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INFORMATION SOCIETY DEPARTMENT

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COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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Ref: NP/LO/General Assembly Resolution 68/167 'The right to privacy in the digital age'

Strasbourg, 31 March 2014

Dear Ms Prouvez,

Thank you for your letter of 26 February 2014 inviting the Council of Europe to provide input towards the preparation of the report by the High Commissioner for Human Rights requested in paragraph 5 of the General Assembly Resolution 68/167 on "The right to privacy in the digital age". I am pleased to provide the following overview of Council of Europe action to promote and protect the right to privacy.

Many of the actions set out below, which are underpinned by international human rights law, have cross-cutting implications with impact at a national level, both in terms of legal frameworks and remedies, and bear on practical responses and supervisory arrangements. Indeed, under Article 1 of the European Convention on Human Rights (ECHR), the states parties "shall secure to everyone within their jurisdiction the rights and freedoms" set out therein. These rights and freedoms include the right to respect for private and family life, home and correspondence (Article 8 ECHR), without an online/offline distinction and without any condition as to citizenship.

The 47 Council of Europe member states, parties to the ECHR, can be held to account for their obligations under the Convention before the European Court of Human Rights. The Court has established that states must not only refrain from interference with the individual's rights, but are also under a positive obligation to provide an effective system of protection from interference by third parties. This approach can be relevant both in respect of domestic and extraterritorial surveillance and/or interception of digital communications and collection of personal data.

The recent report on "national security and the European case-law" prepared by the Research Division of the Registry of the European Court of Human Rights, provides an overview of relevant case law of the Court.¹ Mass surveillance suggests an interference with the right to respect for private life (Article 8 ECHR). But it can also affect the enjoyment of other rights, including the right to a fair trial (Article 6 ECHR), the right to freedom of expression

¹[http://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/Jurisprudence%20CEDH_En%20\(final\).pdf](http://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/Jurisprudence%20CEDH_En%20(final).pdf)

(Article 10 ECHR), the right to freedom of assembly and association (Article 11 ECHR) and the right to an effective remedy (Article 13 ECHR).

The interception of communications by state bodies or agencies, including national security services, constitutes an “interference” with the right to private and family life, home and correspondence guaranteed by Article 8 of the ECHR. Such an interference, to be admissible, must meet a number of conditions as reflected in the case law of the European Court of Human Rights.

In a 2007 report, the European Commission for Democracy through Law, better known as the Venice Commission, examined “the democratic oversight of the security services.”² It addressed the question of oversight arrangements for security services, their accountability, and the strengths and weaknesses of each model.

The Council of Europe Convention on the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) is the sole international legally binding instrument in the field and is open for accession to any country in the world. The 1990 Guidelines of the United Nations concerning “computerized personal data files” and the orientations they provide greatly correspond to the principles set out in Convention 108. The Convention, which currently counts 46 Parties, is being modernised and, in that context, Article 9 which deals with national security could be reviewed.

The Additional Protocol to Convention 108 stipulates that states parties to it should provide a supervisory authority responsible for ensuring compliance with the Convention’s requirements. It also addresses the transborder flows of personal data to recipients which are not subject to the jurisdiction of a party to the Convention.

You may also wish to note other specific Council of Europe actions or events following the revelations on mass surveillance:

- On 11 June 2013, the Committee of the Ministers of the Council of Europe adopted a Declaration on Risks to Fundamental Rights stemming from Digital Tracking and other Surveillance Technologies. The Declaration stresses that “legislation allowing broad surveillance of citizens can be found contrary to the right to respect of private life. These capabilities and practices can have a chilling effect on citizen participation in social, cultural and political life and, in the longer term, could have damaging effects on democracy.”³
- On 4 September 2013, an application was lodged at the European Court of Human Rights by Big Brother Watch and others against the United Kingdom on indiscriminate capture and sharing of vast quantities of communication data by state security services. The case has since been communicated to the respondent state and given priority.
- On 2 October 2013, the Parliamentary Assembly of the Council of Europe (PACE) adopted Recommendation (2024)2013⁴ and Resolution 1954(2013)⁵ on “National security and access to information” and called on the competent authorities of all member states to take account of the “Global Principles on National Security and the Right to Information” (“the Tshwane Principles”) in modernising their legislation and practice concerning access to information. It also called on member states to sign and ratify the Council of Europe Convention on Access to Official Documents and to implement and, in due course, further improve the convention in the spirit of the “Tshwane Principles”.

