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The Potential

*of*

Freedom of Information Laws

*in the*

Global Fight Against Corruption

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## EDITORIAL NOTE

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We are pleased to present LIDS Global's second volume of student-conducted, international research. Our focus this year was on the potential role of Freedom of Information Laws in combating corruption. The LIDS whitepaper team at Harvard conducted its own research, but also coordinated the contributions of four of our fellow Law and International Development Societies from across the world – from India, the Philippines, Singapore, and Argentina. We would like to sincerely thank those teams for their incredible work.

The contributions to LIDS Global Volume II represent the views of the respective authors. The opinions expressed herein do not reflect the positions of Harvard Law School, the Harvard Law and International Development Society, or the Volume II editors. The editors have merely reviewed and compiled the finished work products of the contributing schools. Individual member groups were responsible for verifying their own source material.

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## INTRODUCTION

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Combating corruption is a complex exercise that requires the full and effective use of every tool available. To that end, the Harvard Law and International Development Society's Global Network explores the use of one tool that we feel may be underused -- Freedom of Information Laws. Certainly, FOI laws, like the Freedom of Information Act (FOIA) in the U.S. do already play a prominent role in investigative journalism and other tangential efforts to combat corruption. However, in this paper LIDS Global seeks to explore the potential use of information derived from a Freedom of Information action in a subsequent legal action, undertaken in the so-called "demand-side" country.

An example may be useful. Say the United States Securities and Exchange Commission and the Department of Justice bring an action against a major retail clothing company for violations of the Foreign Corrupt Practices Act. The SEC and DOJ allege that the company had paid millions of dollars in bribes to foreign officials for favorable and illicit advantages in the officials' country. As usual, the SEC and DOJ settle with the company for hundreds of millions of dollars and a signed agreement on its part to never engage in the conduct ever again. After meting out punishment and extracting fines and illicit profits, the SEC and the DOJ send off a case file to their foreign counterparts for the purposes of that country bringing a case against the corrupt officials within their own country. Usually, perhaps due to a lack of capacity or political capture, the foreign prosecutors never bring a case against the corrupt officials and the story ends here.

LIDS Global endeavored in this paper to ask if the story need *not* stop there. Citizens in countries who are victimized by corruption want to play a role in fighting it instead of leaving it to the SEC, DOJ, and their own country's prosecutors. What if citizens used the Freedom of Information Act to obtain the names of the corrupt officials within their own country? What if those names could be used in a future civil or criminal suit against those officials?

Ignacio Boulin Victoria, HLS LLM '14, posed these very questions on Professor Matthew Stephenson's influential Global Anticorruption Blog. LIDS Global, with its network of like-minded law student groups around the world, was uniquely positioned to get answers to these questions.

To the first question, we have determined that it should be possible for a FOIA suit directed at the names of corrupt officials to succeed. The SEC and DOJ are careful to redact or otherwise conceal the names of the corrupt foreign officials involved in their FCPA prosecutions. They do this perhaps out of respect for their foreign counterparts. Foreign citizens, on the other hand, have every reason and

motive to know the names of their corrupt officials. Since only a U.S. citizen can file a FOIA request, this plan requires teamwork. A U.S. partner would file a FOIA request to uncover the names of corrupt officials in already-concluded FCPA cases, then publish the information. The rest is up to the foreign anti-corruption activists.

What exactly foreign anti-corruption activists could do with this information is also a question we sought to answer, at least through the lens of LIDS Global's network of non-U.S. partners. Activists could file a civil suit for damages, press for criminal charges, or at the very least publicize and expose their officials' corrupt behavior.

In addition to these questions, we have also sought to answer a variety of related questions and provide any information that may be relevant.

This paper will proceed as follows: first, we will look at the U.S. anticorruption enforcement regime and how the FOIA could be used to extract the names of corrupt foreign officials, and second we will look at what can be done with the names once they have been exposed.

We hope this report is informative. The Harvard Law and International Development Society Global Network is committed to exploring timely issues in development that our unique organization is especially well-suited to understand. Corruption is a major impediment to development around the world, and LIDS is proud to do our part.

## **PART I: EXPOSING CORRUPT OFFICIALS USING U.S. FOIA**

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Corrupt officials who take bribes from multinational companies often go unpunished and continue to victimize their citizens and businesses. While a multinational corporation that pays bribes for an unfair business advantage will be prosecuted in the U.S. by the Securities and Exchange Commission (SEC) or the Department of Justice (DOJ) under the Foreign Corrupt Practices Act, the foreign official that received the bribe is often<sup>1</sup> untouched by any law enforcement agency. The multinational company that paid the bribe in this arrangement is the “supplier,” while the corrupt foreign official can be thought of as the “demand” side of the equation.

Combating demand-side bribery has long been a major objective among anti-corruption activists who fear that merely punishing the multinational companies does not eliminate the problem of corruption.<sup>2</sup> For instance, while the DOJ and SEC prosecute one company for paying bribes, rival companies can take their market share by stepping in to pay bribes to the same corrupt officials.

To combat this repeated corrupt behavior from demand-side officials, the SEC and DOJ send information about the case and the officials’ corrupt act of taking a bribe to prosecuting agencies in the officials’ home state.<sup>3</sup> However, too often it is the case that the official’s home country will not prosecute them. Among the reasons for this failure to prosecute may be that the foreign agency lacks the capacity to bring a suit, or perhaps they are corrupt and captured themselves.<sup>4</sup>

Citizens of the country whose officials accepted bribes may find this state of affairs unacceptable. Unfortunately, citizens in the foreign country cannot simply log onto the DOJ website and look at the

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<sup>1</sup> Rick Messick, *What about the Bribe Takers?* THE GLOBAL ANTICORRUPTION BLOG (Mar. 26, 2014), <http://globalanticorruptionblog.com/2014/03/26/what-about-the-bribe-takers/>

<sup>2</sup> See e.g., *The Fight Against Bribery and Corruption*, OECD <http://www.oecd.org/governance/ethics/1918235.pdf> (last visited Apr. 10, 2015) (Stating as early as 2000 that “The OECD takes a multifaceted approach to fighting bribery, recognizing that tackling both the supply and the demand side of the bribery transaction requires different measures.”)

<sup>3</sup> Although such information sharing is not specifically for this purpose. See ROPES & GRAY, *Foreign Corrupt Practices Act Enforcement Activity: 2013 Year in Review and 2014 Preview*, <https://www.ropesgray.com/news-and-insights/Insights/2014/March/Foreign-Corrupt-Practices-Act-Enforcement-Activity-2013-Year-in-Review-and-2014-Preview.aspx> (last visited Apr. 12, 2015). (Noting that “Enforcement of the FCPA in 2013 also saw a significant increase in cross-border collaboration between United States regulators and foreign regulatory bodies, due both to strengthened foreign bribery laws abroad as well as increased information-sharing with foreign law enforcement agencies.”)

<sup>4</sup> ARVIND K. JAIN, *THE POLITICAL ECONOMY OF CORRUPTION* (2002).

complaint and settlement documents that the agency filed in its suit against the multinational company. The DOJ and SEC obscures these names, leaving them instead as unnamed “government officials.”<sup>5</sup> One reason for this practice may be respect on the U.S. officials’ part for their foreign counterparts and their sovereign legal system. The U.S. agencies may not want to reveal the names of (allegedly) corrupt foreign officials if they have not yet been given a fair trial in their own country.

While there are many proposed remedies to this problem, this paper explores the possibility of using one method in particular of encouraging demand-side enforcement. As an alternative to relying on government enforcement, citizens in foreign countries could obtain the names of their corrupt officials and take action themselves. Citizens in the U.S. could file a Freedom of Information Act request for the DOJ or SEC or both to reveal the names of the corrupt officials otherwise obscured in their settlement documents. Then, citizens in the foreign country whose officials behaved corruptly could take action into their own hands.

What follows is an overview of the U.S. FCPA enforcement regime, followed by an explanation of the current system of information sharing between the U.S. and foreign agencies, and finishing with the proposed alternative method of encouraging prosecutions of bribe-demanders.

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## OVERVIEW OF THE U.S. ENFORCEMENT REGIME

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### FOREIGN CORRUPT PRACTICES ACT

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Congress enacted the U.S. Foreign Corrupt Practices Act (FCPA or the Act) in 1977 in response to revelations of widespread bribery of foreign officials by U.S. companies.<sup>6</sup> The Act was intended to halt these corrupt practices, create a level playing field for honest businesses, and restore public confidence

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<sup>5</sup> See e.g., SEC v. Eli Lilly, Case 1:12-cv-02045, available at <https://www.sec.gov/litigation/complaints/2012/comp-pr2012-273.pdf> (Without revealing the identity of a corrupt foreign official, the SEC details improper behavior in a typical FCPA complaint. “In at least two instances, the arrangements involved foreign government officials. Between 2000 and 2005, Lilly-Vostok sold significant amounts of pharmaceutical products to a major Russian pharmaceutical distributor for resale to the Russian Ministry of Health. The pharmaceutical distributor was owned and controlled by an individual who, at the beginning of the distributor's relationship with Lilly-Vostok, was a close adviser to a member of Russia's Parliament. In 2003, this official became a member of the upper house of Russia's Parliament. Throughout the period, this official exercised considerable influence over government decisions relating to the pharmaceutical industry in Russia.”)

