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THE CORNERSTONE OF DEMOCRACY: TRANSPARENCY, ACCOUNTABILITY AND THE CONSTITUTIONAL RIGHT TO INFORMATION

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THE CORNERSTONE OF DEMOCRACY: TRANSPARENCY, ACCOUNTABILITY AND THE CONSTITUTIONAL RIGHT TO INFORMATION*

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I. INTRODUCTION

Much public interest was aroused by a case recently filed by Francisco I. Chavez[1] seeking to enjoin and prohibit the Presidential Commission on Good Government from privately entering into any agreements with the heirs of the late Ferdinand E. Marcos concerning the disposal of assets that were allegedly illegally acquired by him and his family during his presidency. Public emotions ran high, fanned by rumors that billions of dollars in Marcos assets were discovered deposited in various Swiss bank accounts, and by news reports that a compromise agreement was being contemplated between the Marcos heirs and the government as regards the final division of these assets. Chavez, as taxpayer and citizen, claimed an interest in the eventual disposal of any alleged ill-gotten wealth that might be recovered from such sources; other

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[1]G.R. No. 130716, 9 December 1998.

citizens expressed similar sentiments, especially those who had been victims of human rights abuses under the Marcos regime who sought compensation for their suffering.

Given this highly-charged political situation, another aspect of this case, equally important in the context of constitutional law, has gone all but unnoticed. In addition to seeking the prohibition of the compromise agreement between the government and the Marcos heirs, petitioner Chavez also sought to compel the respondents to publicize all negotiations and agreements between them and the Marcoses, whether such agreements were ongoing or perfected, and to make available to the public *all* documents that were related to such negotiations and agreements. In trying to pass judgment on Chavez' petition, the Court found itself in a difficult position: on the one hand, the public had a clearly-defined right to government-held information, including information as regards government transactions; but, on the other hand, the information that Chavez sought was all-inclusive in character, and seemed to extend even beyond the constitutionally demandable right of access. Thus, for the first time, with the *Chavez* case, the Supreme Court was called upon to define more clearly the limits and scope of the constitutional right to information, contained in the bill of rights of the 1987 Constitution. Other previously decided cases invoked this right of access to government-held information, but never before had a citizen demanded access to information about negotiations prior to a perfected compromise. In deciding on Chavez' petition, the Court was thus compelled to decide whether or not *all* government transactions and negotiations could be the subject of a demand by an inquiring citizen. Thus, the *Chavez* case is important insofar as it shows judicially-perceived limits on the right to information, and on the corresponding public duty imposed upon government officials to disclose what the inquiring public seeks to know.

This paper examines the constitutional right to information, and the correlative duty of government officials to reveal the information that the public seeks. Because the earliest roots of this right, both legal and theoretical, are American in origin, this paper's starting point is the right to know in the American context. In the United States, the right to information has consistently been perceived as an offshoot of freedom of expression, with its constitutional basis to be found in the First Amendment. This same trend is

present in the earliest Philippine cases, decided under the 1935 Constitution. Whereas it acknowledges the American tradition behind the right of access to information, this paper observes, however, that the Philippine right has evolved beyond its U.S. counterpart, with independent constitutional recognition and additional dimensions not found in American law.

II. THE RIGHT OF ACCESS TO INFORMATION: THE AMERICAN PERSPECTIVE

A. Legal and theoretical bases for the right of access in the United States

1. First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[2]

A close analysis of the wording of the First Amendment to the United States Constitution reveals that there is not a single mention of a constitutionally protected "right to know," or even of the more specific "right of access to government-held information," which the Philippine Constitution specifically provides. Be that as it may, the U.S. Supreme Court has decided in a number of cases that there is, in fact, a constitutionally enforceable right to know, which has been perceived to be a necessary adjunct to the right to freedom of expression, which obviously receives constitutional protection.

It was not the U.S. Supreme Court, however, but members of the press, who first began to make the assertion that the public had a right to know which stemmed from the First Amendment Indeed, popular acceptance of the phrase "the right to know" is traced back to a speech made in 1945 by Kent Cooper, executive director of the Associated Press in the 1940s.[3] The

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[2] The First Amendment to the United States Constitution.

[3] Cooper made the assertion that "the citizen is entitled to have access to news, fully and accurately presented. There cannot be political freedom in one country, or in the world, without respect for 'the right to know.'" Quoted by DAVID M. O'BRIEN, THE PUBLIC'S RIGHT TO KNOW 2 (1981).

following decades saw the members of the press further championing the public's right to know,[4] with press campaigns for reforms in the status of public access to government information contributing towards the enactment of the Freedom of Information Act in 1966.[5] This Act, championed by Congressman John Moss, Chairman of the Government Information Subcommittee of the House Committee on Government Operations, proceeded under "a general philosophy of full agency disclosure,"[6] and made government information available to any person, subject only to the nine statutory exemptions from the Act.[7]

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[4] DAVID M. O'BRIEN, THE PUBLIC'S RIGHT TO KNOW 2-9 (1981). In analyzing the press and the right to know, David M. O'Brien also makes special mention of James Russell Wiggins, Executive Director of the *Washington Post* and *Times Herald* and Chairman of the Committee on Freedom of Information of the American Society of Newspaper Editors, who wrote a series of articles that spoke of the legitimacy of the public's right to know. In *Freedom or Secrecy*, Wiggins sought to clarify this undefined right, by making the assertion that the public's right to know actually refers to a composite of several rights: (1) the right to get information; (2) the right to print without prior restraint; (3) the right to print without fear of reprisal not under due process; (4) the right of access to facilities and material essential to communication; and (5) the right to distribute information without interference by government acting under law or by citizens acting in defiance of the law.

Also worthy of mention is "A Declaration of Principles" by the American Society of Newspaper Editors in which it is stated that: "The American people have the right to know, as heirs of Magna Charta, the inheritors of the privileges and immunities of the English Common Law and the beneficiaries of the freedoms and liberties guaranteed them by the Constitution and the Bill of Rights of the United States.

"To exercise this right citizens must be able to gather information at home or abroad, except where military necessity plainly prevents; they must find it possible to publish or relate otherwise the information thus acquired without prior restraint or censorship by the government; they must be free to declare or print it without fear of punishment not in accord with due process; they must possess the means of using or acquiring implements of publication; they should have freedom to distribute and disseminate without obstruction by government or by their fellow citizens."

[5] *Id.* Especially influential was Harold Cross, counsel for the New York *Herald Tribune* and professor at the Columbia University School of Law, whose 1953 report *The People's Right to Know* concluded that legal provisions for freedom of information were inadequate. His analysis of the then-current regulatory system for federal agencies, the Administrative Procedure Act, led him to conclude that the ambiguous provisions thereof led to the government's denying even legitimate requests for information. Later, Cross convinced Congressman John Moss of the problems in achieving governmental openness under the Administrative Procedure Act and of the necessity for further federal legislation guaranteeing the public a right of access to government information.

[6] *See id.* at 7.

[7] These are: (1) matters that are specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and in fact properly classified pursuant to such Executive Order (2) matters that are related solely to the internal personnel rules and practices of an agency; (3) matters that are specifically exempted from disclosure by statute, provided

The 1970s saw the members of the press campaigning not merely for the statutory recognition of the public's right to know, but demanding that it be a constitutionally enforceable right; a significant amount of litigation involved members of the press invoking the public's right to know in order to gain special privileges to obtain access to information that ostensibly was in the service of the general public. It was some years, however, before there came to be judicial appreciation and recognition of this purported constitutional right. Whereas, as early as 1936, the U.S. Supreme Court recognized that there exists a fundamental link between the First Amendment and self-government,[8] and further recognized a "right to receive" information from willing sources, the court generally denied the press's claims that the public at large, or even the media, enjoyed a constitutionally protected right of access[9] to government-held records or information, whether classified or not.[10] The 1978 case of *Houchins v. KQED Inc.*,[11] for example, witnessed Chief Justice Burger concluding that the Constitution is not a Freedom of Information Act, and denying that the First Amendment commands that government-held information should be

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that such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or established particular types of matters to be withheld; (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, constitute an unwarranted invasion of personal privacy, disclose the identity of a confidential source, or endanger the life or physical safety of law enforcement personnel; (8) matters contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for the use of an agency responsible for the regulation or supervision or financial institutions; or (9) geological and geophysical information and data, including maps concerning wells. The U.S. Freedom of Information Act, 5 USC § 552. (A fuller discussion of this Act, and of the exemptions thereto, is provided below.)

[8]Gosjean v. Am. Press Co., 297 U.S. 233 (1936), cited in Michael J. Hayes, Note, *Whatever Happened to the Right to Know?: Access to Government-Controlled Information Since* Richmond Newspapers, 73 VA. L. REV. 1111, 1114 (1987).

[9]As distinguished from a right to receive information from willing sources, the right of access is seen as the obtaining of information from an unwilling source — the government.

[10]Bruce E. Fein, *Access to Classified Information: Constitutional and Statutory Dimensions*, 26 WM. & MARY L. REV. 805, 819 (1987).

[11]438 U.S. 1 (1978), cited by Fein, *id.* at 819- 820.

disclosed simply because the public understanding would thereby be advanced.

The U.S. judiciary did not specifically grant a right of access to government-held information until 1980, when, in the celebrated case of *Richmond Newspapers Inc. v. Virginia*,[12] seven members of the Court agreed that there was a First Amendment right to attend criminal trials, in furtherance of the First Amendment's political purpose of providing information on issues related to the functioning of government.[13] Further elucidation on the First Amendment's "political purpose" saw the U.S. Supreme Court recognizing a right of access in a wide variety of cases. For example, members of the press were allowed access to the courtroom during the testimony of minors who were the alleged victims of a sex offense,[14] and to *voir dire* proceedings in a criminal case.[15]

In order to understand why the First Amendment was perceived to have conferred a right to know, it is necessary to understand the theoretical underpinnings behind the Supreme Court's analysis of the First Amendment's purported political purpose. Two thinkers are especially influential in the understanding of the assertion that the First Amendment provides a "right of access:" Alexander Meiklejohn, author of the much-acclaimed *Free Speech and Its Relation to Self-Government*,[16] who is perceived to have influenced Chief Justice Burger's opinion in *Richmond Newspapers*, as well as the equally influential concurring opinion of Justice Brennan; and Thomas I. Emerson, renowned First Amendment scholar, who expanded the scope and practical application of Meiklejohn's theories.

Meiklejohn, a philosopher and educator, analyzed the First Amendment in terms of the people's right to information, proceeding from the theory that the fundamental rationale behind demanding access

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[12]448 U.S. 555 (1980).

[13]Note, *supra* note 8, at 1116.

[14]Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), cited in Note, *supra* note 8, at 1117.

[15]Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984), cited in Note, *supra* note 8, at 1119.

[16]This book is generally regarded as the seminal work on the link between the first amendment and self-government.

thereto is that such information is necessary in the functioning of a genuine democracy:

> essential, if men are to be their own rulers, is the demand that whatever truth may become available shall be placed at the disposal of all the citizens of the community. The First Amendment is .... a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal. When a free man is voting, it is not enough that the truth is known by someone else, by some scholar or administrator or legislator. The voters must have it, all of them. The primary purpose of the First Amendment is, then, that all citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them. [17]

In Meiklejohn's analysis, therefore, the core value protected by the first amendment is the citizen's right to participate in America's representative democracy. He perceived that it was in the best interests of the nation to allow the voting public access to as much information as possible, subject only to the limitations placed by the interests of the state, in order that the people may be allowed to make their decisions as wisely and intelligently as possible. Truly free choices are impossible unless they are also informed choices, carefully thought-out, taking into account all available data. Restricting information would prevent the voters from understanding the issues before them, and would lead to ill-considered results, threatening the welfare of the nation.

It is easy to see why Meiklejohn asserted that the First Amendment protects a right of access to government-held information. "At the bottom of every plan of self-government is a basic agreement, in which all the citizens have joined, that all matters of public policy shall be decided by corporate action .... Self-government is nonsense unless the 'self' which governs is able and determined to make its will effective,"[18] wrote he. Citizens must have

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[17] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 88-89 (1948).

