



RIGHT TO KNOW, RIGHT NOW!

Nepomuceno A. Malaluan*
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The proposed Freedom of Information Act will be up for consideration by the Senate plenary on *Second Reading* once it hurdles the vote at the Committee on Public Information and Mass Media. The House of Representatives has already done its work, having approved its counterpart measure (House Bill 3732) as early as 12 May 2008. On *Second Reading*, Committee on Public Information Chairman Senator Alan Peter Cayetano will present to the senate plenary the consolidated/substituted version after undergoing committee hearings and consultations. Floor debates and amendments, if any, will follow, culminating in the Senators' vote on the *Second Reading* version of the bill.

What happens to the bill at the Senate plenary will be a test of every Senator's commitment to transparency, accountability, democracy, and respect for human rights. At stake too at this crucial juncture is the country's strategic future, given the critical role of public access to information in combating corruption that has weighed down development, as well as its role in securing meaningful public participation to facilitate effective and responsive government policies.

We trust that none of the twenty-three incumbent Senators of the 14th Congress will work to water down or to block the passage of the bill.

What the Constitution Provides

The 1987 Constitution secures for us Filipinos our right to information. Section 7 of the Bill of Rights 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

* Nepomuceno Malaluan, a lawyer with academic background in economics, is a trustee of Action for Economic Reforms. He is co-convenor of the Access to Information Network (ATIN-Philippines), which he represents in the Executive Committee of the Global Transparency Initiative. He may be reached at nepo@er.ph and at nepo_m@yahoo.com.

used as basis for policy development, shall be afforded the citizen, subject to limitations as may be provided by law.”

Moreover, the Constitution in Article II (Declaration of Principles and State Policies) Section 28 declares it the policy of the State to adopt and implement “a policy of full public disclosure of all its transactions involving public interest.”

In addition to the foregoing main provisions, there are also specific classes of information that the Constitution requires to be made public. Article XII, Section 21 requires information on foreign loans obtained or guaranteed by the government to be made available to the public. Article XI, Section 17 provides that the declaration under oath of the assets, liabilities, and net worth 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, shall be disclosed to the public in the manner provided by law. In Congress, Article VI, Section 16 (4) requires each House to keep a Journal of its proceedings, and from time to time publish the same. Section 20 of the same Article requires further that the records and books of accounts of Congress shall be preserved and be open to the public in accordance with law, and such books shall be audited by the Commission on Audit which shall publish annually an itemized list of amounts paid to and expenses incurred for each Member.

The clear mandate by the Constitution for transparency in government links to other Constitutional principles. It gives flesh to Article II, Section 1 of the Constitution which states that “(T)he Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them.” As expounded by the Supreme Court in the case of *Valmonte, et. al. vs. Belmonte* (G.R. No. 74930, February 13 1989): “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 operates 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.”

A working right to information likewise gives flesh to the principle, found in Article XI, Section 1, that “(P)ublic office is a public trust. Public officers and employees must at all times be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency, act with patriotism and justice, and lead modest lives.” The Supreme Court emphasized in the case of *Chavez vs. Public Estates Authority* (G.R. No. 133250, 9 July 2002), that “unless citizens have the proper information, they cannot hold public officials accountable for anything.”

The right to information is also a necessary condition for the effective exercise of other rights by the people. The freedom of the press, of speech and expression, as well as the right to petition the government for redress of grievances can only be fully and responsibly exercised by an informed press and citizenry. The same is true for the right of the people and their organizations to effective and reasonable participation at all levels of

social, political, and economic decision making, as provided in Article XIII, Section 16 of the Constitution.

In the case of *Valmonte vs. Belmonte* earlier cited, the Supreme Court explains that “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 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.”

Our fundamental law finds support in emerging international law on right to information. The Universal Declaration of Human Rights (UDHR) adopted by the UN General Assembly in 1948 and the International Covenant on Civil and Political Rights (ICCPR) adopted by the UN General Assembly in 1966 are considered by many to be a codification or evidence of international custom or general principles of law binding even upon non-state parties. Article 19 of the UDHR states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference **and to seek, receive and impart information** and ideas through any media and regardless of frontiers.” The same is also embodied in Article 19 (2) of the ICCPR. These provisions are increasingly being regarded as embodying a distinct right to information. In his fifth report as UN Commission on Human Rights Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain (India) stated that “the right to seek and receive information is not simply a converse of the right to freedom of opinion and expression but a freedom on its own.”