<sup>6</sup> *The Story of the Foreign Corrupt Practices Act*, <http://moritzlaw.osu.edu/students/groups/oslj/files/2013/02/73.5.Koehler.pdf> (last visited Apr. 12, 2015)

in the integrity of the marketplace.<sup>7</sup>

The FCPA contains both anti-bribery and accounting provisions, with the latter being technical offenses with strict liability<sup>8</sup>. The FCPA prohibits any U.S. persons or businesses from engaging in certain acts. It also, separately, prohibits certain acts of any U.S. business or foreign business that is listed on a U.S. stock exchange (and that is subsequently required to file disclosures with the SEC). Even further, the FCPA covers any foreign persons or businesses acting while in the territory of the U.S. Generally, none of these covered entities can make corrupt payments to foreign officials to obtain or retain business.<sup>9</sup>

The FCPA is enforced primarily by the SEC and the DOJ with some assistance from other government agencies. Penalties for violating the FCPA can be high, and indeed the last decade has seen a steep rise in the size and frequency of FCPA penalties.<sup>10</sup>

## FCPA VIOLATIONS - PENALTIES

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Violating the FCPA can entail either criminal or civil penalties, or both, depending on the character of the conduct. Most typically, multinational corporations who face FCPA actions settle their cases without admitting or denying wrongdoing, but while agreeing to pay large fines and institute extra compliance programs.<sup>11</sup> Individuals, on the other hand, are sometimes prosecuted to the full extent of the law and often choose to defend themselves in court rather than settle with the enforcing agencies.<sup>12</sup>

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<sup>7</sup> DEPT. OF JUSTICE, *The Foreign Corrupt Practices Act*, <http://www.justice.gov/criminal/fraud/fcpa/> (last visited Apr. 12, 2015)

<sup>8</sup> Stuart H. Deming, *FCPA: When Strict Liability is Imposed for Civil Violations*, (May 7, 2012) <http://www.deminggroup.com/blog/2012/05/fcpa-when-strict-liability-is-imposed-for-civil-violations.shtml> (Noting that “No “knowing” requirement for civil liability exists under the accounting and record-keeping provisions.[1] Strict liability is imposed. No proof of intent is required. This has dramatic ramifications for an issuer or anyone subject to the FCPA’s accounting and record-keeping provisions. The evidentiary requirements of what must be proven in order to establish a civil violation of the accounting and record-keeping provisions is very low. All that is required is that the substantive violation be proven by a preponderance of the evidence.”)

<sup>9</sup> *A Resource Guide to the US Foreign Corrupt Practices Act*, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited Apr. 12, 2015) [hereinafter “FCPA Resource Guide”]

<sup>10</sup> *Id.*

<sup>11</sup> Michael Yangming Xiao, *Deferred/Non Prosecution Agreements: Effective Tools to Combat Corporate Crime*, 23 CORNELL J.L. & PUB. POL’Y (2013-2014).

<sup>12</sup> Barry J. Pollack & Annie Wartanian Reisinger, *Lone Wolf or the Start of a New Pack: Should the FCPA Guidance Represent a New Paradigm in Evaluating Corporate Criminal Liability Risks Symposium: Reducing Corporate*

## CRIMINAL PENALTIES

The FCPA through its provisions imposes distinct criminal penalties for companies and individuals that are in violation of the statute. The statute further distinguishes its penalty structure depending on whether the violation has occurred for an anti-bribery provision or for an accounting provision. For violation of the statute's anti-bribery provisions, the FCPA mandates that corporations and businesses be fined up to US \$2 million for each such violation, and that individuals be imposed a fine of up to \$250,000 and imprisonment for up to five years.<sup>13</sup> As regards violations of its accounting provisions, the FCPA mandates that businesses and corporations, be imposed a fine of up to \$25 million,<sup>14</sup> and in the case of individuals be imposed a fine of up to \$5 million and imprisonment for up to 20 years.<sup>15</sup>

## CIVIL PENALTIES

Although only DOJ has the authority to pursue criminal actions, both the DOJ and SEC have civil enforcement authority under the FCPA. DOJ may pursue civil actions for anti-bribery violations by domestic concerns (and their officers, directors, employees, agents, or stockholders) and foreign nationals and companies for violations while in the United States, while SEC may pursue civil actions against issuers and their officers, directors, employees, agents, or stockholders for violations of the anti-bribery and the accounting provisions.<sup>16</sup> A civil penalty of up to \$16,000 per violation is applicable to corporations that violate anti-bribery provisions. Individuals, including officers, directors, stockholders, and agents of companies, are similarly subject to a civil penalty of up to \$16,000 per violation, which may not be paid by their employer or principal.<sup>17</sup> For violations of the accounting provisions, SEC may obtain a civil penalty that does not exceed the greater of (a) the gross amount of the pecuniary gain to the defendant as a result of the violations or (b) a specified dollar limitation. The specified dollar

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*Criminality: Evaluating Department of Justice Policy on the Prosecution of Business Organizations and Options for Reform*, 51 AM. CRIM. L. REV. (2014).

<sup>13</sup> 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A); 18 U.S.C. § 3571(b)(3), (e) (fine provision that supersedes FCPA-specific fine provisions).

<sup>14</sup> 15 U.S.C. § 78ff(a).

<sup>15</sup> 15 U.S.C. § 78ff(a).

<sup>16</sup> FCPA Resource Guide, *supra* note 9.

<sup>17</sup> 15 U.S.C. § 78dd-2 (g)(1)(B), (g)(2)(B); § 78dd-3(e)(1)(B), (e)(2)(B).

limitations are based on the egregiousness of the violation, ranging from \$7,500 to \$150,000 for an individual and \$75,000 to \$725,000 for a company.<sup>18</sup> SEC may obtain civil penalties both in actions filed in federal court and in administrative proceedings.<sup>19</sup> In addition to the criminal and civil penalties described above, individuals and companies who violate the FCPA may face significant collateral consequences, including suspension or debarment from contracting with the federal government, cross-debarment by multilateral development banks, and the suspension or revocation of certain export privileges.<sup>20</sup>

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<sup>18</sup> John Ashcroft & John Ratcliffe, *The Recent and Unusual Evolution of an Expanding FCPA*, 26 NOTRE DAME J. OF LAW, ETHICS & PUB. POL'Y 25-40 (2012).

<sup>19</sup> Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447-1457 (2008).

<sup>20</sup> *Id.*

#### EXAMPLE #1: THE CHUDOW CASTLE CASE

To illustrate a typical FCPA enforcement action, consider the famous Chudow Castle Foundation cases.

In two cases almost 8 years apart, two American pharmaceutical companies were the subject of SEC enforcement actions for violations of the FCPA concerning a certain Polish health official.

Both companies bribed the same official through a charitable foundation he controlled, called the Chudow Castle Foundation. Both companies paid bribes in order to win government contracts dispensed by the official's agency. And both companies were eventually caught by the SEC and fined for their conduct.



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The official's position was Director of the Silesian Health Fund, and he was responsible for allocating his Fund's resources with respect to certain pharmaceutical products purchased on behalf of his constituent citizens. The official had established the Chudow Castle Foundation for the purposes of restoring said castle. He demanded bribery payments from companies who wanted to win the Silesian Health Fund's contracts to be paid to his Castle Foundation, perhaps in the hope that it would deflect attention from himself as the beneficiary.

The first American company, Schering-Plough, [settled](#) the SEC's complaints without admitting or denying their FCPA violations and paid a fine of \$500,000 in 2004. The second American pharma company, Eli Lilly, [settled](#) their investigation right as the size of FCPA enforcement penalties was starting to increase substantially and ended up paying much more.

Indeed, Eli Lilly's payment of bribes to the Director of the Silesian Health Fund from 2000-2003 led the SEC through a sprawling investigation of that company's conduct in China, Russia, and Brazil. Eli Lilly settled with the SEC in 2012 and paid a fine of \$29 million dollars. Note that both of these companies were the subject of civil enforcement actions brought by the SEC, not criminal charges brought by the DOJ.

The Director of the Silesian Health Fund is unnamed in the SEC settlement documents, and apparently has gone on to continue his successful career in Polish politics. It is possible that the Director's conduct was not a violation of Polish law -- after all, the payments he demanded were donations to his charity, not technically payments to himself. Nevertheless, it is at least an open question as to whether allocating the Silesian Health Fund's resources based on highly discretionary, non-medical criteria is in line with Poland's development goals.

