 108. Murder	<b>13</b>
Article 212. Manufacturing or sale of forged money or securities	<b>12</b>
Article 210. Manufacturing, sale or use of forged credit cards or charge cards	<b>11</b>
Article 179. Aggravated robbery	<b>11</b>
Article 194. Legalization of illegal income (money laundering)	<b>9</b>
Article 177. Theft	<b>9</b>
Article 223 <sup>1</sup> . Membership of the criminal underworld; thief in law	<b>8</b>
Article 182. Appropriation or embezzlement	<b>6</b>
Article 372. Exertion of influence on a witness, victim, expert or interpreter	<b>5</b>
Article 260. Illegal manufacturing, production, purchase, storage, transportation, transfer or sale of drugs, their analogues, precursors or new psychoactive substances	<b>5</b>
Article 187. Damage or destruction of property	<b>5</b>
Article 117. Intentional infliction of grave injury	<b>5</b>
Article 333. Exceeding official powers	<b>4</b>
Article 143 <sup>1</sup> . Human trafficking	<b>4</b>
Article 214. Breach of the procedure related to the movement of goods across the customs border of Georgia	<b>4</b>
Article 205 <sup>1</sup> . Concealment of property using fraudulent and/or sham transactions	<b>3</b>
Article 143. Unlawful imprisonment	<b>3</b>
Article 362. Making, sale or use of a forged document, seal, stamp or blank forms	<b>3</b>
Article 141. Lewd acts	<b>3</b>
Other	<b>23</b>
<b>Total</b>	<b>265</b>

<sup>6</sup> This data is available on the Supreme Court website: <http://bit.ly/2xLWz5k>

In 2016, nearly half of all motions were related to three criminal offenses: fraud (70 motions, Article 180), extortion (58 motions, Article 181) and bribe-taking (57 motions, Article 338).<sup>7</sup>

<b>Figure #3 – Motions on Telephone Surveillance and Recording in Georgia by Categories of Crime (2016)</b>	
<b>Article of the Criminal Code of Georgia</b>	<b>Number of Considered Motions</b>
Article 180. Fraud	70
Article 338. Bribe-taking	57
Article 181. Extortion	58
Article 182. Appropriation or embezzlement	18
Article 194. Legalization of illegal income (money laundering)	14
Article 108. Murder	14
Article 210. Manufacturing, sale or use of forged credit cards or charge cards	14
Article 179. Aggravated robbery	12
Article 223 <sup>1</sup> . Membership of the criminal underworld; thief in law	12
Article 177. Theft	11
Article 260. Illegal manufacturing, production, purchase, storage, transportation, transfer or sale of drugs, their analogues, precursors or new psychoactive substances	11
Article 262. Illegal import or export of drugs, their analogues, precursors or new psychoactive substances to/from Georgia or their international transportation by transit	9
Article 212. Manufacturing or sale of forged money or securities	9
Article 109. Murder under aggravating circumstances	6
Article 221. Commercial bribery	6
Article 144. Taking hostages	5
Article 205 <sup>1</sup> . Concealment of property using fraudulent and/or sham transactions	5
Article 218. Tax evasion	5
Article 339. Bribe-giving	5
Article 187. Damage or destruction of property	4
Article 143 <sup>1</sup> . Human trafficking	4
Article 200 <sup>1</sup> . Manufacturing, sale and/or use of counterfeit excise stamps	3
Article 200. Release, storage, sale or transportation of excisable goods without excise stamps	3

<sup>7</sup> Full analysis can be found at: [https://idfi.ge/en/statistical\\_data\\_on\\_phone\\_conversation\\_surveillance](https://idfi.ge/en/statistical_data_on_phone_conversation_surveillance)

Article 372. Exertion of influence on a witness, victim, expert or interpreter	3
Article 143. Unlawful imprisonment	3
Article 318. Sabotage	3
Article 185. Damage of property by deception	3
Article 214. Breach of the procedure related to the movement of goods across the customs border of Georgia	3
Article 223. Creation or management of illegal formations, or joining and participation in such formations, and/or implementation of other activities in favor of illegal formations	3
Article 315. Conspiracy or rebellion intended to change the constitutional order of Georgia through violence	3
Article 117. Intentional infliction of grave injury	3
Article 178. Robbery	2
Article 328. Joining a foreign terrorist organization or a terrorist organization controlled by a foreign state or supporting this organization in terrorist activities	2
Other	18
<b>Total</b>	<b>401</b>

As for geographic distribution, Tbilisi City Court considered the most number of motions (299 / 75%) in 2016 as well. The remaining 105 motions were considered by 15 other city / district courts, including Batumi (22 motions), Kutaisi (19 motions), and Rustavi (13 motions).<sup>8</sup>

Since 2015, the Supreme Court has also started publishing data on motions requesting extensions of secret tapping and recording of telephone conversations. In the first 3 months of 2017, city / district courts considered a total of 44 such motions, of which they fully approved 40 and partially approved 4.<sup>9</sup>

### Registry of Covert Investigative Activities in 2016

As a result of legislative changes, starting from August 1, 2014, the Supreme Court of Georgia also started proactively publishing registry of actions of secret investigation. The registry includes information about granted motions on telephone surveillance as well as other secret investigation. As of February 2017, only data for 4 months of 2014 (18 August – 31 December),<sup>10</sup> 2015<sup>11</sup> and 2016<sup>12</sup> are available.

