*Republika ng Pilipinas*

**Komisyon ng Karapatang Pantao ng Pilipinas**

*(Commission on Human Rights of the Philippines)*

# Position Paper on "Freedom of Information Act of 2009" from the Commission on Human Rights

"We all pay taxes. Even a beggar on the street pays sales tax when he buys anything from the market. This money belongs to us. But where does this money go? Why are there no medicines in the hospitals? Why are people dying of starvation? Why are the roads in such pathetic conditions? Why are the taps dry?

Now we have a right to question governments. Right to Information Laws,[1] empower citizens to question the government, inspect their files, take copies of government documents and also to inspect government works."[2]

## Right to Information in International Human Rights Law

People cannot speak or express themselves unless they know. Access to information is key to an informed choice and ultimately, to meaningful decision-making, action and participation.

In international human rights law, the right to information is embedded in the freedom of expression enunciated under Article 19 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, to wit:

> "2. Everyone shall have the right to freedom of expression; this right shall include **freedom to seek, receive** and impart **information and ideas of all kinds**, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> "3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

[1] passed on October 12, 2005 by the Parliament of India

[2] http://www.righttoinformation.org/, original quote was taken in the context of the Right to Information Laws in India



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## Right to Information in Other Parts of the World

The first Access to Information (ATI) law was enacted by Sweden in 1766, largely motivated by the parliament's interest in access to information held by the King. Finland was the next to adopt, in 1953, followed by the United States, which enacted its first law in 1966, and Denmark and Norway, which passed laws in 1970. The interest in ATI laws took a leap forward when the United States, reeling from the 1974 Watergate scandal, passed a tough Freedom of Information (FOI) law in 1976, followed by the passage by several western democracies of their own laws.[3] By 1990, the number of countries with ATI/FOI laws had climbed to 13.

The fall of the Berlin Wall and the rapid growth of civil society groups demanding access to information – about the environment, public health impacts of accidents and government policies, draft legislation, maladministration, and corruption – gave impetus to the next wave of enactments, which peaked in the late 1990s and early 2000s. Between 1992 and 2006, 27 countries in Central and Eastern Europe and the former Soviet Union passed ATI laws.

During that same period through to the present,[4] at least 37 countries in other regions of the world enacted similar laws, including Latin America, the Caribbean, Europe, Africa and Asia.

The right of access to official information is now protected by the constitutions of at least 48, and arguably 55, countries. At least 43, and arguably 50, of these expressly guarantee a "right" to "information" or "documents," or else impose an obligation on the government to make information available to the public.[5]

The fact that so many countries have afforded the right constitutional status is noteworthy, and provides support for strengthening the status of the right under international, regional and national laws.

Most recently, the European Court of Human Rights rendered a decision [6] expanding the right of watchdog groups to access government information.

The decision recognized for the first time Article 10 of the European Convention on Human Rights which guarantees the "freedom to receive information" held by public authorities. The Court

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[3] France 1978, Netherlands 1978, Australia 1982, New Zealand 1982, Canada 1982, Greece 1986, Austria 1987, Italy 1990, http://right2info.org/constitutional-protections-of-the-right-to

[4] Ibid. The most recent enactment is the "Transparency and Access to Information Law" in Chile which came into force on April 20, 2009

[5] The difference in numbers is due to differing definitations of the right to information, http://right2info.org/constitutional-protections-of-the-right-to

[6] April, 2009

noted the important role played by the media and other independent monitors in creating "forums for public debate" and emphasized that any interference with the ability of such groups to obtain information of public interest must be able to withstand the "most careful scrutiny." The court emphasized that governments have an obligation "not to impede the flow of information" on matters of public concern.

In 2004, a member of the Hungarian parliament filed a complaint with the country's Constitutional Court over Hungary's national drug laws. The Hungarian Civil Liberties Union — a rights group active in the field of drug policy — applied to that court to receive a copy of the complaint. Both the Constitutional Court and Hungary's regular courts denied the request on privacy grounds. The Hungarian Civil Liberties Union took the case to the European Court of Human Rights alleging that the denial interfered with its right to access state-held information necessary to fulfill its role as a public watchdog.

The European Court of Human Rights is now the second regional human rights tribunal, after the Inter-American Court of Human Rights, to recognize that the "freedom to receive and impart information and ideas," guaranteed by the Universal Declaration on Human Rights as well as regional human rights treaties, includes a right to receive information of public interest held by government authorities. Both courts highlighted the strong connections among the right to information, freedom of expression, and democratic accountability.

## Right to Information in the Philippines

In the Philippines, the right to information is recognized as a distinct Constitutional guarantee.[7] No less than the Bill of Rights of the 1987 Constitution[8] states:

> **"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."**

Clearly enough, this right is unconditionally and specifically granted under the most supreme law of the land and its exercise being subject only to restrictions as may be given by law.

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[7] The guarantee was first recognized in the 1973 Constitution. Article IV (Bill of Rights), Section 6, of the 1973 Constitution reads: *"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."*

[8] Article III, Section 7

The Supreme Court declared the right to be enforceable in 1987, in a case[9] involving access to information regarding the civil service eligibility of certain individuals:

> "These constitutional provisions [re the right to information] are self-executing. They supply the rules by means of which the right to information may be enjoyed ... 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 the ratification of the constitution without need for any ancillary act of the Legislature . . . . 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 . . . ."

