

## UN privacy expert calls for U.S. government surveillance overhaul

(June 27, 2017) - U.S. privacy policies — from government surveillance to the recent repeal of internet privacy regulations — are getting some tough love from "a critical friend."

A preliminary review by an independent privacy expert for the United Nations Human Rights Council, timed to influence the upcoming debate in Congress over renewing legal authority for foreign intelligence surveillance programs, calls for far-reaching reforms in the work of U.S. intelligence agencies and other areas of U.S. privacy law.

Joseph Cannataci, the UN's Special Rapporteur on the Right to Privacy, rates U.S. privacy protections overall as "good but could do better," he said at a June 27 press briefing in Washington to release findings from his 10-day visit to four U.S. cities. "The U.S. has one of the most complex privacy protection systems on the planet."

Cannataci, a native of Malta and a professor of law at the University of Groningen in the Netherlands as well as head of the Department of Information Policy and Governance at the University of Malta, investigates the privacy policies of about two countries a year for the UN Human Rights Council.

He said his goal is to create a dialogue with the United States and other countries he visits, leading to improved privacy protections from his recommendations in the "role of a critical friend."

His decision to focus on the United States this year was timed to influence debate over Section 702, which expires at year-end. "It's my role to influence the debate," he said.

He said the timing had nothing to do with President Donald Trump's privacy policies, such as repeal of Obama-era internet privacy rules by the Federal Communications Commission or an executive order barring Privacy Act ([PL 93-579](#)) protections for non-U.S. persons.

"I had absolutely no idea who would be in the White House" when the trip was scheduled last year, he said.

However, his preliminary report criticizes Trump and congressional Republicans for repealing the FCC's internet privacy rules. "I clearly and unequivocally said this is a retrograde step," Cannataci added.

The UN official said the upcoming debate over the soon-to-expire Section 702 of the Foreign Intelligence Surveillance Act of 1978 Amendments of 2008 ([PL 110-261](#)), which authorize monitoring of foreign communications but often sweeps up Americans' email and phone conversations, is an opportunity to rethink U.S. intelligence law.

"Given its history in the protection of civil liberties, the U.S. must reclaim its leadership role," the special rapporteur said.

In his preliminary findings, Cannataci called on Trump to fill "without further delay" the four vacant posts at the Privacy and Civil Liberties Board, an independent agency that monitors government surveillance programs.

In his preliminary findings, he recommends the U.S. government should respond to his concern Section 702 should not be re-authorized. "Mass surveillance has not been satisfactorily demonstrated to be effective and is contrary to the principles of proportionality and necessity as established under international law," he said.

Acknowledging it is a complex issue, if FISA Section 702 is renewed it "needs to be reformed by a return to a regime where an individualized warrant for non-U.S. persons located outside the USA be issued by an independent judicial authority outside the intelligence service," such as the Foreign Intelligence Surveillance Court, according to his report.

Such warrants should require evidence of probable cause "BEFORE any surveillance is carried out," the report said (emphasis in original).

Cannataci also recommended the government should respond to several changes suggested to him by the American Civil Liberties Union, such as prohibiting the government from searching Section 702 data for information about Americans without a warrant, and restricting use of the information to national security matters, not domestic criminal investigations.

Other ACLU-inspired reforms he is considering include narrowing the scope of Section 702 investigations to prevent "targeting of individuals who are not agents of a foreign power and who have no connection to terrorism, espionage or nuclear proliferation." He also wants to enhance reviews by FISC to "improve oversight and transparency," and he wants to require the government to report statistics on its surveillance activities.

The Trump administration and U.S. intelligence officials have called for Section 702 to be extended permanently without any changes, arguing it is vital to the fight against terrorism.

Cannataci's investigation is continuing, and "between now and October I might come up with a public statement about 702," he told reporters at the briefing. "I hope they don't leave everything until the last minute."

His report also recommended police use of surveillance technologies should hinge on mandatory and transparent codes of conduct and policies before any technology is deployed, and any access to local surveillance data by intelligence agencies should have "safeguards and remedies explicitly provided for by law."

He also said all forms of health data, such as information generated by Fitbit trackers or other wearable devices and DNA testing by genealogy services, should be covered by the Health Insurance Portability and Accountability Act of 1996 (PL 104-191), calling those "glaring loopholes in current protection."

Cannataci also devoted a page of his eight-page findings to the privacy of sex workers. "In 49 out of 50 states prostitution is still illegal and the criminalization of sex workers as well as their clients has a direct and negative impact on the private and family lives of sex workers," the report said.

He recommended "additional safeguards" to protect multiple identities adopted by sex workers, and "codes of conduct should prohibit sexual liaisons between law enforcement officers with sex workers as part of surveillance carried out for detecting or investigating trafficking of human beings as well as other illegal activities."

His final report, which will take into account further investigations and an upcoming review of the U.S.-European Union Privacy Shield data transfer agreement, will be delivered at a meeting of the UN Human Rights Council next March.

"This is a long game," he added. "Things don't happen overnight."

By Paul Merrion, CQ Roll Call

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