[18] *Id.* at 9.

access to information on all the matters that they decide, precisely because the heart of a democratic system is this public participation. The people need to be informed about the government's activities in order that they may participate more effectively in democratic self-government. Government-held information thus becomes public information, without which there can be no decision-making by the people. Meiklejohn hence argued that the main purpose of the First Amendment is to protect the free flow of information, so as to give every voter, in his capacity as sovereign master over the public servants who compose the government, the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.

Thus, according to Meiklejohn, the right of the citizen to obtain information is the exclusive justification for according all persons freedom of speech and other first amendment rights:

> What, we must ask, would be the use of giving to American citizens freedom to speak if they had nothing worth saying to say? Or — to state the principle less baldly — surely it is true that the protection of public discussion in our nation takes on an ever-increasing importance as the nation succeeds in so educating and informing its people that, in mind and will, they are able to think and act as self-governing citizens. And this means that far deeper and more significant than the demand for the freedom of speech is the demand ... for the freeing of the minds.[19]

Meiklejohn's analysis of the value of the first amendment in a democratic society, therefore, focuses on the right of the people to receive and obtain information; the right to transmit information — the speaker's right — is but a necessary corollary of the listener's right. It is on this point that Emerson, who has been called America's most influential first amendment scholar, differs with Meiklejohn. Emerson asserted that Meiklejohn gave undue emphasis to the rights of the listener, ignoring the lengthy historical tradition that developed on the basis of protecting the rights of the speaker; this focus, according to Emerson, would eventually yield less protection to

[19] *Id.* at 102-103.

freedom of expression, because, whereas it is possible to give full protection to speech, it is impossible to give absolute constitutional protection to the right to obtain information under all circumstances.[20] The core values protected by the system of freedom of expression, according to Emerson, may be reduced to four: (1) individual self-fulfillment; (2) the advancement of knowledge and the discovery of truth; (3) the participation in decision-making by all members of society; and (4) the achievement of a more adaptable, more stable community.[21] To focus purely on the rights of the listener would ignore the fact that a speaker, too, receives value from his speech, in terms of his personal self-fulfillment; whereas the speaker cannot function independently from the listener, his own personal ends are also attained when he is allowed to speak with freedom.

Thus, whereas Meiklejohn asserted that the right to know is the primary justification for the protection afforded to free speech, Emerson chose to situate the right to know squarely within the broader right to freedom of expression, recognizing that the entire system of freedom of expression affords values which are not reducible to the value accorded to the listener. Emerson's model for system of freedom of expression was not merely confined to the right to obtain information, but included the right to communicate the information obtained. These, he asserted, were but flip sides of the same coin; as neither side could exist without the other, the constitutional guarantee that protected the right to free speech of necessity protected the right to know as well.

Within this broader framework, the right to know is reducible to two simple and closely related features: first, it involves the right to read, to listen, to see, and to otherwise receive communications; and, second, it involves the right to obtain information as a basis for transmitting ideas or facts to others. For Emerson, the right to know

> serves much the same function in our society as the right to communicate. It is essential to personal self-fulfillment. It is a significant method for seeking the truth, or at least for seeking

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[20]Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 4-5 (1976).
[21]THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1971).

> the better answer. It is necessary for collective decision-making in a democratic society. And it is vital as a mechanism for effectuating social change without resort to violence or undue coercion.[22]

Within Emerson's paradigm, the primary justification for access to government-controlled records is that it results in better-informed citizens, whose freely expressed ideas are thus culled from a multiplicity of sources rather than from limited information. Like Meiklejohn, Emerson noted that the most significant application of the right to know lies in the area of obtaining information, and that an explicit recognition by the courts that the constitutional right to know embraces the right of the public to obtain information from the government would be a significant and progressive leap forward. The constitutional right to know may thus be asserted by the public in order to obtain information from government sources necessary in order for the citizen to perform his function as ultimate sovereign. As a starting point, Emerson asserted that this right should extend to all information in the possession of the government, and should be enforced by giving all parties whose interests are at stake, namely the citizen or taxpayer, standing to assert their right in courts. Whereas some allowance would have to be made for sensitive national security data, diplomatic negotiations, collective bargaining negotiations, uncompleted litigation, and the like, the major areas in which withholding of information would be justified would be those involving executive privilege and privacy of individuals.[23]

For Emerson, the right to know has two other practical areas of application, apart from its use in obtaining information from governmental or private sources in furtherance of the ends of democracy. First, it can be used as a defense against government interference with the system of freedom of expression. Whereas generally, protection against government interference with the system of freedom of expression can be maintained by securing the rights of the speaker, Emerson recognized that there are situations and circumstances where the right to know, far from playing a secondary role, must come to the forefront. There may be instances, for example, when the government attempts to control expression by applying a sanction directly

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[22]Emerson, *supra* note 20, at 2.

[23]*Id.* at 1-5.

against the recipient, in lieu of or in addition to one against the communicator. Although the imposition of direct sanctions against the recipient of communications is rare, Emerson asserted that the rights of the recipient should still be a focal point, and should receive direct constitutional protection. Further, there are situations when the speaker is not in a position to assert his rights, or may fail to take action to vindicate his interests; in these situations, he says, the Supreme Court should recognize the right of recipients to seek direct vindication of their right to know.

Secondly, Emerson recognized that the right to know can be used as a guideline for formulating affirmative government controls designed to regulate or expand the system of freedom of expression. For Emerson, the government may and should take a direct hand in the regulation and expansion of the system of freedom of expression, in order to maintain and ensure that the free exchange of ideas does in fact occur. One major area that Emerson defined as needing government intervention is the field of broadcast media, whether television or radio. Scarce physical resources need government allocation, to prevent chaos in the system. Using the right to know as a theoretical framework, Emerson noted that this right may be used as a standard in determining the rationale behind government intervention and more extensive structuring. This right would thus justify general programming requirements, a limited right of access to broadcasting facilities, and stricter regulation in general, so that the viewing and listening public may be ensured broad and adequate information on a variety of subjects, hearing a multiplicity of opinions, a diversity of programs, and uninhibited debate.[24]

2. The Freedom of Information Acts: Statutory recognition of the right of access

As is clear from the foregoing discussion, the absence of an express constitutional provision that guarantees the right of access to government-held information leads to manifold difficulties. Foremost among these is the need to search for an elaborate theoretical framework that would justify the link between freedom of speech, the democratic process, and a citizen's need for

[24] *Id.* at 5-14.

information to ensure greater participation therein. In the absence of explicit recognition of the right of access to information, claims premised purely on the First Amendment remain subject to attack. There is a vast world of difference between recognizing the need for an informed citizenry that can take on a more active role in the decision and policy making process of the government, and making the assertion that the government is compelled to disclose information purely on that ground.

The U.S. legislature has not, however, been blind to the need for a legal basis to compel the disclosure of information in the possession of the government. Various legislative enactments reveal the U.S. legislature's recognition of the right of access to information. The first federal guarantee of the right to information was accorded by the Administrative Procedure Act of 1946 (APA),[25] which required the disclosure of requested information to "persons properly and directly concerned," except if such information related solely to the internal management of the agency, or if public interest required that the information remain secret. The APA proved insufficient, however, in guaranteeing access to information, primarily because it was riddled with ambiguities which permitted the government to exercise broad discretion in deciding not only which classes of information to withhold, but also in determining whether or not the person requesting the information did indeed have a right thereto.[26] Far from providing the desired public access to information, the APA in fact became the major excuse for withholding information from an inquiring public.[27] The federal Freedom of Information Act (FOIA), originally enacted in 1966, and revised in 1976,[28] was passed in response to agency abuses of the discretion granted to them.[29]

The FOIA was designed to eliminate the vagueness of the APA provisions, and to ensure the broad disclosure of information in the hands of

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[25]5 U.S.C. § 1002 (1964 ed.),

[26]Kathleen A. Dockry, Note, *The First Amendment Right of Access to Government-Held Information: A Re-Evaluation After* Richmond Newspapers, Inc. v. Virginia, 34 RUTGERS L. REV. 292, 296 (1982).

[27]Lawrence A. Silver, *Reverse Freedom of Information Act Litigation in a Commercial Setting*, 31 CLEV. ST. L. REV. 455, 456 (1982).

[28]5 U.S.C. § 552.

[29]Matthew Edwards, Note, *Are Privacy and Public Disclosure Compatible?: The Privacy Exemption to Washington's Freedom of Information Act*, 62 WASH. L. REV. 257, 259 (1987).

the government. The general philosophy behind the FOIA is "full agency disclosure," apparently with an aim toward limiting the discretion exercised by the government agency concerned. In line with this, the FOIA specifically provides that the information applied for must be made available to any person, irrespective of the requester's personality or specific interest in the information sought.[30] In essence, under the FOIA, any person may request any information from the government, which, if it possesses the information, has a mandatory obligation to release it,[31] subject only to nine narrow exemptions.[32] The fact that a citizen no longer has the burden of showing his specific and direct interest in the information sought is more consistent with the recognition of the role that the free flow of information about the government's workings plays in genuine democracy.

Under the FOIA, the government agency exercises discretion only insofar as it determines whether or not the information sought falls within the specific exemptions to the Act. However, consistent with the general principle of disclosure, the exemptions contained in the FOIA must be narrowly construed; doubts as regards whether or not a piece of information must be disclosed are resolved in favor of disclosure.[33] Further, even if the requested information falls squarely within the exemptions, the agency is still granted the discretion to decide whether or not to disclose the information, whether in full or a segregable portion thereof.[34] Finally, even if the agency concerned should refuse to release the information sought, the requester is still provided with the proper remedy for appealing decisions rejecting his request.[35] Different states have also enacted their own Freedom of Information Acts, closely patterned on the federal act.[36]

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[30] "Each agency shall make available to the public information...." 5 U.S.C. § 552(a) (1976).

[31] Silver, *supra* note 27, at 457.

[32] *See* note 7 for the exemptions.

[33] Department of Air Force v. Rose, 425 U.S. 352, 361 (1976); Vaugh v. Rosen, 484 F. 2d 820, 823 (D.C. Cir. 1973); Soucie v. David, 448 F. 2d 1067, 1080 (D.C. Cir. 1971) (cited by Silver, *supra* note 27, at 457-459).

[34] 5 U.S.C. § 552 (b) (1976).

[35] 5 U.S.C. § 552 (a) (4) (B) (1976).

[36] Some examples include: Washington, which enacted its own FOIA in 1972; New York, which passed its Freedom of Information Law in 1974; and Kentucky, which passed the Kentucky Open Records Act in 1976.

Washington enacted their FOIA in 1972, modeling it in large part after the federal Act. The

The various Freedom of Information Acts (FOIA), coupled with other legislative enactments, suggest the recognition of one other important value that the free flow of information plays: the right of access that the citizen enjoys may serve as a system of increasing the accountability of public officers to the citizens whom they purport to serve. Examples of statutes which further enhance the citizen's right of access include the Federal Advisory Committee Act of 1972,[37] the Government-in-the-Sunshine Act of 1976,[38] and the Presidential Records Act of 1978.[39] What these statutes have in common with the FOIA is a general trend towards transparency in all governmental

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Washington State voters also passed Initiative 276, known as the Public Disclosure Act. This Act provided for a mechanism by which individuals can access information held by the government. It required agencies to make all public records available for public inspection and copying. The act particularly instructed the courts to take into account that "free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." Edwards, *supra* note 29, at 257-60.

To increase the accountability of the government to its citizens, New York's Freedom of Information Law (FOIL) was enacted in 1974. One of the essential principles underlying this act is that the people have a "right to know the process of governmental decision-making and to review the documents and statistics leading to determinations. Again, this statute was closely patterned after the federal FOIA. The policy underlying FOIL reflects a legislative preference for open government" which is meant to alleviate the distrust and alienation that have developed in many citizens as a natural reaction to a relatively impassive bureaucracy. The right of citizens to understand governmental operations and to scrutinize governmental records was considered fundamental to the operation of a democratic society. Its relevance held such a great weight that in 1977, the original FOIL was amended. This amended Act required complete disclosure of all government records, as compared to the original FOIL's limited disclosure to an enumerated list of records. In amending the original FOIL, the legislature sought to broaden significantly the statute's reach by creating a presumption in favor of disclosure. This right was recognized even before the enactment of FOIL. The drafters of FOIL were then aware of this right and concerned themselves with guaranteeing that government agencies and consequently, government officials, become responsible and responsive to an educated citizenry.

