

# Institute for Development of Freedom of Information



## Regulating Secret Surveillance in Georgia: 2013-2015

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## 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.*

## Background

Until recently, the Georgian legislation gave more power to law-enforcing agencies to begin surveillance 24 hours prior court's approval, and allowed for less strict regulations when deciding on surveillance of suspected individuals. Besides, after changes made to the Law on Operational-Investigative Activity in September 2010, the list of those obliged to disclose private communications data upon presenting court approval has been increased to include websites, mail servers, ISPs etc. Although it was still prohibited to interfere with privacy or conduct electronic surveillance without court approval or legal necessity, "respect for these prohibitions was problematic"<sup>1</sup>, as stated in the 2013 Human Rights Report on Georgia prepared by US Department of State.

Prior to Parliamentary Elections 2012 disturbing cases of surveillance and wiretapping by the government have been revealed. 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 employees<sup>2</sup> etc, mostly recorded over the period of 2003-2012. The public authorities mostly involved in illegal surveillance were Ministry of Defense's Military Police, Ministry of Internal Affairs and Presidential Security Office<sup>3</sup>.

As the survey<sup>4</sup> conducted by Caucasus Research Resource Centers (CRRC) for TI Georgia in 2013 has confirmed, the cases of surveillance have influenced public attitude as well. According to the survey, only 9% of Georgians think that the government does not surveil anyone, while 23% believe that they intercept everyone. The majority (63%) do not feel secure enough while sharing personal secret with friends over the phone, and even more (67%) are reluctant to share a critical opinion about political events in Georgia with a friend over a phone.

The government changed after 2012 elections promised to ensure protection of personal data and control illegal surveillance and wiretapping practices. High officials of the MIA's Constitutional Security Department, which, according to the former Prosecutor General Archil Kbilashvili, had developed computer virus software for illegal surveillance, have been detained<sup>5</sup>. An Interim Commission on Illegal Surveillance and Wiretapping<sup>6</sup> (hereafter the Commission) was

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<sup>1</sup> U.S. Department of State, Country Reports on Human Rights Practices for 2013, Georgia 2013 Human Rights Report, p.25, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dlid=220280#wrapper>

<sup>2</sup> Final Report, Interim Commission on Illegal Surveillance and Wiretapping, 31 January, 2014, <http://police.ge/files/pdf/saboloo%20angariSi%20.pdf>

<sup>3</sup> U.S. Department of State, Country Reports on Human Rights Practices for 2013, Georgia 2013 Human Rights Report, p.25, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dlid=220280#wrapper>

<sup>4</sup> TI Georgia poll on surveillance: 69% of respondents would not discuss critical political opinions on the phone, <http://transparency.ge/en/node/4024>

<sup>5</sup> Joint report by: Transparency International Georgia, Georgian Democratic Initiative Human Rights Education and Monitoring Center (EMC) and Georgian Young Lawyers' Association, "Ministry of Internal Affairs of Georgia after November 2012: Evaluation report", April 2014, p.19, <http://transparency.ge/en/node/4168>

<sup>6</sup> Members of the Commission were:

created in August 2013 in order to make an inventory of illegal recordings and decide on their extermination and/or archiving. Namely, the Commission aimed at analyzing and systematizing the recordings, defining method and timeframe for extermination of those not having operationally valuable information or not obtained within the framework of inquiry of a criminal case. Thus, three categories of the recordings have been revealed: the recordings not falling under any abovementioned categories and to be exterminated, material obtained within the framework of inquiry and files having valuable information for operations. Part of the recorded cases consisted of most severe violations of privacy and intimacy, which have been identified and destroyed.

As a result of the analysis the Commission has revealed that the recorded files do not have any operational value as they aimed at identifying and controlling plans and goals of political opponents, political unions, and collecting discreditable evidences. The Commission was unable to find any official document proving legality of collected video, audio and photo data. Thus, 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 persons.

