



FOUNDATION FOR MEDIA
ALTERNATIVES

FREEDOM OF INFORMATION & DATA PROTECTION



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INTRODUCTION

Freedom of Information (FOI)—also referred to as the right to information—is the fundamental right of an individual to access information under the control or custody of the government. The United Nations (UN) General Assembly considers it as an integral part of the right of freedom of expression,¹ which is enshrined in Article 19 of the Universal Declaration of Human Rights (UDHR).² By its very nature, it sits at the core of any democratic nation.

Another advocacy that has grown in significance and prominence in the last half century is data protection (also referred to as “data privacy” or “information privacy”), which is a key aspect of the fundamental right to privacy. As in the case of FOI, the right to privacy is featured in the UDHR, as well as in numerous international treaties, national constitutions, and domestic laws.³

The nature of these two concepts make it inevitable for them to overlap. This has led some to adopt the view that they are inherently contradictory, such that upholding one necessarily entails discarding the other. This is far from the truth. On the contrary, the FOI and the right to privacy should be viewed as making up “two sides of the same coin”.

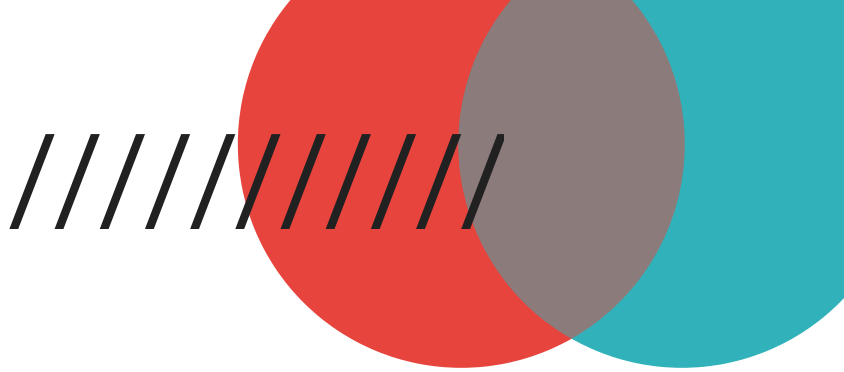
They complement each other given their common purpose of promoting individual rights and government accountability.⁴ In the few instances that they do go directly against one another, the key to a meaningful resolution lies in the proper balancing of all interests involved. Whenever possible, meeting both their objectives without having to sacrifice the cause of one must always be the set goal.

¹ unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/

² un.org/en/universal-declaration-human-rights/
Banisar, D. & Davies, S. Privacy and human rights: An international survey of privacy laws and practice. gilc.org/privacy/survey/intro.html

³ Banisar, D. (2011). The right to information and privacy: balancing rights and managing conflicts. The International Bank for Reconstruction and Development and The World Bank.

⁴ documents.worldbank.org/curated/en/847541468188048435/pdf/80740-Right-to-Information-and-Privacy-Box-377336B-PUBLIC.pdf



FREEDOM OF INFORMATION

As far as official or government-held information is concerned, an FOI law usually determines who can access what data and how, who should disclose them, and what data are exempt from disclosure.⁵ Its benefits are as varied as they are numerous. For one, it allows people to protect their rights from State abuses, mismanagement, and corruption. By fostering openness and transparency in governance, it also improves the people's trust in government decision-making processes.⁶ Some even consider it a critical prerequisite to the very exercise of democracy, whereby effective public participation in the democratic process is only possible when people are properly informed of the activities and policies of their government.

