

## **Address to ICIC on the future of transparency and access to information**

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Good morning everyone and I'm delighted to be here. I've been a member of this community for almost 15 years both as Irish Information Commissioner and now European Ombudsman and it's great to meet old colleagues and get to know some of the newer arrivals.

I first became Information Commissioner in 2003, just five years after the Irish FOI Act began operating and two years before the UK's Act sprang into action. The EU's own transparency regulation was enacted in 2001 and, it's worth pointing out, has not been updated since.

Looking back at some conference papers from those years I see that there was very little reference to the extraordinary technological innovations taking place in that early part of this century, innovations that have utterly transformed our communications and which are now forcing seismic changes in the way in which Governments do their business whether they like it or not.

The first Information Commissioners' conference in Berlin in 2003 predated Facebook by one year, YouTube by two, Twitter by three, Whats App by six, Instagram by seven, and Wikileaks by three. Facebook, the oldest of those innovations so embedded in our daily lives, is just 11 years old. The iPhone – now in its 9<sup>th</sup> iteration – was invented just 10 years ago in 2007 and has recently been described as “the foundational instrument of modern life”.

And back in 2003, the current global power and reach of those innovations was unimaginable. In June of this year Facebook recorded its two billionth active user, a one billion user rise in less than five years. Facebook Messenger has one point two billion active users, YouTube 1.5 billion, Whats App one billion, Instagram 700 million and Twitter 317 million. Even newer technologies include Viber, Snapchat and Tumblr have tens of millions of daily users. No business, no corporation no government agency or body can expect to operate without engaging with and through several of those media.

Our early conferences also assumed significant, even overwhelming, control of data by Government as though there was a single portal through we could access 'official' information. Julian Assange and others came crashing through that assumption in 2006 and has been doing so ever since. Today on the WikiLeaks website, everything from global intelligence reports to treasure troves of hacked political email accounts are available.



It's impossible yet to gauge the total impact of all of that on the operations of Government aside from heightened citizen expectation of openness, expectations of direct interaction with, and response by, Government, and the capacity to bypass traditional access flows in a way that effectively subverts the assumed hierarchy of the governors and the governed.

The Arsenal football team manager Arsene Wenger, in a slightly different context, commented recently, "We have gone from a vertical society to a horizontal society. Basically the respect for people who make decisions is gone because every decision is questioned". What Wenger of course is really talking about is the battle for control.

But the revolution also tests our own assumptions about "openness". We routinely claim that it will lead to greater trust in Government or better citizen choices with more information at their fingertips. But how true is that?

New ways of communicating have always been introduced as harbingers of global peace and goodwill. The telegraph was heralded as a medium that would get rid of old prejudices and hostilities through greater global exchanges while another generation believed that all misunderstandings as between peoples and races would disappear as people got to actually see each other on television. Yet the law of unintended consequences goes into action time after time after time and new technologies inevitably escape the fixed boundaries of their creators' vision.

The internet may well have democratised knowledge, it has also facilitated everything from human trafficking to the dark web activities of illicit and dangerous commerce and some of you may have heard Prime Minister Theresa May's criticism of tech companies failure in relation to the enabling of extremism online in the wake of the recent tube attack in London. How far she or anyone else can turn back the clock on that one is debatable.

Alternative media streams have splintered the public's attention with governments struggling not just to have their voices heard but to be given any greater credibility than the next person on a Facebook timeline. This is particularly critical in an area such as public health with expert and non-expert views at times given equal weight. Interestingly, the Italian health Ministry recently reported that it is now working with Google in relation to its ranking or indexing of online reports on vaccines against a backdrop of decreased take up.

But this doesn't mean that greater transparency does not lead to better government even if the trust issue is contested. As Irish Information Commissioner I fought very hard for the police to be brought under the FOI Act which they now are and subject to my successor Peter Tyndall's mandate. A number of recent scandals around the force have led to Government inquiries and, crucially, their publication. Such scrutiny – helped by leaks and whistle-blowers – would not have been possible in a pre-internet or pre transparency era. The end result should lead to better policing even if trust in the force has been damaged for the moment.