<sup>8</sup> This data is available on the Supreme Court website: <http://bit.ly/2kFltOu>

<sup>9</sup> This data is available on the Supreme Court website: <http://bit.ly/2tZQvFT>

<sup>10</sup> Registry of Actions of Secret Investigation according to courts of first instance from August 18 to December 31, 2014, Supreme Court of Georgia, Available in Georgian at: <http://bit.ly/2kWp5eY>

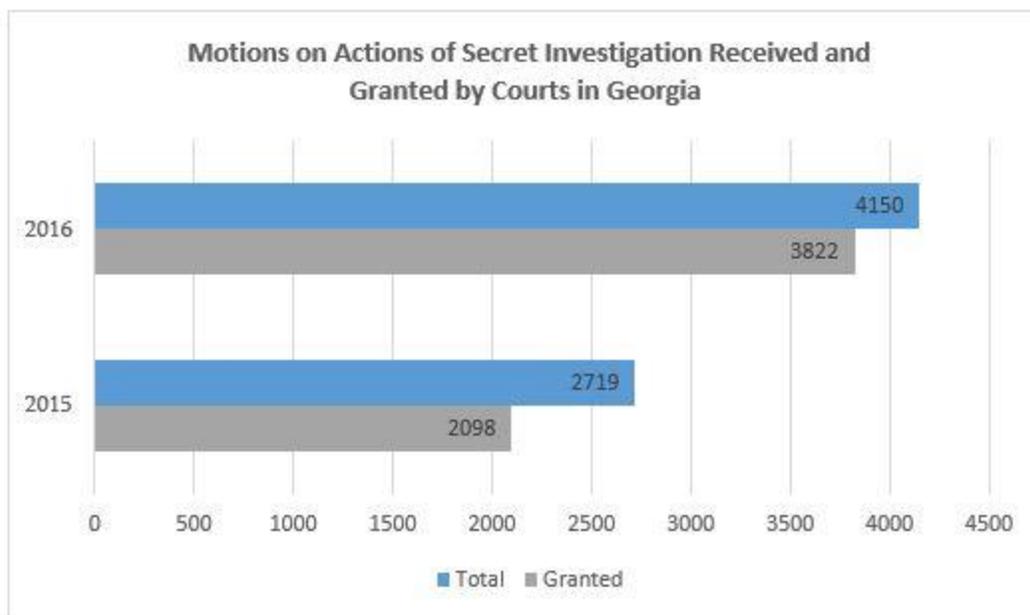
<sup>11</sup> Registry of Actions of Secret Investigation in 2015 by city/regional courts of Georgia, Supreme Court of Georgia, Available in Georgian at: <http://bit.ly/2kkju21>

<sup>12</sup> Registry of Actions of Secret Investigation in 2016 by city/regional courts of Georgia, Supreme Court of Georgia, Available in Georgian at: <http://bit.ly/2jzJskY>

According to the Criminal Procedure Code of Georgia, the types of secret investigative actions are as follows:<sup>13</sup>

- Wiretapping and secret recording of phone conversations.
- Removal and recording of information from:
  - A communications channel (by connecting to the communication facilities, computer networks, line communications and station devices).
  - A computer system (both directly and remotely).
  - Installation of a piece of software in a computer system for this purpose.
- Monitoring of post and telegraphic communications (except for diplomatic post).
- Secret video and audio recording, film and photo shooting.
- Electronic surveillance through technical means, which does not endanger human life, health or the environment.

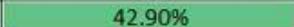
According to 2016 data from the registry of secret investigative actions, the number of motions of secret investigative actions (including wiretapping and secret recording of phone conversations, removal and recording of information from a communications channel, secret video and audio recording, removal and recording of information from a computer system, etc.) has increased 1.5 times compared to 2015. The rate of granted motions has also increased from 77% in 2015 to 92% in 2016.



The registry of secret investigative actions also shows the annual share of telephone surveillance in the total number of secret investigative actions. In 2016, cases of wiretapping and secret recording of phone conversations were only 9.7% of all secret investigative actions. By region, the highest share of telephone surveillance was carried out in Tetrtskaro (42,9%), Senaki (18%) and Gurjaani (18%). In Tbilisi the share of telephone surveillance out of secret investigative actions was 10.3%. In 2015, the share of telephone

<sup>13</sup> Article 143<sup>1</sup> - Types of secret investigative actions

surveillance among the total secret investigative actions was 13.8%. Therefore, the so called “two-key” system, by which the Personal Data Protection Inspector controls cases of wiretapping and secret recording of phone conversations, only covered 9.7% of all secret investigative actions in 2016.