However, the most substantial part of the recordings has been sent to Prosecutor General for further investigation. As it became known later, although publicly destructed, some copies of files of private life might still exist<sup>7</sup>. 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. According to the report of EU Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia Thomas Hammarberg<sup>8</sup>, availability of surveillance equipment at telecommunications operators, enabling the MIA automatic access to all communications was one of the most important concerns. Namely, Hammarberg pointed out about the risk of misusing this technical means and need for proper

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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

<sup>7</sup> U.S. Department of State, Country Reports on Human Rights Practices for 2013, Georgia 2013 Human Rights Report, p.25, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dliid=220280#wrapper>

<sup>8</sup> 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, p. 21, [http://eeas.europa.eu/delegations/georgia/documents/virtual\\_library/cooperation\\_sectors/georgia\\_in\\_transition-hammarberg.pdf](http://eeas.europa.eu/delegations/georgia/documents/virtual_library/cooperation_sectors/georgia_in_transition-hammarberg.pdf)

legal regulations and judicial control. The danger in having access to the illegal recordings has become even more evident when the First Deputy of the Minister of Internal Affairs, Gela Khvedelidze illegally spread internet video recording of one of the critical journalist's personal life in order to harm his reputation. This was followed by arrest of Khvedelidze for illegal infringement upon private secret by a person who was obliged to protect it<sup>9</sup>.

At the same time, a package of legislative amendments<sup>10</sup> for surveillance related changes has been submitted<sup>11</sup> to the Parliament in July 2013, however it was not until August 2014 that the first part of the changes were passed. While the report by EU Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia Thomas Hammarberg stresses that "illegal surveillance was a systematic practice"<sup>12</sup>, 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 have 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"<sup>13</sup> 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 report<sup>14</sup> 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. Thomas Hammarberg recommended that surveillance should not be decided or conducted by the

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<sup>9</sup> Joint report by: Transparency International Georgia, Georgian Democratic Initiative Human Rights Education and Monitoring Center (EMC) and Georgian Young Lawyers' Association, "Ministry of Internal Affairs of Georgia after November 2012: Evaluation report", April 2014, p. 18, <http://transparency.ge/en/node/4168>

<sup>10</sup> Parliament of Georgia, Package of Legislative Amendments on Surveillance, <http://parliament.ge/ge/law/24/23>

<sup>11</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;
4. Journalist Zviad Koridze

<sup>12</sup> 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, p. 21, [http://eeas.europa.eu/delegations/georgia/documents/virtual\\_library/cooperation\\_sectors/georgia\\_in\\_transition-hammarberg.pdf](http://eeas.europa.eu/delegations/georgia/documents/virtual_library/cooperation_sectors/georgia_in_transition-hammarberg.pdf)

<sup>13</sup> <http://esshengexeba.ge/?menuid=30&lang=1>

<sup>14</sup> 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 Neighborhood Policy Stefan Füle, September 2013, p. 21, [http://eeas.europa.eu/delegations/georgia/documents/virtual\\_library/cooperation\\_sectors/georgia\\_in\\_transition-hammarberg.pdf](http://eeas.europa.eu/delegations/georgia/documents/virtual_library/cooperation_sectors/georgia_in_transition-hammarberg.pdf)

prosecutor, MIA or other representatives of the executive without prior collaboration with the judiciary<sup>15</sup>.

It should be mentioned that the importance of transparency and accountability in surveillance policies is not a country-specific issue and is regarded as a priority for numerous countries worldwide. In this light the civil society prepared recommendation package “About the National Security and the Global Principles of Right of Access to Information” which was adopted by Parliamentary Assembly of Council of Europe (PACE) in October 2013. In December 2013 more than 200 international, regional and national organizations, including Institute for Development of Freedom of Information (IDFI) as well as individuals addressed the Co-Chairs of the Open Government Partnership with a Statement of Concern on Disproportionate Surveillance<sup>16</sup>. The signatories recommended the decision makers to recognize the need for updating privacy and human rights legislation, committing in their OGP Action Plans to regulating state involvement in communications surveillance, guaranteeing freedom of the press and protecting whistleblowers, as well as committing to transparency on the mechanisms of surveillance and agreements to share citizen data among states. As part of these recommendations legislative changes and proactive transparency of surveillance related data were made in Georgia.