Trust in the European Union is a particularly contested issue as Brexit has shown yet trust



nonetheless has increased in recent months the rise linked to an economic upturn. Most people after all don't care too much about the obscure workings of transparency regimes once they've jobs to go to and decent lives for their families.

It's worth noting that Donald Trump didn't try to hide the uglier side of his character during the election campaign and that despite the efforts of mainstream media to point out his lies, half truths and false facts, he still became President. Transparency didn't lead to the rational outcome most of us believed would happen. Trust and transparency are complicated matters particularly when we retreat to our own echo chambers in an increasingly atomised media world.

My work has nonetheless focused on the creation of greater accountability through increased transparency in a context where powerful EU institutions seem remote, obscure and impenetrable yet I operate within a transparency regime, like many I suspect around the world is still failing to recognise the 21 st century realities of a hyper digital, hyper connected and hyper expectant brave new world.

The EU law which governs access to documents which falls within my mandate, is an example. Regulation 1049 of 2001, hasn't moved on since 2001 and there is little appetite for change among the main EU institutions.

In her report to the Scottish Parliament earlier this year, our chair this morning, Rosemary Agnew, as Scotland's Information Commissioner, concluded "It is time for a re-think to bring access to information law and practice more into line with how we actually use and approach information as a society." I couldn't agree more. The focus of that report was on proactive publication duties, noting that "public authorities are so busy responding to requests to meet statutory duties, they often don't have the time or resource to develop a more open approach through publication."

This clearly reflects the tension between compliance with a public access regime and the adoption of a more positive approach to the timely publication of useful information in the public interest. But it also indicates the limitations of a purely reactive regime.

Politicians and officials in the EU often refer to Regulation 1049 as "the Transparency Regulation". Yet public access to information is not in itself transparency. It is a tool which can help us to understand the reasons why certain things that have happened, decisions taken, the influencing factors and the identity of those involved. But by definition, it is retrospective. Access can be given only to information that has already been recorded.

We need to think more broadly, not just about publishing what is already created, but ensuring that relevant and accurate information is produced and published in good time for it to be useful.

I know there is much debate in this forum as to the respective merits of an Information Commissioner or an Ombudsman in the role of complaint-handler for public access to information issues. An Information Commissioner with order-making powers certainly wields a



big stick and the potential for being legally compelled to disclose information is bound to be an important factor for decision makers.

Ombudsmen, and indeed some commissioners, have just recommendatory powers. But an Ombudsman's decision nonetheless carries weight, will itself be published and so cannot be ignored altogether. The rate of compliance with my recommendations as European Ombudsman is between 80 and 90% each year, but recently I've noticed a subtle shift. An agreement to disclose more information or content of a document is now often tempered with a statement of self-justification on the part of the institution, arguing that the decision was right and justified at the time it was taken, even if, given the passage of time, the arguments for non-disclosure have weakened or become irrelevant.

This indicates a more legalistic approach, which, in my view, does not actually support transparency as an essential aspect of good governance. Rights entrenched in law have a tendency to be regarded as legal rights to be fought over, rather than fundamental rights to be respected, irrespective of the potential for technical legal knock-outs which can frustrate a positive approach to openness, ignoring the public interest served by greater transparency.

Proactive disclosure of information should be just that – automatic, anticipatory and timely. Public authorities should not be checking to see whether they have a legal obligation to publish documents proactively, but doing so instinctively, as a matter of principle and conviction. It is good governance in practice. It enhances democracy. It is the right thing to do for citizens.

As European Ombudsman, there are two key aspects of my mandate that exceed those I had as an Information Commissioner and which enable me to have more impact on the transparency agenda as a whole, within the institutions of the European Union, even though my recommendations cannot be enforced in law.

The first is the breadth of the concept of maladministration. As European Ombudsman my role is to help uncover maladministration in the EU bodies and make recommendations.

But I am not limited to the matters raised in a complaint. If I suspect other maladministration I can also act on my own initiative and it's through the strategic use of that power and my general powers to improve administrative practice that I've made the most effective recent challenges to some of the opaque practices of the EU institutions.

