

Institute for Development of Freedom of Information



Regulating Secret Surveillance in Georgia: 2013-2015

June, 2015

Summary

After the tens of thousands of shocking cases of illegal surveillance and wiretapping by the government revealed prior to Parliamentary Elections 2012, regulating the issue was one of the main pre-Election promises of the ruling Georgian Dream coalition. Despite high public interest and necessary steps taken by the new political power, such as creating an Interim Commission on Illegal Surveillance and Wiretapping and submitting a package of legislative amendments for surveillance, the credibility of the process was undermined by critical statements from government representatives. Most important division of interests concerned limiting direct access of law enforcing agencies to telecommunications data. On the one hand, the Ministry of Internal Affairs, supported by the current Prime Minister Gharibashvili, the previous Prime Minister Ivanishvili and part of Parliament members, remained strongly opposed to the suggested changes limiting this access. On the other hand, the President, CSOs united in a campaign “This Affects You” as well as a number of Parliament members strongly advocated for limitation of direct access to the data. At the first stage of legal changes five laws were amended in August 2014, however the issue of direct access to telecommunication data was not resolved until November 2014. After multiple discussions,

extensions of the deadline, four various bills and two vetoes from the President, the Parliament adopted the government-supported bill. According to the adopted bill the Ministry of Internal Affairs has retained its direct access to telecom operators' servers, however, 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. The campaign continued advocating for depriving security agencies of direct access to telecom operators' networks after adoption of the government-supported bill and filed a lawsuit in the Constitutional Court against the Parliament of Georgia. Interestingly, as the public information received by IDFI has shown, there is no single standard of releasing information on surveillance. On a positive note, the Supreme Court has considered the recommendation made by IDFI and other CSOs in the framework of the OGP Action Plan of Georgia and took obligation to proactively disclose statistical information on surveillance since September 2014.

Legislative changes after Parliamentary Elections 2012

Before the Parliamentary Elections 2012 disturbing cases of surveillance and wiretapping by the government have been revealed in Georgia. As it turned out, there were up to 29 000 illegal video and audio recordings of meetings and conversations of opposition party representatives, well-known persons opposing the government, prisoners, civil servants, users of various entertainment establishments, transport employees¹ etc, mostly recorded over the period of 2003-2012.

The government changed after 2012 elections promised to ensure protection of personal data and control illegal surveillance and wiretapping practices. An Interim Commission on Illegal Surveillance and Wiretapping² (hereafter the Commission) was created in August 2013 in order to make an inventory of illegal recordings and decide on their extermination and/or archiving. The Commission has concluded that abovementioned cases of illegal surveillance and wiretapping was "classical example of illegal violation of privacy by government representatives". Upon completion of its work the Commission has exterminated part of the recordings with violations of privacy and intimacy, damaged files and those with unidentified

¹ Final Report, Interim Commission on Illegal Surveillance and Wiretapping, 31 January, 2014, <http://police.ge/files/pdf/saboloo%20angariSi%20.pdf>

² Members of the Commission were:

1. Minister of Internal Affairs, Irakli Gharibashvili, succeeded by Aleksandre Chikaidze (Head of the Commission)
2. Prosecutor General Archil Kbilashvili (Deputy Head of the Commission)
3. Minister of Justice, Tea Tsulukiani
4. Judge of Tbilisi Appeal Court, Merab Gabinashvili
5. Public Defender, Ucha Nanuashvili
6. Personal Data Protection Inspector, Tamar Kaldani
7. Editor in chief of newsletter "Resonance", Lasha Tughushi
8. Head of Research Centre of Election and Political Technologies, Kakha Kakhishvili
9. Executive Director of Transparency International Georgia, Eka Gigauri

persons. However, the most substantial part of the recordings has been sent to Prosecutor General for further investigation. Besides, the “black boxes” still enabled the MIA and law-enforcement agencies to have illegal access to information of communication operators and all kinds of communication between citizens.

