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- Lawyers League for Liberty (LIBERTAS)
- National Union of Journalists of the Philippines
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- Philippine Center for Investigative Journalism
- Transparency and Accountability Network

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07 July 2008

Hon. Ramon “Bong” Revilla, Jr.
Chairman
Committee on Public Information and Mass Media
Senate, Republic of the Philippines

Subject: *Comments on the five measures (Senate Bill Nos. 16; 109; 576; 592; and 1578) on the right to information*

Dear Senator Revilla:

Warm greetings!

The Access to Information Network (ATIN)¹ commends the Committee on Public Information and Mass Media for its commitment to start the deliberations on the five Senate bills on the people’s right to information. While the two scheduled public hearings on 22 April and 11 June 2008 have both been canceled, we trust that the committee will be able to finally proceed with the first public hearing on the measures as soon as Congress convenes for its Second Regular Session. In anticipation of the said hearing, we hereby submit our initial position on the measures. We also manifest that in the Lower House, ATIN was allowed by its counterpart Committee to be part of the Technical Working Group to work on the consolidation of the bills. We respectfully request that we be given the same privilege by this Committee should a similar technical working group on the right to information measures be created.

The Committee deliberations on the proposed measures will come at a most critical time when access to information held by government has become the subject of conflicting claims, all in the name of the public interest. As media and citizens organizations, we have been in constant struggle with government agencies on the disclosure of information, notwithstanding the clear public

¹ ATIN is a growing network of organizations advocating for the full enjoyment of the people’s right to information guaranteed by the Constitution. Our work includes pushing for the passage of a freedom of information act, opposing measures that abridge the right to information, creating greater public awareness of the right to information, and documenting and speaking against cases of violation of the right to information. The ATIN Members are: Action for Economic Reforms, Asian Institute of Journalism and Communication, Ateneo Debate Society, Center for Community Journalism and Development, Center for Media Freedom and Responsibility, Lawyers’ League for Liberty (LIBERTAS), National Union of Journalists of the Philippines, Pagbabago@ Pilipinas, Philippine Center for Investigative Journalism, Transparency and Accountability Network.



interest nature of the information, and the guarantee by the constitution of the people's right to information.

The Need for Legislation

A key problem is lack of legislation. While the Supreme Court has upheld the enforceability of the constitutional right to information, its effective implementation has for the past two decades suffered from the lack of the necessary substantive and procedural details that only Congress can provide.

First, there is no uniform, simple and speedy procedure for access to information. Access to information is differently and inconsistently applied across government agencies. There is no uniform manner of making and responding to requests². Agencies are thus able to use the absence of uniform procedure to frustrate the exercise of the right.

Second, the specification of the coverage of the guarantee, particularly the general rule on what information may be exempted, needs legislation. The constitutional provision states that access to information shall be afforded our citizens "***subject to such limitations as may be provided by law***". Congress has yet to fulfill this mandate. As observed by the Supreme Court in Chavez vs. PCGG (G.R. 130716, 9 December 1998), "(T)here are no specific laws prescribing the exact limitations within which the right may be exercised or the correlative state duty may be obliged." To address the gap, what the Court has done was to outline a number of exceptions through jurisprudence, but the expected lack of exactness in the absence of legislation opens the enumeration to wide interpretation.

Third, precisely for the lack of definite procedure as well as the absence of a definite scope, it is difficult to enforce any available administrative or penal sanctions for violations of the right. There is thus no compelling deterrent to the unlawful withholding of information.

Finally, in addition to Section 7, Article III of the Constitution, Section 28 of Article II also urgently needs legislation. The provision states: "***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." The Supreme Court, in the recent case of Chavez v. NHA (G.R. No. 164527) decided last August 15, 2007, noted that while Section 7 of the Bill of Rights contemplates a duty upon government to permit access to information upon request, the declaration of policy under Section 28, in contrast, contemplates a duty to bring into public view all the steps and negotiations leading to the

² The closest to a statutory procedure is found in Republic Act No. 6713 (Code of Conduct and Ethical Standards for Public Officials and Employees). Among the duties of public officials and employees as provided in Section 5 (e) of RA 6713 is to make all public documents accessible to the public, within reasonable working hours. Instead of applying this plain provision to make information available upon request, most agencies apply instead Section 5 (a) which directs public officials and employees to act promptly on letters and requests sent by the public within fifteen days from receipt thereof. Thus requests are often met with a letter within fifteen days from request acknowledging receipt of the request, and stating that the request is being considered. If one does not follow up on the request, often the acknowledgement letter will be the end of it.



consummation of transactions involving public interest and the contents of the perfected contract, **without need of demand from anyone**. The court notes, however, and we quote:

“It is unfortunate, however, that after almost twenty (20) years from birth of the 1987 Constitution, there is still no enabling law that provides the mechanics for the compulsory duty of government agencies to disclose information on government transactions. Hopefully, the desired enabling law will finally see the light of day if and when Congress decides to approve the proposed “Freedom of Access to Information Act.””

The Senate Bills

The five measures before the Committee, taken together, have the key elements that can be consolidated into a responsive and progressive law on access to information, provided that appropriate adjustments are made. For purposes of orderly review, we divide the proposed legislation into key component parts and spell out what we believe are the principles that should guide the crafting of the provisions for these component parts.

A. Title, Declaration of Policy and Definition of Terms

- We propose that the Declaration of Policy captures the provisions in both Section 7, Article III and Section 28, Article II of the Constitution.