*Image - CC BY-SA 2.5*

## FCPA ENFORCEMENT AGENCIES

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The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) share FCPA enforcement authority and are committed to fighting foreign bribery through robust enforcement.<sup>21</sup>

### DEPARTMENT OF JUSTICE

The DOJ has criminal FCPA enforcement authority over “issuers” (i.e., public companies) and their officers, directors, employees, agents, or stockholders acting on the issuer’s behalf.<sup>22</sup> DOJ also has both criminal and civil enforcement responsibility for the FCPA’s anti-bribery provisions over “domestic concerns and certain foreign persons and businesses that act in furtherance of an FCPA violation while in the territory of the United States.”<sup>23</sup> Within DOJ, the Fraud Section of the Criminal Division has primary responsibility for all FCPA matters.<sup>24</sup>

### SECURITIES AND EXCHANGE COMMISSION

The SEC is responsible for civil enforcement of the FCPA over issuers and their officers, directors, employees, agents, or stockholders acting on the issuer’s behalf. SEC’s Division of Enforcement has responsibility for investigating and prosecuting FCPA violations. Since 2010, SEC also has a specialized FCPA Unit with offices around the country, to focus specifically on FCPA enforcement.<sup>25</sup> The FCPA Unit also works together with other enforcement agencies including the Federal Bureau of Investigation.

There are various ways that potential FCPA violations come to the attention of SEC staff, including: tips from informants or whistleblowers; information developed in other investigations; self-reports or public

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<sup>21</sup> FCPA Resource Guide, *supra* note 9.

<sup>22</sup> Sam Birnbaum, *Why FCPA Opinion Procedure Releases Are Broken and How to Fix Them*, THE GLOBAL ANTICORRUPTION BLOG, (June 20, 2014), <http://globalanticorruptionblog.com/2014/06/20/why-fcpa-opinion-procedure-releases-are-broken-and-how-to-fix-them/>

<sup>23</sup> FCPA Resource Guide, *supra* note 9.

<sup>24</sup> *Id.*

<sup>25</sup> FCPA Resource Guide, *supra* note 9.

disclosures by companies; referrals from other offices or agencies; public sources, such as media reports and trade publications; and proactive investigative techniques, including risk-based initiatives.<sup>26</sup>

Investigations can be formal, such as where SEC has issued a formal order of investigation that authorizes its staff to issue investigative subpoenas for testimony and documents<sup>27</sup>, or informal, such as where the staff proceeds with the investigation without the use of investigative subpoenas.

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<sup>26</sup> Suzanne Rich Folsom, Victoria McKenney, Patrick F. Speice Jr., *Preparing for a Foreign Corrupt Practices Act Investigation Before You Are Under Investigation*, 42 INTERNATIONAL LAW NEWS (2013), [http://www.americanbar.org/publications/international\\_law\\_news/2013/winter/preparing\\_a\\_foreign\\_corrupt\\_practices\\_act\\_investigation\\_you\\_are\\_under\\_investigation.html](http://www.americanbar.org/publications/international_law_news/2013/winter/preparing_a_foreign_corrupt_practices_act_investigation_you_are_under_investigation.html)

<sup>27</sup> *Id.*

## EXAMPLE #2: RALPH LAUREN IN ARGENTINA

Ralph Lauren Clothing, the high-end American clothing retailer, was fined in 2013 for violations of the FCPA in Argentina by the DOJ and the SEC in a parallel action. The company neither admitted nor denied its wrongdoing, but paid fines, instituted new compliance programs, and cooperated extensively with the law enforcement agencies over the course of their investigation. The company had been improperly paying bribes to customs officials.



With the SEC, the company reached a Non-Prosecution Agreement (an NPA). According to the SEC’s settlement release, “The SEC has determined not to charge Ralph Lauren Corporation with violations of the Foreign Corrupt Practices Act (FCPA) due to the company’s prompt reporting of the violations on its own initiative, the completeness of the information it provided, and its extensive, thorough, and real-time cooperation with the SEC’s investigation.” The DOJ “resolved” its investigation into Ralph Lauren’s conduct for similar reasons and reached an agreement accordingly. Ralph Lauren paid fines to both agencies for a total of less than \$2 million dollars.

The SEC described some of the reasons why Ralph Lauren was able to reach such favorable terms with the FCPA’s enforcers.

“According to the [Non-Prosecution Agreement with the SEC], Ralph Lauren Corporation’s cooperation included:

- Reporting preliminary findings of its internal investigation to the staff within two weeks of discovering the illegal payments and gifts.
- Voluntarily and expeditiously producing documents.
- Providing English language translations of documents to the staff.
- Summarizing witness interviews that the company’s investigators conducted overseas.
- Making overseas witnesses available for staff interviews and bringing witnesses to the U.S.”

The extensive amount of information that the SEC and DOJ obtained from Ralph Lauren in this case may have included the identities of the Argentine customs officials to whom the bribes were paid. While Ralph Lauren was disciplined for supplying the bribes, and it dismissed its own employees who had been involved in the bribery scheme, it is unclear what if any consequences befell the government customs officials who demanded the bribes.

## PRACTICAL CONSIDERATIONS IN FCPA ENFORCEMENT

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As a practical matter, FCPA enforcement actions against multinational corporations rarely go to court.<sup>28</sup> The reason is simple: multinational companies who are being investigated for FCPA violations do not want to “roll the dice” in litigation, with the fate of their entire company at risk if they are convicted of criminal violations. Instead, regulators typically encourage cooperation from these corporation in return for leniency in subsequent enforcement actions.<sup>29</sup> A more detailed explanation of the FCPA investigation and settlement process will be useful.

### FCPA INVESTIGATION AND SETTLEMENT PROCESS

To begin with, many FCPA investigations start with a multinational corporation “self-reporting.”<sup>30</sup> This means that the company has learned through its own internal compliance and monitoring program that improper conduct may be occurring within its organization and that the company has decided to tell the DOJ and the SEC about it. Self-reporting is encouraged by the DOJ and SEC, and companies who do it are typically rewarded with lighter fines and sanctions.<sup>31</sup>

Alternatively, the DOJ and SEC may begin an investigation into possible FCPA violations through their own information-gathering. Sometimes, for instance, whistleblowers approach the agencies with information about corrupt conduct occurring within their organization.<sup>32</sup>

However, as the DOJ and SEC launch their investigations, the subject multinational corporation will be informed and, as mentioned above, encouraged to cooperate. One such procedure for cooperating with the regulators is for the corporation to conduct its own internal investigation of the potentially corrupt

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<sup>28</sup> Mike Koehler, *Individuals Charged With FCPA Offenses Are More Likely To Pursue Litigation Than Companies*, <http://www.fcprofessor.com/fcpa-101#q16>.

<sup>29</sup> Folsom, McKenney and Speice Jr., *supra* note 26.

<sup>30</sup> NICK KOCHAN, *CORRUPTION: THE NEW CORPORATE CHALLENGE* 38 (2013) (Stating that “an increase in self reporting has also been a factor in the recent rise of FCPA cases”).

<sup>31</sup> AKIN GUMP, *DOJ and SEC Officials Focus on Enforcement, Self-Reporting and Compliance at International FCPA Conference*, (Nov. 24, 2014) <http://www.akingump.com/en/news-insights/doj-and-sec-officials-focus-on-enforcement-self-reporting-and.html>.

<sup>32</sup> JONES DAY, *Whistleblowers to be Paid Bounties in FCPA and Securities Fraud Cases if Senate's Financial Overhaul Bill is Enacted*, (June 2010) [http://www.jonesday.com/fcpa\\_alert\\_whistleblowers/](http://www.jonesday.com/fcpa_alert_whistleblowers/).

conduct.<sup>33</sup> This, like self-reporting, is designed to contain the damage from possible FCPA violations. An outside law firm is usually hired to interview employees that may have been involved in the corruption, and so on.<sup>34</sup>

The results of the internal investigation are usually shared with the DOJ and SEC to the extent that the corporation feels that sharing the information will lead to lighter treatment during the penalties-negotiation process. Oftentimes the company will make its employees available to the enforcement agencies so that they can interview them and make their own determination as to the guilt of the company.<sup>35</sup> Companies have a strong incentive to present the facts of their internal investigation in full to the DOJ and SEC because if they do not, and they are discovered<sup>36</sup> to be obstructing or obfuscating their own corrupt conduct, their punishment will be much heavier. On the other hand, companies are also incentivized to limit what the agencies find out about their corrupt conduct because the less the agencies know, the less they can be fined for. It's a delicate balancing act.

It should be noted that the DOJ and SEC do not always pursue claims in parallel -- sometimes the conduct does not rise to a criminal level and so the DOJ will not get involved, and sometimes the SEC chooses to stay out of an action.

