

Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

REFERENCE:
OL USA 7/2017

1 May 2017

Dear Mr. Allegra,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolution 25/2.

In this connection, I would like to bring to the attention of your Government information I have received concerning **intensified social media screening of travelers at the United States border, leading to undue interference with the rights to freedom of expression and privacy of travelers.**

Concerns about amendments to the Electronic System for Travel Authorization (ESTA) requesting information of travelers' social media, were raised in a previous communication sent on 30 September 2016 (USA 9/2016). I also discussed these concerns with representatives of your Government on 14 October 2016, via conference call.

According to the new information received:

On 19 December 2016, the United States' Office of Management and Budget (OMB) approved the proposal of the Customs and Border Protection (CBP) to collect the social media handles of visitors from countries participating in the Visa Waiver Program. Individuals from such countries can travel without a visa to the USA under certain conditions, including by having a valid approval from ESTA.

On 27 January 2017, CBP implemented additional screening procedures at U.S. airports and other border crossings. Since this date, CBP's requests for social media handles have not always been voluntary. In some cases, they have reportedly required or coerced travelers to provide these handles, as well as passwords to their private social media accounts.

In some cases, CBP has also asked travelers to unlock their cell phones, and taken away these devices for more extensive screening. It has been reported that travelers who refuse to comply with these demands have been among other things, handcuffed, detained for periods ranging between two and eight hours, or physically assaulted.

On 7 February 2017, in a testimony before Congress, the Secretary for the Department of Homeland Security, Mr. John Kelly, stated the U.S. Government's

interest in obtaining passwords to the social media accounts of travelers seeking U.S. visas and denying entry to those who do not cooperate with such a policy.

On 4 April 2017, a bill entitled “Protecting Data at the Border Act” was introduced in the United States Senate to, among other things, require CBP officials to apply for a warrant in order to access the content of electronic devices belonging to U.S. citizens or permanent citizens. The bill will also prohibit CBP from detaining U.S. citizens or permanent residents for longer than four hours in order to obtain access to their cell phones and social media accounts. Travelers who are not U.S. citizens or permanent residents fall outside of the scope of the bill.

Before explaining my concerns with CBP’s practices, I wish to stress the U.S. Government’s obligations to respect and protect the right to freedom of opinion and expression under article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States on 8 June 1992.

Article 19(1) protects everyone’s right to hold an opinion without interference. In other words, opinions may not be “restricted by law or other power” (A/HRC/29/32).

Article 19(2) protects the right to seek, receive, and impart information of all kinds, regardless of frontiers and through any media. This right applies to “everyone”, and is not limited to citizens.

Under article 19(3), restrictions on the right to freedom of expression must be “provided by law”, and necessary for “respect of the rights or reputations of others” or “for the protection of national security or of public order (ordre public), or of public health and morals”. Permissible restrictions on the internet are the same as those offline (A/HRC/17/27).

Surveillance and other restrictions on freedom of expression must be “necessary” to protect such objectives, and not simply useful, reasonable or desirable. The requirement of necessity “also implies an assessment of the proportionality” of those restrictions. A proportionality assessment ensures that restrictions “target a specific objective and [do] not unduly intrude upon other rights of targeted persons.” The ensuing “interference with third parties’ rights must [also] be limited and justified in light of the interest supported by the intrusion” (A/HRC/29/32). Finally, the restriction must be “the least intrusive instrument among those which might achieve the desired result” (CCPR/C/GC/34).

The full texts of the human rights instruments and standards outlined above are available at www.ohchr.org and can be provided upon request.

I am concerned that CBP’s alleged screening of social media information and personal devices unduly interferes with the rights to freedom of expression and privacy. As a threshold matter, it appears that the compelled disclosure of social media

information is not “provided by law”, as it is solely based on CBP’s own practice and therefore lacks a basis qualifying as “law”. Moreover, this practice violates CBP’s own policy that such disclosure should be voluntary. Even if additional surveillance measures may be necessary to protect legitimate national security interests, the forced disclosure of social media information – including passwords- does not appear to be necessary and proportionate as required for any lawful limitation to the right to freedom of expression under article 19 of the ICCPR. As raised in my previous communication to the U.S. Government (USA 9/2016), I observed that social media information is “highly subjective and conclusory”, and “it is unclear how useful – let alone necessary- such information may be to detecting or countering national security interests.”

Given these concerns, I welcome legislative efforts to mitigate the threat of government overreach at the border, including the bill entitled “Protecting Data at the Border Act”. In particular, I welcome the proposal to require pre-judicial authorization of government access to the contents of travelers’ electronic devices on a case-by-case basis. Limits on the maximum duration of detention at the border, in accordance with U.S. obligations under international human rights law, are also welcomed. I urge the Government to extend similar protections to non-U.S. citizens that are not permanent residents, whose right to freedom of expression is protected “regardless of frontiers” under article 19(2) of the ICCPR.

Under the mandate provided to me by the Human Rights Council, it is my responsibility to seek to clarify all cases brought to my attention. I would be grateful for your cooperation and observations on the following matters:

1. Please provide any additional information and any comment you may have on the above mentioned allegations.
2. Please provide the legal basis for the mandatory disclosure of social media information and passwords to CBP, and explain how this is compatible with U.S. obligations under international human rights law.
3. Please clarify the total number of travelers subject to the mandatory disclosure of social media information and passwords described above.
4. Please provide the legal basis for electronic searches of travelers’ cell phones and personal electronic devices, and explain how this is compatible with U.S. obligations under international human rights law.
5. Please clarify the total number of travelers subject to searches of their cell phones and personal electronic devices as described above.
6. Please provide the criteria that CBP relies on to identify travelers for the additional screening procedures described above, and how such criteria is consistent with U.S. obligations under article 19 of the ICCPR.

7. Please provide information about the legal basis for handcuffing and detaining persons who are unwilling to cooperate with the additional screening procedures, and explain how these actions are compatible with U.S. obligations under international human rights law.
8. Please explain what safeguards and procedures, if any, have been established to ensure that all persons at the U.S. border are protected from discriminatory restrictions on their right to freedom of expression.

I would appreciate receiving a response as soon as possible. In view of the above comments, I urge the U.S. Government to take all steps necessary to conduct a comprehensive review of CBP's screening practices and ensure its compliance with international human rights standards.

Finally, I would like to inform that this communication will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on the right to freedom of expression:

<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx>).

Your Government's response will also be made available on the same website as well as in the regular periodic Communications Report to be presented to the Human Rights Council for its consideration.

Please accept, Mr. Allegra, the assurances of my highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression