



NOTES ON EXCEPTIONS IN AGENCY FOI MANUALS

One good thing about the issuance of EO No. 2 is that government offices were forced to map out the information each of them holds and outline clearly discernible procedures for citizens to follow should they wish to exercise their constitutionally guaranteed right to access information. While the Coalition acknowledges that inextricably tied to any access right are the limitations as provided for in the Constitution, statute, and jurisprudence, it noticed certain red flags while conducting a review of some agencies' FOI Manuals.

Personal Information. A common exception found in several of the FOI Manuals is restricting the access to certain documents such as 201 Files, Personnel records, and evaluation forms. Even as it pushes for the passage of the FOI Law, the Coalition is mindful of the need to balance the right to access information with an individual's right to privacy. It is therefore important to note that RA No. 10173 (Data Privacy Act of 2012)¹

¹ See SEC. 4. *Scope.* – This Act applies to the processing of all types of personal information and to any natural and juridical person involved in personal information processing, including those personal information controllers and processors who, although not found or established in the Philippines, use equipment that are located in the Philippines, or those who maintain an office, branch or agency in the Philippines subject to the immediately succeeding paragraph: *Provided, That* the requirements of Section 5 are complied with.

This Act does not apply to the following:

(a) Information about any individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual, including:

- (1) The fact that the individual is or was an officer or employee of the government institution;
- (2) The title, business address, and office telephone number of the individual;
- (3) The classification, salary range, and responsibilities of the position held by the individual; and
- (4) The name of the individual on a document prepared by the individual in the course of employment with the government;

(b) Information about an individual who is or was performing service under contract for a government institution that relates to the services performed, including the terms of the contract, and the name of the individual given in the course of the performance of those services;

itself does not provide for a blanket prohibition on the release of personal information especially if they pertain to public officials and employees or those who render service under contract for a government institution that relates to the services performed, including the terms of the contract and the name of the individual given in the course of the performance of those services. In order therefore to safeguard the need to protect the privacy of an individual at the same time fulfill the obligation to be transparent, redaction may be availed of. This is not provided by statute, and hence is considered by the Coalition an important mechanism provided by pending FOI bills.

Overbroad and Vague Restrictions. Agencies need to be careful of expanding restrictions when none exists in law. *Internal communications, operational matters, prejudicial premature disclosure, restricted documents, and confidential documents* may all be considered as overbroad or vague restrictions that need to be defined further to ensure that they do not go beyond exceptions found in statute, the Constitution, or jurisprudence. It is important to remember that the executive has no power to expand exceptions found in statute, the Constitution, or jurisprudence, and absent clear guidelines on how an office intends to classify matters or documents as one of the foregoing. Without clear guidelines an agency may believe it has the blanket authority to classify in a manner that ultimately goes beyond established exceptions.

Subsequent Identical Requests. At present, denying an FOI request on the basis that it partakes of a subsequent identical or substantially similar request is not an exception provided in statute or jurisprudence. Further, if an agency were to be permitted to deny for this reason, the Coalition is of the opinion that there should be a mechanism in place where responses to requests can be easily seen and that an individual when denied on the basis of having made an identical request to one already responded to should be directed to where such information can be seen.

(c) Information relating to any discretionary benefit of a financial nature such as the granting of a license or permit given by the government to an individual, including the name of the individual and the exact nature of the benefit;

(d) Personal information processed for journalistic, artistic, literary, or research purposes;

(e) Information necessary in order to carry out the functions of public authority, which includes the processing of personal data for the performance by the independent, central monetary authority, and law enforcement and regulatory agencies of their constitutionally and statutorily mandated functions. Nothing in this Act shall be construed as to have amended or repealed Republic Act No. 1405, otherwise known as the Secrecy of Bank Deposits Act; Republic Act No. 6426, otherwise known as the Foreign Currency Deposit Act; and Republic Act No. 9510, otherwise known as the Credit Information System Act (CISA);

(f) Information necessary for banks and other financial institutions under the jurisdiction of the independent, central monetary authority or Bangko Sentral ng Pilipinas to comply with Republic Act No. 9510, and Republic Act No. 9160, as amended, otherwise known as the Anti-Money Laundering Act and other applicable laws; and

(g) Personal information originally collected from residents of foreign jurisdictions in accordance with the laws of those foreign jurisdictions, including any applicable data privacy laws, which is being processed in the Philippines.