### **Legislative Amendments after Parliamentary Elections 2012**

A package<sup>17</sup> of legislative amendments for surveillance related changes has been submitted<sup>18</sup> to the Parliament in July 2013. The package combines 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 positive statement of the Minister of Internal Affairs Alexandre Chikaidze regarding readiness of the Ministry for a dialogue with civil society, other comments from the government have undermined credibility of the process. E.g. MP Levan Bezhashvili connected new campaign with secret recording of one of leaders of the United National Movement and former Tbilisi

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<sup>15</sup> 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 Neighborhood Policy Stefan Füle, September 2013, p. 21, [http://eeas.europa.eu/delegations/georgia/documents/virtual\\_library/cooperation\\_sectors/georgia\\_in\\_transition-hammarberg.pdf](http://eeas.europa.eu/delegations/georgia/documents/virtual_library/cooperation_sectors/georgia_in_transition-hammarberg.pdf)

<sup>16</sup> Statement of Concern on Disproportionate Surveillance addressed to the Co-Chairs of the Open Government Partnership, <https://idfi.ge/public/migrated/uploadedFiles/files/CSO%20OGP%20statement%20%20ENG.pdf>

<sup>17</sup> Parliament of Georgia, Package of Legislative Amendments on Surveillance, <http://parliament.ge/ge/law/24/23>

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5. First Deputy Chairman of Legal Affairs Committee and member of the Georgian Dream Coalition MP Shalva Shavgulidze;
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Mayor Gigi Ugulava and his daughter<sup>19</sup>. The deputy Minister of Internal Affairs Levan Izoria has criticized the campaign and legislative amendments stating “with full responsibility that no illegal wiretapping takes place<sup>20</sup>”. Finally the Prime Minister Irakli Gharibashvili claimed that the draft law was “catastrophic and endangered national security and effective functioning of the law enforcement system”<sup>21</sup>.

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. Besides, on the next day of starting committee hearings on the draft law, an ad hoc interagency task force has been set up at the State Security and Crisis Management Council’s initiative involving the Ministry of Internal Affairs, the Ministry of Justice, and the General Prosecutor’s Office to develop a personal information protection strategy and reconsider the draft law on secret surveillance<sup>22</sup>. 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. As a result, despite a number of progressive changes made by the new amendments, the above-mentioned clause 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.

Although initially the legislative amendments could not be approved by the Parliament due to lack of quorum<sup>23</sup>, the Parliament passed the changes with the third hearing in August 2014<sup>24</sup>. 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.

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<sup>19</sup> Transparency International Georgia (TI-G), Statement of 'This Affects You Too – They Are Still Listening' campaign participants concerning MP Levan Bezhashvili’s initiative from March 13<sup>th</sup>, <http://transparency.ge/en/node/4033>

<sup>20</sup> News Agency “For.ge”, Tamar Karchava, Activeness of NGOs Ahead of Elections Raises Numerous Questions, Unofficial translation made by Transparency International Georgia at: <https://docs.google.com/document/d/1X1bxvvVPJOWZRPPNzCyr7dchetP5dEFGbPjGJmfUhU/edit?pli=1>; Original article in Georgian at: [http://for.ge/view.php?for\\_id=31272&cat=19](http://for.ge/view.php?for_id=31272&cat=19)

<sup>21</sup> Transparency International Georgia (TI-G), NGOs campaigning to end illegal surveillance respond to PM's accusations, <http://transparency.ge/en/node/4191>

<sup>22</sup> Transparency International Georgia (TI-G), ‘This Affects You - They Are Still Listening’ campaign participant organizations’ appeal to the Georgian government and parliament, <http://transparency.ge/en/node/4189>

<sup>23</sup> Internews-Georgia Project – portal MEDIA.GE, Parliament Fails to Approve Amendments over Wiretapping Due to Lack of Quorum, <http://www.media.ge/en/portal/news/302724/>

<sup>24</sup> Online Magazine “Tabula”, The draft bill on secret surveillance passed by third hearing in the Parliament, <http://www.tabula.ge/ge/story/86411-parlamentma-faruli-mosmenebis-shesaxe-b-kanonproeqti-me-3-mosmenit-daamtkica>



Discussion on how to regulate access to telecommunications issue has recommenced since September 2014. This was the first time when “two-key” system was suggested in the debate. In September 2014 the working group created to prepare a legislative proposal, including lawmakers, representatives of the government and civil society organizations, held a conference in Tbilisi. European experts on personal data protection, invited by the Council of Europe (CoE) participated in the conference. In response to the Ministry of Internal Affairs’s position to retain direct access with proper oversight mechanism, one of the invited experts, Joseph Cannataci said that it could be adopted as an interim solution, while the recommendation would be to have more than one “key” – 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 warrant<sup>25</sup>.