At the same time, a package of legislative amendments³ for surveillance related changes has been submitted⁴ to the Parliament in July 2013, however it was not until August 2014 that the first part of the changes were passed. The package combined changes made to five laws: Criminal Procedure Code, Law on operational-investigative activities, Law on Personal Data Protection, Law on Electronic Communications and Regulations of the Parliament of Georgia.

Despite initial positive statement of the Minister of Internal Affairs regarding readiness for a dialogue with civil society, other comments from the government have undermined credibility of the process. Most importantly, the Ministry of Internal Affairs strongly opposed the proposed changes that would limit direct access of law enforcing agencies to telecommunications data obtained by the operators and communication between citizens. Besides, the draft review process has been prolonged by Parliamentary Rules of Procedure according to which no plenary sessions shall be held in the Parliament during a 1 month period prior to the local government elections.

In this light a part of the non-governmental organizations expressed dissatisfaction with lack of systematic changes implemented by the new government and the fact that law enforcement agencies still had access to recorded files obtained from illegal surveillance as well as all kinds of communication among citizens. In March 2014 they launched a campaign “This Affects You - They Are Still Listening”⁵ calling on the Government to consider legislative amendments in order to ensure protection of privacy. The need for legislative changes has also been stressed by international observers. Namely, in his report⁶ Thomas Hammarberg called on the authorities to urgently amend the Law on Operative and Investigative Activities in order to ensure its compliance with human rights standards and protection of privacy rights.

³ Parliament of Georgia, Package of Legislative Amendments on Surveillance, <http://parliament.ge/ge/law/24/23>

⁴ 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;
4. Journalist Zviad Koridze

⁵ <http://esshengexeba.ge/?menuid=30&lang=1>

⁶ Thomas Hammarberg, Assessment and recommendations in his capacity as EU Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia, “Georgia in Transition, Report on the human rights dimension: background, steps taken and remaining challenges”, a report addressed to High Representative and Vice-President Catherine Ashton and Commissioner for Enlargement and European Neighbourhood Policy Stefan Füle, September 2013, http://eeas.europa.eu/delegations/georgia/documents/virtual_library/cooperation_sectors/georgia_in_transition-hammarberg.pdf

Although initially the legislative amendments could not be approved by the Parliament due to lack of quorum, the Parliament passed the changes with the third hearing in August 2014. According to new legislative amendments on surveillance, the list of persons who can become subject of surveillance and wiretapping has been further defined (criminals, persons assisting criminals, cases of deliberate and grave crime, crimes infringing right to live, health or economic cases); the duration of surveillance and wiretapping has been limited to a maximum of 6 months; the person who was surveilled should be notified in a written form about the obtained recordings and its extermination; Significantly, with the abovementioned amendments powers of Personal Data Protection Inspector have been increased.

However, due to strong opposition from the Ministry of Internal Affairs, the clause regulating direct access to telecommunications data has been removed from the bill and it was decided that a special commission should decide upon a mechanism for regulating this issue by November 2014.

Discussion on how to regulate access to telecommunications issue has recommenced since September 2014. In September the working group created to prepare a legislative proposal, including lawmakers, representatives of the government and civil society organizations, held a conference in Tbilisi. This was the first time when “two-key” system was suggested in the debate - one held by the Ministry of Internal Affairs and another by somebody else, private service provider or an oversight agency which would authorize surveillance in case of existence of judicial warrant⁷.

The Ministry of Internal Affairs remained strongly opposed the idea of being deprived so called “black box”. Prime Minister Irakli Garibashvili has backed the Ministry of Internal Affairs in the debate over retaining direct access to telecommunication service providers’ servers. Among the reasons why giving up the direct access would be risky the Prime Minister named the presence of foreign mobile phone operator companies in Georgia upon which it is impossible to rely in terms of state security, as well as difficult region and multiple other challenges that Georgia is facing.

