

Do Filipinos have a right to information?

Yes. The right of Filipinos to information held by government is guaranteed by no less than the Constitution's Bill of Rights. Article III, Section 7 of the Constitution 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 limitations as may be provided by law."*

Aside from the provision in the Bill of Rights, what other provisions in the Constitution deal with access to information?

The other major Constitutional provision on people's access to information is embodied in Article II (Declaration of Principles and State Policies), Section 28. It 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."*

In addition, 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.

Why is Freedom of Information important?

Freedom of information is a key component of democracy. 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 gives flesh to the principle that public office is a public trust. Article XI, Section 1 of the Constitution states 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.

Given that there are clear Constitutional provisions on the people’s right to information and government transparency, is there still a need for 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.

However, despite this ruling, the passage of the Freedom of Information Bill is still necessary. While the Supreme Court has upheld the enforceability of the 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.

What then are the legal gaps that legislation must address?

The legal gaps that legislation must address include:

- **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 is contained 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 said 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.

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.

- **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.”
- **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.
- **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.

Equally important, the self-executing nature of the Bill of Rights provision does not hold 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.

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.””*

What are the consequences of the lack of implementing legislation on the right to information and the policy of full disclosure of all transactions involving public interest?

The result of the lack of legislation is the routine violation by government agencies of the people’s right to information. This harms not only the individual interest of citizens, but the collective interest of society as a whole.

The resulting overall lack of transparency in government has impeded the country’s development. For one, this relates directly to the persistence of rampant corruption that has weighed down Philippine economic performance. For another, this has compromised the quality and effectiveness of government policies.

Can you cite incidence of government refusal to provide access 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 a May 2009 report, the Philippine Center for Investigative Journalism (PCIJ) said 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:

- No one is authorized to release the data on account of the absence or non-availability of the spokesperson or head of agency.
- The information falls under the murky veil of “executive privilege.”
- Public officials doubt the motives of the journalist, as well as the journalist’s capacity to understand the requested data.
- Disclosure of the information may turn the public against the officials, or put these officials at risk of extortion, kidnapping, and blackmail for adverse decisions and rulings.

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.

To be sure, the denial of access is experienced not just by public interest organizations and the media; it is also experienced by ordinary people.

What are the key features of the FOI Act that will address the problem of government refusal to provide information?

The House version and the pending Senate version of the proposed FOI Act have 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, it may be in the public interest for government to keep secret certain information. For example, it is reasonable to withhold information on a planned operation against known criminals because disclosure could alert the criminals and impair police operations.
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.

Under the proposed FOI Act, what are the exceptions to access to information?

The FOI bill lists nine exceptions. Access to information may be denied when:

1. The revelation of the information will create a clear and present danger of war, invasion or any external threat to the State as determined by the Office of the President and/or the Secretary of the Department of National Defense;
2. The information pertains to the foreign affairs of the Republic of the Philippines, when its revelation would unduly weaken the negotiating position of the government in an ongoing bilateral or multilateral

negotiation or seriously jeopardize the diplomatic relations of the Philippines with one or more states with which it intends to keep friendly relations;

3. The information pertains to internal and external defense and law enforcement, when the revelation thereof would render a legitimate military operation ineffective, unduly compromise the prevention, detection or suppression of a criminal activity, or endanger the life or physical safety of confidential or protected sources or witnesses, law enforcement and military personnel or their immediate families. Information relating to the details of the administration, budget and expenditure, and management of the defense and law enforcement agencies shall always be accessible to the public;
4. The information pertains to the personal information of a natural person other than the requesting party, and its disclosure would constitute a clearly unwarranted invasion of his or her personal privacy, unless it forms part of a public record, or the person is or was an official of a government agency and the information relates to his or her public function, or the person has consented to the disclosure of the information;
5. The information pertains to trade, industrial, financial or commercial secrets of a natural or juridical person other than the requesting party, obtained in confidence by, and/or filed with a government agency, whenever the revelation would seriously prejudice the interests of such natural or juridical person in trade, industrial, financial or commercial competition, unless such natural or juridical person has consented to the disclosure of the information;
6. The information is privileged from production in legal proceedings by law or by the Rules of Court, unless the person entitled to the privilege has waived it;
7. The information is exempted by law, in addition to those provided in this section;
8. The information is obtained by any committee of either House of Congress in executive session, whenever such information falls under any of the foregoing exceptions; and
9. The information consists of drafts of decisions by any executive, administrative, judicial or quasi-judicial body in the exercise of their