## NPAS AND DPAS

Among the tools that regulators such as the DOJ and the SEC traditionally deploy to induce cooperation from suspect multinationals are Non-Prosecution Agreements (NPAs) and Deferred-Prosecution Agreements (DPAs).<sup>37</sup> These agreements do not require the company to admit or deny its guilt. The SEC has a similar resolution process, using civil complaints and administrative orders, that allows a company

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<sup>33</sup> For an explanation of what such an investigation might look like, *see e.g.* William Hannay and Patricia Holmes, *The Nuts and Bolts of Conducting an FCPA Internal Investigation*, available at [http://www.schiffhardin.com/FileLibrary/Publications \(File Based\)/PDF/hannay\\_holmes\\_pli\\_050808.pdf](http://www.schiffhardin.com/FileLibrary/Publications%20(File%20Based)/PDF/hannay_holmes_pli_050808.pdf) (last visited Apr. 12, 2015).

<sup>34</sup> *Id.*

<sup>35</sup> *See e.g.*, *SEC Announces Non-Prosecution Agreement With Ralph Lauren Corporation Involving FCPA Misconduct*, <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780#.VSmLaxPF9O8> (last visited Apr. 12, 2015). (Describing Ralph Lauren's cooperation in the course of an FCPA investigation of its conduct in Argentina).

<sup>36</sup> Because, for instance, a whistleblower revealed to the government that the extent of the alleged bribery scheme was much greater than the company had let on, and the company knew it.

<sup>37</sup> Koehler, *supra* note 28.

to settle without admitting or denying guilt.<sup>38</sup> The SEC's NPA with Ralph Lauren in 2013 was the first time the agency entered into such agreement pertaining to FCPA violations.<sup>39</sup> In fact, FCPA enforcement was the single largest source of NPAs and DPAs in 2014.<sup>40</sup>

Supporters of NPAs/DPAs argue that the key advantage of these resolutions is that besides conducting their own internal investigations and sharing the findings with regulators, these agreements often also entail post-resolution oversight mechanisms, establishment of an effective compliance program, among others.<sup>41</sup> However, they have also been criticized to be no more than a slap on the wrist and ineffective in deterring criminal activities.<sup>42</sup>

The distinction between an NPA, a DPA, an outright admission of guilt, or a conviction will become important in the context of a Freedom of Information Act Request, discussed below under the “Alternative Method.”

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## REFERRAL AND INFORMATION EXCHANGE PROCESS

The U.S. enforcement regime of the FCPA is focused on punishing entities, like multinational corporations, that are within its jurisdiction. The most oft-targeted institutions are those that are listed on U.S. exchanges.<sup>43</sup> As indicated above, when the SEC or DOJ brings an action against the covered

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<sup>38</sup> Koehler, *supra* note 28.

<sup>39</sup> *SEC Announces Non-Prosecution Agreement With Ralph Lauren Corporation Involving FCPA Misconduct*, [http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780-.VNGmpVXF\\_K0](http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780-.VNGmpVXF_K0) (last visited Apr. 12, 2015).

<sup>40</sup> Koehler, *supra* note 28.

<sup>41</sup> Audra Marino Len Lyons, *Deferred Prosecution Agreements, Non-Prosecution Agreements and Monitoring Services*, <http://www.marcumllp.com/publications-1/deferred-prosecution-agreements-non-prosecution-agreements-and-monitoring-services> (last visited Apr. 12, 2015).

<sup>42</sup> Elkan Abramowitz; Barry A. Bohrer, *The Debate About Deferred And Non-Prosecution Agreements*, 248 NEW YORK LAW JOURNAL, <http://www.maglaw.com/publications/articles/00317/res/id=Attachments/index=0> (last visited Apr. 12, 2015).

<sup>43</sup> For more information on enforcement patterns, see <http://www.baylor.edu/business/finance/doc.php/229622.pdf> (Explaining that “The FCPA is a U.S. law, but the enforcement agencies have jurisdiction over all firms that issue

entity, they generate a case file full of information gathered over the course of their investigation. This information includes information that is necessary for the U.S. prosecutors to prove that the entity violated the FCPA, including the alleged fact that the entity paid a bribe to a foreign official.

The U.S. prosecutor does not need to know the identity of the foreign official to whom the bribe was paid when bringing an FCPA action. However, in the course of their investigation the agencies may learn the identities of the bribed officials. When the enforcement agency reaches an agreement with the violating entity, or even when the case goes to litigation (as it rarely does), the names of the corrupt foreign officials are redacted and replaced with anonymous identifiers, or just a vague generalization of their title and position.

While the SEC and DOJ have no need to know the identities of these foreign officials, however, such information is crucially useful to any prosecutor in that official's home country. Accordingly, the SEC and DOJ send off information to their counterparts in the foreign country that would be useful in any future action against the allegedly corrupt officials.

However, the identities of the corrupt officials who took the bribes is sometimes never revealed to the public. In other words, the foreign prosecutors who receive information from their U.S. counterparts' FCPA investigation sometimes do not follow through with criminal penalties for the allegedly corrupt officials.

This may be because the prosecutors have determined that, contrary to the U.S. agencies' position, no crime occurred -- the officials never took the bribes and the Americans got it wrong. Another possibility is that the foreign prosecutors determine that they will never be able to gather enough evidence against the officials to bring an actual case -- the U.S. agencies were focused on punishing the company, not the officials, and so their case is easier to make. Maybe the foreign prosecutors lack the capacity to bring a case against the allegedly corrupt officials. Yet a final, perhaps cynical, possibility is that the prosecutor is captured and will not bring an action against officials in its own country for some corrupt reason.<sup>44</sup>

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securities or have business operations in the United States. So, although most [of the companies surveyed in this report] (87) of the targeted companies are incorporated in the United States, the sample includes 21 foreign firms with ADRs traded in U.S. markets, and seven foreign firms with equity listed on U.S. exchanges. Most of the foreign firms (82%) have been targeted for enforcement action since 2005.”)

<sup>44</sup> All of these scenarios are well documented in various accounts of corruption prosecutions in the developing world. See e.g. *Fighting Corruption in Eastern Europe and Central Asia*, OECD, [http://www.oecd-ilibrary.org/governance/fighting-corruption-in-eastern-europe-and-central-asia\\_20743572](http://www.oecd-ilibrary.org/governance/fighting-corruption-in-eastern-europe-and-central-asia_20743572).

This portion of the paper details the process of U.S. enforcement agencies sending off information to their counterpart agencies abroad, and what happens to the information once it arrives.

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## INTERNATIONAL COOPERATION IN CORRUPTION PROSECUTIONS

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Today's system of U.S. FCPA enforcers sharing information with foreign counterparts is described in the following paragraphs.

Information flows in two directions. Firstly, U.S. enforcement agencies often rely on the cooperation of the host country to gather information on the alleged corrupt act and official(s). Subsequently, findings established in U.S.-based investigations could be relayed to facilitate the home country's prosecution of its corrupt government official(s). Obviously, the success of international corruption investigation and enforcement requires monumental collaborative efforts between the U.S. and foreign law enforcement. For instance, according to one scholar who has studied this area<sup>45</sup>, the U.S. government has established a number of programs and initiatives to promote information sharing with regulators in other countries. In particular, the SEC has entered into over 30 bilateral information-sharing agreements and has exercised them in multiple occasions in relation to the FCPA.

Furthermore, the U.S. government has also set up mechanisms to facilitate enforcement of FCPA violations. For example, according to the same scholar, the SEC made over 1,200 requests to foreign authorities for enforcement assistance in 2011. In addition, regulators have also called upon multilateral organizations such as the OECD, mutual legal assistance treaties (MLAT) and multilateral anti-bribery treaties. MLATs are "intend[ed] to facilitate extradition of individuals charged with transnational crimes and the sharing of information needed to investigate and prosecute those crimes" while multilateral anti-bribery treaties contain important provisions on investigative assistance and information sharing. As of January 2013 the DOJ had over 60 MLATs with foreign governments and made 25 requests for information in 2009.<sup>46</sup> American law enforcement also has other forms of bilateral arrangements, e.g.

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<sup>45</sup> Matthew C. Turk, *A Political Economy Approach to Reforming the Foreign Corrupt Practices Act*, 33 NW. J. INT'L L. & BUS. 325 (2013), <http://scholarlycommons.law.northwestern.edu/njilb/vol33/iss2/2>.

<sup>46</sup> Joseph W. Yockey, *Choosing Governance in the FCPA Reform Debate*, 38 JOURNAL OF CORPORATION LAW (2013) <http://ssrn.com/abstract=2202277>.

with the UK Serious Fraud Office and the US-China Joint Liaison Group.<sup>47</sup>

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## EFFECTIVENESS OF THE REFERRAL AND INFORMATION EXCHANGE PROCESS

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The efficacy of the above-described system for sharing information between law enforcement agencies is questionable.<sup>48</sup> However, the reality of multilateral anti-corruption enforcement is complicated by various factors and the existence of international anti-corruption institutions has failed to significantly induce government actions in demand-side countries. Some have attributed this to; (1) developing countries' lack of technical capacity to conduct complex multi-jurisdictional investigations, (2) inefficient flow of information between investigators and prosecutors in bribe-receiving and bribe-paying countries, and (3) lack of political will.<sup>49</sup>

Evidence of successful prosecution of foreign corrupt government officials following a U.S.-based investigation has been scarce. There have been several attempts to prosecute foreign corrupt officials within the U.S. on the ground of conspiracy to violate the FCPA and money-laundering.<sup>50</sup> However, only two such endeavors have been successful involving money-laundering charges against a Haitian official and a Ukrainian official as extradition and sovereignty concerns remain a major challenge to FCPA enforcement in the U.S. Outside of the U.S. it is an even bigger questions because of the lack of transparency and accountability in anti-corruption investigations.