Jeffrey C. Dannenberg, Note, *New York's Freedom of Information Law, Disclosure under the CPLR, and the Common-Law Privilege for Official Information: Conflict and Confusion Over "The People's Right to Know,"* 33 SYRAC. L. REV. 615 (1982).

In Kentucky, the Kentucky Open Records Act was passed in 1976. In its preamble, the Act contained the recognition of the right of access as a 'fundamental and necessary right of every citizen in the Commonwealth of Kentucky.'

Jerome E. Wallace, Note, *Out of the Sunshine and into the Shadows: Six Years of Misinterpretation of the Personal Privacy exemption of the Kentucky Open Records Act*, 71 KENT. L. J. 853 (1982-83).

[37]5 U.S.C. app. § 10-11. This act regulates the establishment and procedures of federal advisory committees.

[38]5 U.S.C., § 552B. This Act requires public access to agency meetings.

[39]44 U.S.C., § 2204-2205. This Act regulates the management and custody of, and access to, presidential and vice-presidential records.

dealings, with an eye towards eliminating the threat of a "secret government," the undertakings and transactions of which are unknown to its people.[40] Apparently, the belief behind these legislative enactments is the theory that the free disclosure of information would lessen the tendency of public officials to commit abuses of their positions in furtherance of their own personal interests. If information regarding their transactions, decisions and reasons therefor is disseminated to the public, the fear of being caught and having their reputation tarnished, and the consequent lowering of the probability of re-election, might serve as effective deterrents to their committing any corrupt practice.

B. Theoretical and practical limits to the right of access

The constitutional right of access to information is primarily justified by the assertion that it is an integral component of freedom of expression; and freedom of expression is perceived to be an integral component of a democracy. Admittedly, even this simple series of assertions is somewhat problematic. C. Edwin Baker, for example, disagreed with the notion that the concept of a democracy necessarily implies the free flow of information to the sovereign body. Nothing in the concept of a democracy, he asserted, could possibly lead one to conclude that the public must be presented with all viewpoints and all alternatives in order to make decisions wisely. All that is essential for the functioning of a democracy is the people's "power of choice" — and, reduced to its simplest terms, this "power of choice" consists of the simple right to say "yes" or "no," which can be (and often is) exercised in ignorance.[41]

It is at this juncture that several questions emerge: by what standards is it possible to decide how much information is necessary for the democratic process to work? Is the right of access to information theoretically endless,[42] or can information be restricted without disastrously affecting the democratic

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[40]Department of Air Force v. Rose, 425 U.S. 352, 361 (1976).

[41]C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 29 (1989).

[42]Variations of these questions were asked by Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690, 723-724 (1984).

process, as Baker asserts?[43] What guidelines may be formulated in order to distinguish between what information is necessary for the democratic process, and what is not?

It may be argued, purely from a theoretical standpoint, that the right of access to information is without boundaries. If access to information is to be linked to the democratic decision-making process, then every piece of information that the government possesses can be linked to this process, since all information about the government and its workings may in theory be useful to help the public understand how the government works. No one seriously advocates the stand, however, that the public's interest in access to information is unconditional or unqualified. Even Patrick Henry and George Mason, two of the Founding Fathers of the United States, and the delegates to the Virginia Convention that were the most vocal advocates of the people's right to know, were united in the claim that information must not be divulged indiscriminately.[44] Apparently, there may be some compelling interest that can outweigh the public's right to know; in practice, there must be limits on this theoretically limitless right.

In the United States, the nine statutory exemptions present in the federal FOIA provide the primary legal bases for restricting the free flow of information to the public. In addition, both the U.S. Executive Branch and the U.S. Supreme Court have restricted access to information, using a line of reasoning analogous to their restrictions on freedom of speech. The prior restraint on the free dissemination of information has usually been justified on the theory that there may be some compelling interest that warrants the interference with the public interest in receiving information from and about the government. This is not to deny the right to know altogether, or to make the claim that the people's power of choice is satisfied when they are given the chance to simply affirm or deny something, without any substantive content thereto; but, apparently, the idealistic conception of a democracy can be satisfied even with the existence of government regulations to restrict the flow of information. The standards that have been developed for the regulation of

[43]BAKER, *supra* note 41.

[44]O'BRIEN, *supra* note 3, at 39.

speech and press, and of assembly and petition and association are applicable to the right of access to information, because all of these are cognate rights.[45]

1. Interests that justify the non-disclosure of information

a. National security

The U.S. Executive Branch has restricted the free flow of information mainly in the interests of national defense and foreign policy,[46] two of the specific exemptions enumerated in the FOIA that justify the withholding of information.[47] This has rarely been challenged by the citizenry, who recognize that the very existence of their country would be at stake if such confidential information were to be released indiscriminately.

A classification system allows the executive branch to prevent access to information if the disclosure thereof might be harmful to these two national interests, which are perceived to be directly linked to national security.[48] Obviously, the public interest in national security is greater than the public interest in receiving information, even with the sweeping claim that democratic interests are best served when there is the free flow of information.

The current classification system in use in the United States, which divides and restricts information based on the perceived potential damage that would be caused by the disclosure thereof,[49] gives the executive branch broad

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[45] JOAQUIN BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 333 (1996).

[46] Patti Goldman, *Combatting the Opposition: English and United States Restrictions on the Public Right of Access to Governmental Information*, 8 HASTINGS INT'L & COMP. L. REV. 249, 282 (1985).

[47] 5 U.S.C. § 552(b)(1)(A) (1976).

[48] Fein, *supra* note 10, at 810-815. Fein concluded that the government's interests in the areas of national defense and foreign policy were fostered by a policy of selective non-disclosure.

[49] The current classification system, based on an Executive Order issued by Reagan, defines "national security" as the national defense or foreign relations of the United States, and provides three levels of classification for information: "top secret" information, "the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security;" "secret" information, "the unauthorized disclosure of which could be expected to cause serious damage to the national security;" and "confidential" information, "the unauthorized disclosure of which reasonably could be expected to cause damage to the national security." Exec. Order No. 12, 356, 3 C.F.R. 166

discretion in classifying information, and in deciding what information to withhold and what to reveal. Therein lies the greatest potential threat to the free flow of information from the government to the public. Because the executive branch both establishes the criteria for classification, and performs the actual classification of such information, the exceptions regarding national defense and foreign policy could actually become license for the unrestrained withholding of information. One potential danger is "overclassifying" information, that is, classifying information for reasons other than national security — such as to hide errors in judgment[50] — which impairs the constitutional values of the first amendment, without furthering thereby the interests of the government. Also impaired is the fact that the restriction on the flow of information might prevent citizens from maintaining the vigilant scrutiny of public officials, another value that the right of access to information promotes.

b. Efficiency

Interests in the efficient bureaucratic operations of the government may interfere with the free exercise of the right of access. The government may wish to continue functioning with as little interference as possible, and requests for information may impede the efficiency of the normal day-to-day operations of the government. In this regard, regulations concerning the time, place, and manner of access to information, while they may promote bureaucratic efficiency, may in fact impede the exercise of the right of access.[51] The exemptions provided in the FOIA have been construed to justify the withholding of information in order to avoid unnecessary interference with the normal operation of the governmental system.

Further, the government may withhold information on the claim that public access thereto will destroy the confidentiality that is necessary to certain aspects of governing.[52] For example, unrestricted access to government-held information may conflict with the rights of other persons being governed, such

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(1983), cited by Fein, *supra* note 10, at 807.

[50]Goldman, *supra* note 46, at 278.

[51]Dockry, *supra* note 26, at 335.

[52]*Id.*

as the rights that pertain to a person's life and liberty. If disclosure would interfere with the due process of law, then the right of access should be tempered to the extent that a person will be allowed fair and just adjudication proceedings.[53]

Interests in efficiency are also raised when members of government agencies, mindful that their statements may be exposed to public scrutiny, hesitate to volunteer points of view at meetings records of which may be viewed at any time, for fear of what the public's reaction to their statements might be. Thus, the spontaneous flow of ideas would be curtailed, because of fear of the public's perception; a "chilling effect" might be experienced by the governmental agencies, whose members may no longer feel the complete freedom necessary to candidly express their opinions. This in turn may lead to the inefficient functioning of the agency concerned.

The "chilling effect" might also extend to the withholding of information from the government because of fear of being embarrassed by the threat of publicity due to the indiscriminate grant of requests for disclosure. Such information may be necessary in the formulation, by the government, of decisions that are responsive to the needs of the people in general. Hence, in the interests of a wide-ranging and open dialogue between the government and its people, the right of access to information may have to be curtailed. The "chilling effect" argument has thus been raised to justify withholding of the identity of informers,[54] to protect the secrecy surrounding the decision-making conferences of the judiciary,[55] and to preserve the confidentiality of grand jury investigations.[56]

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[53]" This section does not apply to matters that are —

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would... (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, ... or (F) endanger the life or physical safety of law enforcement personnel;" 5 U.S.C. § 552(b)(7) (1976).

[54]Dockry, *supra* note 26, at 336.

[55]*Id.*

[56]*Id.*

The asserted privilege of confidentiality by government entities, in the interests of the efficient functioning thereof, must however fail when it threatens to short-circuit rather than facilitate the democratic process.[57] If the non-disclosure of information renders nugatory the public's constitutional role as a participant in the governmental process, and as a check upon the government's abuses, then the right of access to information must take precedence over the efficient functioning of the government.

c. Privacy

One other important limitation to the right of access to information is the right to privacy of individuals. In the United States, for example, there exists a strong presumption in favor of public access to judicial records; but even when the presumption of public access applies, it may still be overcome by the privacy rights of third parties, and items of evidence may be sealed or otherwise prevented from being revealed to the public or the media.[58]

Privacy rights of third persons are a compelling interest that frequently justifies the rejection of a request for information. The government has access to information of every conceivable nature, and this may in fact threaten the autonomy of the individual citizen. If personal information in the hands of the government is made freely accessible to the public, the private citizen may lose all control over the identity he or she wishes to preserve.[59] One of the consequences of this situation could be the already mentioned "chilling effect," a refusal to cooperate in any way with any information-gathering scheme of the government, even if the program is for policy-making for their benefit. Eventually, citizens would be hesitant, if not resolute, in refusing to volunteer any information that pertains to them.

An exemption present in the FOIA protects the right to privacy by justifying the non-disclosure of information in the hands of the government if such would not serve any public purpose at all, or if the private interest in non-disclosure outweighs the public interest in the release of information.

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[57] *Id.* at 337.

[58] Goldman, *supra* note 46, at 296.

[59] *Id.*

However, because the FOIA is a disclosure statute, any doubt about whether or not the privacy interest outweighs the public interest should be resolved in favor of release of information. The refusal to grant the application for disclosure would be warranted only if there were a strong amount of evidence showing that the release of the information would produce such harmful effects to the private individual that this result would be deemed more important than allowing the release of such information for the public's benefit. The invasion into the privacy of a private individual must be clearly unwarranted,[60] and so offensive as to merit the protection of that individual at the expense of the public's right to the information.

2. Judicial tests concerning the right of access

Litigation over the scope of First Amendment rights has succeeded in securing for individuals the standing to challenge the withholding of information by the government.[61] Whereas there has yet to be judicial recognition of an independent listener's right to receive information,[62] the judiciary, based on the system of checks and balances, has been given the discretion to examine the system of governmental secrecy, to review whether or not the system is overbroad.[63] This process of review has significantly broadened the scope of information that may be accessible to the public, and has resulted in a number of tests to determine whether or not a right of access to information exists.

First of these is a two-prong test, resting on a "historical tradition of openness" and on "contribution to function."[64] This test traces its roots to Justice Brennan's concurring opinion in *Richmond Newspapers*, which became the foundation for subsequent decisions in the area of the right of access. Justice Brennan based the right of access to government-controlled information squarely on the political theory of the first amendment. Because,

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[60]5 U.S.C. § 552(6) (1976).