Special Laws. Some agencies have also detailed special laws relevant to their work that contain confidentiality provisions. The Department of Environment and Natural Resources (DENR) has made reference to RA No. 9072 (National Caves and Cave Resources Management and Protection Act)², RA No. 6969 (Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990)³, PD 1586 (Establishing An Environmental Impact Statement System, Including Other Environmental Management Related Measures And For Other Purposes) in relation to RA No. 6969 while the Commission on Higher Education (CHED) has cited its IPCR or Individual Performance Commitment and Review as being confidential in nature. Admittedly the laws cited by the DENR do classify certain documents as confidential and beyond the public's reach. The same laws, however, provide for limitations on the confidentiality. It is suggested that inasmuch as the restrictions have been included in the agency's FOI Manual, the limitation on the restriction also be disclosed for proper guidance of the one processing the request and

² See SEC. 6. *Information Concerning the Nature and Location of Significant Caves.* – Information concerning the nature and specific location of a potentially significant cave shall not be made available to the public within one (1) year after its discovery by the DENR, during which time the DENR in coordination with the Department of Tourism (DOT), the National Museum, the National Historical Institute, concerned LGUs the scientific community and the academe shall assess its archaeological, cultural, ecological, historical, and scientific value, unless a written request is made and the Secretary determines that disclosure of such information will further the purpose of this Act and will not create a substantial risk of harm, theft or destruction on such cave.

The written request shall contain, among others, the following:

- (a) a description of the geographic site for which the information is sought;
- (b) an explanation of the purpose for which the information is sought; and
- (c) an assurance or undertaking satisfactory to the Secretary that adequate measures are to be taken to protect the confidentiality of such information and to ensure the protection of the cave from destruction by vandalism and unauthorized use.

³ See **Section 12. Public Access to Records, Reports or Notification.** – The public shall have access to records, reports, or information concerning chemical substances and mixtures including safety data submitted, data on emission or discharge into the environment, and such documents shall be available for inspection or reproduction during normal business hours except that the Department of Environment and Natural Resources may consider a record, report, or information or particular portions thereof confidential and may not be made public when such would divulge trade secrets, production, or sales figures or methods, production, or processes unique to such manufacturer, processor, or distributor, or would otherwise tend to affect adversely the competitive position of such manufacturer, processor, or distributor. The Department of Environment and Natural Resources, however, may release information subject to claim of confidentiality to a medical research or scientific institution where the information is needed for the purpose of medical diagnosis or treatment of a person exposed to the chemical substance or mixture.

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the citizen making the request. Regarding CHED's IPCR, the Coalition also believes that this should be read in conjunction with the limitations provided for in RA No. 10173.

RA No. 7942 (Philippine Mining Act of 1995),⁴ however, is a different matter altogether as the law itself allows for a blanket confidentiality provision throughout the duration of the project. Then again, the confidentiality only extends to information provided by the contractor.

Reports, Ongoing Bidding, Non-Final Papers. On the matter of reports, ongoing bidding and evaluations, and non-final papers, these are accepted by access advocates to be beyond the right to access information. The Coalition is aware that the right to access information extends only to official acts, transactions, or decisions, as well as government research data. But once the reports, bidding, and non-final papers have attained finality or have already become the basis of official action, the government should be able to make available such official acts, transactions, and decisions.

SALN. The issue of the SALN access is more administrative in nature. Inasmuch as no statute provides for mandatory disclosure of documents such as the SALN and since there are offices or bodies properly identified under the law as the proper custodian for the SALN, the Coalition sees no diminution in the right of the citizens to access information if the request is made not to the proper custodian of the SALN.

Executive Privilege or Presidential Communications Privilege. Notably, several of the FOI Manuals provide for executive privilege or presidential communications privilege as an exception to the agency's obligation to disclose when requested. In this regard, we are reminded by the pronouncement of the Court in the case *Neri vs. Senate Committee on Accountability of Public Officers and Investigations, et al.*⁵ citing *United States vs. Reynolds*⁶ and *Unites States v. Article of Drug*⁷.

We now proceed to the issue -- **whether the claim is properly invoked by the President.** Jurisprudence teaches that for the claim to be properly invoked, there must be a formal claim of privilege, lodged by the head of the department which has control over the matter. A formal and proper claim of executive privilege requires a precise and certain reason for preserving their confidentiality.

While a recognized exception to the right to access information, the privilege should be invoked by the head of the department citing precise and certain reason(s). It is not something to be left to the discretion of the person processing the request.

⁴ See SEC.94 (f) Confidentiality - Any confidential information supplied by the contractor pursuant to this Act and its implementing rules and regulations shall be treated as such by the Department and the Government, and during the term of the project to which it relates.

⁵ G.R. No. 180643; 25 March 2008.

⁶ 345 U.S. 1, 6-8 (1953).

⁷ 43 F.R.D. at 190.