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## ALTERNATIVE METHOD OF ENCOURAGING DEMAND-SIDE PROSECUTIONS

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While the current system of anticorruption enforcement is efficacious in certain respects, it fails to hold those who demand bribes to account. As described above, the U.S. FCPA enforcement regime is

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<sup>47</sup> Nathaniel Edmonds, *The Foreign Corrupt Practices Act (FCPA) and International Bribery Crimes: When Other Nations Join the Enforcement Party*, [http://www.americanbar.org/content/dam/aba/events/criminal\\_justice/WCC\\_FCPA\\_Edmonds\\_PwC.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/criminal_justice/WCC_FCPA_Edmonds_PwC.authcheckdam.pdf). (last visted Apr. 12, 2015).

<sup>48</sup> Francesco De Simone, *The Impact of Foreign Anti-Bribery Laws on the Demand-Side Countries*, THE GLOBAL ANTICORRUPTION BLOG (Sept. 26, 2014) <http://globalanticorruptionblog.com/2014/09/26/guest-post-the-impact-of-foreign-anti-bribery-laws-on-the-demand-side-countries/>.

<sup>49</sup> *Id.*

<sup>50</sup> Garen S. Marshall, *Note: Increasing Accountability For Demand-Side Bribery In International Business Transactions* 46 NYU JOUR' OF INT'L LAW AND POL'S (2014).

arguably good at punishing and extracting fines from those who supply bribes to foreign officials. Such “supply-side” corrupt actors include major multinational corporations. “Demand-side” actors, such as customs officials or environmental safety officers in developing countries, are left outside of the current system of enforcement. The U.S. enforcers have no jurisdiction over their conduct, and their own country’s enforcers for whatever reason often fail to bring an action.

Thus, some anticorruption activists have proposed an alternative method of enforcement, driven by public citizens instead of government agencies who may be unable or unwilling to act.

This method is fairly simple. In developed countries such as the U.S. that enforce anticorruption laws, there are often Freedom of Information Laws as well. The U.S. law is called the Freedom of Information Act (FOIA). Using the FOIA, any citizen can request that a government agency divulge information that is otherwise kept secret if the citizen has a legitimate public purpose to obtain that information. Journalists often use the FOIA in the course of investigative journalism to expose corruption in the United States.<sup>51</sup> Why not use it to help expose corruption abroad?

Citizen activists could file a FOIA request in the U.S. to uncover the names, or at least other identifying information, of corrupt foreign officials who were identified in the course of an FCPA investigation. Once uncovered, citizen activists in the corrupt officials’ home country can take actions to deter future corruption. They can, for instance, file a civil suit if laws enable them. They could press local prosecutors to bring criminal charges. Or, and perhaps necessarily, they could publicize the names of the corrupt officials through media outlets.

The following section lays out this plan in greater detail, beginning with an overview of the U.S. Freedom of Information Act and then proceeding to a discussion of the practical implications of filing a FOIA request, such as how long such a request takes to be fulfilled.

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<sup>51</sup> Stephanie Martinez, *The Good, the Bad, and the Ugly of using FOIA in Journalism*, <http://ajr.org/2014/10/08/foia-request-challenges/> (last visited Apr. 12, 2015)

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## THE U.S. FREEDOM OF INFORMATION ACT

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The Freedom of Information Act (FOIA) was passed in 1967 and provides for the full or partial disclosure of information or documents created and maintained within the executive branch of the US government. The law was strengthened considerably following the Watergate Scandal during the Nixon Administration<sup>52</sup>, and it has survived in that general form until this day. Its purpose is to provide a check against government abuse of public power.

The FOIA sets out the instances in which a federal government agency must release information and documents to citizens filing a FOIA request, but also lists nine exceptions and three exclusions to that obligation. We will first consider what information can be requested and from whom. We shall then turn to exceptions that allow government agencies to withhold requested documents.

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### ENABLING PROVISIONS

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FOIA allows citizens to make request to “agencies” for “records”. FOIA incorporates definition of “agency” from Administrative Procedure Act<sup>53</sup>, and is defined as including any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.”<sup>54</sup> FOIA originally didn’t define “agency records”, so the court in *Forsham v. Harris*<sup>55</sup> looked to the Records Disposal Act which defined a record as “books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency”.

One court<sup>56</sup> held that “records” don’t include “tangible evidentiary objects,” i.e. “archival exhibits consisting of guns, bullets, and clothing pertaining to assassination of President Kennedy are not ‘records’”. Also certain “research data generated through federal grants are not considered agency

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<sup>52</sup> *Freedom of Information Past and Present*, <http://www.pbs.org/now/politics/foia06.html> (last visited Apr. 12, 2015)

<sup>53</sup> 5 U.S.C. § 552(f)

<sup>54</sup> *Id.*

<sup>55</sup> 445 U.S. 169 (1980)

<sup>56</sup> *Nichols v. United States*, 324 F. Supp. 130, 135-36 (D. Kan. 1971),

records subject to FOIA”, if agency serves in “limited, ministerial role” for “Trustee Council, did not appropriate funds to private researchers, and studies were not conducted on agency’s behalf, research data are not agency records”.<sup>57</sup> In 1996 FOIA was amended to include a definition of “records” as “any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format.

Therefore, the definition of both “agency” and “records” is quite broad and it would appear that almost all information available with the SEC and DOJ for instance can be requested through a FOIA request. This is of course, too good to be true and the FOIA also sets out various exemptions and exclusions under which an agency can refuse to provide information.

## EXCLUSIONS AND EXEMPTIONS

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Broadly, the nine exceptions to FOIA allow the government agencies to withhold requested documents if their release is likely to be harmful to governmental and private interests.

The FOIA exceptions extend to information related to national security (exception 1), internal agency practices (exception 2), information prohibited by federal law from disclosure (exception 3), trade secrets and financial information (exception 4), inter-agency documents subject to privilege (exception 5), information that would harm an individual’s privacy interest (exception 6), certain sensitive law enforcement information (exception 7), information on the supervision of financial institutions (exception 8), and geological information on wells (exception 9).

Of the nine exceptions, we anticipate that the carve-out for inter-agency documents under Exception 5 (such as those between the DOJ and the SEC) and the carve-out for sensitive law enforcement information under Exception 7, will pose the largest challenges for using FOIA as an anti-corruption tool.

## CHALLENGES POSED BY EXEMPTION 5

This exemption protects “inter-agency or intra-agency memorandums or letters” which would not be available by law to a party other than an agency in litigation with the agency. While it appears to cover only documents created by agencies, Courts have read it to cover even documents submitted to

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<sup>57</sup> ExxonMobil v. Dept. of Commerce, 828 F. Supp. 2d 97, 105-106)

agencies by experts and consultants. The intent behind this exemption is to protect the “deliberative process” so that frank discussions are encouraged internally within the agencies. It also seeks to protect against premature disclosure (such as that of a policy that is only being deliberated internally) and avoid confusions. This exemption has however been interpreted so broadly such that it has been called the “withhold it because you want to exemption”.<sup>58</sup>

The Supreme Court has noted that this exemption would encompass both statutory privileges and those commonly recognized by case law, such that all civil discovery rules are incorporated into the FOIA.<sup>59</sup> The relevant standard would be whether the documents would “routinely be disclosed” in civil litigation and only such documents would need to be provided. This would mean that all documents for which a party would have to make a showing of need would not need to provide under this exemption. The use of this exemption has also been rising and was used 81,752 times in 2013 (applied to 12 percent of all of 2013’s processed requests) to deny information.<sup>60</sup> A denial on this exemption could however be challenged on the grounds that withholding information does not aid the “deliberative process”. However, exemption 5 would still protect documents and other memoranda prepared by an attorney in contemplation of litigation under the attorney – client privilege doctrine.<sup>61</sup>

## CHALLENGES POSED BY EXEMPTION 7

Exemption 7’s ability to bar disclosure may pose real challenges to our present project, on both substantive and formal levels. Formally, although Federal Agencies must meet the “threshold requirement” of Exemption 7 (requiring documents be “compiled for law enforcement purposes”) before withholding requested documents, the Supreme Court has read the threshold requirements such that the Exemption applies broadly. A document initially “compiled for law enforcement purposes” does not lose its designation if it is recompiled into a non-law enforcement record.<sup>62</sup> Similarly, a document

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<sup>58</sup> See: *The Next FOIA Fight: The B(5): Withhold It Because You Want To Exemption*, <https://nsarchive.wordpress.com/2014/03/27/the-next-foia-fight-the-b5-withhold-it-because-you-want-to-exemption/> (last visited Apr. 12, 2015).