[61]O'BRIEN, *supra* note 3, at 120.

[62]In other words, an individual may claim a right to receive information only after another individual seeks unsuccessfully to exercise the first amendment guarantee to disseminate information. *Id.* at 120-121.

[63]Cheh, *supra* note 42, at 730.

[64]Hayes, *supra* note 8, at 1116-1119.

like Meiklejohn, Brennan believed that an informed citizenry is necessary for a democracy to survive, he claimed that the first amendment must provide a right of access, in order to ensure that information in fact flows to the public. Brennan's guidelines stated that a right of access claim is stronger where there is a tradition of openness to the particular proceeding or information at issue; and he proposed that access be granted whenever it furthers the functioning or purposes of the particular process involved. Later cases elevated this test from "helpful principles" to the bases or necessary preconditions for a right of access to government-controlled information.[65]

Applications of the two-prong test, however, deviated from the idealistic principles outlined by Brennan, and reveal the flaws of this test when it is used as the sole standard for determining whether or not the public has a right of access to information. The two-prong test is somewhat problematic because it has been inconsistently applied. Great discretion is given to the judiciary in the determination of whether or not there has in fact been a historical tradition of openness, or whether or not the information sought contributes to the functioning of the proceeding in question. The main problem with the two-prong test is that as applied, there is really no logical link between this test and the First Amendment rationale underlying the right of access. The right of access determination should be based on the relevance of the information involved to the citizen's understanding of the functioning of their government.[66] The proxy criteria provided by the two-prong test serve no useful purpose, as they are not really linked to the citizen's capacity to promote self-governance, which is the main reason advanced for the constitutionally protected right to know.[67]

Of greater value than the two-prong test is the balancing test,[68] also used by the United States judiciary in determining whether or not a citizen has a right of access to information. Basically, the balancing test weighs the public's interest in obtaining particular information against the government's interest in refusing to provide it. Unlike the two-prong test, the balancing test

[65] *Id.* at 1119.
[66] *Id.* at 1123-26; 1130-36.
[67] *Id.* at 1130.
[68] *Id.* at 1126.

already stems from the presumption that there is a pre-existing right of access to government-controlled information, which right attaches regardless of the history of openness. Hence, the right can be denied only if it is outweighed by some governmental interest.

The balancing test is more consistent with the theoretical framework outlined above, in that it recognizes a constitutionally protected first amendment right, while still taking into account contemporary values and conditions. It properly focuses the reviewing court's inquiry on the political rationale of the right of access, which is, as we have stated, a theoretically limitless right. Under the balancing test, the limiting variable on the right of access is not an arbitrary factor like historical tradition, but rather the information's relevance to public debate and self-governance. If the information involved would do little to enhance public understanding of the workings of government or of an important public issue, then the government's countervailing interest in limiting access need not be very strong. If, on the other hand, the information does bear on the citizen's ability to make informed political decisions, then a strong governmental interest is needed to offset the right of access.

The problem with these tests, however, as they have actually been used and developed by the courts, is that they still leave too much room for ambiguity as regards the actual limits of the right to information; there is still a certain amount of confusion as regards what the right does and does not include. In this regard, Cheh suggests a shift of focus as regards freedom of information claims; instead of basing them on an assertion of First Amendment rights, Cheh suggests that a stronger legal foundation would be to base the right of access on the due process guarantee of open process, in order to check against the arbitrary secrecy regarding government institutions. In essence, Cheh argues, the fundamental value in access to information is not to ensure a better-working democracy, but to protect the public against arbitrary government action. Hence, the right of access must be based not so much "on a desire to know what is going on so that the citizenry can vote approval or disapproval or otherwise practice democracy; rather, it is more a desire to acquire information in order to stop improper governmental behavior or, by

public scrutiny, prevent it from ever occurring."[69] This public scrutiny, based on the due process clause, would suggest natural limits on the right of access, which would thus be confined to areas in which the government operates directly and coercively on individuals.[70]

III. THE PHILIPPINE CONTEXT

A. Constitutional bases for the right to know in the Philippines

Unlike the United States, the Philippine Constitution has a specific provision that recognizes a separate right of access to information held by the government. In order to understand the scope and limits of this constitutional provision, it is helpful to inquire into the historical evolution of the right of access, both in terms of constitutional tradition and in terms of the judicial interpretation of the right.

1. The 1935 Constitution

The 1935 Constitution did not recognize a separate right of access to information, although a right to freedom of expression was already existent, the wording of which reveals the obvious influence of the U.S. Constitution's First Amendment

> Article III, Section 8. No law shall be passed abridging the freedom of speech, of the press, or of the right of the people peaceably to assemble and petition the government for redress of grievances.

In interpreting this right to free speech, Philippine jurists proved as reluctant as their American counterparts to come to the conclusion that this right implicitly conferred a right of access to information. Indeed, in the 1948 case of *Subido v. Ozaeta*,[71] the Supreme Court explicitly stated that the right of

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[69]Cheh, *supra* note 42, at 732.

[70]*Id.*

[71]80 Phil. 383 (1948).

access to information was not constitutionally recognized. Even if freedom of the press was involved, as it was in *Subido*, this was still not sufficient justification for recognizing the right of access to public records and matters of public concern. Stated the court:

> The petition in part is grounded on the liberty of the press. We do not believe that this constitutional right is in any way involved. The refusal by the respondents does not constitute a restriction upon or censorship of publication. It only affects facilities of publication, and the respondents are correct in saying that *freedom of information or freedom to obtain information for publication is not guaranteed by the constitution.* (emphasis supplied)[72]

The Court eventually granted access to the information desired, but it was on statutory, and not constitutional, grounds.[73]

Justice Briones' separate opinion in *Subido* is of value in the study of historical tradition behind the right of access in the Philippines. Justice Briones concurred with the majority insofar as the Court granted the petitioner access to the information sought, but further asserted that press freedom necessarily includes the right of access to information:

> *Se dice, sin embargo, que esa prohibicion nada tiene que ver con la libertad de imprenta. Pero pregunto: ¿de que le sirve a la prensa la libertad si, por otro lado, se le niegan los instrumentos para ejercer esa libertad, se le cierran las fuentes publicas de informacion — fuentes que son de vida o muerte para la prensa, pues de ellas mismas dimana y fluye el jugo esencial de su existencia?*[74]

The Briones opinion thus provided the first glimmers of the reality that access to information is part of the system of freedom of expression. In terms of situating the right to know within a broader theoretical framework, later decisions cited the Briones opinion.[75]

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[72]Subido v. Ozaeta, 80 Phil. 383, 386 (1948).

[73]Act No. 496 (1902), sec. 56 provides that "All records and papers relating to registered land in the office of the register of deeds shall be open ...."

[74]80 Phil. 383, 394 (1948).

[75]*See*, for example, Baldoza v. Dimaano, A.M. No. 1120-MJ, 5 May 1976, 71 SCRA 14, 18-19.

Interestingly enough, in the same year that the *Subido* case was decided, the Supreme Court held in *In Re: Parazo*[76] that a newspaper reporter could not validly withhold his sources of information from the public, when the interests of the State demanded that the sources of such information be revealed. Angel J. Parazo, a reporter for the *Star Reporter*, wrote a news article concerning an alleged leak in the questions of the bar examinations, and refused to reveal the confidential sources of his information, invoking press immunity under section 1 of Republic Act No. 53, which provided that the "publisher, editor or duly accredited reporter of any newspaper, magazine or periodical of general circulation" could not be "compelled to reveal the source of any news-report or information appearing in said publication which was related in confidence to such publisher, editor or reporter, unless the court or a House or committee of Congress finds that such revelation is demanded by the interest of the state."

In holding Parazo guilty of contempt of court for his continued refusal to reveal the sources of his information, the Supreme Court declared that the public had a very strong interest in knowing the information that Parazo possessed, since the integrity of the entire legal profession was at stake. Hence, the Court declared that the phrase "interest of the state" was not merely confined to matters of national security, but also included

> cases and matters of national importance in which the whole state and nations, not only a branch or instrumentality thereof such as a province, city or town, or a part of the public, is interested or would be affected, such as the principal functions of Government like administration of justice, public school system, and such matters like social justice, scientific research, practice of law or of medicine, impeachment of high Government officials, treaties with other nations, integrity of the three coordinate branches of the Government, their relations to each other, and the discharge of their functions, etc.[77]

In the *Parazo* case, we therefore see that the Court could validly demand information from the members of the press, who are private individuals, upon determination that the "interests of the state" so warranted,

[76]82 Phil. 230 (1948).
[77]82 Phil. 230, 241 (1948).

with the phrase being given the broad definitional interpretation that the Court provided.

2. The 1973 Constitution

It was not until the 1973 Constitution that the explicit recognition of the right of access to information[78] first appeared in the Philippines. The 1973 constitutional provision on access to information reads thus:

> Article IV, Section 6. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, shall be afforded the citizen subject to such limitations as may be provided by law.

As originally worded, the Constitutional provision simply stated that access to official records and the right to information "shall be afforded the citizens as may be provided by law." It was pointed out, however, that the proposed provision did not grant a self-executory right to citizens, but still required implementation by statute. After deliberation, the provision was reworded so that the Constitution itself would give the right, subject to statutory limitations provided by the National Assembly. The final provision took into account this suggestion.[79] Hence, the 1973 Constitution expressly gave the State and its agents the duty to afford access to official records, documents, and papers, subject only to limitations provided by law.

The significance of the express constitutional recognition of the right of access to information may be seen in the light of the previous discussion on the right to know in the United States. American jurists and scholars to date have been most reluctant in deciding that the first amendment includes an affirmative right of access to information; three and a half decades passed before there was judicial recognition of the constitutional right to know that the members of the press had been clamoring for since the 1940s. Whereas

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[78]This was in addition to the right of free speech, section 9 of the bill of rights, which retained the 1935 text.

[79]The suggestion was made by Commissioner De la Serna at the Meeting of the 166-Man Special Committee on November 16, 1972. Quoted by BERNAS, *supra* note 45, at 333-334.

statutory recognition of the right to know came with the passage of the Federal Freedom of Information Act in 1966, a constitutionally protected right was not recognized until the *Richmond* case in 1980.

The first, and most obvious, implication of a separate constitutional provision is simple: in the Philippines, there is no need to search for an elaborate legal basis, or theoretical justification, for the assertion of the right to know. Whereas, in deciding right-to-know cases on the basis of the First Amendment, the United States Supreme Court needed to go into the underlying principles for the establishment of a democratic society, and the role that information plays in creating an informed voting populace, in the Philippines, the existence of the provision precludes the need to seek justification elsewhere from black letter law. Further, the First Amendment only indirectly and derivatively ensures the public's right of access; in the Philippines, the direct and explicit recognition thereof makes the public's claims to information stronger than in the United States.[80]

Despite the fact that there is no further need to search for elaborate theoretical justifications for the right of access to information, both constitutional scholars and the Supreme Court itself consistently felt the need to situate this right within a broader theoretical paradigm. Apparently, in the perception of these scholars and jurists, the right to know cannot be viewed in isolation, but can only properly be understood in relation to the other rights that the Constitution provides.