Despite continued discussion of the issue, the working group failed to produce the bill by the deadline of November 1, 2014 and hence it was suggested by then Georgian Dream representative to extend the deadline until April 1, 2015. The suggestion to extend the deadline was met with wide criticism from civil society representatives, representatives the Georgian Dream coalition, United National Movement as well as Public Defender Ucha Nanuashvili.

At a parliamentary session on October 30, 2014 Parliament Speaker Davit Usupashvili agreed that postponing the issue would be the best option in the given situation, however, suggested tighter deadline until February 28, 2015 instead of April 2015. The Parliament voted on extension until February 28 and passed it. Although being asked by the Parliament Speaker not to veto the extension agreed by the Parliament, the President Margvelashvili still vetoed the

⁷ Daily News Online, Civil.ge, <http://civil.ge/eng/article.php?id=27758>

February 28 deadline and suggested even tighter deadline only until December 1st. The President justified his decision with the strong consensus existing in the society over necessity to define position on this issue. The Parliament approved the President's proposal with overwhelming majority and there was no more need to vote on overturning the veto.

The former Prime Minister Bidzina Ivanishvili criticized President Margvelashvili's decision to veto extension of the deadline. Furthermore he claimed that the position of the Ministry of Internal Affairs should be considered due to security issues in the region, which suggests that Ivanishvili supports the position shared by the Ministry of Internal Affairs and the current Prime Minister that the Ministry of Internal Affairs should retain its direct access to servers of telecom operators.

There were in total at least four different suggestions to solve the existing problem of access to "key": two competing initiatives both prepared by Coalition - Georgian Dream representatives but substantially different from each other, a proposal prepared by a group of CSOs and the alternative proposal suggested by the President after his veto.

One of the bills⁸ initiated by some of Georgian Dream representatives and supported by the government suggested that the Ministry of Internal Affairs retains its direct access to telecom operators' servers, however, 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. Another bill, initiated by a representative of the Republican Party suggested that the Ministry of Internal Affairs should be deprived of its direct access to networks and the so called "key" is transferred to the regulatory body Georgian National Communications Commission (GNCC). The third proposal initiated by part of CSOs also supported the idea of so called "two-key" system, however, in this case it was suggested that one "key" is given to telecom operators, while another is controlled by the judiciary, which would technically authorize telecom operators to carry out surveillance. Although this version has been advocated by "This Affects You" campaign group for a long time, it lacked support from the Parliament and the actual debate concentrated on the first two versions sponsored by MP Beselia and MP Khmaladze.

The Parliament passed the government-supported bill with its third and final hearing on November 28, however the President Margvelashvili vetoed it. The president explained his veto by the lack of right balance between protection of human rights and national security as presented in the Parliament-supported bill. After the veto the President suggested his own proposal, which was close to the version advocated by a group of CSOs. According to President's suggestion, the Ministry of Internal Affairs should be deprived of direct access to operators' servers and the so called "key" should be held by the court, which should issue warrants for the law enforcement agencies to conduct surveillance. However, President's suggestion was met with criticism both from those members of the Parliament who initially supported the government-

⁸ <http://parliament.ge/ge/law/7567/14653>
<https://matsne.gov.ge/ka/document/view/29620?publication=22>

backed bill, and by those who were against it. It was claimed that the President's bill lacked clarity about depriving the Ministry of Internal Affairs of direct access to operators' data, and it would still leave the Ministry of Internal Affairs a possibility to carry out illegal surveillance without warrant of the court or knowledge of an oversight institution. On November 30th the Parliament overrode the President's veto, and the President signed the previously adopted government-supported bill into law. The Ministry of Internal Affairs had time until March 31, 2015 to ensure functioning of the two-stage electronic system⁹. From March 31, 2015 the so called "two-key" system was launched 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 implemented in a right way.

