



# FREEDOM ONLINE COALITION

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## WORKING GROUP 3 Privacy and Transparency Online

A People-Centered Approach to Transparency Online

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### Working Group 3 “Privacy and Transparency Online”

The Freedom Online Coalition Working Groups were established to explore in more detail important policy issues facing online freedom and to inform the work of the Coalition and its members. Working Group 3 focuses on the relationship between governments and information & communications technology (ICT) companies, with a particular emphasis on respecting human rights online, including freedom of expression and privacy.

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# 01

## A PEOPLE-CENTERED STANDARD FOR ONLINE TRANSPARENCY

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### WHAT DOES ADEQUATE GOVERNMENT AND CORPORATE TRANSPARENCY LOOK LIKE?

Over the last few years, transparency about government requests to companies for user information or content restriction has become a central issue for the community of people working to improve human rights online. More and more companies and governments produce transparency reports and other materials aimed at raising public awareness about practices that impact privacy and freedom of expression. Initiatives such as the Freedom Online Coalition's Working Group on Privacy and Transparency analyse their efforts and push them to do more. In the midst of this work, it's easy to take for granted what it means to be "transparent," why it matters, and how you know if it's working.

This Working Group has developed a people-centred standard for companies and governments to evaluate whether their transparency efforts are adequate and effective in contributing to the protection of human rights online. Stepping back from analysis of specific tactics and tools, how can a company or government evaluate whether they are being meaningfully transparent?

### INTRODUCING A PEOPLE-CENTERED STANDARD

Companies and governments can assess whether they are providing adequate transparency to individuals by asking the following question:

*After reviewing what you have made public, e.g. in a transparency report, would a reasonable person understand what information you have collected about them and how and under what circumstances you and/or relevant authorities can limit, manipulate, and/or track their expression and activities?*

### BREAKING DOWN THE STANDARD

In developing the scope of this standard, the Working Group considered a number of factors — including what practices are covered, who the readers are, and how their rights are affected. Below we walk through our thinking behind these key concepts.

*"After reviewing what you have made public..."*

This standard evaluates transparency not solely on whether a company or government has issued a transparency report, but on a broader range of measures that it may use to share information. (See this working group's [2015 report](#) for a longer analysis of current practices.)

On the corporate side, transparency by internet and telecommunications companies can take on many forms. The “transparency report” is the most well-known – typically a regularly published document that details government requests for user information and/or requests to remove or block content. Other examples include publication of law enforcement guidelines, explanations of internal policies and processes for responding to law-enforcement requests, notification – and even annotation – of changes to terms of service, and alerts about when communications are (or are not) encrypted.

Transparency reports are also one of the more well-known mediums for government transparency. As with corporate transparency efforts, governments can provide insight into the number and types of requests for communications and metadata. Other examples of government transparency efforts include periodic reviews and assessments of government policy and practice, including if and how the government has veered from stated commitments. Governments can also provide public education tools such as FAQs that explain current practices and legislation. They also often explain policy interpretations or positions in the form of testimonies, press statements, or government planning documents.

#### “Would a reasonable person understand...”

By putting an individual – a reasonable person – at the heart of the standard, we have tried to design a test that measures the effectiveness of transparency for a range of audiences.

Transparency reports and related efforts have a variety of readers: the general public, company customers and product or service users, journalists, lawyers, regulators, advocates, lawmakers, investors, and more. They serve different purposes for these audiences – empowering users to understand how their information is handled, holding governments and companies accountable to their commitments, and informing advocacy efforts to improve policies or practices.

We have also tried to convey that the information governments and companies publish must be accessible and understandable through reasonable levels of effort. To access and understand what has been disclosed, a reader should not require an advanced degree, a certain subscription or account, or knowledge of where to look or who to ask solely by nature of being part of a specialised professional community.

In developing the standard, we debated how to describe the scope of understanding a reader should expect from a company or government. We acknowledge the need for confidentiality of some material, for example, in the case of sensitive government information related to intelligence or law enforcement operations. Yet we came to the conclusion that beyond these specifically defined limitations, people must fully understand what information is collected about them and how and under what circumstances companies and governments can affect their free expression and privacy.

#### “How and under what circumstances...”

By asserting that people should adequately understand how and under what circumstances their information is being collected and treated in the ways the standard enumerates, we highlight the need for companies and governments to disclose not just statistics about requests, but also to describe the legal and policy

context under which they are made.

The scope of information required for this understanding may include (but is not limited to):

- What information is collected, removed, or blocked (i.e., content, metadata, user identity data; mobile, landline, broadband/cable, application/content; real-time vs. stored)
- How many times information is collected, removed or blocked (specifying number of requests vs. devices vs. user accounts affected)
- Under what authority, circumstances, and for what purpose information is collected, removed, or blocked
- How long information is retained, removed or blocked
- Where information is stored, and who has authorised access to the stored information
- Policies and processes for making and receiving content restriction or disclosure requests
- Policies and processes for notifying affected individuals (i.e., upon request vs. automatic) and which entity is responsible for giving notifications (i.e., government vs. company)
- How many times the affected individuals were notified in practice, and the content of that notice
- Paths for remedy or recourse for affected users
- Circumstances under which service may be cut off entirely
- Circumstances under which a policy is subject to modification or change
- Representative examples of requests and enforcement decisions.

