

**FREEDOM OF INFORMATION LAW
AND ITS IMPACT ON
TRANSPARENCY AND ACCOUNTABILITY**

Atty. Felix D. Carao, Jr.

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On January 18, 2010 the Bicameral Conference Committee of Congress finally succeeded in reconciling disparate provisions of the Senate and House versions of the Freedom of Information (FOI) Bill. However, despite the confirmation by the Senate of the Bicameral Conference Committee Report on February 1, 2010, the House failed to ratify the FOI Bill for lack of quorum. Hence, the Fourteenth Congress failed to pass the FOI Bill of 2009.

The approval of the Bill by the Bicameral Conference Committee of Congress is a giant step in the right direction, especially in giving substance and meaning to President Aquino's public declaration that his administration will anchor its governance on a policy of transparency.

The Freedom of Information bill as approved by the Bicameral Conference Committee of Congress contains provisions that clearly and expressly promote and insure transparency in government transactions and expenditures of public funds.

Section 6 of the Bill, provides:

Access to Information. - Government agencies shall make available to the public for scrutiny, copying and reproduction in the manner provided by this Act, all information pertaining to official acts, transactions or decisions, as well as government research data used as basis for policy development, regardless of their physical form or format in which they are contained and by whom they were made.

However, to insure its early passage, the President has to certify the Freedom-of-Information Bill as a priority. The President is expected by the people to rally and unify the lawmakers by certifying the urgency and significance of the Bill in advancing his announced policy of transparency and accountability in governance and promoting public participation in governmental programs and projects involving public interest.

Despite President Aquino's announced policy, however, it appears that he has not certified as a priority the passage of the Freedom of Information Bill during his meeting with the first Legislative Executive Development Advisory Council (LEDAC).

This is deplorable because the non-enactment of the Freedom of Information Bill serves only to perpetuate the mantle of secrecy that shrouds government transactions and expenditures of public funds.

This Bill, if passed into Law, could serve as the pathway to President Aquino's *MATUWID NA DAAN*.

Is *MATUWID NA DAAN* no longer a priority?

Prosecuting public figures for corrupt practices has been the major thrust of the present administration during the last few weeks. Understandably, threats of sending people to jail for corruption has been directed principally against former President GMA and her cohorts.

However, while this step is laudable and should be supported by all, more far-reaching and primordial than merely prosecuting corrupt government officials is preventing corruption through the enactment of the Freedom of Information Bill.

Corruption thrives because it can be so easily perpetrated in so many ways and can be so conveniently shielded from public scrutiny. The best source of evidence involving graft and corruption are usually records that are kept in the strictest confidence in the hands of government officials who may have participated in the commission of these offences.

Moreover, while government contracts and disbursements of government funds are all required to be subject for review by government Auditors, unfortunately the results of the Audit are, likewise, kept from public scrutiny.

In a few instances, these anomalies are exposed by whistle blowers. By this time, however, a lot of public funds may have already been siphoned off into the pockets and secret bank accounts of the corrupt public officials involved. The irony of this is that the government would again have to spend time and money to prosecute them after they are exposed.

There can be no doubt, therefore, that if the Bill is signed into law, our government officials, however inclined they may be to commit malfeasance in office, will think twice before doing so because every step of the way, the people will have access to all information concerning their acts and transactions.

Let me discuss the legal background of the Right to Information under the 1987 Constitution.

The Constitutional Birth of the Right to Information

Section 7, Article III of the 1987 Constitution provides the fundamental framework for the Filipino people's right to information on matters of public concern. It provides:

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.

Prior to 1973, however, the right to information did not have constitutional bearing. This was made clear by the Philippine Supreme Court when it held in the 1948 case of *Subido vs. Ozaeta*, that freedom of information "is **not guaranteed by the constitution**" and that the right to examine or inspect public records "is **purely a question of statutory construction.**"¹

Because of the *Subido* case, the framers of the 1973 Constitution inscribed the right to information into the fundamental law.² It would, therefore, appear that no longer will the ordinary citizen have to look for any specific law to know if he has such right – the Constitution has already guaranteed to him such right. On the other hand, the 1987 Constitution not only **reproduced the 1973 text** but also **broadened the scope of information** that can be demanded as a matter of constitutional right.

Shortcomings of Section 7, Article III of the 1987 of the Constitution.