<sup>59</sup> See *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 800 (1984))

<sup>60</sup> Ted Birdis and Jack Gillum, *Us Cites Security More To Censor, Deny Records*, (Mar. 16, 2014 2:25 PM) <http://bigstory.ap.org/article/us-cites-security-more-censor-deny-records>

<sup>61</sup> *Hickman v. Taylor*, 329 U.S. 495.

<sup>62</sup> *FBI v. Abramson*, 456 U.S. 615.

that was not originally compiled for law enforcement purposes but which is subsequently used in law-enforcement contexts also falls within exemption grounds.

While Exemption 7 broadly covers law enforcement records, the exemption is subdivided into six subsections (Exemptions 7(A - F)). The potential application of each subsection of Exemption 7 will depend on the context of corrupt foreign official in relation to the SEC investigations. For instance, promises of confidentiality, involvement of the foreign official in the SEC investigation, and other factors could cause one of the subsections of Exemption 7 to apply. The potential difficulties that each subsection could cause are discussed below.

### EXEMPTION 7(A)

Exemption 7(A) applies to law enforcement records “but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings.”<sup>63</sup> Courts have developed a two-part test to determine whether Exemption 7(A) applies.<sup>64</sup> First, the law enforcement proceeding must be pending or prospective.<sup>65</sup> Second, the release of the information must be reasonably expected to cause an articulable harm.<sup>66</sup>

Exemption 7(A) could be a potential bar to the release of information that could affect any pending SEC investigation. The withholding of the information, however, is not intended to be limitless in duration.<sup>67</sup> The exemption extends to related proceedings meaning that if information in a closed investigation will be used in other pending or prospective proceedings, the information can continue to be withheld.<sup>68</sup> Furthermore, the information can be withheld if there is an appeal or a request for a new trial.<sup>69</sup>

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<sup>63</sup> *Dep’t of Justice Guide to Freedom of Information Act*, <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption7a.pdf> (last visited Apr. 12, 2015)

<sup>64</sup> *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> James v. US Secret Serv., No. 06-1951, 2007 U.S. Dist. LEXIS 52554 at \*12 (D.D.C. July 23, 2007).

<sup>68</sup> *See* Nat’l Pub. Radio v. Bell, 431 F. Supp. 509, 514-15 (D.D.C. 1977); *see also* Donovan v. FBI, 579 F. Supp. 1111, 1127 (S.D.N.Y. 1984).

<sup>69</sup> James v. US Secret Serv., No. 06-1951, 2007 U.S. Dist. LEXIS 52554 at \*12 (D.D.C. July 23, 2007).

The second prong of the Exemption 7(A) test is easily met as the government can merely show that their case will be harmed by a premature release of information. (DOJ Guide; *NLRB v. Robbins Tire Co.*)<sup>70</sup> Exemption 7(A) therefore could cause a bar to the release of information concerning corrupt officials identified in FCPA cases *if* such cases are ongoing or the information relates to other pending investigations. For instance, ICE was able to justify the withholding of certain documents after showing that their release would interfere with ongoing investigations in *Barnard v. Dep't of Homeland Sec.*<sup>71</sup>

To the extent that agreements between the SEC, DOJ and firms suspected of FCPA violations are rendered in the form of Non-Prosecution Agreements and Deferred-Prosecution Agreements, 7A may play a large role in determining the viability of a FOIA request. In a recent case (whose litigation is still ongoing), a group called 100Reporters was denied the ability to obtain certain records from an FCPA investigation that had been concluded by an NPA/DPA-like settlement with Seimens.<sup>72</sup> Similarly, the law firm of Robbins, Geller, Rudman & Dowd submitted a FOIA request related to an FCPA investigation of Wal-Mart and Wal-Mart used Exemption 7(A) to withhold the documents.<sup>73</sup>

### EXEMPTION 7(B)

Exemption 7(B) of the Freedom of Information Act is aimed at preventing prejudicial pretrial publicity that could impair a court proceeding and protects "records or information compiled for law enforcement purposes [the disclosure of which] would deprive a person of a right to a fair trial or an impartial adjudication."<sup>74</sup>

Exemption 7(B) is rarely invoked and has only been central to one FOIA case.<sup>75</sup> FOIA requests concerning names of corrupt officials implicated in FCPA cases do not seem likely to deprive an individual under

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<sup>70</sup> See *NLRB*, 437 US at 232; *Lemaine v. IRS*, No. 89-2914, 1991 US Dist. LEXIS 18651 at \*17 (D.Mass. Dec. 10, 1991).

<sup>71</sup> *Barnard v. Dep't of Homeland Sec.*, 598 F. Supp. 2d 1, 20 (D.D.C. 2009).

<sup>72</sup> Gibson Dunn, *2014 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements* (Jan. 6, 2015) <http://www.gibsondunn.com/publications/pages/2014-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx>

<sup>73</sup> See: *41 New Foia Court Documents, Plus Case Descriptions*, <http://foiaproject.org/2014/11/20/41-new-foia-court-documents-plus-case-descriptions-2/> (last visted Apr. 10, 2015)

<sup>74</sup> FOIA Guide, *supra* note 63.

<sup>75</sup> FOIA Guide, *supra* note 63.

investigation of a right to a fair trial. Therefore, this exemption does not seem likely to justify the withholding of corrupt officials implicated in FCPA cases.

### EXEMPTION 7(C)

Exemption 7(C) provides protection for information which "could reasonably be expected to constitute an unwarranted invasion of personal privacy."<sup>76</sup> To determine whether Exemption 7(C) applies, courts have undertaken a balancing test.<sup>77</sup> Courts weigh any privacy interest at stake in the requested information against any public interest in the disclosure of the information.<sup>78</sup> Exemption 7(C) is the law-enforcement equivalent of Exemption 6, but the privacy interests at stake are more easily met. For instance, courts will find a privacy interest at stake in the mere mention of names in an investigation file even when the named individual is not the target of the investigation.<sup>79</sup> Courts, however, have found that the disclosure of government officials who have demonstrated misconduct serves a public interest that can outweigh the privacy interest at stake. It seems likely that Courts could find privacy interests implicated in the request for the names of corrupt officials in FCPA investigations. To overcome this burden, FOIA requesters would have to convince courts that there was a strong public interest in the release of the names of the corrupt officials. While it seems likely that this burden could be met, it is unclear how courts would weigh the interests.

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<sup>76</sup> 5 U.S.C. § 552(b)(7)(C) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110 175, 121 Stat. 2524

<sup>77</sup> *See* Schoenman v. FBI, 573 F. Supp. 2d 119, 148 (2008).

<sup>78</sup> *Id.*

<sup>79</sup> *See* Fabiano v. McIntyre, 146 F. App'x 549, 550 (3d. Cir. 2005).

### EXAMPLE #3: 100REPORTERS, FOIA, AND SIEMENS FCPA SETTLEMENT

In 2008, the German industrial giant Siemens settled with the Department of Justice and the Securities and Exchange Commission for about \$550 to resolve allegations that the company had violated the FCPA. Siemens's settlement was of the type that is now typical of FCPA settlements -- basically an NPA/DPA style arrangement that did not require Siemens to admit or deny violating the FCPA.

One component of the settlement agreements was the appointment of a third party monitor that would make periodic audits and inspections of Siemens and ensure their continued compliance with the terms of the settlement. The appointed monitor, a prominent and well-respected German ex-Finance Minister, was to keep watch over Siemens for four years after the settlement. In the course of his duties, the monitor had full access to all of Siemens' internal files and operations (much like its own lawyers would) and compiled its findings into reports that detailed Siemens' efforts to comply with the settlement. Those reports are now the subject of a lawsuit initiated by an investigative journalism organization called 100Reporters.

100Reporters started with a FOIA request. Sensing that the monitor's reports may be a rich source of information about Siemens' allegedly corrupt business practices in developing countries, 100Reporters had filed a FOIA request to the DOJ to release these reports to the public. 100Reporters reasoned that Siemens had already been punished for its wrongdoing, and the monitor's reports (which had been submitted to the DOJ for its review) were now a matter of public record.

The DOJ rejected 100Reporter's FOIA requests to release the monitor's reports, citing several carve-outs to the FOIA, including under Exemption 7 for interference in ongoing law enforcement activities. 100Reporters brought the above-mentioned lawsuit to compel the DOJ to release the record, arguing that the DOJ had improperly applied the FOIA exemptions and that the monitor's reports were not at all a part of an ongoing law enforcement action. After all, the Siemens' monitor's task concluded in 2012 and it seemed that for all intents and purposes the DOJ's FCPA action against Siemens' was over. 100Reporters describes its mission as thus:

“100Reporters exists to hold accountable those wielding power and controlling money – specifically, governments, public officials and corporations in the U.S. and abroad – through fearless reporting that spans the globe.”