For example, in spite of the Supreme Court's firm assertion in *Subido* that press freedom and access to information were in no way linked, Justice Fernando's analysis of the new right of access to information situated this right

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[80]In commenting on the right to know claim, Mary M. Cheh observed that it may take on two forms. The first, weak form is based on the conventional first amendment argument that limitations on free expression are more serious if, in addition to affecting an individual's rights, they limit the stock of ideas available to the public. The second, strong form of the right to know argument focuses on an independent public right of access to governmental information, and imposes an affirmative governmental obligation to disclose. This form of claim is stronger because it posits a right to receive information which the government may be unwilling to share. Cheh, *supra* note 42, at 719-720. In the Philippines, by virtue of the constitutional provision, right to information claims take on this second, stronger, form.

within the broader paradigm of the right to free expression. He stated that the public has a "legitimate interest in matters of social significance. News concerning them may be yielded by state papers and documents. They should be made available to representatives of the press, including all forms of mass media."[81]

The Supreme Court went beyond the understanding of the link between press freedom and access to information, and, consistently with Emerson and Meiklejohn's theoretical assertions, held that the right to know plays an important role within a democratic society. The earliest case involving this new constitutional right is the 1976 case of *Baldoza v. Dimaano*.[82] In that case, the Municipal Secretary of Taal, Batangas, charged Municipal Judge Rodolfo B. Dimaano with abuse of authority in refusing to allow employees of the Municipal Mayor to examine the criminal docket records of the Municipal Court to secure data in connection with their contemplated report on the peace and order situation in the said municipality. The Supreme Court emphasized that the right to know plays a significant role in the democratic decision-making process. "Undoubtedly," wrote the Court, "in a democracy, the public has a legitimate interest in matters of social and political significance."[83] Further, the Court stated:

> The New Constitution now expressly recognizes that the people are entitled to information on matters of public concern and thus are expressly granted access to official records, as well as documents of official acts, or transactions, or decisions, subject to such limitations imposed by law... The incorporation of this right in the Constitution is a recognition of the fundamental role of free exchange of information in a democracy. There can be no realistic perception by the public of the nation's problems, nor a meaningful democratic decision making if they are denied access to information of general interest. Information is needed to enable the members of society to cope with the exigencies of the times.[84]

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[81]ENRIQUE M. FERNANDO, THE CONSTITUTION OF THE PHILIPPINES 596 (1974).
[82]A.M. No. 1120-MJ, 5 May 1976, 71 SCRA 14.
[83]A.M. No. 1120-MJ, 5 May 1976, 71 SCRA 14, 18.
[84]A.M. No. 1120-MJ, 5 May 1976, 71 SCRA 14, 19.

Recognition of the role of the free flow of information in a democratic society is significant because the scope of the right to know is considerably broadened thereby. Hence, in interpreting the limitations to the right of access, the Court in *Baldoza* held that public officers in custody or control of public records do not have the authority to prohibit their examination; all that they may reasonably regulate is the *manner* in which such public records are examined, with respect to who, when, where, and how they are to be inspected.

In the 1981 case of *Lantaco Sr. v. Llamas*,[85] the Court reiterated its declaration that access to public records is

> predicated ... on the right of the people to acquire information on matters of public concern in which the public has a legitimate interest. While the public officers in custody or control of public records have the discretion to regulate the manner in which such records may be inspected, examined or copied by interested persons, such discretion does not carry with it the authority to prohibit such access, inspection, examination, or copying.[86]

Thus, on the basis of this, the Supreme Court found the respondent judge guilty of grave abuse of authority in refusing to give the petitioners a copy of his decision in four criminal cases in which they were the complaining witnesses.

Another significant case decided by the Supreme Court under the 1973 Constitution is *Tañada v. Tuvera*,[87] in which the petitioners invoked their right to be informed on matters of public concern, in conjunction with the statutory requirement that laws to be valid and enforceable must be published in the *Official Gazette* The *Tañada* case is significant for two reasons: first, it firmly established the fact that *any* citizen of the Philippines may invoke the public's right to information, regardless of whether or not he has a specific interest in the information sought; and, second, it linked the right to know with the right to due process, at least insofar as the information sought is

[85]A.M. No. 1037-CJ, 28 October 1981, 108 SCRA 502.
[86]A.M. No. 1037-CJ, 28 October 1981, 108 SCRA 502, 508.
[87]G.R. No. L-40007, 23 October 1985, 136 SGRA 27.

a legislative or executive act having the force and effect of law.

The petitioners in *Tañada* sought a writ of mandamus to compel the respondent public officials "to publish and/or cause the publication in the *Official Gazette* of various presidential decrees, letters of instruction, general orders, proclamations, executive orders, letters of implementation, and administrative orders."[88] The respondents, on the other hand, questioned the legal standing or personality of the petitioners, since there was no showing that they were personally and directly affected or prejudiced by the alleged non-publication of the presidential issuances in question; hence, according to respondents, petitioners were not within the definition of "aggrieved parties" who could validly file a petition for mandamus under the Rules of Court. Ruling on this issue, the Court held that since the petitioners were all citizens, they had the legal personality to seek the enforceability of a public right, and could validly compel the performance of a public duty.[89] This case warrants an important conclusion regarding the existence of a separate constitutional provision that recognizes the right of access to information, with regard to the *standing* of individuals to assert this right. In the United States, only those who seek to disseminate information have the standing to assert the right to know under the first amendment.[90] The acknowledgment of the right to receive information exists only as a coordinate with each individual's right to free speech and press.[91] The U.S. Supreme Court's recognition of the right to information "extends only to protect the intended recipients of information from governmental interference with the voluntary dissemination of information, not to entitle public access to confidential governmental information."[92] Hence, the United States Supreme Court has thus far failed to recognize an independent "listener's right" — used in the sense that both Meiklejohn and Emerson used it — and have focused on the right only of the

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[88]G.R. No. L-40007, 23 October 1985, 136 SCRA 27, 33-34.

[89]G.R. No. L-40007, 23 October 1985, 136 SCRA 27, 33-34.

[90]Although only the speaker has standing to assert a first amendment right to information, the Freedom of Information Act asserts that access to information is not limited to persons with particular reasons for seeking disclosure; material is available to any person, and courts are precluded from considering the needs of the party seeking relief unless the information falls within the nine statutory exemptions, cited above.

[91]O'BRIEN, *supra* note 2, at 120-121.

[92]*Id.* at 121.

speaker to receive information that he intends to disseminate. In contrast, in the Philippines, both the speaker and the listener may have the independent standing to pursue a right to know claim. In fact, since the right to information is a public right, and the performance of the dissemination of information by governmental officials is a public duty, *any* citizen of the Philippines has the standing to assert this right, whether or not he has any specific interest in the information being sought.[93] Thus, in a wide variety of cases, the Supreme Court has recognized that, in the assertion of the public right to information, the mere fact that a person is a citizen, and hence part of the general "public" which possesses the right, gives him standing to compel government officials to perform their public duty of making such information available.[94] Commenting on the "public's right to know," the Court as far back as *Subido* stated that the word "public" is a "comprehensive, all-inclusive term" that "embraces every person,"[95] which thus gives *every* citizen the right to claim access to information.[96]

In the Philippines, therefore, there is a clear constitutional recognition of direct constitutional protection of the rights of the recipient of information. This becomes important, as recognized by Emerson,[97] in situations when the speaker is not in a position to assert his rights, or simply fails to take action to assert his right to information.

In the *Tañada* case, however, the Court decided that the requirement of publication in the *Official Gazette* applied only insofar as the presidential issuances concerned were "of a public nature" or "of general applicability." Only unpublished presidential issuances which were of general applicability

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[93]REYNALDO B. ARALAR, EXPLANATIONS ON THE 1973 CONSTITUTION OF THE PHILIPPINES 60 (1976).

[94]*See*, for example, Tañada v. Tuvera, G.R. No. L-40007, 23 October 1985, 136 SCRA 27; Legaspi v. Civil Service Commission, G.R. No. 72119, 29 May 1987, 150 SCRA 530; Garcia v. Board of Investments, G.R. No. 88637, 7 September 1989, 177 SCRA 374.

[95]Subido v. Ozaeta, 80 Phil. 383,397 (1948). The Court further said that "(t)o say that only those who have a present and existing interest of a pecuniary character in the particular information sought are given the right of inspection is to make an unwarranted distinction."

[96]Of course, a necessary corollary is that only citizens have the right to information on matters of public concern, considering the fact that information in the hands of aliens, who have no loyalty to the Republic of the Philippines, could be dangerous. ARALAR, *supra* note 93.

[97]Emerson, *supra* note 20, at 8.

were ordered to be published; the other presidential issuances, which applied only to particular persons or classes of persons, did not need publication, on the assumption that they were circularized to all concerned.[98] The publication of laws "of a public nature" or "of general applicability" was held to be "a requirement of due process" since it is "a rule of law that before a person may be bound by law, he must first be officially and specifically informed of its contents."[99] Further, the Court held in *Tañada* that the public officials concerned had *no discretion whatsoever* to decide what must be included or excluded from publication.[100]

In 1986, the Supreme Court had occasion to re-examine the *Tañada* case, and reiterated that the people's right to know under section 6 of the 1973 Constitution applied to legislative enactments. This time, however, the Supreme Court held that publication was a requirement for the effectivity of *all* laws, and not merely those of general applicability:

> The term "laws" should refer to all laws and not only to those of general applicability, for strictly speaking all laws relate to people in general albeit there are some that do not apply to them directly.... The subject of such law is a matter of public interest which any member of the body politic may question in the political forums or, if he is a proper party, even in the courts of justice. In fact, a law without any bearing on the public would be invalid as an intrusion of privacy or as class legislation or as an *ultra vires* act of the legislature. To be valid, the law must invariably affect the public interest even if it might be directly applicable only to one individual, or some of the people only and not to the public as a whole.[101]

In the second *Tañada* case, the Court once more recognized the place of access to information in a democratic society:

> The days of secret laws and unpublished decrees are over. This is once again an open society, with all the acts of the government subject to public scrutiny and available always to public cognizance. This has

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[98] Tañada v. Tuvera, G.R. No. L-40007, 25 October 1985, 136 SCRA 27, 39-42.

[99] G.R. No. L-40007, 25 October 1985, 136 SCRA 27, 39.

[100] G.R. No. L-40007, 25 October 1985, 136 SCRA 27, 39.

[101] Tañada v. Tuvera, G.R. No. L-63915, 29 December 1986, 146 SCRA 446, 453.

> to be so if our country is to remain democratic, with sovereignty residing in the people and all government authority emanating from them.
>
> Although they have delegated the power of legislation, they retain the authority to review the work of their delegates and to ratify or reject it according to their lights, through their freedom of expression and their right of suffrage. This they cannot do if the acts of the legislature are concealed.
>
> Laws must come out in the open .... [they] cannot be recognized as binding unless their existence and contents are confirmed by a valid publication intended to make full disclosure and give proper notice to the people.[102]

3. The 1987 Constitution

The present constitution has preserved the text of the 1973 Constitution, with the addition of the phrase "as well as to government research data used as basis for policy development:"

> Article III, Section 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

This amendment came as a reaction to the government practice during the martial law regime of withholding social research data from the knowledge of the public whenever such data contradicted policies which the government wanted to espouse;[103] the perception was that dispensation of information was "manipulated to serve the interests of the regime, to legitimize its policies and perpetuate the power of its leaders."[104] Hence, "government research data," that is, findings of

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[102]Tañada v. Tuvera, G.R. No. L-63915, 29 December 1986, 146 SCRA 446, 456.

[103]BERNAS, *supra* note 45, at 334.

[104]Commissioner Wilfredo Villacorta made this statement. 1 RECORD 709.

government-funded research, were included among the sources of information available to the public, for the reason that the people were perceived to have the right to know any data of which they themselves were the subjects. The findings of privately funded research, over which proprietary rights might exist, were, however, not included in the information to which the public had a right of access.[105] In certain limited situations, though, the framers of the 1987 Constitution conceded that even proprietary rights must give way to the public's right to know.[106] According to the writers of the Constitution, statutory limitations have reference primarily to the procedure whereby information is disseminated; there could be imposable limits on the *manner* of access, but limitations on *substance* should be open to further discussion.[107] This is consistent with the Supreme Court's rulings under the 1973 Constitution.

The leading case of *Legaspi v. Civil Service Commission*[108] provides interesting insights as regards the Supreme Court's interpretation of the right of access under the 1987 Constitution. Petitioner Legaspi invoked the right to information in a special civil action for mandamus to compel the Civil Service Commission to make available information regarding the civil service eligibilities of certain persons employed in the Health Department of Cebu City. In upholding Legaspi's right to the information that he requested, the Court reiterated the principle that government agencies were without discretion in refusing disclosure of, or access to, information of public concern. Reasonable regulations could be imposed by the agencies in custody of the public records, with regard to the manner in which the right to information may be exercised by the public; but the authority to regulate the manner of examining public records does not carry with it the power to prohibit access to records altogether. Said the Court:

> [W]hile the manner of examining public records may be subject

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[105] *Id.* at 708-709.