Secret Investigative Actions and Telephone Surveillance in Georgia in 2016			
www.idfi.ge			
	Considered Motions on Secret Investigative Actions	Considered Motions on Telephone Surveillance	Share of Motions on Telephone Surveillance in Secret Investigative Actions
Tbilisi	2902	299	 10.30%
Batumi	207	22	 10.60%
Kutaisi	188	19	 10%
Rustavi	141	13	 9%
Zugdidi	121	6	 4.90%
Gori	110	9	 8%
Telavi	78	4	 5%
Bolnisi	67	5	 7.50%
Akhaltzikhe	60	6	 10%
Ozurgeti	48	1	 2%
Mtskheta	47	2	 4%
Poti	27	0	0%
Samtredia	13	0	0%
Senaki	22	4	 18%
Zestaponi	20	1	 5%
Khelvachauri	18	2	 11%
Khashuri	15	0	0%
tetrtskaro	14	6	 42.90%
Sachkhere	12	0	0%
Gurjaani	11	2	 18%
Sighnaghi	4	0	0%
Tsageri	4	0	0%
Akhalkalaki	2	0	0%
<b>Total:</b>	<b>4131</b>	<b>401</b>	 <b>9.70%</b>

Unfortunately, the registry of secret investigative actions does not separate the data by the type of crime, which would enable additional analysis. Therefore, data that is currently available does not show the full extent to which the government uses legal secret surveillance.

## Media Reports on Unlawful Surveillance

Secret surveillance related events from January to July 2017:

### *Wiretapped recordings of Bidzina Ivanishvili*

According to former Deputy Chief Prosecutor Davit Sakvarelidze, Lasha Natsvlshvili, Deputy Chief Prosecutor during Bidzina Ivanishvili's time in office, offered him to purchase audio recordings of Bidzina Ivanishvili's phone in exchange for several million. This was confirmed by Nika Gvaramia, director of Rustavi 2.<sup>14</sup>

### *Decision of Tbilisi Court of Appeal*

On April 20, 2017, Tbilisi Court of Appeal upheld the verdict of abuse of public office by Shota Khizanishvili, former Deputy Minister of Internal Affairs, Levan Kardava, former head of the Constitutional Security Department (SCD), and Vasil Leluashvili, former deputy department head at (CSD).

According to the decision of the Court of Appeal, in 2009, the CSD illegally created a computer program on Vasil Leluashvili's orders that enabled access to any computer system, including illegal surveillance and recording of conversations taking place near a computer. This program was created in 2011 and was used to illegally obtain personal information.<sup>15</sup>

### *Court decision on former high-ranking officials of the Constitutional Security Department*

On July 3, 2017, the court found former high-ranking officials of CSD and the police guilty of obtaining and possession of illegal secret recordings depicting personal lives. One of the six accused was acquitted due to lack of evidence, while the other five were sentenced to prison. Two of these five persons are fugitives.<sup>16</sup>

## Regulating Unlawful Secret Surveillance – State Security Service Reform

On April 14, 2016, the Constitutional Court found that the existing system of secret surveillance was unconstitutional, and set March 31, 2017 as a deadline for the Parliament to adopt relevant legislative amendments. More specifically, the Court found that **an investigative body that deals with Personally Identifiable Information (PII) must not have direct access to telephone and internet communications when conducting secret investigative activities or the ability to copy and store this information.** In this way, the

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<sup>14</sup> Sakvarelidze: Natsvlshvili offered us Ivanishvili's recordings in exchange for several million, *Netgazeti*, February 7, 2017, available at: <http://netgazeti.ge/news/172353/>

<sup>15</sup> Court of Appeal upholds the decision on Khizanishvili, Kardava and Leluashvili, *on.ge*, April 20, 2017, available at: <http://bit.ly/2u9N410>

<sup>16</sup> Court finds former high-ranking officials guilty of obtaining and possession of secret recordings, *interpressnews.ge*, July 3, 2017, available at: <http://bit.ly/2tT7zf0>

Court found that direct access of the State Security Service to telephone and internet communication was unconstitutional.

In accordance with this decision, the Parliament of Georgia adopted legislative amendments on March 22, 2017 that changed the organization of technical infrastructure used for secret online surveillance. According to these amendments, **surveillance shall be carried out by LEPL Operative-Technical Agency (OTA), which is subordinate to the State Security Service.** On June 17, 2017, a special commission appointed Koba Kobidze as head of OTA. Previously, Kobidze was deputy head of the Operative-Technical Department of the State Security Service.<sup>17</sup>

The OTA is authorized to:<sup>18</sup>

- Wiretap and record telephone communication, obtain information from communications channels.
- Obtain information from computer systems.
- Make secret video and audio recordings, take secret photos.
- Obtain and disclose Personally Identifiable Information (PII) from electronic communications.
- Implement strategic and individual monitoring.
- Prepare and use documents that mask the identity of its employee, name of its structural subdivision, and property.
- Examine the information-technological and telecommunication infrastructure of an electronic communications company for the purpose of executing its legal functions, etc.