The group has secured pro bono legal representation from the Washington, D.C. law firm Arnold & Porter, and appears prepared to continue litigating its claim to access the Siemens monitor's reports. Attorneys for Siemens and its monitor, Gibson Dunn, have written an extensive report on why the judge should rule in the DOJ's favor and find that the FOIA exemptions will keep the records out of the public's view. This litigation is ongoing.

### EXEMPTION 7(D)

Exemption 7(D) provides protection for "records or information compiled for law enforcement purposes [which] could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source." Courts have held that Exemption 7(D) provides comprehensive protection in order to prevent retaliation against confidential sources (e.g. Cooper Cameron). Frequently, courts will apply Exemption 7(D) in combination with Exemption 7(C)'s privacy protections. For instance, in *Roth v. DOJ*, the Court had to analyze whether the FBI had properly withheld the names of individuals to protect their privacy (Exemption 7(C)) and as confidential sources (Exemption 7(D)).<sup>80</sup>

If the corrupt officials prosecuted under the FCPA were given explicit assurances of confidentiality, then Exemption 7(D) would bar the release of their names. If, however, the officials were only given vague assurances, the exemption might not apply. Therefore, Exemption 7(D) will likely bar the release of the official's name *only* if the official was promised confidentiality in the course of the FCPA investigation.

### EXEMPTION 7(E)

Exemption 7(E) of the Freedom of Information Act affords protection to law enforcement information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." Because this exemption pertains to techniques and procedures, it likely would not bar the release of the names of corrupt officials.

### EXEMPTION 7(F)

Exemption 7(F) protects information that "could reasonably be expected to endanger the life or physical safety of any individual." Courts have routinely applied this exemption to the identities of law enforcement agents but have also extended the protection to the names of informants and sources.

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<sup>80</sup> *Roth v. DOJ*, 642 F.3d 1161, 1172 (D.C. Cir. 2011).

While the protection afforded by Exemption 7(F) is similar to that provided by Exemption 7(C), Exemption 7(F) does not require a balancing test. In some cases, Exemption 7(F) has been used narrowly to exempt the names of individuals from documents and merely requiring the release of documents with the names redacted.<sup>81</sup> Exemption 7(F) therefore could cause a bar to the release of corrupt officials' names if physical harm could be expected from the release of the information.

Thus, of the five substantive subsections of Exemption 7, (A) and (B) are most likely to impede requests relevant to investigations of corruption and bribery abroad. There is concern that non-prosecution agreements (NPAs) or deferred prosecution agreements (DPAs), an increasingly common result in SEC and DOJ investigations, may fall under Exemption 7(A) as documents that could "reasonably be expected to interfere with enforcement proceedings". Though no case law to date has indicated as such, it is possible that courts would uphold agency denials of FOIA requests containing of names and materials involved in NDAs and DPAs under Exemption 7(A).

Agencies may use Exemption 7(B) to argue that disclosure would "deprive a person of a right to a fair trial or an impartial adjudication" in their home country. Considering that our objective is to retrieve names of foreign persons for native prosecution in demand-side countries, agencies may rightly raise this exemption. The agency's success depends on whether the statute can be read to include foreign persons within its definition, and whether the right to fair trial refers solely to a right to a fair U.S. trial. Though no exact precedent exists, FOIA disclosure exemptions have previously been interpreted in favor of protecting foreign interests in non-disclosure. *Donovan v. FBI* indicates that Exemption 7 applied not only documents compiled by domestic law enforcement, but also documents compiled for foreign law enforcement<sup>82</sup>. By extension, it is plausible that courts could read Exemption 7(B) as allowing non-disclosure when disclosure would likely deprive a foreign person of a right to fair trial in their home country.

## EXCLUSIONS

The FOIA exclusions allow federal agencies to disavow even the existence of requested documents,

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<sup>81</sup> Lawyers' Comm. for Civ. Rights of S.F. Bay Area v. Dep't of Treasury, No. C 07-2590, 2008 U.S. Dist. LEXIS 87624 at \*54.

<sup>82</sup> 579 F. Supp. 1111, 1119-20 (S.D.N.Y. 1983)

provided that the documents fall under three “narrow” exclusion categories. Exclusion categories relate strictly to law enforcement and national security records. The first exclusion protects the existence of ongoing criminal law enforcement investigations when the subject is unaware of the investigation. The second exclusion protects informant statuses. The third protects the classified FBI documents relating to foreign intelligence and terrorism.

## PRACTICAL CONSIDERATIONS OF A FOIA REQUEST

The actual process of filing a FOIA request and obtaining the requested documents is complex and time-consuming.<sup>83</sup> The following section provides a brief overview of this process along with a few real-world examples for demonstration.

The process of making requests for information from federal agencies using the Freedom of Information Act is fairly well-documented, if not to the exact questions raised by this anticorruption effort.

Journalists, for instance, frequently employ the FOIA to obtain documents needed in the course of investigative journalism.<sup>84</sup> Lawyers that frequently represent plaintiffs in a variety of lawsuits also make use of the FOIA for tactical reasons. To be clear, a FOIA request is often only the first part of the process of obtaining information from government agencies under the law. If an agency denies a FOIA request on the grounds of any of the above-mentioned exceptions, then it is within the requester’s rights to sue the agency for failure to properly process their FOIA request, i.e. for misapplying the exemptions.<sup>85</sup>

### STEP 1: FILING THE REQUEST

A citizen trying to use the FOIA to get information from a government information that they feel should be publicly available must first file the FOIA request itself.<sup>86</sup> This take the form of a letter written to an

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<sup>83</sup> See e.g., *Taking the Shock out of FOIA Charges*, <http://foiacouncil.dls.virginia.gov/ref/FOIACCharges.pdf> (last visited Apr. 12, 2015). (Describing the costs to both requester and public agency associated with the FOIA process, as well as the process of litigation that often follows).

<sup>84</sup> See e.g., Martinez, *supra* note 51.

<sup>85</sup> See FOIA Guide, *supra* note 68. (allowing that while the FOIA is supposed to work without litigation, it is often the case that FOIA requests are contested enough to proceed to litigation -- if the requester can shoulder the cost, of course).

<sup>86</sup> See U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, *Citizen's Guide On Using The Freedom Of Information Act And The Privacy Act Of 1974 To Request Government Records*, available at

agency that you think will have the information you are looking for.<sup>87</sup> The more specific the request, the faster the FOIA office at the agency can respond.<sup>88</sup> Furthermore, when requesting from large agencies, a requester should do their best to address the actual sub-unit within the agency that is most likely to have the information they are requesting. For instance, the Division of Enforcement of the Securities and Exchange Commission is most likely going to have information about an FCPA enforcement action.

The letter must be properly addressed to the agency and it must bear the return address of the requester and their organization.<sup>89</sup> The latter should be reflected in the letterhead of the request letter.<sup>90</sup> The request should include a statement that the letter is a request pursuant to the Freedom of Information Act, 5 U.S.C. Section 552.<sup>91</sup> It should contain as clear and specific a description of the information that the requester wants -- as in, and it should state exactly what documents the requester wants.<sup>92</sup> These documents could be identified by their date, their authors, the documents' subjects, and/or the documents' titles.<sup>93</sup> It could refer to any related documents that have already been published or released -- for instance, the requester could enclose newspaper articles or other government disclosures to identify the documents and substantiate the claim that they actually exist.<sup>94</sup> The requester may also request a waiver of fees associated with making the request.<sup>95</sup> The request should include a statement that the requester expects a response from the agency within the 10-day statutory time limit, and that if the agency denies the request on the basis on some exemptions that the requester wants a detailed explanation as to their applicability.<sup>96</sup> If any information is withheld on the basis of exemptions,

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<http://oversight.house.gov/wp-content/uploads/2012/09/Citizens-Guide-on-Using-FOIA.2012.pdf> (last visted Apr. 12, 2015)

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

the requester is entitled under the FOIA to still obtain any remaining “reasonably segregable portions” of the documents.<sup>97</sup>

The requester should put some thought into exactly which documents they are requesting. For instance, if the requester knows that the SEC and DOJ have already concluded an FCPA investigation and have settled with the offending corporation, then the requester can safely assume that the SEC and DOJ are in possession of internal investigation documents that the company produced and handed over to the agencies to be cooperative. These documents may be useful for the requester to obtain because they often contain information that the SEC and the DOJ themselves did not find useful to their own investigation, but would be useful to foreign civil society activists trying to hold their own public officials accountable.