The Consequence of Lack of Legislation

The right to information under Article III, Section 7 has been held by the Supreme Court to be enforceable even without an implementing legislation. In the leading case of *Legaspi vs. Civil Service Commission* (G. R. No. 72119, May 29 1987), the Supreme Court said that the guarantee provisions are “self executing”; that “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. The Court concluded that the right may be asserted by the people without need of ancillary legislation, and where it is denied, the people have recourse to the Courts through a *Petition for Mandamus*¹.

Given this ruling by the Court, is the passage of the Freedom of Information Act still necessary?

The answer is yes. While the Supreme Court has upheld the enforceability of the right to information, its effective implementation has for the past two decades suffered

¹ A *Petition for Mandamus* is a special civil action under Rule 65 of the Rules of Court whereby any tribunal, corporation, board, office or person that unlawfully neglects the performance of an act that the law specifically enjoins as a duty may be ordered by the courts to do the act required to be done.

from the lack of the necessary substantive and procedural details that only Congress can provide. The legal gaps that legislation must address include:

1. The absence of 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 requests. Agencies are thus able to use the absence of uniform procedure to frustrate the exercise of the right. The closest to a procedure that Congress has provided can be found in Section 5 of Republic Act 6713 (Approved on 20 February 1989), or the Code of Conduct and Ethical Standards for Public Officials and Employees, which lists the duties of public officials and employees. Letter (e) of this section states: “Make documents accessible to the public. – All public documents must be made accessible to, and readily available for inspection by, the public within reasonable working hours.” In practice, government has evaded the application of this plain provision by applying instead letter (a) of the same section: “Act promptly on letters and requests. — All public officials and employees shall, within fifteen (15) working days from receipt thereof, respond to letters, telegrams or other means of communications sent by the public. The reply must contain the action taken on the request.” Thus, requests are generally 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 actively follow-up on the request, often the acknowledgement letter will be the end of it.
2. 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. To address the gap, the Supreme Court has stepped in by enumerating a number of exceptions through jurisprudence, but the expected lack of exactness in the absence of legislation opens the enumeration to wide interpretation. To highlight the lack of legislation, the Supreme Court in the case of Chavez vs. PCGG (G.R. No. 130716, December 9, 1998) noted that “there are no specific laws prescribing the exact limitations within which the right may be exercised or the correlative state duty may be obliged.”
3. Because of 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.
4. The present judicial remedy of *mandamus* is inaccessible to the public. In a survey by the Social Weather Stations, when respondents were asked what the most likely action they will take if an agency refused access to a document, only 12.7 % said they will file a case in court. Almost 40% will look for help in another agency, while 36.7% will report the case to the media. But also to

highlight the importance given to the right by people, only 10.6% will not do anything about the refusal.

But the self executing nature of the provision under the Bill of Rights is not true for the policy of full disclosure of all transactions involving public interest under Article II, Section 28. In the case of *Chavez vs. NHA* (G.R. No. 164527, August 15, 2007), the Supreme Court distinguished between the two provisions. It said that Sec. 28, Art. II compels the State and its agencies to fully disclose all of its transactions involving public interest without need of demand from anyone. Under this provision, government must bring into public view all the steps and negotiations leading to the consummation of the transaction and the contents of the perfected contract. In contrast, under the Bill of Rights provision, the interested party must first request or even demand that he or she be allowed access to documents and papers in the particular agency. The duty to disclose without demand 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. Unfortunately, there is no enabling law that provides the mechanics for the implementation of the compulsory duty to disclose transactions of public interest without demand under Article II, Section 28 of the Constitution. The Court observed: “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 result of the lack of legislation is the routine violation by government agencies of the people’s right to information. To cite a few examples: the refusal of access to text of the proposed agreement during the negotiation of the Japan-Philippines Economic Partnership Agreement (JPEPA); the denial of access to the report of retired Supreme Court Chief Justice Hilario Davide, Jr. on electoral reform; the initial denial of access to the report of the Independent Commission to Address Media and Activist Killings; and the denial of access to various government loan agreements and government contracts.

