

NSA review to leave spying programs largely unchanged, reports say

By: Spencer Ackerman – December 13, 2013

A participant in a White House-sponsored review of surveillance activities described as “shameful” an apparent decision to leave most of the National Security Agency’s controversial bulk spying intact.

Sascha Meinrath, director of the Open Technology Institute, said Friday that the review panel he advised is at risk of missing an opportunity to restore confidence in US surveillance practices.

“The review group was searching for ways to make the most modest pivot necessary to continue business as usual,” Meinrath said.

Headed by the CIA’s former deputy director, Michael Morrell, the review is expected to deliver its report to President Barack Obama on Sunday, the White House confirmed, although it is less clear when and how substantially its report will be available to the public.

National security council spokeswoman Caitlin Hayden said she would have no further comment “on a report that is not yet final and hasn’t yet been submitted to the White House”.

Should the review group’s report resemble descriptions that leaked late Thursday, the report “does nothing to alter the lack of trust the global populace has for what the US is doing, and nothing to restore our reputation as an ethical internet steward,” said Meinrath, who met with the advisory panel and White House officials twice to discuss the bulk surveillance programs that have sparked international outrage.

Leaks about the review group’s expected recommendations to the New York Times and Wall Street Journal strengthened Meinrath and other participants’ long-standing suspicions that much of the NSA’s sweeping spy powers would survive. The Times quoted an anonymous official familiar with the group saying its report “says we can’t dismantle these programs, but we need to change the way almost all of them operate”.

According to the leaks, the review group will recommend that bulk collection of every American’s phone call data continue, possibly by the phone companies instead of the NSA, with tighter restrictions than the “reasonable, articulable suspicion” standard for searching through them that the NSA currently employs. Less clear is whether the review will recommend removing authorities NSA possesses to allow searches for Americans’ identifying information in its vast databases of foreign communications content.

The leaks in the New York Times and Wall Street Journal suggested that the review group will do less to restrain the bulk spying on foreign nationals that is a more traditional NSA activity, although the Journal referred to additional privacy safeguards. For surveillance of foreign leaders, the group looks likely to recommend such spying be personally approved by the president or White House officials.

Revelations that the NSA spies on allied leaders yielded a diplomatic outcry after German chancellor Angela Merkel personally raised the issue with Obama. Dianne Feinstein, the Senate intelligence committee chairwoman who has sponsored a bill preserving and in some cases expanding the bulk collection efforts, declared herself “totally opposed” to spying on allied leaders.

The report also appears to embrace the idea of allowing a privacy advocate to contest government collection requests before the secret surveillance panel known as the Fisa court, a key reform sought by congressional privacy advocates.

But the White House rejected a more controversial proposal that would split the technologically sophisticated NSA from the military's relatively new cyber command, which is tasked with protecting the military's data networks and launching wartime cyberattacks. Keeping the NSA director in charge of cyber command is “the most effective approach to accomplishing both agencies’ missions”, Hayden told the Washington Post. The decision likely indicates the NSA will continue to be run by a military officer, unless an unusual bureaucratic arrangement is found.

On Wednesday, NSA director Keith Alexander, the army general who will retire in the spring after leading the agency for eight years, strongly defended the bulk collection of phone data as necessary to detect future domestic terrorist attacks. “There is no other way we know of to connect the dots,” Alexander told the Senate judiciary committee.

For months, the NSA and other intelligence officials have said they were open to the idea of letting phone companies conduct the bulk retention of data – although they have warned that doing so is technologically cumbersome – provided the bulk data pool continues. The NSA has maintained strong, secret ties with the phone companies since its inception in 1952.

Michelle Richardson, the ACLU’s surveillance lobbyist, said the organization would wait for a public release of the report to evaluate its merits, but said the group’s support depended on how far the review panel went in curbing “bulk suspicionless spying or not”.

“To the extent that they, like Feinstein, codify existing practices, we’ll oppose it,” Richardson said, “but if they make substantial reforms about protecting this very sensitive data, it’s on the right track.”

Jim Harper of the libertarian Cato Institute warned that the phone companies’ retention of bulk domestic phone data was a “non-starter”.

“Is secretly violating Americans’ communications privacy really rewarded by a policy requiring the violation of Americans’ communications privacy?” Harper wrote in a Friday blogpost.

Lurking in the background of the White House’s internal review is a heated legislative battle over ending bulk surveillance.

Civil libertarians in both parties and both houses of Congress are backing a bill, the USA Freedom Act, that would prevent the NSA's bulk collection of Americans’ data without individualized, court-approved

suspicion of wrongdoing. The Obama administration has yet to take a formal position on the bill, which supporters claim has 120 congressional co-sponsors but has yet to pass.

It is unclear whether the bill's proponents will be satisfied by requiring the bulk preservation of phone data by the phone companies. Currently the phone companies retain the data for 18 months, while the NSA desires a data pool comprised of information spanning between three and five years.

Obama has publicly portrayed the surveillance review process as substantial and inclusive of all equities in a debate he did not expect to have pre-Snowden.

In an MSNBC interview last week, Obama said the review heard from "a whole bunch of folks, civil libertarians and lawyers and others to examine what's being done", and predicted proposing "some self-restraint on the NSA and to initiate some reforms that can give people more confidence".

Yet the anticipated surveillance report appears to stop short of desires for reforms expressed in a little-noticed public-comments section on the review group's website – which is nestled within the director of national intelligence's online home.

Richard Barnblace, who described himself as having nearly avoided death or injury in this year's Boston Marathon bombing, commented: "The NSA's desire to collect ever more data is a prime example of the Haystack Fallacy: the absurd notion that you will find more needles by piling on more hay."

"We need the same level of confidence in our electronic privacy as in we do in our physical homes," wrote Cyprien Noel of California.

Some commenters discussed technical shortcomings of the NSA's now-public geolocation activities, describing them as inevitably and mistakenly collecting data domestically.

"If the NSA were to mistakenly classify domestic servers as outside the United States, even at low rates, it would acquire a substantial amount of purely domestic internet traffic," wrote Jonathan Mayer of Stanford University's department of computer science.

The Open Technology Institute's Meinrath said he told White House chief of staff Denis McDonough that the bulk surveillance revelations represented a "reputational crisis" for the US. "I think the Obama administration is going to be shocked in their own special way by just how little impact this has in turning around public perception of what they're doing," he said.

"I think what they're going to find is when the initial dust settles from this attempt to spin the story is that people are going to be quick to realize this is not meaningful reform, this is not a bold new direction, and it is not going to do much to rein in a surveillance regime run amok."