



**OPEN TECHNOLOGY
INSTITUTE**

**New America Foundation
1899 L Street NW, Suite 400
Washington, DC 20036**

***THE OPEN TECHNOLOGY INSTITUTE'S COMMENTS TO THE REVIEW GROUP ON
INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES***

October 4, 2013

Dear Members of the Review Group,

In light of recent revelations regarding extensive National Security Agency surveillance, the New America Foundation's Open Technology Institute (OTI) urges the review group to exercise its authority to fully investigate the nature, purpose, and impact of the NSA's surveillance activities. In addition to evaluating the intelligence and defense purposes of NSA surveillance, the review group must also consider its implications for the broader political and foreign policy goals of the United States as well as the impact on human rights. In order to facilitate a balanced and transparent review, we ask that the review group consider making significant changes to the process by which it evaluates the NSA's activities.

Revelations regarding the breadth and scope of the NSA's surveillance have raised serious concerns among a variety of stakeholders within and outside the United States, including technology companies, civil liberties groups, and the millions of citizens who rely upon digital communications in their personal and professional lives. As citizens become increasingly wary of over broad data collection on popular online platforms and services, it is critical that the Administration rebuild trust in the United States as a benevolent steward of the Internet and reaffirm the nation's respect for international law and commitment to protecting civil liberties and human rights both at home and abroad. Restoring trust is critical as well to ensuring that the country's burgeoning technology sector remains vibrant, open, and healthy.

The President's appointment of a review group to examine the NSA's surveillance activities is a modest first step towards accountability and oversight. Thus far, however, due to several key flaws in how it is organized, the review group's implementation undermines the Administration's attempts to rebuild trust:

- The review group's composition is limited in technical expertise, making it difficult to fully analyze the technical implications of the government's surveillance programs and activities.
- The group has yet to define its scope of work. At the moment, the following details remain unclear: what specifically the group is reviewing, what aspects of the NSA's surveillance programs or practices will be analyzed, what frameworks/guidelines will inform the group's analysis, and what the outputs are and which outputs will be made public.

- It is unclear how the review group's efforts relate to the activities of the Privacy and Civil Liberties Oversight Board (PCLOB). Will its findings inform and feed into PCLOB's efforts? Will the review group provide an outline for a more in-depth review to be carried out by PCLOB in 2014?
- The group also has inadequate transparency and disclosure mechanisms: most germane information is considered classified, thus the only thing to comment on is information leaked to the press rather than official descriptions of the activities and practices of various surveillance programs. Given the lack of information available to the public, the review group's request for public comments should only be a first start and must be reiterated throughout the group's work.

Given these concerns, the review group ought to consider significant changes to its processes, including the following:

- The review group should allow independent experts to provide technical expertise, and it should examine all of the different components of the U.S. government's surveillance system. This includes: what each element of the surveillance system collects, how this collected data is used, and what solutions can truly protect the privacy of individuals – U.S. and non-U.S. Citizens – from overly expansive surveillance.
- Crucially, the review group should provide these findings to the public. There ought to be an additional public comment period following the review group's submission of its interim report, expected later this month.
- Additional changes to the review group process include identifying solutions for security clearance obstacles so that the review group can call on a broader base of expertise, particularly from the technology sector.
- Furthermore, the group should not segregate civil liberties and industry groups during convenings so that all parties are equally informed and are allowed to engage in dialogue.

Ultimately, in order to rebuild trust with US citizens, technology platform and service providers, and people around the world, the review group must detail measures to promote transparency. More specifically, the following information should be made public:

- The metrics and frameworks that the review group is using to evaluate the programs' benefits and risks;
- The scope and focus of the review group's investigation;
- How the review group's work relates to the work of other government institutions tasked with analyzing digital privacy and surveillance (such as PCLOB); and,
- Information on follow up action and how the group's findings will be operationalized.

In addition to making its own processes more transparent, the review group should take steps to promote transparency from other actors going forward. For example, the group should advocate for reforms that allow technology and communications companies to disclose information on data requests and compliance. Rather than being the norm, gag orders should be used sparingly, and only in cases when it can be reasonably shown that disclosure of information would result in security harm. Furthermore, the group should encourage that FISC court opinions are released whenever possible, with necessary steps taken to protect national security when applicable.

As the review group considers legal and regulatory reforms, special attention should be paid to Section 215 of the PATRIOT Act as well as Section 702 of the 2008 FISA Amendments Act.

Furthermore, the review group should evaluate reforms that respect and integrate human rights protections, including the principles codified in Article 17 of the International Covenant on Civil and Political Rights.

Absent a transparent and thorough review, the default response from the public and policymakers will continue to be to call for broad measures of de-funding surveillance programs. In addition, we will see a further movement by many nations to impose data localization and traffic routing requirements that will not only contribute to a balkanization of the open Internet but also facilitate network architectures that would further empower authoritarian states to surveil and censor communications. The only way to avoid these destructive outcomes is for the Administration to commit itself to a comprehensive and transparent review of the full scope of NSA's surveillance activities and their impact on privacy, security and human rights.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sascha Meinrath', written in a cursive style.

Sascha Meinrath
Director, Open Technology Institute
Vice President, New America Foundation