"This Affects You" Campaign and Critique of the Adopted Bill

Ensuring protection of personal data and controlling illegal surveillance and wiretapping practices was one of the main pre-elections promises of the new ruling Georgian Dream coalition during Parliamentary Elections in 2012. However, since the actual process of legal amendments was prolonged, in March 2014 several CSOs started a campaign "This Affects You – They Are Still Listening" which aimed to advocate for legislative amendments in order to ensure protection of privacy. The group continued advocating for depriving security agencies of direct access to telecom operators' networks after adoption of the government-supported bill on the "black box" in November 2014. The main criticism addressed the direct access of the Ministry of Internal Affairs to the data of telecommunication companies. Besides, the opponents of the government-backed bill have criticized over-technical wording of the actual bill which leaves room for the Ministry of Internal Affairs to bypass Personal Data Protection Inspector; the group has also raised concerns about conflict of interests after involvement of Personal Data Inspector in the process; and has criticized aggressive statements of Prime Minister Garibashvili claiming that CSOs involved in the campaign "damage Georgia's international reputation and undermine country's security".

On April 8th, 2015 a number of CSOs representing the campaign "This Affects You" have filed a lawsuit in the Constitutional Court against the Parliament concerning the clauses in the laws which allow the Ministry of Internal Affairs to retain direct and unimpeded real-time access to the data of electronic communications companies.

⁹ 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 332³. Entry into force of two-stage electronic system of secret investigation (in Georgian): <https://matsne.gov.ge/ka/document/view/90034>

FoI practice on surveillance and wiretapping related data

Since access to information is essential for protecting human rights, IDFI has been requesting public information regarding statistics on secret surveillance and has acquired extensive practical experience covering various state institutions. As the received replies¹⁰ have shown, there is no single standard of releasing information on surveillance. Namely, the Institute has requested information about the number of applications that were filed and accepted by the court concerning permissions of secret surveillance and recording of telephone conversations, as well as the number of those actions conducted without court's permission that have been recognized as either lawful or unlawful. While some institutions regard it as secret information (Ministry of Internal Affairs, Ministry of Finance), some left requests unanswered (Kutaisi City Court, Tbilisi City Court, Prosecutor's Office), and upon submission of an appeal either state that they do not have the information (Kutaisi City Court), or take obligation to fully release requested information but as a result only provide summarized data rather than details (Tbilisi City Court). Some institutions do not consider such information to be secret, but claim not having the analysis ready for provision (Batumi City Court).

Interestingly, High Council of Justice of Georgia stated that it did not have official documents of the data on surveillance, which have been presented by one of its members Giorgi Obgaidze at a session of the Parliament. In some cases the institutions state that they do not compile requested information separately (Supreme Court of Georgia on applications of the Prosecutor's Office for surveillance of judges), or do not have unified systematized database to find the information (Ministry of Internal Affairs on removing information and fixation from telecommunications channel/computers).

While Prosecutor's Office gave information about the number of applications filed to the court (1207 cases in the period between November 1, 2012 and May 9, 2013), it first ignored the request about number of cases of removing information and fixation. After another request the Prosecutor's Office gave total number of such cases (18 cases of removing information and fixation in the period between October 25, 2013 and February 3, 2014) but requested 4 month period for giving full information. Four months later IDFI received additional information¹¹ from the Prosecutor's Office, according to which in the period between January 1, 2012 and October 26, 2013 the Prosecutor's Office applied for 96 warrants from Tbilisi City Court on removing information from telecommunication channel and fixation, and 2 warrants – on removing information from computer system and fixation. The Prosecutor's Office also informed IDFI that in the period between April 8, 2010 and October 26, 2013 there were no cases when the

¹⁰ Institute for Development of Freedom of Information (IDFI), Access to Statistical Information on Surveillance, <https://idfi.ge/ge/statistical-data-idfi-practice>

¹¹ Institute for Development of Freedom of Information (IDFI), Statistical Information on the Surveillance Conducted by the Prosecutors Office, August 11, 2014, [https://idfi.ge/en/statistical information on the surveillance of the prosecutors office](https://idfi.ge/en/statistical%20information%20on%20the%20surveillance%20of%20the%20prosecutors%20office)

Prosecutor's Office applied to the Supreme Court on secret surveillance of judges. However, it gave no information about such cases in 2005-2010.