² European Commission for Democracy through Law (Venice Commission) 2007: Report on the Democratic Oversight of the Security Services. (An update is currently in preparation)

[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2007\)016-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)016-e)

³ Council of Europe, Committee of Ministers (2013), Declaration of the Committee of Ministers on risks to fundamental rights stemming from digital tracking and other surveillance technologies, 11 June 2013, available at:

<http://wcd.coe.int/ViewDoc.jsp?id=2074317&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

⁴ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20194&lang=en>

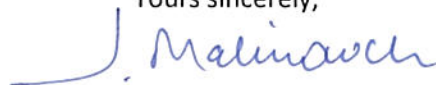
⁵ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20190&lang=en>

- On 24 October 2013 the Council of Europe Commissioner for Human Rights published a Human Rights Comment⁶ highlighting the threats to human rights and the right to privacy stemming from secret surveillance. The Commissioner recommended that private companies and states should be more cautious in using data relating to private life and thus avoid any abuses that could arise from indiscriminate data mining. For this purpose they should develop surveillance and data collection policies that respect human rights with necessity and proportionality as leading principles.
- On 6 November 2013, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (PACE) appointed a Rapporteur to draft a report for two inter-related subjects: "Massive Eavesdropping" and "Improving whistleblower protection."⁷ The report is underway and scheduled to be presented to the Assembly later this year or in 2015.
- Ministers responsible for media and information society adopted a political declaration at the Belgrade Conference on freedom of expression and democracy in the digital age (7-8 November 2013), underlining that "any [...] surveillance for the purpose of the protection of national security must be done in compliance with existing human rights and rule of law requirements." The declaration also emphasised the need for "adequate and effective guarantees against abuse (of electronic mass surveillance) which may undermine or even destroy democracy."⁸ The Ministers also adopted a Resolution on internet freedom.
- Following discussions of the Consultative Committee of Convention 108 (October 2013), the Chairperson of this Committee sent a letter to the Chairperson of the Committee of Ministers of the Council of Europe on the implications that the information revealed by Edward Snowden regarding mass surveillance might have for the protection of human rights and fundamental freedoms. The Chairperson of the 108 Committee in particular denounced the use of mass surveillance techniques, which could seriously impinge on human rights and democracy, and suggested that further action be taken based on Convention 108.
- On the occasion of Data Protection Day (28 January 2014), a side event to the Winter session of the Parliamentary Assembly was organised on the theme "After Snowden: using law and technology to counter snooping" with the participation of Jacob Appelbaum (Developer of the Tor Project), Professor Douwe Korff (London Metropolitan University) and Professor Christian Grothoff (Technological University of Munich).

A comprehensive overview of the European data protection law can be found in the handbook jointly prepared by the Council of Europe and the European Union Agency for Fundamental rights⁹.

Please do not hesitate to contact me should you need any clarification or additional information.

Yours sincerely,



Jan Malinowski

⁶ <http://humanrightcomment.org/2013/10/24/human-rights-at-risk-when-secret-surveillance-spreads/>

⁷ <http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=4856&lang=2&cat=5>

⁸ Council of Europe, Conference of Ministers responsible for Media and Information Society, "Freedom of expression and democracy in the digital age, opportunities, rights, responsibilities" (2013), Political Declaration, 8 November 2013, available at: www.coe.int/t/dghl/standardsetting/media/belgrade2013/Belgrade%20Ministerial%20Conference%20Texts%20Adopted_en.pdf.

⁹ http://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/Handbook.pdf