The amendments also changed the role of the Personal Data Protection Inspector, who no longer has the authority to issue electronic permits for secret investigative activities through the two-stage electronic system (the so-called 'two-key' system). However, the Inspector retained the authority to monitor the legality of data processing<sup>19</sup> and terminate a secret investigative activity through the electronic system<sup>20</sup>.

The Law on Counterintelligence Activities allowed the State Security Service to make secret video and audio recordings, and take secret photos without a court permit and oversight, and without the participation of the Personal Data Protection Inspector. According to legal amendments adopted on March 22, 2017, the Supreme

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<sup>17</sup> A Special Commission Approves the Head of LEPL Operative-Technical Agency, *State Security Service*, June 17, 2017, available at: <http://bit.ly/2us9kkV>

<sup>18</sup> Law of Georgia on LEPL Operative-Technical Agency, *Parliament of Georgia*, March 22, 2017: <http://info.parliament.ge/file/1/BillReviewContent/146594>

<sup>19</sup> Ibid. Article 2, Paragraphs i), i.a) and i.b), available at: <https://matsne.gov.ge/ka/document/view/3597534>

<sup>20</sup> Criminal Procedure Code, Article 143<sup>6</sup> - Termination and Suspension of Secret Investigation Activities, Paragraph 5, available at: <https://matsne.gov.ge/ka/document/view/90034>

Court was granted the authority to issue orders on strategic monitoring,<sup>21</sup> which includes intelligence and counterintelligence activities.<sup>22</sup>

The Law also introduced the concept of a ‘**supervisor judge**’, who is selected by the Supreme Court Chairperson and has the authority to issue orders on operative-technical measures and electronic surveillance. The supervisor judge will also be able to start overseeing<sup>23</sup> secret wiretapping and recording activities in 2020 through the electronic control system.<sup>24</sup> On October 1, 2017, the supervisor judge was granted the authority to oversee actions taken in relation to the Central PII Database of Electronic Communication.<sup>25</sup>

The amendments authorize the supervisor judge to issue orders to conduct electronic surveillance and then monitor their implementation.<sup>26</sup> The judge sets the timeframes for electronic surveillance,<sup>27</sup> and is authorized to terminate surveillance activities via the electronic control system.<sup>28</sup> The judge is authorized to request information about ongoing surveillance activities as well as information obtained through them. Upon conclusion of a surveillance activity, the implementing body provides the supervisor judge with a protocol and a report on the information obtained as a result of this activity.<sup>29</sup>

The Law provides for the possibility to launch an electronic surveillance activity without an order of a supervisor judge for counterintelligence purposes; however, the implementing body must notify the court within 24 hours of launching surveillance and request an order. If the supervisor judge does not issue an order, the electronic surveillance activity must be terminated immediately and any information obtained must be destroyed.<sup>30</sup>

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<sup>21</sup> “Strategic Monitoring Measure – Monitoring by the Agency of telecommunications transmitted through electronic communication channels outside the territory of Georgia, as well as on territory not under Georgian jurisdiction, for the purpose of intelligence and counterintelligence activities, in order to obtain information about actions directed against Georgian constitutional order, sovereignty, defense capabilities, territorial integrity, legal order, scientific, economic and military potential,” Law on LEPL Operative-Technical Agency, Article 2, Paragraph a), available at: <https://matsne.gov.ge/a/document/view/3597534>

<sup>22</sup> Law on LEPL Operative-Technical Agency, Article 16 - Implementation of Strategic Monitoring Measures and Individual Monitoring Measures, available at: <https://matsne.gov.ge/ka/document/view/3597534>

<sup>23</sup> Law on Counterintelligence Activities, Article 2, Paragraphs n), n.a) and n.b), available at: <https://matsne.gov.ge/ka/document/view/27364#>

<sup>24</sup> Ibid. Activity, Article 9, Paragraph 3, Subparagraph a) shall enter into force on March 30, 2020

<sup>25</sup> Ibid. Article 14<sup>7</sup>

<sup>26</sup> Ibid. Article 13, Paragraph 6

<sup>27</sup> Ibid. Article 14<sup>1</sup>

<sup>28</sup> “If a) no order has been issued by a supervisor judge on electronic surveillance; or b) head of the implementing body has not uploaded an electronic copy of their decision to launch electronic surveillance due to urgent necessity to the electronic control system.” Law on Counterintelligence Activities, Article 14<sup>4</sup>, Paragraph 4, available at: <https://matsne.gov.ge/ka/document/view/27364#>

<sup>29</sup> Law on Counterintelligence Activities, Article 14<sup>5</sup>, available at: <https://matsne.gov.ge/ka/document/view/27364#>

<sup>30</sup> Ibid. Article 14, Paragraphs 1 and 2

## Diverging Positions

Following the April 14, 2016 decision of the Constitutional Court, diverging positions emerged from different branches of government and civil society on regulation of secret surveillance.