The Ministry of Internal Affairs remained strongly opposed the idea of being deprived so called “black box”. Despite continued discussion of the issue, the working group failed to produce the bill by the deadline of November 1, 2014 and hence then Georgian Dream representative Shalva Shavgulidze<sup>26</sup> proposed to extend the deadline until April 1, 2015. The suggestion to extend the deadline was met with criticism from civil society representatives being members of the working group, as well as some representatives of both the Georgian Dream coalition and United National Movement. Several members of the working group even claimed that the proposal to extend the deadline had not been discussed with the entire working group. The extension was also condemned by Public Defender Ucha Nanuashvili.

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. Interestingly, the Prime Minister also referred to complicated relations with the judiciary in terms of obtaining warrants as one of the challenges if the Ministry of Internal Affairs is deprived of direct access to the “key”. This is especially noteworthy in the context of recent developments when increased transparency and objectivity of the judiciary has been reported by CSOs<sup>27</sup>. Namely, over the last three years the success rate of the state party in administrative trials has reduced significantly<sup>28</sup>.

At a parliamentary session on October 30, 2014 Parliament Speaker Davit Usupashvili discussed the situation with surveillance bill and has admitted lack of sufficient pace with the process from

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<sup>25</sup> Daily News Online, Civil.ge, <http://civil.ge/eng/article.php?id=27758>

<sup>26</sup> Since November 2014 Shalva Shavgulidze left the party “Georgian Dream” and joined “Free Democrats”

<sup>27</sup> IDFI, Access to Public Information in Georgia Information Report № 6 October 2013 – December 2014, p. 45, <https://idfi.ge/public/upload/Reports/OPD-ENG-29-01-2015.pdf>

<sup>28</sup> Transparency International Georgia, Three years of court monitoring on administrative cases revealed significant improvements, but problems still remain, <http://transparency.ge/en/post/report/three-years-court-monitoring-administrative-cases-revealed-significant-improvements-problems-still-remain>



the Parliament which resulted in their inability to adopt the bill earlier. Finally 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, and the Parliament speaker asked the President not to veto the extension agreed by the Parliament. Usupashvili claimed that if the deadline was not extended, there would be no legal framework for investigative agencies to carry out any surveillance actions from November 1. Despite this, the President Margvelashvili vetoed the February 28 deadline and suggested even tighter deadline only until December 1<sup>st</sup>. This was the first veto of President Margvelashvili. The President justified his decision with the strong consensus existing in the society over necessity to define position on this issue, and that the system of special services must be reformed in Georgia. The Parliament approved the President's proposal with overwhelming majority and there was no more need to vote on overturning the veto. The representatives of Georgian Dream coalition which voted for extension of the deadline until February the previous day claimed that even though they did not agree on such tight deadline, they accepted President's suggestion due to forcing circumstances such as possible "legal vacuum" on surveillance. Importantly, the tight deadline only concerned adoption of new regulations on unrestricted access to telecom operators' servers, rather than enforcement of new provisions.

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, and no matter how surveillance is regulated "people would anyway have a "perception" that illegal eavesdropping continues". This 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.

### Versions of the bill

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 bills initiated by Georgian Dream representatives 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. Although this bill suggested existence of two "keys", the holders would not be able to separately access the servers. Thus, consent from Personal Data Protection Inspector's Office would be needed for the Ministry of Internal Affairs to gain access. This bill was suggested by chairperson of human rights committee MP Eka Beselia, her deputy MP Gedevan Popkhadze and chairman of defense and security

committee MP Irakli Sesiashvili. The bill shared the position of the Ministry of Internal Affairs and was also supported by the Prime Minister, mainly due to security reasons.