[106] In response to Mr. Villacorta's question as regards whether or not popular sovereignty and popular interest should prevail over proprietary rights of research, Fr. Bernas agreed that they should. *Id.* at 709.

[107] *Id.* at 677.

[108] G.R. No. 72119, 29 May 1987, 150 SCRA 530.

> to reasonable regulation by the government agency in custody thereof, the duty to disclose the information of public concern, and to afford access to public records cannot be discretionary on the part of said agencies. Certainly, its performance cannot be made contingent upon the discretion of such agencies. Otherwise, the enjoyment of the constitutional right may be rendered nugatory by any whimsical exercise of agency discretion.[109]

Legaspi thus laid down valuable guidelines in determining the availability of access to a particular public record. In every case, said the Court, the availability of access must be circumscribed by the nature of the information sought. A two-prong test was established by the Court with regard to the particular information sought, which must be (a) of public concern; and (b) not exempted by law from the operation of the constitutional guarantee.[110] In cases of denial of access, the government agency has the burden of showing that the information requested is not of public concern, or, if it is of public concern, that it has been exempted by law from the operation of the guarantee.[111] In determining exactly what was meant by "public concern," however, the Court declined to give a clear-cut definition, stating instead:

> In determining whether or not a particular information is of public concern there is no rigid test which can be applied. "Public concern" like "public interest" is a term that eludes exact definition. Both terms embrace a broad spectrum of subjects which the public may want to know, either because these directly affect their lives, or simply because such matters naturally arouse the interest of an ordinary citizen. In the final analysis, it is for the courts to determine in a case by case basis whether the matter at issue is of interest or importance, as it relates to or affects the public.[112]

Of further importance in *Legaspi* is the Court's explicit recognition that the public's right to know is self-executing, and needs no further

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[109]G.R. No. 72119, 29 May 1987, 150 SCRA 530, 539.
[110]G.R. No. 72119, 29 May 1987, 150 SCRA 530, 540.
[111]G.R. No. 72119, 29 May 1987, 150 SCRA 530, 540-541.
[112]G.R. No. 72119, 29 May 1987, 150 SCRA 530, 541.

implementing legislation. In contrast to the United States, where there was the need for the enactment of a statute in order to give tangibility to the political ideal of the public's right to know, in the Philippines, the legislature is given the very limited role of placing limitations on the right. Thus, the Court declared:

> These constitutional provisions are self-executing. They supply the rules by means of which the right to information may be enjoyed (Cooley, A Treatise on the Constitutional Limitations 167 [1927]) by guaranteeing the right and mandating the duty to afford access to sources of information. Hence, the fundamental right therein recognized may be asserted by the people upon ratification of the constitution without need for any ancillary act of the Legislature. (*Id.* at p. 165) What may be provided for by the Legislature are reasonable conditions and limitations upon the access to be afforded which must, of necessity, be consistent with the declared State policy of full public disclosure of all transactions involving public interest (Constitution, Art. II, Sec. 28). However, it cannot be overemphasized that whatever limitation may be prescribed by the Legislature, the right and duty under Art. III, Sec. 7 have become operative and enforceable by virtue of the adoption of the New Charter.[113]

There is no need for implementing legislation because, as pointed out by Bernas, what the Constitution really recognized is a single right, that is, the right to information. The second sentence thus merely implements and clarifies the first.[114]

The case of *Valmonte v. Belmonte*[115] provides the first application of the two-prong test set forth in *Legaspi* for the determination of whether or not the public could demand access to information. The information sought by the petitioners in *Valmonte* was the truth of reports that certain Members of the Batasang Pambansa belonging to the opposition were able to secure "clean" loans from the Government Service Insurance System (GSIS) immediately before the 1986 election through the intercession of former First Lady Imelda R. Marcos. Citing the public nature of the loanable funds of the GSIS and the

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[113]G.R. No. 72119, 29 May 1987, 150 SCRA 530, 534-535.

[114]BERNAS, *supra* note 45, at 334.

[115]G.R. No. 74930, 13 February 1989, 170 SCRA 256.

public office held by the alleged borrowers, the Court held that the information sought was "clearly a matter of public interest and concern."[116] The Court further held that the respondents failed to identify any law granting the GSIS the privilege of confidentiality as regards the subject matter of the petition.[117] Apparently, therefore, the public's right to information may be asserted even against government-owned and controlled corporations.

One more point is of value in analyzing *Valmonte*: the Supreme Court linked the right of access to information not only with the workings of the democratic process, but with the new Constitutional policies of full public disclosure of all transactions involving public interest, and honesty in the public service. Said the Court:

> An informed citizenry with access to the diverse currents in political, moral and artistic thought and data relative to them, and the free exchange of ideas and discussion of issues thereon, is vital to the democratic government envisioned under our Constitution. The cornerstone of this republican system of government is delegation of power by the people to the State. In this system, governmental agencies and institutions operate within the limits of the authority conferred by the people. Denied access to information on the inner workings of government, the citizenry can become prey to the whims and caprices of those to whom the power had been delegated. The postulate of public office as a public trust, institutionalized in the Constitution (in Art. XI, Sec. 1) to protect the people from abuse of governmental power, would certainly be mere empty words if access to such information of public concern is denied, except under limitations prescribed by implementing legislation adopted pursuant to the Constitution.
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> Petitioners are practitioners in media.... For them, the freedom of the press and of speech is not only critical, but vital to the exercise of their professions. The right of access to information ensures that these freedoms are not rendered nugatory by the government's monopolizing pertinent information. For an essential element of these freedoms is to keep open a continuing dialogue or process of communication between the government and the people. It is in the interest of the State that the channels for free political discussion be maintained to the end that the

[116]G.R. No. 74930, 13 February 1989, 170 SCRA 256, 268.
[117]G.R. No. 74930, 13 February 1989, 170 SCRA 256, 268.

> government may perceive and be responsive to the people's will. Yet, this open dialogue can be effective only to the extent that the citizenry is informed and thus able to formulate its will intelligently. Only when the participants in the discussion are aware of the issues and have access to information relating thereto can such bear fruit.
>
> The right to information is an essential premise of a meaningful right to speech and expression. But this is not to say that the right to information is merely an adjunct of and therefore restricted in application by the exercise of the freedoms of speech and of the press. Far from it. The right to information goes hand-in-hand with the constitutional policies of full *public disclosure* and *honesty in the public service.* It is meant to enhance the widening role of the citizenry in governmental decision-making as well as in checking abuse in government.[118]

Apparently, therefore, the constitutional recognition of the people's right to be informed is further enhanced by the following constitutional provisions:

> Article II, Section 28. Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest.
>
> Article XI, Section 1. Public office is a public trust. Public officers and employees must at all times be accountable to the people, serve them with utmost integrity, loyalty, and efficiency, act with patriotism and justice, and lead modest lives.

The policy of full public disclosure, in particular, which is new to the 1987 Constitution, complements the right of access to information found in the bill of rights. If the right to information guarantees the right of the people to demand information, this provision recognizes the duty of public officials to give information, even if nobody demands it.[119] Other constitutional provisions, scattered throughout the Constitution, further supplement the policy of transparency espoused by the 1987 Constitution.[120]

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[118]G.R. No. 74930, 13 February 1989, 170 SCRA 256, 265-266.

[119]BERNAS, *supra* note 45, at 93.

[120]The 1987 Constitution has other provisions which are further indicative of the policy of transparency, as the Court recognized in *Valmonte.* These are:

Cases decided under the 1987 Constitution saw a further clarification of the types of information that the public could validly demand access to. For example, in *Garcia v. Board of Investments*,[121] the Supreme Court held that the right to know can be asserted against government agencies. Certain documents filed with the Board of Investments were requested by the petitioner. In granting his request, the Court however held that the petitioner's right of access was not absolute; trade secrets and confidential, commercial, and financial information, and matters affecting national security, are exempt from the privilege.[122] Later, in *Aquino-Sarmiento v. Morato*,[123] the Court held that the decisions of the Movie and Television Review and Classification Board, and even the individual voting slips that were accomplished by the members pursuant to their official functions, could be opened for inspection because they were public in character. In *Perez v. Alpuerto*,[124] the court found the respondent Judge guilty of dereliction of duty and improper conduct bordering on oppression for his failure to give the complainant a copy of the dismissal order and minutes of the proceedings of a case.

A recently decided case, *Chavez v. Presidential Commission on Good Government*,[125] is a good summary of Philippine jurisprudence regarding the public's right to information, including the possible limits to be placed

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Art. VII, Sec. 12. In case of serious illness of the President, the public shall be informed of the state of his health. The members of the cabinet in charge of national security and foreign relations and the Chief of Staff of the Armed Forces of the Philippines shall not be denied access to the President during such illness.

Art. XI, Sec. 17. A public officer or employee shall, upon assumption of office and as often thereafter as may be required by law, submit a declaration under oath of his assets, liabilities, and net worth. In the case of the President, the Vice President, the Members of the Cabinet, the Congress, the Supreme Court, the Constitutional Commissions and other constitutional offices, and officers of the armed forces with general or flag rank, the declaration shall be disclosed to the public in the manner provided by law.

Art. XII, Sec. 21. Foreign loans may only be incurred in accordance with law and the regulation of the monetary authority. Information on foreign loans obtained or guaranteed by the Government shall be made available to the public.

[121]G.R. No. 88637, 7 September 1989, 177 SCRA 374.

[122]G.R. No. 88637, 7 September 1989, 177 SCRA 374, 384.

[123]G.R. No. 92541, 13 November 1991, 203 SCRA 515.

[124]A.M. No. MTJ-88-173, 16 August 1991, 200 SCRA 591.

[125] G.R. No. 130716, 9 December 1998.

thereon. The unique feature of the *Chavez* case is that the Court, for the first time, had occasion to pass on whether or not the right to information extended to government negotiations that had not yet been consummated or concluded. In other words, the Court was called upon to decide on the precise scope of the "official records...documents, and papers pertaining to official acts, transactions, or decisions," as described by article III, section 7, and of the correlative duty to reveal these public transactions as found in article II, section 28.

Petitioner Chavez sought access to the proposed terms of a compromise agreement to be entered into between the government and the Marcos heirs as regards their alleged ill-gotten wealth, even if these proposed terms and conditions had not yet been the subject of a final agreement between the parties. Specifically, Chavez sought information as regards "*all* negotiations and agreement, *be they ongoing or perfected*, and all documents related to or relating to such negotiations and agreement between the PCGG and the Marcos heirs." (emphasis supplied)

In granting the petition, the Court, invoking *Tañada* and *Legaspi*, held that Chavez had sufficient standing to file suit, as he was a Filipino citizen seeking the enforcement of a public right. Applying the two-prong test set forth in *Legaspi*, the Court held that the question as regards the recovery of the alleged ill-gotten wealth of the Marcoses, is, by its very nature, public in character; therefore the petitioner had the right to disclosure of any agreement that would be arrived at concerning the alleged money. In speaking of the limitations imposed by law, the Court acknowledged that there are no specific laws prescribing the exact limitations within which the right may be exercised or the state duty may be obliged. However, some of the recognized restrictions are: (1) national security matters; (2) trade secrets and banking transactions; (3) criminal matters; and (4) confidential information.

Most interestingly, the Court held that not only the final agreement, but also ongoing negotiations or proposals prior to the final agreement, could be demanded from the government, provided that the above-mentioned tests were adequately met. Said the Court:

> Considering the intent of the framers of the Constitution, we believe

> that it is incumbent upon the PCGG and its officers, as well as other government representatives, to disclose sufficient public information on any proposed settlement they have decided to take up with the ostensible owners and holders of ill-gotten wealth. Such information, though, must pertain to definite propositions of the government, not necessarily to intra-agency or inter-agency recommendations or communications during the stage when common assertions are still in the process of being formulated or are in the "exploratory" stage. There is a need, of course, to observe the same restrictions on disclosure of information in general, as discussed earlier — such as on matters involving national security, diplomatic or foreign relations, intelligence and other classified information.