### ‘This Affects You’ Campaign

The campaign This Affects You got involved in the parliamentary working group in January 2017, where the government presented its package of legislative amendments.

According to non-governmental organizations, the presented draft law contradicted the decision of the Constitutional Court and created risks of unjustified interference in human rights. This Affects You representatives left the working group after it decided to consider the draft law without making any changes.<sup>31</sup>

The campaign summarized the main risks posed by the draft law as follows:<sup>32</sup>

1. **The legislative package contradicts a decision of the Constitutional Court** – A structural unit (LEPL) that carries out covert investigative actions still remains part of the State Security Service. In order to successfully carry out surveillance, it will have to perform functions that involve obtaining as much information as possible, such as ensuring information security in the area of electronic communications, information/technical support of public agencies and institutions, ensuring nuclear, radiation, chemical and biological security in the territory of the country, etc. According to the decision of the Constitutional Court, *“creation, possession, and administration of technical means of obtaining personal information in real time and having direct access to personal information using this means, by an agency that has investigative functions or is professionally interested in familiarizing itself with this information, creates an excessive threat of unsubstantiated interference with personal life.”*
2. **The legislative package fails to provide safeguards for the independence of the new agency** – Candidates for the position of its head will be selected by the head of the State Security Service who will submit them to a commission headed by him/herself. The State Security Service will exercise control over the new agency. If the head of the agency fails to fulfill his/her duties properly, the head of the Security Service will be able to give the Prime Minister a proposal to dismiss him/her. Deputy heads of the agency will be appointed and their powers will be determined by the head of the State Security Service.
3. **The number of structural units with surveillance powers increases** – The agency may also have territorial bodies. Therefore, instead of the existing reality where only one department of the State Security Service eavesdrops on citizens, it will be possible to create several (unlimited number of) structural units with this authority.

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<sup>31</sup> Statement by This Affects You on the proposed initiative on secret investigative activities, *This Affects You*, January 31, 2017, <https://www.esshengexeba.ge/?menuid=9&id=1147&lang=1>

<sup>32</sup> Risks and shortcomings of the new draft law on secret surveillance, *This Affects You*, February 10, 2010, <https://www.esshengexeba.ge/?menuid=9&id=1149&lang=1>

4. **Surveillance powers of the agency expand** – The legislative package introduces new terms, such as “strategic monitoring measure” and “individual monitoring measure”, which imply monitoring of communication transmitted through electronic communication networks abroad and in the territory currently beyond Georgia’s control. In these cases, a judge’s order authorizing monitoring of communication of an individual will not be required.
5. **Oversight mechanisms have a formal character only** – Apart from the State Security Service, all other mechanisms for controlling the agency will be formal or weak: The oversight mechanism of the Personal Data Protection Inspector will be weakened, and he/she will no longer take part in the process of technical initiation of surveillance; oversight by the Prime Minister will be limited to an obligation to report to him/her, and reports will first be submitted to the head of the State Security Service; parliamentary oversight will be limited to submitting statistical and activity reports to the Group of Trust.
6. **The agency will interfere with the activities of private companies** – The agency will not only carry out covert investigative and certain operative-investigative actions (e.g. interviewing a person, collecting information, and visual control), but also interfere with the activity of private companies. The agency will be authorized to conduct an infrastructure audit in electronic communications companies to impose a fine on them (with a maximum fine of GEL 200,000), and to demand suspension of their authorization by the National Communications Commission.

In response, This Affects You campaign advocated for creating an independent body that would be accountable to the Parliament.

## Telecommunications Companies

The new draft law was criticized by large<sup>33</sup> and small telecommunications operators alike (the latter as part of the Association of Small and Medium Telecommunications Operators of Georgia)<sup>34</sup>.

The private sector criticized the process of elaboration of the draft law. Despite the draft law having significant financial and regulatory impact on companies, no consultations were conducted with the private sector. According to the Association of Small and Medium Telecommunications Operators, the amendments were especially discriminatory towards small and medium businesses that have neither financial nor human resources required to comply with the new regulations. Small and medium sized operators also spoke about inadequately high sanctions and additional market entry barriers.

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<sup>33</sup> Geocell, Magti and Beeline Criticize the Draft Law on Secret Surveillance, *on.ge*, February 11, 2017, <http://bit.ly/2tACsEB>

<sup>34</sup> Statement of the Association of Small and Medium Telecommunications Operators regarding Planned Amendments, *Association of Small and Medium Telecommunications Operators of Georgia*, February 14, 2017, <http://toa.ge/?p=1032>

## President's Administration

Despite the criticism of nongovernmental organizations and opposition parties, the Parliament adopted the draft law on March 1, 2017, which was then sent to the President, who had a ten-day deadline to either sign or veto the law. The President used this period to consult with various political forces.