Another bill, initiated by a representative of the Republican Party Vakhtang Khmaladze, 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. In this case the judiciary would decide in which cases to issue warrant for security agencies and 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<sup>29</sup> prepared by MP Beselia 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. In this proposal the Office of the Personal Data Protection Inspector remains as a monitoring institution and is not directly involved in the process. The President stressed that it was crucially important to deprive the Ministry of Internal Affairs of direct access to network data, while the details of the specific mechanism could be decided a bit later.

However, President’s suggestion was met with criticism both from those members of the Parliament who initially supported the government-backed bill, and by those who were against it. According to those who did not support government-backed bill, 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. Besides, there was criticism from the Republican Party concerning giving the “key” to the court. Although MPs from the Republican Party criticized the President’s bill, they did not vote for overriding President’s veto as they considered that government-supported bill was unacceptable for them. Free Democrats was the only party which voted for President’s bill, as it would bring the discussion on depriving the Ministry of the “key” back to the agenda. Lastly, UNM did not participate in the vote at all. On

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<sup>29</sup> <http://parliament.ge/ge/law/7567/14653>  
<https://matsne.gov.ge/ka/document/view/29620?publication=22>

November 30<sup>th</sup> 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 system<sup>30</sup>. 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.

### Reform of the system

During the debate over direct access to servers of telecom operators, need for the more comprehensive reform of the system has been highlighted many times. The Parliament speaker Usupashvili recalled that one of the pre-election promises of Coalition - Georgian Dream was to reform the system of the Ministry of Internal Affairs, de-coupling security and intelligence agencies from the ministry. Usupashvili also suggested that further reform is needed for guaranteeing accountability of the prosecutor's office. Although the prosecutor's office remains under the system of the Ministry of Justice, by amendments made last year it has become independent from the oversight of the Ministry of Justice.

The President Margvelashvili in his address to the Parliament on November 14<sup>th</sup> also referred to the need for systematic reform of the Ministry of Internal Affairs. According to the President, merging of police and security agencies and incorporation of security agencies into the Ministry of Internal Affairs has led to human rights violations during the previous government. The President also discussed about the necessity to ensure institutional independence of the Prosecutor's office and the importance of judicial independence. The President also stressed significance of effective functioning of the Parliament and in this context he once more criticized the postponement of deadlines concerning regulations on illegal surveillance.

On the other hand, PM Gharibashvili has claimed that there is a need for strong Ministry of Internal Affairs which may suggest that reform of the system is not on the agenda. The Prime Minister has said that as for him strong Ministry of Internal Affairs equals to strong state, his slogan is "the strong Ministry of Internal Affairs, the strong state, the strong Georgian special services" which according to him will be "prerequisite for our country's success, progress, development and strength".

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<sup>30</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>

## **“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. “This Affects You – They Are Still Listening” campaign group continued advocating for depriving security agencies of direct access to telecom operators’ networks. In December 2014 the campaign “This Affects You” organized demonstration in the streets of Tbilisi in order to protest the government-supported bill<sup>31</sup>. The critique of the amendments continued after the adoption of the government-supported bill as well. 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 of CSOs united in the campaign “This Affects You – They Are Still Listening” claimed that the government-supported bill which was eventually adopted into law has worsened even those changes that were made a few months earlier, in August 2014<sup>32</sup>. According to the campaign representatives, in the new system the two “keys” are only used during telephone surveillance, while during collection of the metadata (time, place, duration of a call) as well as Internet traffic (including communication content) such control is not used; in contrast with the law adopted in August, the investigation authorities cannot delete personal data which is unrelated or irrelevant to an investigation, they only may delete compromising material; the investigation authority can collect information from a computer system without strict limitations, such as consideration of the category of crimes or justification of an urgent public necessity; even the communication not related to investigation may be recorded etc.

The new role of Personal Data Protection Inspector was criticized as well. According to new changes, by giving the second “key” to the Personal Data Inspector she has become part of the process, which raises concerns in terms of conflict of interests, as the Inspector is also the main oversight body on the righteous conduct of surveillance. Interestingly, the Inspector herself had the position that her functions should be limited to oversight, and not being involved in the process.