Under a typical FOI system, a person may request for access to information held by a government agency, and the latter is legally bound to respond and provide that information, unless prevented by lawful causes. In more modern regimes, FOI already includes access to machine-readable data or open data.⁷

An FOI law fails to fulfill its objectives when there is "burdensome mechanism for information access, weak enforcement, arbitrary use of exceptions, bad state of record-keeping and archive management system, and poor implementation".⁸

Shifting from a culture of secrecy to one of transparency is a considerable challenge for many governments, but not impossible.⁹ On record, Sweden was the first country to have enacted a law that governs access to government-held information in 1766.¹⁰ As of December 2016, there were already 115 countries with FOI regimes.¹¹ They vary in content, scope, and implementation, as determined by several factors: constitutional laws, availability of funds and trained implementers, and the activism of civil society and journalists, among others.¹²

⁵ Stein, L & Camaj, L. (2018, February). Freedom of Information.

communication.oxfordre.com/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-97

⁶ Banisar, D. (2010). Linking ICTs, the right to privacy, freedom of expression and access to information. *East African Journal of Peace and Human Rights*, 16(1), pp. 124-154. poseidon01.ssrn.com/delivery.php

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⁷ Tan, N., Chavez, L, et. al. (2014, July 27). Fast facts Freedom of information laws around the world. *Rappler*.

www.rappler.com/newsbreak/iq/63867-fast-facts-access-to-information-laws-world

⁸ unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/

⁹ Ibid.

¹⁰ Tan, N., Chavez, L, et. al. (2014, July 27). Op. cit.

¹¹ www.freedominfo.org/2016/12/eight-countries-adopt-foi-regimes-2016/

¹² unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/



Article 19, a civil society organization, developed a set of principles to help determine the effectiveness of any particular FOI regime: (1) maximum disclosure; (2) obligation to publish; (3) promotion of open government; (4) limited scope of exceptions; (5) processes to facilitate access; (6) costs; (7) open meetings; (8) precedence of disclosure; and (9) protection for whistleblowers.

In the Philippines, both press freedom and FOI have been pivotal in its people's struggle for independence and in removing corrupt and/or oppressive presidents from power.¹³

However, it was only in 1987 that the concept of FOI was firmly enshrined in its Constitution, to wit:

"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."¹⁴

There is also Article III, Section 7, which is more explicit in taking up the subject, to wit:

"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."

To further cement FOI in the country's legal system, several FOI bills have been filed in Congress, albeit none of them has actually been enacted into law.

The first one was considered the same year the current Constitution became effective.¹⁵

During his presidential campaign, current President Rodrigo Duterte swore to give life to an FOI law. He seemed poised to deliver on this promise when, less than a month after stepping into office, he signed Executive Order (E.O.) No. 2,¹⁶ which provides for an FOI mechanism in the executive branch. Many regarded the act as a milestone in the decades-long campaign for the country's first-ever FOI law.

As of 28 June 2018, a total of 567 out of 941 government entities (i.e., national government agencies, government-owned and -controlled corporations, and state universities and colleges) had submitted their People's FOI Manuals and implementing details.¹⁷ At the same time, 274 government agencies are already participating in the concurrent eFOI (i.e., electronic FOI) portal.¹⁸

¹³ Celdran, D. (2002). The Philippines: SMS and citizenship. *Development Dialogue*, 1, 91-103.

www.right2info.org/resources/publications/ai-in-southeast-asia-and-beyond

¹⁴ 1987 Philippine Constitution, Art. II, §28

¹⁵ cmfr-phil.org/freedom-of-information/

¹⁶ Operationalizing in the Executive Branch the People's Constitutional Right to Information and the State Policies to Full Public Disclosure and Transparency in the Public Service and Providing Guidelines Therefor

¹⁷ Freedom of Information – Project Management Office of the Presidential Communications Operations Office (August, 2018) FOI MID-YEAR REPORT.

www.foi.gov.ph/resources

¹⁸ *Ibid.*



DATA PROTECTION

Data privacy gives individuals control over their personal data, except in certain cases recognized by law. With that, it is significant in many ways. It protects individuals against unwarranted surveillance, identity theft, profiling, and discrimination, among others. As a key aspect of the right to privacy, it also allows individuals to exercise their other fundamental rights, like freedom of association and freedom of speech.¹⁹ Like FOI, proponents argue that it is essential to making democracy possible.