In 2014 IDFI requested public information from the Prosecutor's Office of Georgia, Investigations Service of the Ministry of Finance, Ministry of Defense and the Ministry of Internal Affairs on the number of investigations launched in 2009-2014 on the bases of disclosure of secrecy of private conversation, disclosure of privacy of personal correspondence, telephone conversation or other message¹².

The information received from the Prosecutor's Office, Investigations Service of the Ministry of Finance and the Ministry of Defense did not include any reference to the cases of investigations launched for the disclosure of secrecy of private conversation or for the disclosure of privacy of personal correspondence. However, such response is unclear and raises questions since there were well-known cases (e.g. 12 former employees of the Prosecutor's Office being held under custody for the conduct of the criminal action, inter alia for the disclosure of the secrecy of private conversation is important¹³) when at least two of these former employees were prosecuted on the bases of article 158 of the Criminal Code of Georgia.

According to the information received from the Ministry of Internal Affairs (only after court appeal and 4 months late) during 2009-2014 (first 5 months) the Ministry of Internal Affairs Started an Investigation on the cases of the breach of article 158 - disclosure of secrecy of private conversation in 12 cases only. As for the cases of the disclosure of privacy of personal correspondence (article 159), telephone conversation or other message, the investigation was launched in two cases only. As for the launch of the prosecution for the disclosure of secrecy of private conversation, based on the information received from the Ministry of Internal Affairs, no such instances took place during the given period. As for the disclosure of privacy of personal correspondence the investigation for conducting the given act was launched in one instance only and the case took place in 2010. The official correspondence also makes it clear that during 2009-2014 no prosecution or investigation was launched against the employees of the Ministry of Internal Affairs based on the abovementioned articles.

Recommendations of CSOs on government surveillance and wiretapping in Open Government Partnership (OGP) Action Plan of Georgia

Based on the actual developments and analysis of access to information Institute for Development of Freedom of Information (IDFI) with other CSOs has been actively involved in advocacy process¹⁴. As a result of this, some international obligations taken by Georgia within the framework of Open Government Partnership (OGP) initiative also contribute to more

¹² https://idfi.ge/en/158_159

¹³ <http://www.netgazeti.ge/GE/105/News/16235>

¹⁴ <https://idfi.ge/en/2014-15-action-plan-ngo-recommendations>

transparency and accountability in conducting surveillance by the Government. Namely, recommendations¹⁵ prepared by IDFI in cooperation with Open Government Partnership (OGP) Georgia's Forum member organizations and presented to OGP Georgia secretariat to be included in Georgian 2014-2015 OGP Action Plan¹⁶ also covered recommendation related to surveillance – improving legislation and proactive transparency on surveillance which has been accepted and included in the Action Plan.

Importantly, since representative of the Supreme Court had not expressed official position of the court regarding proactive disclosure of the statistical data about the government surveillance, OGP Forum Member Organizations made a public appeal¹⁷ to the Chairman of the Supreme Court of Georgia. As a result, the Supreme Court has considered the recommendation and made the commitment in the framework of the OGP Action Plan of Georgia to proactively disclose statistical information on surveillance since September 2014.

According to one of the amendments to the Criminal Procedure Code of Georgia, made on August 1, 2014¹⁸, the Supreme Court of Georgia took obligation to proactively disclose the registry of actions of secret investigation on an annual basis. The registry includes such information 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. The Supreme Court of Georgia has met taken obligation and by the end of 2014 published the data of the registry¹⁹ for the period between August 18 and December 31, 2014.