adjudicatory functions whenever the revelation thereof would reasonably tend to impair the impartiality of verdicts, or otherwise obstruct the administration of justice.

Are there safeguards against government abuse of the exceptions?

The proposed FOI Act provides various mechanisms to safeguard against government abuse of the exceptions.

First, as can be seen from the list of exceptions, they do not simply identify categories of exempt information but also specify the public interest sought to be protected by the non-disclosure of information.

Second, there is a legal presumption in favor of access to information. Government agencies claiming an exception has the burden of proving by clear and convincing evidence that the information requested is exempted from disclosure by the Act.

Third, requesters who are denied information that validly falls under the exceptions have the opportunity to show that the public interest in the disclosure outweighs the harm to the public interest sought to be prevented by the exceptions.

Fourth, any public officer or employee claiming an exemption under the Act faces criminal liability if it is shown that the claim is manifestly devoid of factual basis.

Will the exceptions under the FOI Act now foreclose any claim of exception other than those listed in the Act?

While this issue will, when it arises, be a matter for the Courts to decide, there could be exceptions that the Court will recognize beyond those listed in the Act when the exceptions can be shown to be based on the Constitution. An example would be a claim of “executive privilege”, which the Supreme Court has recognized to have Constitutional basis. In the case of *Neri vs. Senate* (G.R. No. 180643, March 25, 2008), the Court stated in part that “the right to information must be balanced with and should give way in appropriate cases to constitutional precepts particularly those pertaining to delicate interplay of executive-legislative powers and privileges which is the subject of careful review by numerous decided cases.”

While Constitutionally-based exceptions may be recognized in addition to the exceptions enumerated in the Act, the procedures under the Act should equally apply even when the exception claimed is constitutionally based. Also, a claim of a Constitutionally-based exception, when proven to be manifestly devoid of factual basis, falls within the criminal acts under the proposed FOI law.

Under the proposed FOI Act, what is the procedure for accessing information?

A citizen who wishes to obtain information shall submit a request to the government agency concerned personally, by mail, or through electronic means. The request shall state the name and preferred contact information of the requester, and reasonably describe the information required, the reason for the request of the information and the preferred means by which the government agency shall communicate such information to the requesting party. The stated reason, or the failure to state the reason for the request of the information, shall not be used as a ground to deny the request or to refuse the acceptance of the request. If the request is submitted personally, the requester shall show identification card issued by any government agency, or government or private employer or school. If the request is submitted by mail or through electronic means, the requester may submit a photostatic or electronically scanned copy of the identification, or other convenient means as determined by the agency.

The request shall be stamped by the government agency, indicating the date and time of receipt and the name, rank, title and position of the receiving public officer or employee with the corresponding signature, and a copy thereof furnished to the requesting party. In case the request is submitted by electronic means, the government agency shall provide for an equivalent means for the acknowledgement of receipt.

The government agency shall comply with the request within ten (10) calendar days from the receipt of request, except under certain circumstances identified in the bill when the time limit for the production of the requested information may be extended by no more than fifteen (15) calendar days.

Government agencies may charge a reasonable fee to reimburse the actual cost of reproduction, copying or transcription and the communication of the information requested.