Germany supposedly enacted the first data protection law in 1970.²⁰ As of 2017, there were already 114 data protection laws and 40 pending bills around the world.²¹ Practically all of them operate under certain principles popularized by the Organization for Economic Cooperation and Development, namely: (1) collection limitation; (2) data quality; (3) purpose specification; (4) use limitation; (5) security safeguards; (6) openness; (7) individual participation; and (8) accountability.²²

The Philippines's Data Privacy Act (DPA) was enacted in 2012. Patterned after the 1995 European Union (EU) Data Protection Directive, it lay dormant for four years before being put into action in 2016, with the appointment of the inaugural members of the National Privacy Commission (NPC), which is the agency tasked to administer its implementation. Notably, the DPA also recognizes the equally vital role of free information flows to society.²³

In general, entities covered by the DPA must ensure that their data processing activities are carried out in a manner consistent with the so-called data privacy principles²⁴ and the various criteria for processing personal data.²⁵ They ought to uphold the rights of individuals vis-à-vis their personal data,²⁶ and should put in place necessary and appropriate security measures.²⁷ Notably, the law does recognize exemptions, subject to certain conditions, including data that: (1) qualify as matters of public concern;²⁸ (2) are processed for journalistic, artistic, or literary purposes; and (3) are necessary for a public authority to carry out its constitutionally or statutorily-mandated functions.²⁹

¹⁹ Banisar, D. and Davies, S. Op. cit.

²⁰ Werry N., Kirschbaum, B., et.al. (2017, December) *The Privacy, Data Protection and Cybersecurity Law Review. 4th ed.* thelawreviews.co.uk/edition/the-privacy-data-protection-and-cybersecurity-law-review-edition-4/1151282/germany

²¹ Banisar, D. (2010). Op. cit.

²² oecdprivacy.org/#principles

²³ Rep. Act No. 10173, Chap. I, §2

²⁴ Rep. Act No. 10173, Chap. III, §11

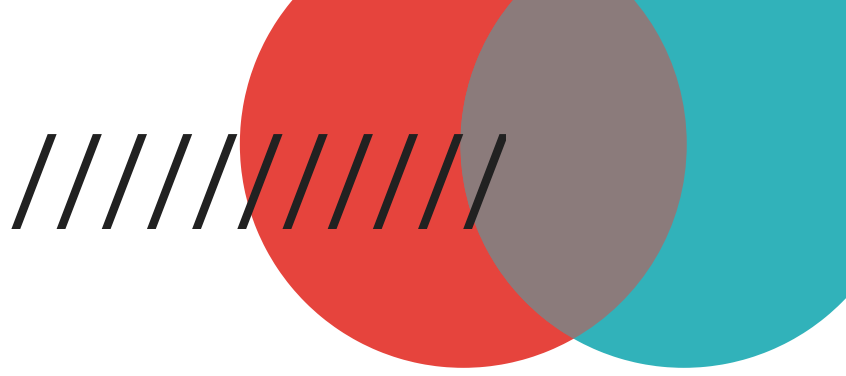
²⁵ Rep. Act No. 10173, Chap. III, §12, 13

²⁶ Rep. Act No. 10173, Chap. IV, §16

²⁷ Rep. Act No. 10173, Chap. V, §20

²⁸ Rep. Act No. 10173, Chap. I, §4(a)

²⁹ Rep. Act No. 10173, Chap. I, §4(e)



FOI AND DATA PROTECTION

Many rights advocates agree that FOI and the right to privacy are complementary. They both help ensure that governments are accountable to the people by reducing corruption and by promoting development through improved governance and public participation.³⁰ They also reflect fundamental democratic values like openness, transparency, and accountability, and constantly seek to balance the interests of individual citizens with those of the State.

As fundamental rights, neither takes precedence over the other by default.³¹ In every situation where both are called on to apply, there should always be an effort to reconcile their interests. If this is not possible, attempts to minimize any negative impact that may result should be exhausted.

This is particularly the case when the demand for information requires disclosing personal data held by government bodies. Given the massive amount of personal data held by governments, it is important that safeguards that prevent their unwarranted release exist and are properly enforced. At the same time, neither should a public officer be allowed to invoke the right to privacy as a shield against accountability.