On March 20, 2017, the President vetoed the draft law<sup>35</sup> and returned his motivated remarks to the Parliament<sup>36</sup>. The President offered an alternative model to have the new agency be directly accountable to the Prime Minister. He also suggested the state compensate the expenses incurred by companies for providing security related services.<sup>37</sup>

The Legal Issues Committee of the Parliament discussed the President's remarks, which, according to the President's Parliamentary Secretary, was more political rather than substantive.<sup>38</sup>

## United National Movement

The United National Movement also came up with an initiative to regulate secret surveillance, which included three aspects:

1. Creation of an agency independent from the executive government that will not carry out investigative activities and be accountable to the Parliament alone.
2. Having the so-called 'two keys' (access) - one for the independent agency, and the other for the court.
3. Granting the Public Defender and MPs the authority to monitor secret surveillance and check its compliance with the law.<sup>39</sup> The Public Defender approved of this initiative.<sup>40</sup>

## Government and Parliament

Despite the President's veto and motivated remarks, the parliamentary majority did not change its position and [ass]ed the draft law unchanged.<sup>41</sup> Leader of the parliamentary majority Archil Talakvadze stated that "the President vetoed not the law but the safety of our citizens, fight against organized crime, and our ability to deal with the risks of terrorism."<sup>42</sup>

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<sup>35</sup> President Vetoes the Draft Law on Secret Surveillance, *on.ge*, March 20, 2017, <http://bit.ly/2v3oq0b>

<sup>36</sup> Motivated remarks of the President of Georgia on the draft law on LEPL Operative-Technical Agency adopted by the Parliament of Georgia on March 1, 2017, *Parliament of Georgia*, <http://parliament.ge/ge/ajax/downloadFile/58631/07-1.5-veto>

<sup>37</sup> Legal Issues Committee Discusses the President's Motivated Remarks on the Draft Law on Surveillance, *interpressnews.ge*, March 21, 2017, <http://bit.ly/2tDE6KH>

<sup>38</sup> Ana Dolidze – The Parliament Held a Politically Motivated Discussion of the President's Comments, *interpressnews.ge*, March 21, 2017, <http://bit.ly/2uPl6Zy>

<sup>39</sup> UNM: Our Initiatives on Surveillance Will Protect Citizens, *on.ge*, February 22, 2017, available at: <http://bit.ly/2uyRf7y>

<sup>40</sup> Public Defender Finds UNM's Initiative Interesting, *on.ge*, February 24, 2017, available: <http://bit.ly/2uCEcBr>

<sup>41</sup> Parliament Overrides the President's Veto on the Draft Law on Secret Investigative Activities, *interpressnews.ge*, March 22, 2017, <http://bit.ly/2eHzT1U>

<sup>42</sup> Archil Talakvadze: The President Vetoes the Security of Our Citizens, *interpressnews.ge*, March 22, 2017, <http://bit.ly/2eHIYaR>

According to the Parliament, it fully complied with the standards established by the decision of the Constitutional Court on April 14, 2016. Even though the new agency is subordinate to the State Security Service, it still has the necessary guarantees of independence in terms of the rules for appointment and dismissal of its head, as well as financial and organizational independence. This position is shared by the State Security Service and LEPL Operative-Technical Agency.

During discussion of the issue in the Constitutional Court, a Parliament representative stated that secret investigative activities were previously carried out by a structural unit of the State Security Service - Operative Technical Department, and was now carried out by a Legal Entity of and Public Law (LEPL) Operative-Technical Agency. According to the Parliament, an LEPL has vastly greater guarantees of independence than a department.

Head of the State Security Service would directly appoint the department head, while, in case of the LEPL, he/she can simply nominate a candidate to be considered by a special 7 member commission composed of high ranking representatives of various branches of government: Public Defender's Office, Supreme Court, Parliament and Government. The head of the State Security Service also cannot unilaterally dismiss the head of the LEPL, and requires approval of the Prime Minister.

According to the Parliament, the new body responsible for secret surveillance has been granted financial guarantees as well, since it is not possible for its budget to be reduced below the amount of the previous year without the agency's consent.

External oversight mechanisms of the new agency have also been strengthened according to the Parliament. More specifically, provisions have been included in the legislation detailing which technical means must be employed for which type of investigative action. A representative of the Personal Data Protection Inspector has the authority to inspect the agency's surveillance infrastructure, observe investigative activities being carried out, and access the legal documents and instructions regulating the agency's activities.

In addition, the agency is obligated to issue protocols on any secret investigative action it carries out and sent it to the Inspector. The Inspector has the authority to look into the actions carried out by the agency and determine their legality on the basis of a prosecutor's decision or a judge's motivated ruling.

According to the Parliament, the constitutional complaint should not be satisfied because the risk of unjustifiable restriction of the right to privacy no longer exists. The Constitutional Court's decision of April 14, 2016, has resulted in a situation where the agency responsible for secret surveillance is no longer professionally interested in obtaining as much information as possible, operates independently from the state, and has legal, political and financial independence.