If the government agency decides to deny the request, in whole or in part, it shall, within ten (10) calendar days from the receipt of the request, notify the person making the request of such denial in writing or through electronic means. The notice shall clearly indicate the name, rank, title or position of the person making the denial, and the grounds for the denial. In case the denial is by reason of a claimed exception, the denial shall also state clearly the legitimate aim or interest sought to be protected in the confidentiality, and the facts and circumstances invoked showing the substantial harm to, or frustration of, the legitimate aim or interest that will result in the disclosure of the information. Failure to notify the person making the request of the denial, or of the extension, shall be deemed a denial of the request for access to information.

Government agencies are required to provide the public with the necessary information that will facilitate orderly procedure for access.

If a requester is denied access to information, what remedies are available to him or her to reverse the denial?

In all government agencies other than in the judicial branch, every denial of any request for access to information may be appealed to the person or office next higher in authority within fifteen (15) calendar days from the notice of denial. The appeal must be decided within fifteen (15) calendar days from filing. Failure of the government agency to decide within this period shall constitute a denial of the appeal.

Instead of appealing or after the denial of the appeal, the person denied access to information may file a verified complaint with the Office of the Ombudsman, praying that the government agency concerned be directed to immediately afford access to the information being requested. Such complaint shall be resolved by the Office of the Ombudsman within sixty (60) calendar days from filing, or earlier when time is of the essence, taking into account such factors as the nature of the information requested, context of the request, public interest, and danger that the information requested will become moot. The Office of the Ombudsman shall promulgate its special rules of procedure for the immediate disposition of such complaints. Unless restrained or enjoined, the decisions of the Office of the Ombudsman shall be immediately executory, without prejudice to review in accordance with the Rules of Court.

Instead of filing a complaint with the Office of the Ombudsman, whenever a request for information is denied originally or on administrative appeal,

the requester may file a verified petition for mandamus in the proper court. The procedure for such petition shall be summary in nature.

In the Judicial Branch, the Supreme Court shall promulgate the remedies that would govern offices under its jurisdiction.

Is the Office of the Ombudsman an appropriate agency to handle complaints on access to information?

Yes. The Office of the Ombudsman is an appropriate intermediate and independent body to provide assistance in cases of denial of access to information. Under the Constitution (Article XI, Section 13 (2)) 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. Providing access to information is a duty required by the Constitution and by the proposed Act.

The Ombudsman must welcome the role it is being asked to play in ensuring the effective exercise of the people of their right to information. For one, it is designated by the Constitution as the protector of the people. For another, the right to information, as mentioned earlier, serves as a mechanism for mitigating corruption, which falls under the functions and duties of the Ombudsman.

Is the reversal of denial the only relief available to requesters denied access to information?

No. The remedies available to compel disclosure are without prejudice to any other administrative, civil or criminal action covering the same act.

What acts are defined to be criminal under the proposed FOI law? What are the penalties?

The penalty of imprisonment of not less than one (1) month but not more than six (6) months, and/or the penalty of suspension from office for the same duration, at the discretion of the court, shall be imposed upon:

- (a) Any public officer or employee receiving the request who shall fail to promptly forward the request to the public officer within the same office or agency responsible for officially acting on the request when such is the direct cause of the failure to disclose the information within periods required;
- (b) Any public officer or employee responsible for officially acting on the request, who shall:
 - (1) Fail, to act on the request within the periods required;
 - (2) Knowingly deny the existence of existing information;
 - (3) Destroy information being requested for the purpose of frustrating the requester's access thereto;
 - (4) Claim an exception under the Act, or under the Constitution, when the claim is manifestly devoid of factual basis; or
 - (5) Refuse to comply with the decision of his immediate supervisor, the Ombudsman or the court ordering the release of information that is not restrained or enjoined by a court;
- (c) The head of office of the government agency directly and principally responsible for the negotiation and perfection of any of the transactions mandatorily required to be disclosed, who shall knowingly refuse to direct the posting or uploading of such transaction despite the agency capacity to implement such directive. The same penalty shall be imposed upon the public officer or employee who, despite a directive from the head of office, shall fail, to post or upload any of said transactions;
- (d) Any public officer or employee who shall destroy, or cause to destroy, records of information that are prohibited to be destroyed under the Act;
- (e) Any public officer who formulates policies, rules and regulations manifestly contrary to the provisions of the Act, and which policies, rules and regulations are the direct cause of the denial of a request for information; or
- (f) Any public or private individual who knowingly induced or caused the commission of the foregoing acts.