Court	Received	Not considered	Satisfied	Among them Motions			Destroyed
				Satisfied	Partially satisfied	Not satisfied	
Total in Georgia	936	18	918	596	78	244	10
Tbilisi	681	15	666	426	67	173	9
Batumi	19	3	16	11		5	
Kutaisi	39		39	26		13	1

¹⁵ Institute for Development of Freedom of Information (IDFI), “Recommendations Regarding the 2014-2015 Action Plan of the Government of Georgia for Open Government Partnership (OGP) Initiative”, May 2014, <http://bit.ly/1vxygFk>

¹⁶ 2014-2015 Action Plan of the Government of Georgia for Open Government Partnership (OGP), (in Georgian) <http://www.justice.gov.ge/Multimedia%2FFiles%2FOGP%2FOGP%20AP%202014-2015.pdf>

¹⁷ Institute for Development of Freedom of Information (IDFI), Appeal of the OGP Forum Member Organizations to the Chairman of the Supreme Court of Georgia Konstantine Kublashvili, <https://idfi.ge/en/cso-address-supreme-court>

¹⁸ Article 143^{10,1} Criminal Procedure Code of Georgia, <https://matsne.gov.ge/ka/document/view/190034>

¹⁹ <http://www.supremecourt.ge/files/upload-file/pdf/2014w-statis-faruli-reestri.pdf>

Rustavi	33	33	29	2	2
Gori	68	68	58	4	6
Akhaltzikhe	9	9	4		5
Poti	6	6	6		
Telavi	15	15	7		8
Zugdidi	25	25	10	1	14
Samtredia	2	2			2
Mtskheta	15	15	10	1	4
Zestaponi	5	5	1	1	3
Sighnaghi	2	2	1	1	
Senaki	2	2		1	1
Bolnisi	2	2	1		1
Ozurgeti	10	10	5		5
Khelvachauri	1	1			1
Akhalkalaki	1	1			1
Khashuri	1	1	1		

Besides, the Supreme Court of Georgia has published statistics on the motions regarding telephone secret surveillance and recording²⁰. According to the statistics, in 2014 there were in total 1074 motions, out of which 894 were satisfied. Unfortunately, this information is not detailed and statistical data does not show which public institutions made these motions in the Supreme Court (Prosecutor's Office, Ministry of Internal Affairs, Investigation Service of Ministry of Finance).

Based on the information received by IDFI as well as that published by the Supreme Court it can be assumed that in 2014, as compared to previous years, the number of motions made to courts on secret surveillance has significantly decreased. For instance, only in case of Tbilisi Prosecutor's Office Tbilisi City Court received 7195 motions on telephone surveillance in 2011,

²⁰ <http://www.supremecourt.ge/files/upload-file/pdf/2014w-statis-faruli-sat.mosmenebi.pdf>

5951 - in 2012 and 1400 motions in the first 5 months of 2013. However, Tbilisi City Court received only 1074 motions from all the investigative entities in 2014. The statistics also reveal that the percentage of granted motions has decreased, while 99,86% of motions were granted in 2011, the courts satisfied only 83,24% of the motions in 2014.

Motions on Telephone Surveillance Received by Tbilisi City Court from the Prosecutor's Office of Georgia (The information received by IDFI from High Council of Justice of Georgia in 2013)			
Year	Received	Satisfied	Satisfied %
2011	7195	7187	99,86%
2012	5951	5939	99,80%
2013 (January-May)	1400	1259	89,93%
Motions on Telephone Surveillance Received by Courts of First Instance (Data from the Supreme Court of Georgia)			
2014	1074	894	83,24%

While it is indeed an advantage that the statistics on surveillance is published proactively, further improvement of transparency will be achieved if the data is published according to the applicant public institutions, the data about surveillance via other telecommunication channels is published, the data is published proactively by quarters and months, the data is given according to the courts and the data is published in a more user-friendly manner on the website, apart from the statistics on securing measures.