We also intend this standard to cover a range of interactions between company and government. Requests for an individual's information can occur through established legal processes or through less formal mechanisms, such as informal requests to companies for user information or public-private partnerships related to content moderation. Governments and companies must be transparent about all of these interactions for individuals to understand the implications for their rights

#### “...you and/or relevant authorities can limit, manipulate, and/or track their expression or activities?”

In this standard, we cover a range of ways companies and governments can affect a person's human rights, particularly freedom of expression and privacy. A non-exhaustive list of relevant actions includes:

- Limit: Direct filtering, blocking, or removing of content
- Manipulate: Targeted censorship or widespread surveillance that creates a chilling effect on expression
- Track: Periodic or ongoing monitoring of a person's speech or activities, directly or through disclosure of information by a company to the government

Corporate and government transparency are critical to the protection of human rights. A number of legal precedents, international directives, and internet governance principles have established a clear connection between commitments to protect human rights and transparency around fulfilment of those commitments. These include the European Convention on Human Rights, the UN Guiding Principles on Business and Human Rights, the Global Network Initiative's Principles on Freedom of Expression and Privacy, and the FOC Tallinn Agenda for Freedom Online.

# 02

## MAKING THE CASE FOR TRANSPARENCY FROM GOVERNMENTS AND COMPANIES

Governments frequently make requests to companies to restrict content, restrict or shut down service, and to share user data with authorities. Transparency reports published by several companies indicate that the volume of such requests is growing rapidly around the world. This paper articulates why it is important for governments and companies to be transparent about government requests to companies for user information or content restriction. It outlines the goals transparency serves for society as well as its specific value for governments and for companies.

The arguments below are based on the Freedom Online Coalition Working Group's interviews with company and government representatives from around the world, as well as by the work of individual group members.

### THE CASE FOR TRANSPARENCY

Transparency is a cornerstone of democratic governance. It enables governments to demonstrate that they are upholding obligations and commitments to protect human rights. Transparency is also a key element of corporate best practice when it comes to respecting human rights. By being transparent about how they handle users' personal information, companies can demonstrate how they implement their commitment to respect human rights.

Transparency about requests made by governments to companies about online content and user information can serve three goals, without which the protection of and advocacy for human rights are not possible.

- Empowering individuals: Transparency empowers individuals to make informed choices as consumers so that they understand the risk they may take in using particular online platforms and services, thereby maximizing their ability to freely and safely exercise their rights online. Being transparent about what actions affecting freedom of expression or privacy are being taken, by whom, and on whose authority, educates users about potential direct restrictions on their rights. It helps people understand how their access to information, or ability to share certain content, may be restricted, or which authorities or private entities can access what information about them under what circumstances. Importantly, transparency also mitigates the "chilling effect" that causes people to self-censor or limit their online speech and activities because they do not know the scope of government or company actions, and therefore cannot make informed decisions or hold these actors accountable.

- Providing accountability: Transparency facilitates oversight. With knowledge of government and company practices, civil society, investors, and other stakeholders can hold each party accountable to contracts/user agreements, societal expectations, international human rights principles, and other commitments, such as those made by States through the [Universal Periodic Review](#) process or statements like the [Tallinn Agenda for Freedom Online](#), as well as those made by companies through efforts like the [Global Network Initiative](#). Without transparency, governments and companies face little public scrutiny when they fail to protect and respect human rights, including freedom of expression and privacy.
- Informing policy and advocacy: Transparency enables public debate about whether government requests to restrict content or share user information are being made within frameworks that reasonably consider individual rights together with national security and law enforcement interests. Transparency helps stakeholders focus their advocacy efforts, raise questions, and assist companies and governments in improving their practices. It keeps people informed in situations where a government or company may be infringing upon their human rights. It also enables regulators who oversee companies' and government agencies' activities to assess whether companies are respecting human rights and governments are complying with human rights obligations and commitments.

There are different benefits for governments and companies in being transparent. The reasons below are derived from interviews with government and corporate representatives.

### THE VALUE TO GOVERNMENTS

- Demonstrating obligations and commitments: According to the [UN Guiding Principles on Business and Human Rights](#), governments have the primary duty to protect human rights. Transparency about requests made to companies to take actions that affect human rights, including online freedom of expression and privacy, is essential to the fulfillment of human rights obligations, such as those set out in international and regional human rights treaties, national constitutions, or domestic laws, as well as commitments made by States through processes like the [Universal Periodic Review](#) or statements like the [Tallinn Agenda](#). Governments are obligated to operate in accordance with the law. Transparent laws and policies—and transparency about how those laws and policies are implemented and by whom—are part of ensuring strong rule of law, enabling the governed to hold government accountable.
- Empowering people and building public trust: Being transparent is critical to building public trust in law enforcement and intelligence activities. A lack of information can breed mistrust over the intentions and practices of government authorities, and obscure the value of these activities.
- Fostering public dialogue: As public awareness of human rights online grows, providing more information about government requests to companies fosters an informed public debate. Transparency helps clarify what actions are taken on whose legal authority and surfaces effective policy recommendations for conducting these requests in a way that protects human rights.
- Facilitating a positive climate for investment and innovation: As Internet-based services and platforms increasingly expand internationally, transparency regarding relevant regulations, expectations, and policies can help foster a business environment that attracts investment and encourages

innovation.

