



His Excellency William E. Kennard
Embassy of the United States of America
Rue Zinner 13
1000 Brussels

18 June 2013

Mr Ambassador,

European Digital Rights would like to thank you for the invitation to meet with you today. We welcome the opportunity to have a discussion with you on current issues of great importance to citizens on both sides of the Atlantic.

However, we would also like to express our profound disappointment with regard to recent revelations about the PRISM programme and the underlying legal framework (FISAAA in particular), which provides the domestic legal basis for this activity. We expect and demand better from the United States of America.

We would also like to express our disappointment at the behaviour of the United States during the discussions surrounding the proposed European Regulation and Directive on data protection.

Regarding PRISM, widespread untargeted surveillance leads to self-censorship, the discouragement of dissent, the restriction of freedom of assembly and the restriction of freedom of communication. In such an environment, democratic discourse and participation are the ultimate casualties. Untargeted surveillance imposed in societies which have had no democratic choice in the matter, which have neither been consulted nor informed of this infringement of their basic rights, is a double affront to democracy. The fact that the foreign power (regardless of who that foreign power is) that imposed these restrictions believes that its domestic procedures are adequate to minimise the risks of this surveillance is wholly irrelevant. When the President of that foreign power then seeks to reassure his own citizens that the surveillance only covers foreigners (who do not even have the same rights before US courts as US citizens), this heaps insult onto injury. We expect better.

Regarding the European legislative proposals on data protection, while we recognise the right of the United States to give its views on relevant legislation in the European Union, we expect and demand an appropriate degree of respect for our democratic processes. The US intervention in the drafting process of the Regulation, even before the text was formally available to citizens in Europe, was wholly inappropriate. The resulting successful deletion of provisions to protect the fundamental rights of European citizens against access by foreign governments went far beyond the bounds of what is acceptable in a democratic society. The use of an "informal note"¹, distributed to the Commission without traceability to the US government, fell far below the minimum standards one should be able to expect from the United States. We were also shocked by your speech at the Forum Europe Conference where you referred to "the regulation's requirement for explicit consent in all circumstances", which is simply false. We expect and demand better from the United States than misrepresentations of this nature.

¹First informal note; December 2011 http://edri.org/files/12_2011_DPR_USlobby.pdf

It was possibly even more surprising to see a second "informal note"² being circulated by the US authorities in January of this year. We were also disappointed by the frantic, alarmist and essentially groundless nature of that document. We stress that the United States has the right to make its views known in this process - but it has to stand behind its statements. Both in terms of process and content, the circulation of the informal paper fell, yet again, beneath the standards that we should be able to expect from the United States. The contradiction between the paper's call for respect for the International Covenant on Civil and Political Rights (ICCPR) on the one hand, and the unequivocal breach of Articles 17 and 19 of that instrument by the PRISM programme is quite simply astonishing.

In summary, we demand:

- that the USA desist from any and all foreign data collection measures that are not part of appropriate mutual legal assistance agreements that have treaty status;
- that any foreign data collection measure include provisions giving all affected individuals, at the very least, equal rights to US citizens at all stages of an investigation and, to avoid "jurisdiction-shopping", rights that are not significantly lower than any democratically approved safeguards in their country of residence;
- that the USA desist from any and all data collection measures which are not targeted and not based on concrete suspicions;
- that the USA desist in future from lobbying on proposals that have not been released by the European Commission;
- that the USA only communicate position papers to the European Union that are clearly identifiable as documents emanating from the US administration.

We say all of this not because we do not respect the United States, but because we do. We expect better because we know that we can expect better.

Yours sincerely,

Joe McNamee
Executive Director

² Second informal note, January 2013 http://edri.org/files/us_position_20130114.pdf