Thus, while defining limits to the right of access to information, the Court simultaneously expanded the understanding of that right, to include even government transactions, public in character, that were not yet effective and binding.

On the other hand, the closely linked cases of *Sanidad v. Commission on Elections (COMELEC)*[126] and *National Press Club v. Commission on Elections*[127] are significant insofar as they both perceive the right to information as being a component of free speech. Both cases assailed the constitutionality of legislation that limited the use of mass media to disseminate election-related information. In *Sanidad*, what was assailed was a COMELEC Resolution that prohibited columnists, commentators, or announcers from using their columns to campaign for or against the plebiscite ratifying the establishment of the Cordillera Autonomous Region. Finding the questioned provision of the COMELEC Resolution unconstitutional, the Court said:

> Plebiscite issues are matters of public concern and importance. The people's right to be informed and to be able to freely and intelligently make a decision would be better served by access to an unabridged discussion of the issues, including the forum. The people affected by the issues presented in a plebiscite should not be unduly burdened by restrictions on the

[126]G.R. No. 90878, 29 January 1990, 181 SCRA 529.

[127]G.R. No. 102653, 5 March 1992, 207 SCRA 1.

> forum where the right to expression may be exercised. COMELEC spaces and COMELEC radio time may provide a forum for expression but they do not guarantee full dissemination of information to the public concerned because they are limited to either specific portions in newspapers or to specific radio or television times.[128]

Although *Sanidad* was not explicitly about demanding information held by the government, reference was made to the public's right to be informed, and the place of this right in a democracy, a concept that already had a long tradition of judicial recognition. The implication of *Sanidad* is that even the limitations placed by law on the right to information can be declared unconstitutional if the public interest so warrants.

In *National Press Club v. Commission on Elections*, the petitioners questioned the constitutionality of section 11(b) of Republic Act No. 6646, which provided for the supervision and regulation by the Commission on Elections of the enjoyment or utilization of the franchises or permits for the operation of media of communication and information. The Court in that case held that the assailed provision was perfectly valid, despite the restrictions that it placed on both the freedom of expression and the people's right to be informed during election. The Court explained that the questioned provision serves as an "equalizer" between candidates who had the financial resources to purchase large amounts of air time, and the less affluent candidates, who did not. Said the Court:

> Section 11 (b) does *not* cut off the flow of media reporting, opinion or commentary about candidates, their qualifications and platforms and promises. Newspaper, radio broadcasting and television stations remain quite free to carry out their regular and normal information and communication operations. Section 11 (b) does *not* authorize any intervention and much less control on the part of the COMELEC in respect of the *content* of the normal operations of the media, nor in respect of the *content* of political advertisements which the individual candidates are quite free to present within their respective allocated COMELEC time and COMELEC space ....

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[128]Sanidad v. Ozaeta, 80 Phil. 383, 535 (1948).

> Section 11 (b) does, of course, limit the right of free speech and of access to mass media of the candidates themselves. The limitation, however, bears a clear and reasonable connection with the constitutional objective set out in Article IX(C) (4) and Article II (26) of the Constitution. For it is precisely in the unlimited purchase of print space and radio and television time that the resources of the financially affluent candidates are likely to make a crucial difference.... That the statutory mechanism which Section 11 (b) brings into operation is designed and may be expected to bring about or promote equal opportunity, and equal time and space, for political candidates to inform all and sundry about themselves, cannot be gainsaid.[129]

For purposes of understanding the right to information, the *National Press Club* case is significant for three reasons. First, the Court recognized once again that information is essential in a democratic society; and, apparently, this information is not limited to that which the government possesses. Second, the Court allowed the limitations on the free flow of information because such limitations were merely procedural, and not substantive in nature; hence in the eyes of the Court, no censorship was involved. Finally, the case is of value insofar as it provides a guiding principle for determining the scope of allowable statutory limitations on the right to access. The Court applied a balancing test, weighing both the public's right to freedom of expression and the public's right to information, against the public interest in a clean and orderly election. Ultimately, the public's immediate interest in maintaining an orderly election outweighed the other rights.

4. Conclusions

The cases decided by the Supreme Court warrant the following conclusions about the people's constitutional right of access to information:

(1) Access to government-held information is inextricably linked to the democratic decision-making process.

(2) Any citizen of the Philippines has the standing to demand its enforceability, even without showing his specific

[129] G.R. No. 102653, 5 March 1992, 207 SCRA 1,13-14.

interest in the information sought, because the right of access is a public right.

(3) It is a self-executory right, without need for implementing legislation; the role of the Legislature is simply to set limits on this right. These limits, however, must be only with regard to the manner of access; the subject matter of the information cannot be regulated.

(4) Access to information is also linked to due process, at least insofar as the publication of laws is concerned.

(5) The disclosure by public officials of government-held information is an affirmative public duty, consistent with the State policy of transparency and full public disclosure. Absent specific statutory limitations, the government agencies or officials concerned have no discretion whatsoever in limiting the substantive content of the information that is made available to the public. Even government transactions that are not yet effective and binding may be demanded, provided these transactions are public in character. Reasonable limits may however be placed, with regard to the manner in which such information is made available.

(6) A two-prong test may be used to determine whether or not the public has a right of access: (a) the information must be on a matter of "public concern;" and (b) the information must not be exempted by law from the operation of the constitutional guarantee. What is, or is not, a matter of "public concern" is for the courts to decide, on a case-to-case basis.

(7) In determining the constitutionality of a statute that seeks to limit the free flow of information, the Court can use the "balancing test" to weigh the interests involved.

B. Statutory Bases for the Right to Know in the Philippines

Even with the existence of an express constitutional provision recognizing the right of access to information, various provisions scattered throughout our laws serve to affirm the imperative duty of the government to disclose information. Despite the absence of a single Freedom of Information Act, the duties of public officials are clearly mandated by various laws, promulgated under both the 1973 and 1987 Constitutions. In addition, various laws prescribe certain limitations to the right to information, with the objective of protecting basically the same interests as are protected under U.S. laws.

1. Statutory recognition of the right to know

The constitutional policy of transparency of government workings becomes more meaningful when taken in conjunction with various laws that serve to increase the accountability of public officers. Chronologically, the first statutory recognition of the people's right to know came with the enactment of the Administrative Code in 1987,[130] in which there was an explicit recognition that the people's right of access to information is essential to enable them to take part in the policy-making and decision-making process of the Government and its instrumentalities. In the Administrative Code's declaration of guiding principles and policies, it is expressly mentioned that the people have a right to "effective and reasonable participation" at "all levels of social, political, and economic decision-making."[131] This right "may not be abridged" by the State, which has the further imperative duty of establishing adequate mechanisms to facilitate the exercise thereof. Thus, the Administrative Code also provides for the establishment of a Public

[130]Exec. Order No. 292 (1987).

[131]Exec. Order No. 292 (1987), Book II, chapter 1, sec. 1. Guiding principles and policies in Government — Governmental power shall be exercised in accordance with the following basic principles and policies: . . . (7) The right of the people and their organizations to effective and reasonable participation at all levels of social, political, and economic decision-making shall not be abridged. The State shall, by law, facilitate the establishment of adequate consultation mechanisms.

Information and Assistance Office,[132] one of the official functions of which is to "provide policy direction and guidance to the operating Bureaus and Offices of the Departments for the proper dissemination of appropriate information."

Other statutes also further emphasize the imperative duty of public officials to disseminate information, consistent with the state policy of transparency. Republic Act No. 6713, promulgated in 1989, is probably the closest that the Philippines has in the way of a Freedom of Information Act. The said law establishes a Code of Conduct and Ethical Standards for public officials and employees, consistent with the belief that a public office is a public trust. Rule IV of the Implementing Rules of Republic Act No. 6713 provides for transparency of transactions and access to information, in keeping with the state policy of full public disclosure of transactions involving public interest. In section 2 thereof, it was deemed "the responsibility of the heads of departments, offices, or agencies to establish measures and standards that will ensure transparency of and openness in public transactions in their respective offices." These instrumentalities were ordered to establish information systems for the proper dissemination of information of public concern.

The people's right to information was also the core of Executive Order No. 89, promulgated by President Fidel V. Ramos in 1993, in response to public sentiment that the government's bureaucracy hindered the proper dissemination of information to the citizens. All heads of executive departments, bureaus, instrumentalities, offices, and agencies of the Government, as well as government-owned and controlled corporations, were "directed to post in conspicuous places within the premises of their respective offices the procedures for all public transactions or official business including the procedure by which an aggrieved party may seek administrative redress for any violation of the aforementioned procedures." This directive had reference to the procedure through which information is disseminated; the substantive content of the information that must be posted was still provided by Republic Act No. 6713.

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[132]Exec. Order No. 292 (1987), Title II, chapter 3, sec. 13.

At the local government level, the importance of transparency has likewise been recognized. *Sanggunian* secretaries are required to keep their offices open during the usual business hours, and to make all non-confidential records therein open to the public.[133] Section 404 of the Local Government Code[134] further gives *lupon* secretaries the authority to issue certified true copies of any public record in his custody, provided that such is not otherwise declared confidential.

In addition to these, several bills have already been filed in Congress, which expressly seek the creation of a Philippine counterpart to the U.S. Freedom of Information Act. Although these bills have yet to be passed, the fact of their filing reveals a growing tendency on the part of the legislature to recognize, by means of a statute, the constitutional right of access, in order to provide clearer guidelines as to the exercise of this right.

Rep. Oscar Orbos filed the same bill, entitled the "Freedom of Information Act," in both the Eighth Congress and the Ninth Congress. He invoked the public interest of transparency in government and the need to provide a procedure to afford citizens easier access to official records, documents, or information, and proposed penalties for public officials who failed to release, reveal or reasonably provide access to any requesting citizen. The only exemption to the grant of the disclosure is if the public official applies and obtains from the proper court, through an *ex parte* and summary proceeding, an order upholding his or her decision to withhold the requested information, which order must specifically mention the legal basis for such an action.[135]

A mirror-image of the federal FOIA was introduced by Rep. Raul

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[133]Rep. Act No. 7160 (1991), sec. 469 (c) (7).

[134]Rep. Act No. 7160 (1991).

[135]Oscar M. Orbos in his bill recognized that the burden in applying for information held by the government, whether it be in terms of costs or effort, is on the requesting party. He tried to remedy this anomaly by "...placing on the withholding official the burden of going to court to justify the withholding of any information requested by a citizen." He recognized that this would be "...more in consonance and promotive of the citizen's right to information." H. B. No. 22629, 8th Cong. (Sess. no. unavailable) (1989) and H. B. No. 1805, 9th Cong. 1st Sess. (1992).

Daza in the Tenth Congress.[136] Again recognizing the need for transparency in the government, and invoking the Constitutional provisions affording the people the right of access to government-held information, his bill, entitled the "Freedom of Access to Information Act," declared that "it is the avowed policy of this Government to afford to all its citizens broad access to public records consistent with their constitutional right." Daza's bill limited the right to "information on governmental transactions involving public interest and on matters of national concern." The enumeration in section 3 thereof provided, however, that any kind of record could be acquired from any kind of agency (including the Office of the President). The exemptions he provided were patterned after the federal FOIA, including the provision on the "unwarranted invasion of personal privacy" and national security and efficient law enforcement interests.

2. Statutory limitations on the right to know

The Constitution itself has expressly recognized that the right to information is not absolute, and is subject to reasonable regulations that may be provided by law. Historically, these limitations fall into the same broad categories as the limitations recognized in the United States; that is, information may be withheld from the public due to some compelling interest in national security, the efficient workings of the government bureaucracy, or privacy rights of third parties. Generally, public officials and employees are prohibited from disclosing confidential information when such would be deemed a violation of the time-honored principle of a public office being a public trust. This presupposes that the public, the very same entity that puts its trust in public officials, also gives them the authority to determine the reasonableness of disclosing or withholding the information sought. Reasonable restrictions may thus be placed on the public's right to information, but only when a greater value is sought to be protected.