- **Internal coordination:** The process of compiling a transparency report or related materials can help improve coordination and communication across different parts of government about what requests are being made to companies, by whom, and for what purpose. Engaging different parts of government in the creation of a report can also educate people across government about the broader policy implications of their actions and the value of transparency to the public.
- **International leadership:** As general demand for transparency grows, governments can exercise leadership by pioneering new ways to disclose this information to the public effectively.

### THE VALUE TO COMPANIES

- **Building user trust:** Being transparent about government requests assures users that the company is handling their information responsibly and transparently.
- **Industry benchmarking:** Publishing transparency reports and related measures is becoming the industry norm. Companies that are less transparent than their peers will increasingly be at a competitive disadvantage when it comes to public perceptions around the extent to which a company respects user rights.
- **Good corporate governance:** Transparency reporting requires internal tracking and consistency in how a company handles government demands across different jurisdictions. The process of being transparent—especially creating a transparency report—can help a company refine and improve its own internal processes for responding to government requests (ensuring consistency and efficiency, helping anticipate issues). It also enables companies to track trends in requests received from certain governments or specific authorities.
- **Consistency with company mission:** For companies that cite transparency as a core value, providing reports and taking other measures to be transparent with the public about how content is restricted or how user information is shared is a natural extension of that commitment. Transparency is also part of companies’ fulfillment of responsibilities under the framework of the UN Guiding Principles on Business and Human Rights.
- **Pressure on governments:** Lawfully publishing information about government requests may draw attention to the scope of a government’s demands, and whether those demands are changing over time. There is some evidence that some governments are sensitive to such scrutiny and may be more judicious or at least coordinated in their requests if they know information will be reported.

# 03

## THE HUMAN RIGHTS CONTEXT FOR TRANSPARENCY

Corporate and government transparency promote respect for human rights. Multiple sources outlining human rights commitments, expectations, or aspirations of governments and companies articulate the importance of transparency.

For the Freedom Online Coalition (FOC) Working Group 3, a key source is the Tallinn Agenda for Freedom Online, adopted by FOC member governments in April 2014. The FOC was founded on a commitment to respecting human rights and fundamental freedoms online. The Tallinn Agenda detailed various approaches and commitments to promoting the FOC’s mission. The preamble to the Tallinn Agenda “recognis[ed] transparency of government processes and open government data initiatives as important elements in protecting human rights and fundamental freedoms, and participation in a democratic society.” The Tallinn Agenda included the following recommendations, in which the FOC member governments:

**Dedicate ourselves, in conducting our own activities, to respect our human rights obligations as well as the principles of the rule of law, legitimate purpose, non-arbitrariness, effective oversight, and transparency, and call upon others to do the same;**

**Call upon governments worldwide to promote transparency and independent, effective domestic oversight related to electronic surveillance, use of content take-down notices, limitations or restrictions on online content or user access and other similar measures, while committing ourselves to do the same.**

The Tallinn Agenda also called on other stakeholders – non-member governments, the private sector, international organizations and civil society worldwide – “to endorse these recommendations to guarantee a free and secure internet for all.”

Other sources also emphasize the role of transparency in efforts to protect and respect human rights. These include (but are not limited to):

- The UN Guiding Principles on Business and Human Rights articulated certain expectations of transparency for both governments and business enterprises. As set out in the Principles, states have the duty to protect and promote the rule of law, including by taking measures to ensure “procedural and legal transparency,” among other important aims. The Principles also explain that business enterprises, when addressing their human rights impacts, should show that they respect human rights by providing “a measure of transparency and accountability to individuals or groups who may be impacted,” as well as to other stakeholders.

- For European state parties, the European Convention on Human Rights enumerated protections for privacy and freedom of expression, including respect for private and family life, home, and correspondence and the freedom “to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” On multiple occasions the European Court of Human Rights has held that transparency of government actions is necessary for the protection of these rights. For example, the Court has found a basic right of the public to be “properly informed” about matters of public concern and has also explained that “acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion.”
- For companies, the Global Network Initiative, a non-governmental multi-stakeholder organization that brings together companies, NGOs, responsible investors and academics to foster protection of freedom of expression and privacy, has also found that transparency and respect for human rights go hand-in-hand. GNI members commit to uphold the GNI Principles on Freedom of Expression and Privacy, which emphasize the need for companies to act on their commitment to human rights in a transparent and accountable manner, including participation in accountability assessments.

These sources and others can help governments, companies, and civil society situate transparency efforts within a greater framework of protecting and respecting human rights.

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