B. Coverage and Limitations

- The provision on coverage and access to information must clearly cover all possible government agency or instrumentality in all branches of government, as well as all possible information in government custody regardless of the form or format in which it is stored, by whom it is created, and its stage or status.
- The matter of exceptions is always a contentious issue in any access to information legislation. On the one hand, there is a tendency on the part of citizens to demand as limited exceptions are as possible, and on the part of government, to carve out exceptions as broad as possible. We submit that we can strike a balance in the exceptions by:
 - (1) Specifying a serious harm that disclosure will directly cause to an accepted public interest, in identifying the exemption. The exemption cannot be a blanket class of information, since this is prone to abuse and overbroad interpretation.
 - (2) Providing an opportunity and right to override a recognized exception with a clearly greater public interest in the disclosure, as defined by the circumstances on a case-by-case basis.



C. Mandatory Disclosure and Promotion of Openness

- In order to give a legislative expression to Section 28, Article II, as interpreted by the Supreme Court in the case of Chavez vs. NHA cited earlier, we propose the introduction of a section providing for the mandatory disclosure of transactions involving public interest.
- We urge the committee to strengthen the provisions promoting government openness. This can be done by combining and streamlining the following: Sections 10 (Mandatory Disclosure of Information on Governance) and 11 (Mandatory Disclosure for Public Interest) of SB 109; Section 11 (Duties of Government Agency) of SB 1578; Section 4, par. 2 of SB 16 and SB 576; and the key provisions of SB 592.

D. Procedure for Access, Remedies in Cases of Denial and Sanctions/Penalties

- The procedure for access must provide for a quick and certain period of compliance, and for the manner of making and responding to requests.
- The existing remedy to compel disclosure is primarily judicial, which remains inaccessible to the general public. We favor a cumulative system of remedies that a citizen may choose from. The citizen may exhaust administrative remedies, or seek the assistance of an intermediate but independent body, or go directly to the courts.
- We agree with the identification by SB 109 of the Office of the Ombudsman as an appropriate intermediate and independent body mandated to provide assistance in cases of denial of access to information. Under the Constitution (Section 13 (2), Article XI) and the Ombudsman Act, among the powers, functions and duties of the office of the Ombudsman is to direct, upon complaint or at its own instance, any public official or employee of the Government, or any subdivision, agency or instrumentality thereof, as well as GOCCs with original charter, **to perform and expedite any act or duty required by law.**
- We propose the improvement in the provisions on sanctions for unlawful denial of access to information. This can be done by providing very specific definitions of the punishable acts, in order to avoid vagueness.

The House Version

The Lower House on 12 May 2008 approved on third reading House Bill 3732, or the Freedom of Information Act of 2008. We wish to ask whether it is possible for the Committee to adopt the approved House version as a starting point for the consolidation of the Senate measures.



This approach should be prudent for several reasons. One, it has already gone through a committee and technical working group process that considered the inputs of various stakeholders, including the various government branches and agencies, public interest organizations, and media organizations. Two, key provisions of the different Senate measures can also be found in the House-approved version. It also already incorporates the improvements we propose in this comment. Finally, adopting the House version as starting point will reduce to a minimum the potential differences for reconciliation by the two chambers.

Should the committee adopt the House version as the starting point for the consolidation of the Senate measures, we propose the insertion of a short phrase in Section 15 (b) (4) thereof, to read:

SEC. 15. Criminal Liability. x x x

(b) x x x

“(4) Claim an exception under Section 8 of this Act, or under the Constitution, when the claim is manifestly devoid of factual basis; or”.

In addition to the listed exceptions in the House version, exceptions with a constitutional (instead of statutory) basis may also be invoked. A possible example is executive privilege. The insertion of the phrase “or under the Constitution” is necessary to impose the same standards to be followed in invoking an exception based on the proposed law.

A copy of the House version is attached as Annex “A” hereof.

Our Appeal to the Senate

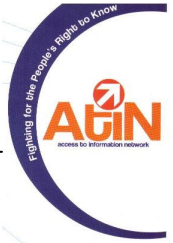
The right of the people to information held by governments is being recognized by a rapidly growing number of countries around the world. Today over 70 countries have adopted laws giving citizens the right to access government information.

The Philippines is one among countries that have elevated the right to information into a Constitutional guarantee. Such high level of legal importance accorded to the right to information is only proper given the key role that the right to information plays in securing democracy, good governance, and development.

The people’s right to information is an indispensable element of a functioning democracy. The ideal of a “government by the people” presupposes that the people have access to information on matters of public concern. The free flow of information about the affairs of government paves the way for public participation, and fosters accountability in government.

The people’s right to information is not only a political imperative. It is also essential in economic life. It provides the institutional foundation for a more responsive

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government planning by enhancing the capacity of the public to provide timely feedback to government, and builds consensus around policy objectives and design. The availability of information on official rules, policies, programs, and resource allocation also enables the private sector to make sound long-term economic decisions.

A free flow of government information is also a vital safeguard against corruption. Secrecy in government allows corruption to flourish. It provides a greater cover for any evidence in corruption. In contrast, transparency exposes the vested interests involved and leads to the identification of corrupt practices.

As noted by Rep. Lorenzo Tañada III in his sponsorship speech for the House version, in the 14th Congress lies the distinct opportunity and challenge to bring forth a very important piece of legislation. We trust that this committee, under the leadership of its chairman Senator Ramon “Bong” Revilla, Jr., will shepherd these measures towards the enactment of a responsive freedom of information law -- a shining legislation in pursuit of democracy, good governance, and national development.

Thank you very much

Very truly yours,

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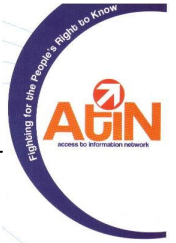
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