The Court continued by noting the importance of the right to information for democratic decision-making:

> "The incorporation in the Constitution of a guarantee of access to information of public concern is a recognition of the essentiality of the free flow of ideas and information in a democracy.... In the same way that free discussion enables members of society to cope with the exigencies of their time..., **access to information of general interest aids the people in democratic decision-making ... by giving them a better perspective of the vital issues confronting the nation.**"[10]

The 1987 Constitution also contains a provision in Article II[11] Declaration of Principles and State Policies, Section 28, which reads:

> ***"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."***

For many years, this latter provision was regarded merely as providing emphasis to the guarantee under the Bill of Rights. However, in the recent case of Chavez vs. National Housing Authority,[12] the Supreme Court for the first time gave this Section 28 an independent construction. The Court distinguished between "the duty to permit access to information," which is required by Section 7 of the Bill of Rights, and "the duty to disclose information," which is what Section 28 mandates. The Court stated:

> "Sec. 28, Art. II compels the State and its agencies to fully disclose all of its transactions involving public interest. Thus, **the government agencies, without need of demand from anyone, must bring into public view all the steps and negotiations leading to the consummation of the**

[9] Legaspi vs. Civil Service Commission, 150 SCRA 530
[10] Ibid.
[11] Declaration of Principles and State Policies
[12] GR No. 164527, August 15, 2007

> **transaction and the contents of the perfected contract. Such information must pertain to "definite propositions of the government," meaning official recommendations or final positions reached on the different matters subject of negotiation.** ...."

The other aspect of the people's right to know apart from the duty to disclose is the duty to allow access to information on matters of public concern under Sec. 7, Art. III of the Constitution. The gateway to information opens to the public the following: (1) official records; (2) documents and papers pertaining to official acts, transactions, or decisions; and (3) government research data used as a basis for policy development.

Thus, the duty to disclose information should be differentiated from the duty to permit access to information. There is no need to demand from the government agency disclosure of information as this is mandatory under the Constitution; failing that, legal remedies are available. On the other hand, the interested party must first request or even demand that he be allowed access to documents and papers in the particular agency. A request or demand is required; otherwise, the government office or agency will not know of the desire of the interested party to gain access to such papers and what papers are needed. The duty to disclose covers only transactions involving public interest, while the duty to allow access has a broader scope of information which embraces not only transactions involving public interest, but any matter contained in official communications and public documents of the government agency.[13]

However, while the guarantee in the Bill of Rights is self-executing, the Court stated that Section 28 requires implementing legislation.[14]

In addition to the foregoing provisions spelling out general rights and duties, there are also specific classes of information that the Constitution requires to be made public. These include information on foreign loans obtained or guaranteed by the government. Article XII,[15] Sec. 21 of the 1987 Constitution which states that:

> "Foreign loans may only be incurred in accordance with law and the regulations of the monetary authority. Information on foreign loans obtained or guaranteed by the government shall be made available to the public."[16]

The constitutional guarantee is applied to all branches of government – legislative, judicial, and executive, including all their instrumentalities. Further, the public's right of access to declarations

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[13] http://right2info.org/constitutional-protections-of-the-right-to
[14] Ibid.
[15] National Economy and Patrimony
[16] http://right2info.org, supra

by public officers or employees of their assets and liabilities is also recognized.[17]

Comments from the Commission on Human Rights on the Proposed Right to Information Law

The instant substitute bill, entitled "An Act Implementing the Right of Access to Information on Matters of Public Concern Guaranteed under Section Twenty-Eight, Article II and Section Seven, Article III of the 1987 Constitution and for Other Purposes," simply known as the "Freedom of Information Act of 2009," affirms not only the Constitutionally, enshrined right to information but also the internationally-recognized right to freedom of expression.

*Transparency, Accountability and Accessibility*

The Commission on Human Rights fully supports the instant bill which further gives life to the human rights based approach principles and standards of transparency, accountability and accessibility. A democratic government, such as ours, is ultimately accountable to the people, hence, all information that affects them should be made available as guaranteed under the Constitution. While not an absolute right, the Commission regards relevant limitations and restrictions to access this freedom provided they are prescribed by law and are necessary, reasonable, valid, objective and consistent with human rights norms.

*Balancing of Interests*

The Commission notes the exemptions provided under this Act. However, we would like to give attention to confidential information of vulnerable sectors of society, such as women and children who may have been subjects of abuse, trafficking and similar forms of violence, to information with respect to the rehabilitation of people under the influence of drug abuse and to other information which may be best left private even if part of public records. This may constitute an infringement of their right to privacy. In essence, the Commission respectfully recommends a balance of what can and cannot be made public taking into consideration all factors that will best promote, protect and respect the human rights of as many stakeholders possible.

*Exemption Involving Human Rights Violations*

While the Commission notes and concurs with the procedure and guidelines set forth under Sections 9 to 15 of this bill for seeking

[17] Ibid.

information as properly laid out, we would like to provide additional exemption for its application in matters of extreme urgency involving human rights. By this we mean information involving the whereabouts of persons believed to be victims of enforced disappearance, extra-judicial killings, torture and other human rights violations. In these instances, following strictly the procedures herein provided may mean loss of precious time needed to prevent further damage and prejudice to victims. Proper government agencies must not be given a justification, in the guise of this law, to conceal information relevant to any investigation for violations of human rights.

*Other Considerations*

The Commission also notes the criminalization of violations of this Act through the imposition of penalties of imprisonment with the understanding that this does not prejudice possible violations of the Administrative Code as well as Republic Act No. 3019 or the Anti-Graft and Corrupt Practices Act.

In sum, the Commission on Human Rights advocates for the peoples' right to know, access to information and the freedom to express themselves in a free and democratic society subject to such guidelines and restrictions as may be necessary and reasonable without sacrificing due regard to the promotion and protection of human rights.

Respectfully submitted. 6 May 2009.

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