The earliest limitations on the constitutionally recognized right of

[136] Raul Daza, citing CONST. art. II, sec. 28 and art. III, sec. 7, recognized "the people's right to be informed of the workings of its government." It is his opinion that the "rights and obligations enshrined under the Constitution would be meaningless if the working and operation of the Government are shrouded in secrecy." H. B. No. 7608, 10th Cong. 6th Sess. (1996).

access came in 1984, with the promulgation by President Ferdinand E. Marcos of Letter of Instruction No. 1420. Directed to all ministers, directors, heads, and chiefs of bureaus, offices, or government-owned or controlled corporations, it recognized the constitutional mandate of a right of access to official records and to documents pertaining to official acts, transactions, or decisions, but recognized as well that this right was not absolute. It sought to prevent the disclosure of vital, confidential, and sensitive matters to unauthorized persons or to the general public, on the ground that unlimited disclosure would be prejudicial to the general welfare, public interest, or national security.

Under Letter of Instruction No. 1420, information was allowed to be disseminated within a department, but classified information was released only to authorized persons whose official duties required the knowledge or possession thereof. The authority to determine the "need-to-know" was vested both in the individual who had possession, knowledge, or command control of the information involved, and in the potential recipient thereof. Other restrictions as to the transmission and discussion of classified information were also provided for. The conveyance of classified information outside a department was generally prohibited unless such disclosure had been previously processed and cleared by the department head or his authorized representative; publication was likewise prohibited, unless there was clearance from the President. All these restrictions were imposed due to the perceived necessity of protecting confidentiality, in order to enable the Government to carry out its responsibilities in international relations and national defense, and to implement the national economic recovery program.

It must be remembered, however, that the Letter of Instruction was promulgated during turbulent times; the prohibitions present therein may no longer be applicable, given the current situation in the Philippines. Under succeeding administrations, the emphasis of various statutes leaned more towards an express recognition of the right to information; limitations thereto were not given as much emphasis. Whereas exceptions to the right of access still exist, with basically the same grounds as the Letter of Instruction, these must be viewed in an entirely different context, and with a different set of objectives.

The Implementing Rules and Regulations of Republic Act No. 6713 enumerate seven exemptions to the imperative duty of public officials to disclose official information, records or documents to any requesting public. These are: (1) if such information must be kept secret in the interest of national defense or security or the conduct of foreign affairs; (2) if such disclosure would put the life and safety of an individual in imminent danger; (3) if the information falls within the concepts of established privilege or recognized exceptions as may be provided by law, settled policy, or jurisprudence; (4) if such information comprises drafts of decisions, orders, rulings, policy decisions, memoranda, *et cetera*; (5) if such information is of a personal nature, and disclosure thereof would constitute a clearly unwarranted invasion of personal privacy; (6) if such information would disclose investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would interfere with enforcement proceedings, deprive a person of a fair and impartial trial, disclose the identity of a confidential source, or unjustifiably disclose investigative techniques and procedures; and (7) prematurely disclose information that would lead to financial speculation, endanger the stability of any financial institution, or frustrate the implementation of a proposed official action.[137]

Under the Local Government Code, for example, the generally recognized principle of transparency is limited to information that is not declared by law to be confidential.[138] Even the municipal mayor, city mayor, and provincial government, although given the power to require all national officials and employees stationed or assigned under his area of jurisdiction to make available to him books, records, and other documents, such power is still subject to the express limitation that such be not specifically classified by law to be confidential.[139]

In certain cases, the right to privacy is deemed more important than the right to information. The confidentiality of bank records and deposits of whatever nature are guaranteed in certain situations,

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[137]IRR, Rep. Act No. 6713 (1989), rule IV, sec. 3.

[138]Rep. Act No. 7160 (1991), sec. 404.

[139]Rep. Act No. 7160 (1991), sec. 444.

even to the extent of providing penal sanctions in case of violations.[140] Businesses of persons, associations, or corporations are likewise veiled from public scrutiny regarding matters that relate to their income and method of operations. Trade secrets and other information concerning production or processes unique to a manufacturer, processor, or distributor are also protected from disclosure.[141]

Privacy rights of individuals are likewise protected by law. In cases where the government agency or instrumentality gained access to information by the very nature of such agency, the information cannot be disclosed except upon an order from a court or department of competent jurisdiction, or with the approval of the duly authorized official. Under Republic Act No. 6425,[142] for example, the Department of Justice has the authority to keep a record of the proceedings determining the status of drug dependents. However, such information must remain confidential, and may be used only to determine whether or not a person accused under the Dangerous Drugs Act is a first offender. Judicial and medical records are likewise deemed confidential, and may be used solely for the purpose of determining how many times the alleged drug dependent shall have voluntarily submitted himself to treatment, or has been committed to a rehabilitation center. Further, Republic Acts that create Juvenile and Domestic Relations Courts[143] provide that, upon petition of any party, hearings involving cases between husband and wife, or parent and child, may be held in chamber or with the exclusion of the public. All information gathered in the course of such hearings are deemed confidential and privileged, and shall not be divulged without the approval of the court.[144] This approval is

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[140]*E.g.*, Rep. Act No. 7653 (1993), The New Central Bank Act; Rep. Act No. 6848 (1990), providing for the Charter of the Al-Amanah Islamic Investment Bank of the Philippines.

[141]*E.g.*, Rep. Act No. 6124 (1970), sec. 6, and Rep. Act No. 6361 (1971), sec. 7, both of which are entitled "An Act Providing for the Fixing of the Maximum Selling Price of Essential Articles or Commodities, Creating the Price Control Council, and for Other Purposes."

[142]The Dangerous Drugs Act of 1972.

[143]*E.g.*, Rep.Act No. 6512 (1972), An Act Creating a Court of Juvenile and Domestic Relations in the City of Baguio; Rep. Act No. 6586 (1972), An Act Creating a Juvenile and Domestic Relations Court in the Province of Cebu and Appropriating Funds Therefor; and Rep. Act No. 6591 (1974), An Act Creating a Juvenile and Domestic Relations Court for the Province of Camarines Sur and the Cities of Naga and Iriga.

[144] Rep. Act No. 6512 (1972), sec. 4; Rep. Act No. 6586 (1972), sec. 4; Rep. Act No. 6591 (1974), sec. 4.

likewise necessary in disclosing information regarding guardianship and custody proceedings, and adoption cases. Other examples of confidential information include birth records; the identity of victims of child abuse before the proper court acquires jurisdiction over the case, upon the instance of the offended party; and the identity of witnesses who voluntarily testify in consonance with the Government's Witness Protection Program.[145]

Currently, the primary problem as to the free flow of information lies in the absence of an explication of general standards for the purpose of determining whether or not disclosure may be disallowed. If there is a perceived conflict of interest, the government's instrumentalities are given a wide range of discretion in determining, for their own purposes, the grounds for non-disclosure. The difficulty therefore lies in the lack of an authorized body that specifically reviews the grounds advanced for non-disclosure; because there is no system of automatic review, the requesting individual must appeal the decision made by the agency, to the agency itself. The public is then burdened with availing of measures to protect the right to information, from the same body that denied them that right in the first place.

It is doubtful, however, whether or not such guidelines may be enumerated with any degree of specificity, apart from the rules already found in Republic Act No. 6713. The danger of abuse of discretion on the part of the government agency is considerably lessened, however, when we consider that recourse to the judicial system is still possible on the part of the requesting individual. The problems that are currently encountered as regards the non-disclosure of information must therefore be viewed as inherent to the functioning of any sort of government; fortunately, the system of checks and balances in the Philippines may reinforce the public's right to know.

IV. CONCLUSIONS

In the Philippines, as in the United States, access to government-held information is justified on two broad theoretical grounds: (1) an increased

[145] Rep. Act No. 6981 (1991), An Act Providing for a Witness Protection, Security and Benefit Program and for Other Purposes.

access to government-held information serves to facilitate the democratic process, because only an informed citizenry is fully equipped to make vital decisions; and (2) an increase in the transparency of government workings serves to enhance the accountability of public officers, with the end goal of the creation of an efficient government that truly works in the interests of the public.

Historical tradition teaches that these values must be pursued. Only with a transparent government can the people check the possible abuses that public officials may be prone to; and only when armed with information can people make intelligent decisions. In the same way that other countries have recognized the need for a dialogue between the government and the citizenry to substantiate the claim of being a democratic state, there is a growing recognition in the Philippines of the voice of the people, and of the public's more active role in the government's decision and policy making.

Unlike in the United States, the right of access to government-held information is not explicitly recognized by a single statute; the Constitution itself is the guarantor of this right. Although we lack an enabling law that deals solely with the right to information, the goal of transparency may already be met through existing legislation. In particular, Republic Act No. 6713, Rule IV of which is entitled "Transparency of Transactions and Access to Information,"[146] already embodies the principles and exceptions provided by the United States Freedom of Information Act. Sections 1, 2, and 4 provide full public disclosure as a deliberate state policy, with responsibility on departmental heads to establish measures to insure transparency of and openness in public transactions.[147] Section 3 on the other hand reveals

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[146] Rules Implementing the Code of Conduct and Ethical Standards for Public Officials and Employees (Rep. Act No. 6713).

[147] Rule IV, sec. 1. Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest.

Rule IV, sec. 2. It is the responsibility of heads of departments, offices or agencies to establish measures and standards that will ensure transparency of and openness in public transactions in their respective offices, such as in biddings, purchases, other financial transactions including contracts, status of projects, and all other matters involving public interest.

They shall establish information systems that will inform the public of the following: (a) policies, rules, and procedures; (b) work programs, projects, and performance targets; (c) performance reports,

standards for the valid withholding of information, with marked similarities to the federal FOIA.[148]

There is value, however, in concentrating information and requests therefor in one agency, and having one single statute directly applicable to all kinds of requests for whatever kind of information. This single statute may serve to enhance the efficiency of the government, and enhance as well the

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and (d) all other documents as may hereafter be classified as public information. Such information shall be utilized solely for the purpose of informing the public of such policies, programs and accomplishments, and not to build the public image of any official or employee or to advance his own personal interests.

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Rule IV, sec. 4. Every head of department, office and agency shall establish information systems and networks that will affect the widest possible dissemination of information regarding the provisions of the Code, and the policies and programs relative thereto.

[148] Rule IV, sec. 3. Every department, office or agency shall provide official information, records or documents to any requesting public, except if:

(a) such information, record or document must be kept secret in the interest of national defense or security or the conduct of foreign affairs;

(b) such disclosure would put the life and safety of an individual in imminent danger;

(c) the information, record or document sought falls within the concepts of established privilege or recognized exceptions as may be provided by law or settled policy or jurisprudence;

(d) such information, record or document comprises drafts of decisions, orders, rulings, policy decisions, memoranda, etc.;

(e) it would disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(f) it would disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (i) interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, or (iv) unjustifiably disclose investigative techniques and procedures; or

(g) it would disclose information the premature disclosure of which would (i) in the case of a department, office or agency which regulates currencies, securities, commodities, or financial institutions, be likely to lead to significant financial speculation in currencies, securities, or commodities, or significantly endanger the stability of any financial institution; or (ii) in the case of any department, office or agency, be likely or significantly to frustrate implementation of a proposed official action, except that subparagraph (I) (ii) shall not apply in any instance where the department, office or agency has already disclosed to the public the content or nature of its proposed action, or where the department, office or agency is required by law to make such disclosure on its own initiative prior to taking final official action on such proposal.

efficiency of acting on requests for information. The difficulty here is that, through the years, there has been an accumulation of a vast amount of information within different agencies of the government; the agencies themselves may have developed their own systematic filing of these information, responsive to their own particular needs. The Philippines may, at present, lack the technological means to gather and process all the information in the possession of the government.

At present, a Freedom of Information Act is unnecessary and redundant; it is sufficient for the agencies themselves to rely on their own systems of gathering, maintaining, and disseminating information, considering that other laws already specifically mention the obligation to disclose such information to anyone who requests it. There is no need to enact an Act similar to the FOIA, which is riddled with exemptions that limit rather than advance the right of access. In the ultimate analysis, the Philippine citizenry already has the constitutional mandate of full public disclosure. This, coupled with the existing legislative enactments, should suffice to protect the public's right to know.

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