Balancing mechanisms may take the form similar to that adopted by the 1995 EU Data Protection Directive, which provides for three distinct (but not necessarily exclusive) methods: (1) by exempting specific acts from the application of the Directive; (2) by authorizing EU Member States to provide for exemptions in their respective domestic laws; and (3) by ameliorating applicable requirements.³²

A common feature of FOI and data protection laws is the presence of a commission or body charged with their implementation.³³ In the case of FOI, the commission usually has the power to receive appeals and make determinations or recommendations regarding the release of information by other state agencies or offices. It is an integral cog in the balancing mechanism of the FOI system.³⁴

³⁰ Banisar, D. (2010). Op. cit.

³¹ Draper, E. (2012). *Secrecy, privacy and transparency: The balance between state responsibilities and human rights*. Global Information Society Watch.

www.giswatch.org/en/internet-and-corruption/secrecy-privacy-and-transparency-balance-between-state-responsibilities-a

³² Maxeiner, J. (1995). Freedom of Information and the EU Data Protection Directive. *Federal Communications Law Journal*, Vol. 48(1).

<https://www.repository.law.indiana.edu/fclj/vol48/iss1/4>

³³ Banisar, D. (2011). Op. cit.

³⁴ *Ibid.*



So far, countries have adopted two distinct approaches when implementing these two laws. Some have established separate bodies for their enforcement. They include countries like Austria, Canada, Denmark, Romania, Spain, and Sweden.³⁵ In jurisdictions like New Zealand and Peru, they have their ombudsman's office enforcing their FOI law.³⁶ Others have created a single agency to handle both FOI and privacy protection. Among them are Australia, Germany, Malta, Mexico, and Thailand.³⁷

Each approach has its own merits and downsides. Maintaining separate implementing bodies creates clear champions unencumbered by the need to balance two competing interests. Though, it also means potential conflicts between the agencies, which could get messy, expensive, and even downright embarrassing.³⁸ People could also receive conflicting advice.³⁹ In these instances, there should be official processes that enable cooperation and minimize conflicts.⁴⁰ On the other hand, having a common implementing body means there is shared expertise and a reduction of potential or actual conflict. This makes things easier for the public with only one point of contact to elevate one's concerns.⁴¹ It will also reduce the misuse of data protection by government agencies.⁴² However, a single-agency arrangement could also give rise to situations where one interest may appeal more to those managing the agency at a particular point in time, making them incapable of carrying out the balancing process objectively.⁴³ Lack of necessary resources is also a common issue given the two gargantuan tasks the lone agency is responsible for.⁴⁴

In the Philippines, the current FOI system is being administered by the Presidential Communications Operations Office (PCOO), under the Office of the President. The authority to implement the data privacy law, on the other hand, lies with the NPC.

Case Study: Duterte's EO No. 2 (2016)

Numerous individuals and organizations have utilized the limited FOI mechanism established by Duterte's EO No. 2 (2016) for various purposes. For instance, Rappler Philippines used documents obtained through the FOI system to run a story showing how the President's foreign trips so far cost triple the amount incurred by his predecessors within the same period of their respective terms.⁴⁵

³⁵ Human Dynamics. *Legal balance of interest between transparency of public life and data protection*. dzlp.mk/sites/default/files/doc_id_1.1.21.pdf. See also: Banisar, D. (2011). Op. cit.

³⁶ Pearlman, M. (2007). Freedom of information. law.yale.edu/system/files/documents/pdf/Intellectual_Life/CL-OGI-Pearlman-FOI-English.pdf

³⁷ Human Dynamics. Op. cit. See also: Banisar, D. (2011). Op. cit.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Banisar, D. (2011). Op. cit.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Ranada, P. (2017, June 17). Duterte's foreign trips cost thrice more than predecessors'. *Rappler*. www.rappler.com/newsbreak/investigative/173127-rodrigo-duterte-foreign-trips-cost-first-year-aquino-arroyo



Similarly, a government study confirming widespread mercury poisoning in two villages in Puerto Princesa, Palawan, came to light when the Philippine Daily Inquirer released a report on the matter using government data acquired through an FOI request.⁴⁶ The FOI team of the PCOO also cites instances where the system has been used by the various users.⁴⁷