## **Personal Data Protection Inspector**

During case hearing in the Constitutional Court, the Personal Data Protection Inspector stated that the Parliament's decision to take away direct access to surveillance (so-called key) from the Inspector's Office was

justified, due to the fact that the Office is an oversight body. According to the Inspector, the investigative body that carries out secret investigative actions should take full responsibility for such actions, while the Inspector should be able to stop the process upon discovering a problem.

The Office of the Personal Data Protection Inspector was created in July 2013. In the period from March 2015 to March 2017, the Inspector had the authority to issue permits on secret surveillance in accordance with the two-stage electronic system (the so-called 'two-key' system). According to the 2016 annual report, the Inspector denied a total of 47 permits in 2016 due to technical errors related to the legal basis for data processing or vagueness of the court order. Permissions were eventually granted after these shortcomings were corrected.<sup>43</sup>

## Office of the Public Defender

The Public Defender accepted the position of This Affects You campaign and stated that the legislative amendments adopted by the Parliament on March 22, 2017, contradicted the decision made by the Constitutional Court on the same case, since the technical ability to carry out secret surveillance remains within the State Security Service.<sup>44</sup>

In March 2017, the Public Defender invited the UN Special Rapporteur on the right to privacy Joseph Cannatacche for the purpose of studying and developing mechanisms related to privacy protection and legislative regulations and control of surveillance.<sup>45</sup> The Public Defender also stated that the efforts of the Prosecutor's Office to respond to leaked sex tapes and threats were insufficient.<sup>46</sup>

## A New Constitutional Complaint

Following the Parliament's decision to overturn the President's veto and adopt the unchanged version of the legislation on secret surveillance, constitutional complaints were filed against the new amendments by nearly 300 citizens (as part of the This Affects You campaign), the Public Defender,<sup>47</sup> and political parties European Georgia, United National Movement, Republicans and Free Democrats.<sup>48</sup>

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<sup>43</sup> Report on the State of Personal Data Protection and Activities of the Inspector, *Office of the Personal Data Protection Inspector*, 2016, pp, 62-63, available at:

<https://personaldata.ge/manage/res/images/2017/angarishi/2016%20Eng.pdf>

<sup>44</sup> Public Defender to File a Constitutional Complaint on the New Law of Surveillance, *on.ge*, April 5, 2017, available at:

<http://bit.ly/2uCDRyW>

<sup>45</sup> Ucha Nanuashvili Invited the UN Special Rapporteur on the Right to Private to Georgia, *interpressnews.ge*, March 16, 2017, available:

<http://bit.ly/2v0bgEH>

<sup>46</sup> Ucha Nanuashvili Finds Efforts of the Prosecutor's Office to be Insufficient, *interpressnews.ge*, May 18, 2017, available:

<http://bit.ly/2us8gh6>

<sup>47</sup> Public Defender Files a Constitutional Complaint Against the Law on Surveillance, *interpressnews.ge*, May 31, 2017, available at:

<http://bit.ly/2uptzBF>

<sup>48</sup> File Constitutional Complaints Against the Law on Surveillance, *Netgazeti*, April 6, 2017, available at:

<http://netgazeti.ge/news/185338/>

According to complaints prepared by This Affects You, the new Agency has direct stationary as well as remote access to telephone and internet communications, which increases the risk of unjustified interference with the right to privacy.

The claimants stated that they do not dispute the constitutionality of obtaining information in real time through secret investigation activities, because it serves an important and legitimate interest, but rather that this ability must not be given to an agency that has investigative functions, since it is professionally interested in obtaining as much information as possible, creating a risk that personal information will be collected unlawfully.

Claimants believe that the new legislation does not include sufficient safeguards for prevention offenses during secret investigative activities. This risk is increased by extensive technical capabilities of the State Security Service and the ineffective external oversight. According to the claimants, there is a real threat that the Agency might bypass the law and engage in secret surveillance without a judge's order. Therefore, the new legislation violates Article 20 of the Constitution of Georgia which states that the right to privacy may be restricted only upon a court's consent.

The claimants also believe that the disputed norms have a chilling effect on the right to personal development guaranteed by Article 16 of the Constitution. Citizens may start fearing that the various means of communication used by them are not safe and are being subject to state surveillance. This may result in citizens avoiding the use of various means of communication means, which will reduce their capacity for personal development.

The claimants also believe 12 months is an unreasonably long time for the surveillance agency to be able to hold on to personal information gathered through surveillance. According to them, the surveillance agency has access to information about the daily conduct of citizens, their habits and social connections without proper procedural safeguards. This negatively affects not only personal freedoms, but social connects and healthy social interactions as well.

## Hearing of the Constitutional Complaint

On May 17, 2017, the Constitutional Court satisfied the motions of two judges of the First Chamber Merab Turava and Lali Papiashvili, and transferred the case to the Plenum for consideration.