How will the proposed FOI Act implement the policy of full disclosure of all government transactions involving public interest?

All government agencies are mandated to upload on their websites all the steps, negotiations and key government positions pertaining to definite propositions of the government, as well as the contents of the contract, agreement or treaty in the following transactions involving public interest:

1. Compromise agreements entered into by a government agency with any person or entity involving any waiver or its rights or claims;
2. Private sector participation agreements or contracts in infrastructure and development projects;
3. Procurement contracts entered into by a government agency;
4. Construction or concession agreements or contracts entered into by a government agency;
5. Loans, grants, development assistance, technical assistance and programs entered into by a government agency with official bilateral or multilateral agencies, as well as with private aid agencies or institutions;
6. Loans from domestic and foreign financial institutions;
7. Guarantees given by any government agency to government owned or -controlled corporations and to private corporations, persons or entities;
8. Public funding extended to any private entity;
9. Bilateral or multilateral agreements and treaties in defense, trade, economic partnership, investments, cooperation and similar binding commitments; or
10. Licenses, permits or agreements given by any government agency to any person or entity for the extraction and/or utilization of natural resources.

A summary list of the foregoing information uploaded in the website shall be posted in the bulletin boards of the concerned government agency.

The information uploaded in the website may be withdrawn after a period of three years from the time of uploading, provided that an abstract of

the information withdrawn shall remain uploaded in the website, containing a brief description of the transaction and an enumeration of the information withdrawn, and indicating the dates of posting and withdrawal.

Considering that government agencies are with limited resources and capacity, is it reasonable to expect them to meet the obligation for mandatory disclosure?

Recognizing the limitations, the Act has provided for reasonable flexibility in the application of the requirement. Should an agency lack the capacity to comply, the agency shall initiate a capacity-building program, or coordinate with another appropriate agency, to facilitate substantive compliance not later than three years upon approval of the Act. We note that there are agencies that have been successful in using their website to post important documents. An example is the Commission on Audit, which has been posting its completed annual audit reports of government agencies, along with other documents of public interest.

What is the current legislative status of the proposed Freedom of Information Act?

The House version has been passed on third reading by the House of Representatives as early as 12 May 2008. 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. What is left is for the Senate to pass its counterpart measure.

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 towards the end of 2008. He has made good his promise to take the measure forward by conducting public hearings and technical working group meetings. This resulted in a Committee substitute version that has introduced further improvements to the House version. In the Senate the bill also has strong

support from Senators Loren Legarda and Mar Roxas, among other authors of various bills.

A draft committee report in the Senate is now ready. After committee members sign the report, the next step is its sponsorship before the Senate plenary on *Second Reading*. Floor debates and amendments, if any, will follow, culminating in the Senators' vote on the Second Reading version of the bill.

If approved on Second Reading, it shall be submitted to final vote on Third Reading after printed copies in final form have been distributed to the Members of the Senate at least three days prior to the voting.

After the approval on Third Reading by the Senate, a Bicameral Conference Committee might be called to reconcile the House and Senate versions should the House of Representatives not agree to the changes introduced by the Senate. Once agreement is reached, the Conference Committee report will be submitted to the floor for final approval.

We need your support.

While we have been successful in pushing a progressive measure closer to passage, we anticipate that it will take a stronger, high-profile push, to move the Senate plenary to promptly pass the bill, and for the two Chambers to finally approve the bill. We remain optimistic that the bill can still be passed. However, we note the narrowing window of opportunity as general election fast approaches.

We need your help at this crucial juncture of the campaign!