



Brussels and Washington DC, 25 April 2017,

Dear Mr. Moraes,

Access Now welcomes your initiative in preparing the European Parliament Resolution on the Adequacy of the protection afforded by the EU-U.S. Privacy Shield.¹ In preparation for this document and in response to the Article 29 Working Party (WP29) letter of 11 April 2018 on Section 702 of FISA Amendments Act, we would like to share the following clarifications.

Section 702 of the FISA Amendments Act is the legal authority that the U.S. government uses to conduct warrantless surveillance programmes, like Prism. The European Parliament in its resolution condemning “the vast and systemic blanket collection of the personal data of innocent people” emphasised that “mass surveillance has potentially severe effects on freedom of the press, thought and speech” and the right to privacy.² Section 702 was set to expire at the end of 2017, but instead the U.S. Congress reauthorised the authority.

In reauthorising Section 702, the U.S. Congress extended the authority for an additional six years, meaning it will be some time before members of the U.S. Congress are required to come together again to discuss reform. Recent history has demonstrated the startling rate at which surveillance technologies are being developed and utilised. Six years is a long time without any impetus to consider how new tools and technologies are increasing the power and reach of U.S. surveillance agencies like the National Security Agency (NSA). In fact, the U.S. Central Intelligence Agency (CIA) is already reporting that it is using algorithms and other technologies to replace agents in the field.³ This shift in the balance of reach versus cost inevitably results in much more surveillance.⁴

More troubling, rather than reforming Section 702, the renewal actually expanded the already overbroad authority. Most notably, the renewal enacted more uses of data collected under Section 702 and provided an express pathway to re-starting so-called “about” collection. We will briefly examine both of these expansions.

¹ Access Now is an international organisation that defends and extends the digital rights of users at risk around the world: <https://www.accessnow.org/>

² European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens’ fundamental rights and on transatlantic cooperation in Justice and Home Affairs: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0230+0+DOC+XML+V0//EN&language=EN>

³ See: <https://edition.cnn.com/2018/04/22/politics/cia-technology-tracking/index.html>

⁴ See: <https://www.yalelawjournal.org/forum/tiny-constables-and-the-cost-of-surveillance-making-cents-out-of-united-states-v-jones>

The Section 702 renewal expressly authorised direct pathways for the U.S. Federal Bureau of Investigation (FBI) to access information collected under Section 702 for purposes unrelated to its collection. These searches were previously known as “back door searches,” because they allowed the FBI to gain access to information without going through necessary legal processes. The provision was advertised as reforming this loophole, but instead it entrenched the FBI’s practices while only providing a requirement for to obtain a warrant in the case of an established criminal investigation.⁵ As the New York Times explained, the warrant requirement “would not apply to security-related queries by any intelligence or law-enforcement agency, nor to requests from F.B.I. agents who are following up on criminal tips but have not yet opened formal investigations.”⁶

The reauthorisation also re-opened the door to conducting “about” collection.⁷ “About” collection was one of the NSA’s most invasive practices even though it was not specifically enacted in the original Section 702. It enables law enforcement to compel communications providers to scan for communications to or from a “target” using certain selectors such as an email address.⁸ However, the technology used would scan both the metadata and the content of a message meaning that the message surveilled could be to, from, or about a target. This practice produces a high likelihood that communications will be collected from people who are not themselves targets. The practice of collecting “about searches” was halted in 2017 after a ruling from the Foreign Intelligence Surveillance Court.⁹ However, in the reauthorisation the U.S. Congress including specific language on “about” collection in Section 702, thus providing a path toward its reinstatement, which groups have argued violates the U.S. constitution and international human rights standards.¹⁰

Finally, it is important to reiterate that the U.S. Congress’ reauthorisation did not solve any of the key problems inherent in Section 702. For example, in contrast to law in the EU, under U.S. law, surveillance counts as targeted so long as it is not purely indiscriminate. Therefore, so long as a single identifier is used, even if it is very broad such as cyber threat indicator, it is not considered bulk surveillance.¹¹ This means that intelligence officials in the United States can still claim that

⁵ For more information, see:

<https://www.aclu.org/blog/national-security/privacy-and-surveillance/congress-just-passed-terrible-surveillance-law-now>

⁶ See New York Times, House Extends Surveillance Law, Rejecting New Privacy Safeguards:

<https://www.nytimes.com/2018/01/11/us/politics/fisa-surveillance-congress-trump.html>

⁷ For more information on “about” collection see:

<https://www.eff.org/deeplinks/2018/02/how-congresss-extension-section-702-may-expand-nas-warrantless-surveillance>.

⁸ “Selectors can be things such as email addresses or phone numbers and they can be used to either gather information from the target or communications about the target.”, See:

<https://www.accessnow.org/pclab-and-human-rights-violations-through-spacetime/>.

⁹ <https://www.accessnow.org/privacy-victory-u-s-nsa-stop-collecting-communications-foreign-intel-targets/>;

¹⁰ This practice is unconstitutional in the US and in violation of Articles 7, 8, 47 and 52(1) of the EU Charter of Fundamental Rights according to EU case law. See Court of Justice of the European Union ruling in the *Schrems* Case C-362/14:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130deccd89854fa314600b10cd869688d4b28.e34KaxiLc3eQc40LaxqMbN4Pb3aOe0?text=&docid=169195&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=261933>; See also:

<https://www.hrw.org/news/2017/09/14/q-us-warrantless-surveillance-under-section-702-foreign-intelligence-surveillance>

¹¹ See:

<https://www.accessnow.org/three-facts-us-surveillance-european-commission-gets-wrong-privacy-shield/>

Section 702 is not a bulk surveillance authority, even though it would qualify as such in the EU.¹² Furthermore, the terms “collected” or “collection” in the context of surveillance in U.S. are used in the same way that “processing” is used in EU law, which can include use and storage of data and can thus amount to multiple interferences with the fundamental rights to privacy and data protection protected under the EU Charter.¹³

While the Article 29 Working Party indicates that several provisions of Section 702 were positively impacted by the U.S. Congress’ reauthorisation, instead it should be viewed as a significant blow to human rights for people around the world. The reauthorisation ignored the past years of thoughtful criticism by experts and lessons learned over intelligence overreach.

Access Now hopes that these clarifications on the scope and reach of the reauthorisation of Section 702 will contribute to your upcoming resolution on the EU-U.S. Privacy Shield. We remain at your disposal for any questions you may have.

Yours sincerely,

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¹² See:

<https://www.accessnow.org/cms/assets/uploads/2016/09/StepanovichWrittenTestimony-GermanBundestag1stCol.pdf>

¹³ See Department of Defense’s procedures governing the activities of intelligence component:

https://fas.org/irp/doddir/dod/d5240_1_r.pdf