Despite these, reviews of the system remain mixed to this day. FOI advocates note that it is far from the ideal FOI policy needed by the people since it only covers the Executive branch of the government.⁴⁸ It may be possible that most information the public wants disclosed is not covered by the current mechanism.⁴⁹ According to FOI advocates, this fact accounts for the low number of requests received via the eFOI portal. And then there are also the exceptions provided by the EO, which allows for numerous types of information that may be withheld from public access, namely:⁵⁰

- information covered by executive privilege;
- privileged information relating to national security, defense, or international relations;
- information concerning law enforcement and protection of public and personal safety;
- information deemed confidential for the protection of the privacy and certain individuals such as minors, victims of crimes or the accused;
- information, documents, or records known by reason of official capacity and are deemed as confidential, including those submitted or disclosed by entities to government agencies,

tribunals and boards or officers, in relation to the performance of their functions or to inquires or investigation conducted by them in the exercise of their administrative, regulatory or quasi-judicial powers;

- prejudicial premature disclosure records of proceedings or information from proceedings which pursuant to law or relevant rules and regulations are treated as confidential or privileged;
- matters considered confidential under banking and finance laws and their amendatory laws; and
- other exceptions to the right to information under laws, jurisprudence, and rules and regulations.

⁴⁶ Anda, R. (2017, June 8). Widespread mercury poisoning detected in 2 Palawan villages. *Inquirer.net*. newsinfo.inquirer.net/903525/widespread-mercury-poisoning-detected-in-2-palawan-villages

⁴⁷www.facebook.com/foiph/photos/a.339930713050402.1073741828.334084150301725/442333769476762/?type=3&theater

See also:

www.facebook.com/foiph/photos/a.339930713050402.1073741828.334084150301725/446112099098929/?type=3&theater

See also:

www.facebook.com/foiph/photos/a.339930713050402.1073741828.334084150301725/438630343180438/?type=3&theater

⁴⁸ Salaverria, L. (2017, June 26). Duterte's FOI order leads to 'unintended consequences'. *Inquirer.net*. newsinfo.inquirer.net/908698/dutertes-foi-order-leads-to-unintended-consequences.

See also: pia.gov.ph/branches-of-govt

⁴⁹ Dagcutan, A. 503 requests on e-FOI portal: 183 denied, 166 granted, 154 pending. *Philippine Center for Investigative Journalism*. pcij.org/stories/183-denied-166-granted-154-pending/

⁵⁰ Office of the President of the Philippines. (2016). *Inventory of exceptions to Executive Order no. 2 (s.2016)*. op-proper.gov.ph/wp-content/uploads/2016/11/Exceptions-to-Right-of-Access-to-Information.pdf



In August 2017, a controversy appeared to reinforce the apprehension harbored by some regarding the possibility of a harmonious coexistence between the two advocacies. The release by the Malacañang Records Office of copies of the Statements of Assets, Liabilities, and Net Worth (SALNs)⁵¹ of 28 Cabinet members to a group of journalists sparked an uproar after a significant amount of information were redacted, citing the data privacy law as basis.⁵² Most prominent among the protesters was the Right to Know Right Now Coalition, a network of FOI advocates, who argued that only the declarant's address should be redacted for security purposes, consistent with Civil Service Commission rules.⁵³

Called to comment on the issue, NPC Deputy Privacy Commissioner, Ivy Patdu, clarified that the DPA is not meant to provide undue cover to government officials, but rather to protect any personal data contained in government records that is not relevant to an FOI request, particularly when it affects private citizens.⁵⁴ She noted, for instance, that the costs of government officials' properties are not sensitive personal information and may therefore be disclosed. She also stressed that the legal mandate to disclose assets, liabilities, and net worth, with limited to no redactions, proceeds from the language of Republic Act No. 6713. This, while noting at the same time, that the law does permit the non-disclosure of information in the SALN "that would put the life and safety of an individual to a danger or an unwarranted invasion of personal privacy".⁵⁵

With this pronouncement, the concerned government agencies committed to review the SALN form to achieve a reasonable balance between public interest and that of the individual.⁵⁶

⁵¹ A SALN is a "declaration of one's assets (i.e. cars, houses, cash in bank, etc), liabilities (i.e. loans, debts, etc) including business and financial interests of a public official, of his or her spouse, and of his or her unmarried children under 18 years old still living in their parents' household. The basis for the SALN is the 1987 Philippine Constitution and RA 6713."