The constitutional status of the Right to Information *should* have projected the Philippines before the international stage as one of the countries with strong adherence to principles of transparency and accountability. Indeed, constitution-wise, the Philippines fares better than the United States – since nowhere in the American federal Constitution is the right to information as explicitly stated as Section 7 of Article III of our 1987 Constitution, and so the United States had to pass a law³ that created and defined this right.

However, despite its inclusion in our Constitution, the public's invocation of the right to information against the government only resulted in frustration and the gradual institutionalization of a culture of impunity and secrecy in government transactions and expenditures of public funds.

This deplorable situation was brought about by a qualification in Section 7, Article III of the Constitution that the right of information is "**subject to such limitations as may be provided by law**". This is compounded by the Supreme Court's interpretation of the phrase "subject to such limitations as may be provided by law" as either a **substantive** limitation or, as a **regulatory** limitation.

According to the Supreme Court, "**Substantive** limitation" means that certain types of information, like those affecting national security, are exempt from public scrutiny.⁴ On the other hand, "**regulatory** limitation" means that a record custodian may adopt rules "prescribing the manner and hours of examination to the end that damage to or loss of, the records may be avoided, that undue interference with the duties of the custodian of the... documents and other employees may be prevented, [and] that the right of other persons entitled to make inspection may be insured[.]"⁵

Between the above two limitations, the **regulatory discretion** allowed to public-record custodians is more notorious in frustrating the people's access to public information.

In May 2011, the Philippine Center for Investigative Journalism (PCIJ) published the result of its audit of how certain national agencies deal with access to information.⁶ The PCIJ found that the Office of the President and the Office of the Ombudsman **"stick out... as the most barren fields for harvesting information and documents."** Security and police agencies like the AFP, PNP, and the Department of National Defense were also found to be seemingly "stuck in the practices of old". Not to be forgotten is the country's May 10, 2010 experience, where COMELEC imposed severely restrictive conditions for access to information regarding the sub-performing automated system it adopted for the 2010 elections.

PCIJ summed the situation appropriately as follows: "[s]ome packets of transparency, but **most[ly] everywhere, a predilection for opaqueness and more barriers to access in place.**"⁷

The root cause of all this is the way Section 7, Article III of the Constitution itself is worded. To begin with, the provision is broadly and generally worded; the only phrase that is more or less specific is the reference to government research data. The situation is not improved by the Supreme Court's liberal interpretation of the provision as allowing **regulatory** limitation. The effect is that agencies in custody of public records enjoy a field day in devising rules limiting access to said records. Even though it is evident to the public that the rules are restrictive, or convoluted, or heavily laden with bureaucratic red tape, these ill-conceived rules hide themselves under the twin veils of the Supreme Court rulings and of the presumption of reasonableness.

More importantly, considering the flip-flopping of the Supreme Court in its decisions in a number of cases recently resolved by it, which is regrettable, the public can hardly expect a final, clear and definitive ruling from the highest tribunal on this issue.

The Necessity for a Legislated Freedom of Information

The overly comprehensive wording of the constitutional right of information, and the unreliability of the judicial process in enforcing it, provide the overriding justification for the enactment of a statute on the right to information. As CenPEG advocated, we need an FOI law

- to provide uniform and definitive procedure for dealing with requests for information;
- to clearly define exceptions;
- to secure for us effective remedies in cases of denial of access;
- to require the disclosure of government transactions without need of request; and
- to impose criminal and administrative sanctions for violation of our right to information

However, the true appeal of a Freedom-of-Information statute lies in its role in the fight against corruption.

For me, the best way to fight corruption is prevention, not prosecution. This can only be achieved if transparency in government transactions is statutorily enjoined and definitively provided under a Freedom of Information law.

May I now address His Excellency: Mr. President, if Your Excellency wants those in government to follow your *MATUWID NA DAAN*, we respectfully urge you to certify to Congress as a priority measure the Right of Information Bill approved by the Bicameral Conference Committee of Congress on January 18, 2010.

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¹ 80 PHIL 383. 386 (1948)

² See 1973 Constitution, Article IV, Section 6

³ The Freedom of Information Act (5 U.S.C. § 552), as amended

⁴ *Cf Legaspi vs. CSC*, 150 SCRA 530, 540 (1987)

⁵ *Id.* at 538

⁶ "Access to information under P-Noy: Some open spaces, many closed corners", *PCIJ*, May 2011, <http://pcij.org/stories/some-open-spaces-many-closed-corners/> (accessible as of July 19, 2011)

⁷ *Id.*