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<sup>31</sup> <http://www.radiotavisupleba.ge/content/es-shen-gekheba-isev-kuchashia/26752887.html>

<sup>32</sup> <http://transparency.ge/en/post/general-announcement/affects-you-beselia-popkhadze-sesiashvilis-draft-step-backwards-protection-civil-liberties>

The campaign group criticized Prime Minister Garibashvili for his aggressive statements towards Civil Society Organizations (CSOs), saying that the CSOs involved in the campaign “damage Georgia’s international reputation and undermine country’s security”. The campaign group also criticized the stress of the Prime Minister on strengthening of law enforcement agencies and argued that while democracy cannot be achieved with only one strong institution and security protection, a balance of institutions as well as balance between protection of privacy rights and national security is essential to be achieved.

On April 8<sup>th</sup>, 2015 a number of CSOs representing the campaign “This Affects You” have filed a lawsuit in the Constitutional Court against those clauses in the laws on “Electronic Communications” and “Personal Data Protection” as well as Criminal Procedure Code of Georgia, which allow the Ministry of Internal Affairs to retain direct and unimpeded real-time access to the data of electronic communications companies. The data which is easily accessible for the investigation agencies includes length of communication, people involved in communication, place, visited web-sites etc. Another lawsuit on the same issue was submitted to the Constitutional Court on January 30<sup>th</sup>, 2015 by Public Defender. The Public Defender also included the issue in his annual report presented to the Parliament. According to the Public Defender the direct access of the Ministry of Internal Affairs to communication data violates constitutional right to privacy. It is the second time that the Public Defender is appealing the changes concerning illegal surveillance, the first case in May 2014 raised the same concerns with direct access of the Ministry of Internal Affairs and lack of protection of personal information.

### Law on State Secret

One of the serious changes in this regard was adoption of a new law on “State Secret” in February 2015<sup>33</sup>, initiated by MP Irakli Sesiashvili (GD - Democratic Georgia) and replacing the previous legislative act adopted in 1996. The concerns around the bill have been raised long before its adoption, as according to the draft bill statistical information connected with operational-investigative activities may indeed be regarded as state secret<sup>34</sup>.

The adopted version, although not referring to classification of the abovementioned statistical data, still was met with harsh criticism from Civil Society Organizations (CSOs). Firstly, the CSOs raised concerns that the law on “State Secret” was prepared separately from and prior to the bill on FOI, as these two pieces of legislation must interact quite closely. The law on “State Secret” was prepared without involvement of CSOs working on accountability and transparency issues. Several meeting of the Parliament with the non-governmental and international experts after the first hearing of the bill did not result in essential amendments to the initial version of the draft law. Furthermore, the criticism addresses the content of the law. For example, the law does not mention the public interest test and the so-called “Harm test” is formulated very weakly.

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<sup>33</sup> <https://matsne.gov.ge/ka/document/view/2750311>

<sup>34</sup> Parliament of Georgia, Draft Bill on “State Secret”, <http://parliament.ge/ge/law/1391/10210>

Furthermore, the law still imposes the main role of protecting the state secret on the Ministry of Internal Affairs (MIA). According to CSOs, giving MIA this mandate does not comply with best practice because, generally speaking, MIA is the possessor of a large amount of the information, and believe it is in their interest to keep this information secret; subsequently MIA might use this authority for the collection of information that it would otherwise need court permission to collect; and there is no accountability mechanism for MIA in this role. Besides, the law does not provide relevant guarantees for the protection of whistleblowers. It also does not regulate the existing significant problems of criminal liability of journalists if they disclose state secrets. At the same time, the law further deteriorates some provisions in the current version of the law: the group of those normative acts that might belong to the state secret list is extended; a person holding top secret status is not obliged to give well-grounded response to a request for information; the time period from when a person applies for top secret security clearance to approval is increased and a person may have their clearance request rejected on vague criteria; and there is a broadened definition of information that may be classified as secret.

### **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 replies<sup>35</sup> 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).