See: Venus, C. (2016, June 22). #InquirerSeven facts you need to know about SALNs. *Inquirer.net*. newsinfo.inquirer.net/791861/inquirerseven-facts-saln-statement-assets-liabilities-net-worth

⁵² Placido, D. (2017, September 26). National Privacy Commission: Some details in cabinet members' SALNs did not have to be redacted. *ABS-CBN News*. news.abs-cbn.com/news/09/26/17/national-privacy-commission-some-details-in-cabinet-members-salns-did-not-have-to-be-redacted

⁵³ Placido, D. (2017, September 26). Op. cit.

⁵⁴ Takumi, R. (2017, July 27). 'Gov't officials can't use Data Privacy Act to evade FOI requests'. *GMA News*. <http://www.gmanetwork.com/news/news/nation/575361/gov-t-officials-can-t-use-data-privacy-act-to-evade-foi-requests/story/>

⁵⁵ Gita, R. (2017, September 26). Palace vows to limit SALN redaction to sensitive info. *Inquirer.net*. <http://www.sunstar.com.ph/manila/local-news/2017/09/27/palace-vows-limit-saln-redaction-sensitive-info-566184>

⁵⁶ *Ibid*.



CONCLUSION AND RECOMMENDATIONS

With FOI and the right to privacy firmly entrenched in the Philippine Constitution, the path forward must involve finding ways to promote both rights, maximizing the benefits they offer, while reconciling conflicts if and when they arise. This is easier said than done, to be sure. Not getting that proper balance, in particular, can have disastrous consequences.⁵⁷

Most issues can be addressed by providing clear definitions in the applicable laws, and by establishing appropriate guidelines and effective oversight systems. It is also important to have a mechanism for case-to-case assessments to account for rare or unique problems that may call for unconventional solutions.⁵⁸

It has been suggested that appropriate public interest tests be adopted to facilitate the careful balancing of rights.⁵⁹ For instance, the following elements of a “fairness” test set by the United Kingdom Ministry of Justice may prove useful when making critical FOI decisions:

- how the information was obtained,
- a person’s likely expectations regarding the disclosure of his or her information
- the effect of disclosure on the person whose information is involved,
- whether a person has expressly refused to consent to the disclosure of his or her information,
- content of the information,
- the public interest in the disclosure of the information

Of equal importance is determining the agency or agencies that will be in charge of enforcing both laws—whether a new or separate entity will be created, or the obligation will be shouldered by an existing government office. Either way, legislators should take into account the pros and cons of each approach and decide which one best applies to the Philippine context.

It is also crucial to remember that FOI and privacy do not exist in a vacuum. Other considerations include preserving an independent and free press, which has always played a key role in the preservation of the country’s fragile democracy. That both rights exist in a fast-evolving landscape where technologies are constantly changing the ways the State and the public transact with one another should also be kept in mind. Policies are often outpaced by technological advancements. If not careful, policymakers could come up with rules already rendered moot even before they have even taken root.

⁵⁷ Draper, E. (2012). Op. cit.

⁵⁸ Human Dynamics. Op. cit.

⁵⁹ Banisar, D. (2011). Op. cit.



In all these, it is quite evident that the road that lies ahead is rife with struggles and constant debate. Still, the task—no matter how difficult—must be done. The stakes are too high, while the threats are all too real. At the same time, though, the upside is impossible to set aside. After all, only by ensuring transparency can the public hold the government accountable for its activities and decisions, and only by ensuring privacy can citizens freely exercise their rights.⁶⁰ If anything, this should be enough to convince any true rights advocate to see this campaign through.

⁶⁰ Janssen, M. & van den Hoven, J. (2015, October). Big and Open Linked Data (BOLD) in government: A challenge to transparency and privacy?. *Government Information Quarterly*, 32(4), pp. 363-368.
www.sciencedirect.com/science/article/pii/S0740624X15001069