In its story “Multiple requests for access to info meet with flat denials”, the Philippine Center for Investigative Journalism (PCIJ) reports that its own writers and editors, even though patient and diligent in their effort to secure access to documents, have met with routine denials and flimsy excuses from public officials. Over the last 10 years, the PCIJ has documented 14 major requests for information vital to its investigative reporting projects that have been rebuffed by 12 national government agencies. The requested data and documents included civil works contracts, contractors of government projects, loan agreements, and the assets and liabilities and net worth (SALNs) of justices of the Supreme Court, generals of the Armed Forces and political appointees of Malacanang and other executive agencies. The requests made in writing and followed up by multiple phone calls to the agencies concerned have been denied for the most incredulous reasons. In the most difficult cases, the PCIJ had to wait for 56 days

to six months, file 3 to 5 request letters, make 18 to 21 follow-up phone calls, and deal with 6 to 9 various officials in the same agencies, to get action or response on its requests.

If denial of access is experienced even by seasoned journalists, we can expect that it gets even more difficult for ordinary citizens. For instance, the farmers support group Kaisahan shares the experience of the Sumilao farmers denied access to important decisions/orders and documents relating to the sale/transfer of ownership from Norberto Quisumbing to San Miguel Foods Inc. from the relevant government agencies. Kaisahan laments that if only the government agencies gave farmers vital information, many arguments could have been explored earlier on.

The Proposed Freedom of Information Act

House Bill 3732 passed by the Lower House is already a very progressive bill. The passage has been made possible through the persistent efforts of key allies in the Lower House, particularly by Rep. Erin Tañada who chaired the technical working group in the House Committee on Public Information, and long-time supporters Representatives Joel Villanueva, Del De Guzman, Riza Hontiveros, and Satur Ocampo. It also received impetus from the various authors and co-authors of freedom of information bills.

While even in past Congresses the proposed Freedom of Information Act has moved in the Lower House, in contrast it has languished in the Senate. The Senate legislative mill only moved when Senator Alan Peter S. Cayetano assumed chairmanship of the committee. As a result of the hearings and technical working group meetings involving representatives from government agencies, public interest groups and the media, the Committee substitute version has introduced further improvements to the House version. If passed in its present form, the proposed Freedom of Information Act will be a robust legislation which will be instrumental in addressing the grave problems in Philippine governance.

The proposed law has the following key features:

1. It is expansive in scope. It covers all possible government agencies whether they are in the executive, legislative, or judicial branches, or are independent Constitutional bodies. It covers all information made, received or kept in or under the control and custody of any government agency regardless of the form or format in which they are stored.
2. It provides only a narrow list of clearly defined and reasonable exceptions. While the general rule is that all information in the hands of government must be accessible to the public, there are information that are in the public interest to keep secret. For example, it is reasonable to withhold information on a planned operation against known criminals, for to disclose such plans would alert the criminals and cause the operation to fail.

3. It provides an opportunity and right for citizens to override an exception whenever there is greater public interest in the disclosure of information.
4. It provides clear, uniform, and speedy procedure for public access to information.
5. It provides the mechanics for the compulsory duty of government agencies to disclose information on government transactions pursuant to Article II, Section 28 of the Constitution.
6. It provides adequate and accessible remedies in cases of denial of access to information.
7. It provides clear criminal liabilities for violation of the right to information.
8. It spells out numerous mechanisms for the active promotion of openness in government.

The Need for Immediate Action by the Senate

The lack of legislation on the right to information has grave consequences for the country. The resulting overall lack of transparency in government has impeded the country's development. This relates directly to the persistence of rampant corruption that has weighed down Philippine economic performance. Free flow of information is a vital safeguard against corruption and rent seeking. Secrecy in government gives public officials and rent seekers alike a wide room for maneuver and greater cover for evidence of corruption. In contrast, transparency exposes the vested interests involved and leads to the identification of corrupt officials.

Lack of transparency has also compromised the quality and effectiveness of government policies. A free flow of information is needed for better government policies. It will enhance the capacity of the public to provide timely feedback to government, promote informed debate among stakeholders, and build consensus around policy objectives and design. The availability of information on rules and government policies, programs, and resource allocation will enable the private sector to make sound long-term economic decisions. In critical enterprises such as electricity and water, public access to relevant information through regulatory agencies will help guard against undue exercise of market power.

We remain optimistic that the bill can still be passed in the 14th Congress. However, we note the narrowing window of opportunity as general election fast approaches. We need to act together, and push for the passage of the Freedom of Information Act. Our right to know, right now!