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<sup>35</sup> Institute for Development of Freedom of Information (IDFI), Access to Statistical Information on Surveillance, <https://idfi.ge/ge/statistical-data-idfi-practice>



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 information<sup>36</sup> 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 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 message<sup>37</sup>.

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 important<sup>38</sup>) 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

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<sup>36</sup> 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)

<sup>37</sup> [https://idfi.ge/en/158\\_159](https://idfi.ge/en/158_159)

<sup>38</sup> <http://www.netgazeti.ge/GE/105/News/16235>

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 process<sup>39</sup>. As a result of this, some international obligations taken by Georgia within the framework of Open Government Partnership (OGP) initiative also contribute to more transparency and accountability in conducting surveillance by the Government. Namely, recommendations<sup>40</sup> 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 Plan<sup>41</sup> 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 appeal<sup>42</sup> 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, 2014<sup>43</sup>, 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

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<sup>39</sup> <https://idfi.ge/en/2014-15-action-plan-ngo-recommendations>

<sup>40</sup> 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>

<sup>41</sup> 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>

<sup>42</sup> 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>

<sup>43</sup> Article 143<sup>10,1</sup> Criminal Procedure Code of Georgia, <https://matsne.gov.ge/ka/document/view/190034>

Supreme Court of Georgia has met taken obligation and by the end of 2014 published the data of the registry<sup>44</sup> for the period between August 18 and December 31, 2014.

Court	Received	Not considered	Satisfied	Among them Motions			Destroyed
				Satisfied	Partially satisfied	Not satisfied	
<b>Total in Georgia</b>	<b>936</b>	<b>18</b>	<b>918</b>	<b>596</b>	<b>78</b>	<b>244</b>	<b>10</b>
<b>Tbilisi</b>	681	15	666	426	67	173	9
<b>Batumi</b>	19	3	16	11		5	
<b>Kutaisi</b>	39		39	26		13	1
<b>Rustavi</b>	33		33	29	2	2	
<b>Gori</b>	68		68	58	4	6	
<b>Akhaltzikhe</b>	9		9	4		5	
<b>Poti</b>	6		6	6			
<b>Telavi</b>	15		15	7		8	
<b>Zugdidi</b>	25		25	10	1	14	
<b>Samtredia</b>	2		2			2	
<b>Mtskheta</b>	15		15	10	1	4	
<b>Zestaponi</b>	5		5	1	1	3	
<b>Sighnaghi</b>	2		2	1	1		
<b>Senaki</b>	2		2		1	1	
<b>Bolnisi</b>	2		2	1		1	
<b>Ozurgeti</b>	10		10	5		5	
<b>Khelvachauri</b>	1		1			1	

<sup>44</sup> <http://www.supremecourt.ge/files/upload-file/pdf/2014w-statis-faruli-reestri.pdf>

<b>Akhalkalaki</b>	1	1	1
<b>Khashuri</b>	1	1	1

Besides, the Supreme Court of Georgia has published statistics on the motions regarding telephone secret surveillance and recording<sup>45</sup>. 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, 5951 - in 2012 and 1400 motions in the first 5 months of 2013<sup>46</sup>. 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.

<b>Motions on Telephone Surveillance Received by Tbilisi City Court from the Prosecutor's Office of Georgia</b> (The information received by IDFI from High Council of Justice of Georgia in 2013 <sup>47</sup> )			
<b>Year</b>	<b>Received</b>	<b>Satisfied</b>	<b>Satisfied %</b>
<b>2011</b>	7195	7187	99,86%
<b>2012</b>	5951	5939	99,80%
<b>2013 (January-May)</b>	1400	1259	89,93%
<b>Motions on Telephone Surveillance Received by Courts of First Instance</b> (Data from the Supreme Court of Georgia)			
<b>2014</b>	1074	894	83,24%

<sup>45</sup> <http://www.supremecourt.ge/files/upload-file/pdf/2014w-statis-faruli-sat.mosmenebi.pdf>

<sup>46</sup> <https://idfi.ge/ge/statistical-data-idfi-practice>

<sup>47</sup> <https://idfi.ge/en/decreased-motions>

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.