I inquired for example into the transparency of what are known in EU jargon as "Trilogues." These are the tri-partite negotiations, held behind closed doors between representatives of the European Parliament and Council, as co-legislators, and the representatives of the European Commission, who put forward legislative proposals, to identify areas of agreement in order to speed up the negotiating process and, very often, agree the final form of legislative proposals that can then just be nodded through. It's efficient yes but can fall short in terms of transparency, accountability and opportunity for citizen participation.

My inquiry examined the potential for making information and documents proactively available



to the public, at a point in time which enabled effective citizen participation and scrutiny, without unduly encroaching on the space genuinely needed for free and frank discussion. Documents to be considered for proactive disclosure included a calendar of future meetings, summary agendas, lists of participants the initial positions of the parties, and final compromise texts. I also recommended the publication of what's known as the "four-column document", a working document which evolves during the trilogue sessions as the position of the parties shifts towards a compromise on particular issues. The first three columns show the position of each of the three parties and the fourth, the compromise text.

There has been some move towards greater transparency as a result of my inquiry, although some of the issues, including the publication of the four-column document, are subject to an ongoing court case.

Another inquiry concerns transparency of the Council of Ministers, how they do or do not publish documents during the legislative process. This Council of the 28 Member States is often seen as the least transparent of the major institutions in the EU. It exhibits a culture of traditional international diplomacy, but is, nevertheless, is the EU's co-legislator alongside the directly-elected European Parliament.

This is now all taking place against a backdrop of some clear reaction against the perceived remoteness of the institutions of the European Union from citizens, notably in the rise of populist movements in some Member States and, in particular, the UK's decision to leave the EU.

The consequences of that "Leave" decision will be felt throughout the European Union and the public interest in the transparency of the negotiations is obvious.

I therefore wrote to the Commission and the Council urging a proactive approach to the timely public disclosure of relevant information and documents and I received a positive response. President Juncker noted, "These negotiations will be unique... There is no precedent for this process. Therefore, our transparency policy will also be unique and unprecedented."

The Council has also committed to "facilitate effective public scrutiny and provide a steady flow of information throughout the negotiations whilst preserving the space to form EU positions and negotiate with the UK."

The transparency issue has itself of course become a battleground, the commitments on the EU side being in stark contrast to the UK mantra of "No running commentary." Yet it does appear that the UK is being encouraged into a position of being more open than perhaps it would like, publishing a series of "Position" or "Future Partnership" papers.

The less the transparency of course, the greater the number of leaks which are not always accurate and therefore enhance the case for a structured release via a progressive transparency regime. The knowledge that important information is being kept from people undermines trust and creates greater uncertainty.



So the future of access to information has to accommodate the needs and expectations of all citizens, equipped with mobile devices, high-speed internet access and the tools of social media. The proactive release of relevant and accurate official information should be based on a clear strategy for the creation of such information, anticipating the public interest, and a communication strategy aimed at engaging citizens, either passively, by sharing with them knowledge and understanding, or actively, through participation and the opportunity to influence.

Traditional, retrospective access laws have, and will always have, their place, but only as a backstop.

Perhaps the true vanguard of the next transparency revolution are the Open Data activists and those who want greater citizen access to the raw data held by Government to enable better law making through greater participation and the contribution of other creative and wise minds and not just those of the officials.

Had active citizens for example been given access to the raw data on diesel emissions held by the European Commission prior to the Volkswagen 'dieselgate' scandal, the problem might have been identified far earlier than it was.

Our future role may simply be to give our judgments on the declining number of records that Governments may continue to withhold for exceptional reasons. Equally we may become involved in transparency in the private sector as private enterprise and new technologies continue to usurp many of the traditional roles, functions and information flows of our public administrations.

The global debate about the appropriate control of the tech giants is gathering pace. When politicians and ordinary citizens start talking, as they are, about algorithms and access codes we know that something unprecedented has entered the mainstream and we, as Ombudsmen and Information Commissioners need to be a more visible and impactful part of that debate.