Four judges of the First Chamber expressed a dissenting opinion on passing the case to the Plenum.<sup>49</sup> They did not see the need to transfer the case to the Plenum and believe that it should have been considered by the First Chamber, to which the case was originally addressed. The reasoning behind this position could be that the new legislative changes are similar enough in essence with the norms that have already been declared

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<sup>49</sup> Dissenting Opinion of Constitutional Court Judges: Irine Imerlishvili, Giorgi Kverenchkhiladze, Maia Kopaleishvili and Tamaz Tsabutashvili, on the case of Georgian citizens: Avtandil Baramidze, Givi Mitaishvili, Nugzar Solomonidze and others v. Parliament of Georgia

unconstitutional that the First Chamber could make the final decision without the need to transfer the case to the Plenum, or the full composition of the Constitutional Court.

Preliminary hearings have already been held on June 20, 21, 22 and July 8, 9 of 2017.<sup>50</sup> These hearings will decide whether to launch the consideration on the merits of the case, as well as whether the disputed norms are similar in essence with norms that have already been declared unconstitutional. If the Court finds the latter to be true, it can use a simplified procedure to declare the disputed norms unconstitutional without launching the considering on the merits of the case. At this point however, the preliminary hearings are ongoing and the decision is pending.

In addition to the claimants and the respondent (Parliament), the Constitutional Court judges heard from the Personal Data Protection Inspector, State Security Service and LEPL Operative-Technical Agency.

## Summary of Ongoing Processes

- Official statistics on court motions on telephone surveillance by category of crime and location were first published in 2016.
  - The approval rate of such motions in the first six months of 2017 was 96%, an increase from the average of 82-86% in previous years.
  - Tbilisi City Court considered the majority of motions on telephone surveillance and recording: 75% of all motions in 2016 and 74% in 2017.
  - The majority of motions (41-46%) submitted in 2016 and 2017 (first six months) were related to three criminal offenses: fraud (Article 180), extortion (Article 181) and bribe-taking (Article 338).
  - In 2016, the number of motions on secret investigative actions increased 1.5 times compared to 2015, and the approval rate from 77% to 92%.
- In 2016, cases of wiretapping and secret recording of phone conversations were only 9.7% of all secret investigative actions.
- In 2016, the Personal Data Protection Inspector was able to oversee only 9.7% of all secret investigative actions.
- On July 3, 2017, the court found former high-ranking officials of the Constitutional Security Department and the police guilty of obtaining and possession of illegal secret recordings depicting personal lives.

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<sup>50</sup> The purpose of the preliminary hearing is to prepare the case for the main session.

- Following the April 14, 2016 decision of the Constitutional Court that declared the existing system of secret surveillance unconstitutional, the Parliament adopted a new law, according to which, surveillance functions were granted to a new LEPL Operative-Technical Agency, which is subordinate to the State Security Service.
- The oversight system for secret surveillance was changed. The so-called ‘two key’ (direct access) system was abolished, through which the Personal Data Protection Inspector issued surveillance permits. Instead, the Inspector was granted an additional authority to examine the legality of data processing by the surveillance agency, and the Supreme Court was granted the authority to issue strategic monitoring orders. The new law also introduced the concept of a ‘supervisor judge’, who is selected by the Supreme Court Chairperson and has the authority to issue orders on operative-technical measures and electronic surveillance. The supervisor judge will also have oversight functions.
- The new Agency is authorized to:
  - Wiretap and record telephone communication, obtain information from communications channels.
  - Obtain information from computer systems.
  - Make secret video and audio recordings, take secret photos.
  - Obtain and disclose Personally Identifiable Information (PII) from electronic communications.
  - Implement strategic and individual monitoring.
  - Prepare and use documents that mask the identity of its employee, name of its structural subdivision, and property.
  - Examine the information-technological and telecommunication infrastructure of an electronic communications company for the purpose of executing its legal functions, etc.
- The new amendments were criticized by non-governmental organizations within the This Affects You campaign, the Public Defender, the President of Georgia, telecommunications companies and opposition parties.
- The following criticism was expressed:
  - The draft law is out of line with the decision of the Constitutional Court, since the newly established agency remains to be an investigative entity under the State Security Service.
  - The Agency is not equipped with sufficient guarantees of independence.
  - The number of entities engaged in secret surveillance is increasing.
  - Oversight mechanisms are formal and weak.

- The Agency has the authority to interfere with the activities of private companies.
  - Private sector representatives claim that the draft law was prepared without consultation with them. According to SMEs, the planned changes are particularly discriminatory towards them, as the amendments do exceed the capacity of small operators.
  - According to private sector representatives, the draft law elaborated without their involvement. Small and medium companies stated that the amendments were especially discriminatory towards them, since they do not have the capacity to comply with the new regulations.
- The President vetoed the new amendments, but the Parliament refused to accept his suggestions and overturned it.
  - Following the Parliament's decision to overturn the President's veto, constitutional complaints were filed against the new amendments by nearly 300 citizens (as part of the This Affects You campaign), the Public Defender, and political parties European Georgia, United National Movement, Republicans and Free Democrats
  - The complaint is currently being considered by the Plenum of the Constitutional Court.