As noted in previous sections, sometimes the SEC and the DOJ assign companies third-party monitors as part of their FCPA settlement agreement.<sup>98</sup> Monitors produce reports periodically that include the results of their own investigations into the company’s compliance<sup>99</sup>, and these reports may also include information that would be useful to activists. Finally, FOIA requesters should be aware that if the SEC and the DOJ have not yet settled their FCPA complaints against a company, requesting information and documents about that ongoing investigation may be considerably more difficult than if a settlement has already been achieved. Ongoing investigations are usually quite secretive, it is difficult to identify specific documents that the requester might want if there is not very much public information available about the documents involved. Moreover, the SEC and DOJ will very easily be able to assert exemptions to the FOIA that protect their law enforcement activities from being prematurely exposed.

## STEP 2: APPEALING THE DENIAL

FOIA requests for government-held information are often denied on the basis of some exemption or another. As discussed, this particular anticorruption effort seeking information from FCPA investigations

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<sup>97</sup> *Id.*

<sup>98</sup> See e.g. USA v. Total, Criminal No. 1:13CR 239 available at <http://www.justice.gov/iso/opa/resources/9392013529103746998524.pdf> (showing a deferred-prosecution agreement between the DOJ and Total, S.A., a Spanish oil conglomerate, over FCPA charges that includes a provision for a “corporate compliance monitor”)

<sup>99</sup> *Id.*

is likely to face some resistance from FOIA Exemption 7, among others.

Nevertheless, if the requester feels that the agency has mis-applied the exemption they have several avenues of recourse. Oftentimes agencies have administrative appeal processes if requesters feel that the agency's explanation for denying the request was inadequate or if the request was misunderstood and misdirected.<sup>100</sup>

Finally, if engaging with the agency directly fails, requesters have the right under the FOIA to compel the agencies' disclosure by suing them in a U.S. Federal Court. To undertake this process, a requester should have secured able legal assistance -- a FOIA lawsuit can become very complex. This is understandable considering the competing considerations at play in government disclosure: on the one hand, the SEC and the DOJ are trying to hold corrupt companies accountable for their actions overseas, and on the other hand they have a responsibility to the public to release information about their activities.

The issue of FOIA requests about FCPA investigations is at the time of this report a live legal issue, as the examples demonstrate. Another contemporary example is included below for illustration.

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<sup>100</sup> *Id.*

#### EXAMPLE #4: WALMART IN MEXICO AND THE FOIA

Wal-Mart first disclosed in its 2011 SEC filings that it was conducting an internal investigation into whether “certain matters, including permitting, licensing and inspections” were in compliance with the U.S. Foreign Corrupt Practices Act (“FCPA”).” In 2012 the New York Times broke the dramatic story of how Wal-Mart Mexico had apparently been operating and expanding for years on the basis of bribes paid to government officials. Even worse, it appeared that Wal-Mart HQ in Bentonville, Arkansas, knew about the corruption and suppressed the internal investigation.



Wal-Mart shareholders are threatening the company with lawsuits for what they say are its deceptive statements as to when they first learned of the corruption -- according to U.S. lawmakers, Wal-Mart first became aware of the potentially corrupt activity in 2005 and started conducting internal investigations in 2006.

In order to gather evidence for use in their lawsuits, some shareholders are turning to the Freedom of Information Act. The SEC and the DOJ are conducting their own investigation into Wal-Mart’s misconduct, and as part of the ongoing affair had requested the company’s own internal investigation documents. Wal-Mart did indeed turn those documents over, saying in 2013:

“We have provided extensive documentation to the Department of Justice and the Securities and Exchange Commission . . . as part of our ongoing cooperation with the appropriate law enforcement agencies on this matter.”

These documents are exactly what shareholders say they need to bring an effective lawsuit against the board and management for deceiving them. Notably, these same documents also very likely include information that would be of use to civil society anticorruption activists in Mexico. Plaintiff-shareholder firm Robbins Geller filed a FOIA request in 2013 to the SEC for the Wal-Mart internal investigation documents, only to be rebuffed on the grounds of FOIA Exemption 7(A) for potential interference with enforcement activities.

Robbins Geller has now filed a lawsuit against the SEC to compel these documents’ release, arguing that the SEC has misapplied Exemption 7(A) since these documents aren’t part of the SEC’s ongoing enforcement action against Wal-Mart but were instead prepared by the company itself and given to the SEC years ago, and thus should be in the public record. At least one experienced FOIA attorney has weighed in on Robbins Geller’s suit, saying that the firm would likely not succeed on this argument given the broad scope that courts assign to Exemption 7(A).

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## RECAP: WILL THE ALTERNATIVE METHOD WORK?

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To recap, the objective of this project is to see if data held by FCPA prosecuting agencies in the United States can be used to launch prosecutions in demand-side countries. As we have seen, FOIA is a powerful tool that allows citizens in the U.S. to make requests to U.S. “agencies” for “records”. Thus, all records held by agencies such as the SEC and DOJ can be requested. There are clear procedures for making such a request and there are timelines within which the agency would have to respond. An information request cannot be ignored or denied for no reason. Therefore, the moment a request is made, an agency is put under the obligation to respond to that request within a particular timeframe.

There are however, exemptions that the agencies can use to refuse disclosure. The most likely exemption to be relied on would be the “law enforcement” exemption. Under this exemption, an agency could refuse to disclose if a law enforcement proceeding is pending or is prospective *and* if the release of the information could be reasonably expected to cause an articulable harm. Courts have held that if the agency is able to articulate the fact that the government’s case would be harmed by disclosure, this exemption would be likely available.

Nevertheless, there are several avenues of recourse to challenge non-disclosures based on an exemptions. Agencies have administrative appeal processes if requesters feel that the agency’s explanation for denying the request was inadequate or if the request was misunderstood and misdirected. Finally, if engaging with the agency directly fails, requesters have the right under the FOIA to compel the agencies’ disclosure by suing them in a U.S. Federal Court. As we have seen recently both in *Walmart* and *100Reporters*, denials of FOIA requests have been challenged -- forcing the agencies to articulate before a court its reliance on an exemption.

An interesting problem would be in the case of investigations that are already closed. With FCPA investigations, while there are of course consequences for the U.S. companies and its directors in the United States, the individuals who actually received bribes in demand side countries could go scot-free if their own countries do not prosecute them. It could be argued that the law enforcement exemption would no longer apply in this case, as the matter is no longer “pending or prospective” relative to the U.S. targets. However, agencies frequently enter into deferred-prosecution agreements (or NPAs), which have the legal effect of extending the investigation and could have confidentiality provisions drafted to protect disclosure of information. There is no automatic exemption for such agreements under the FOIA and as noted it may not be possible for the agencies to continue using DPAs as a tool to block plaintiff

litigation like FOIA requests and appeals. Therefore, at least in the case of investigations that have closed, and as long as time and resources are not a constraint, requesting such information may be worth a try.

Of course, time and resources are never unlimited. Activists who want to use this alternative method may have to wait years for an FCPA investigation to resolve to the point where its records are susceptible to a FOIA request. Consider also that a FOIA request itself takes a long time, and that is not including the time that a requester may need to account for if they have to re-draft their request and start all over again (if, for instance, they requested records improperly). Moreover, litigating an appeal to a FOIA denial can be expensive.

## **PART II: EXPOSING CORRUPT OFFICIALS IN THEIR HOME COUNTRY**

In this second portion of the paper, LIDS Global’s international partners evaluate whether or not the above-described alternative, FOIA-based method of holding bribe-demanding officials accountable would even work. Could names and documents obtained from the SEC and DOJ be useful to anticorruption civil society groups in other countries? Ignacio Victoria Boulin believed that they would be, saying:

*“...Even if the U.S. government has provided more detailed information about the transactions to demand-side governments, the lack of public disclosure means that if the demand-side government takes no action, local activists lack the ability to use “naming and shaming” techniques effectively.*

*To go after the bribe-takers effectively—and to put pressure on demand-side governments to do so—we need the names, the dates, and the details of the corrupt transactions.”<sup>101</sup>*

The “we” that Ignacio refers to there are activists that he works with in Argentina, a country wracked by corruption but rich in the energies of dedicated citizens like himself. Could such citizen activists who obtain this information from partners in the U.S. use it to hold their government accountable? Could they spur a criminal prosecution? Could they launch their own private, civil action? Could they “name and shame” their officials without fear of retribution?

Four countries weigh in on this question in the context of their own country.

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<sup>101</sup> Ignacio A. Boulin Victoria, *Using FOIA to Get Evidence on Bribe Takers*, THE GLOBAL ANTICORRUPTION BLOG (May 5, 2014) <http://globalanticorruptionblog.com/2014/05/05/guest-post-using-foia-to-get-evidence-on-bribe-takers/>.

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Corruption

*and*

Freedom of Information Laws

*in*

India

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APRIL 2015

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## INTRODUCTION

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India is a 'demand side' country with respect to corruption i.e. there are numerous instances of officials receiving bribes and indulging in corruption. The framework of laws relating to corruption regulates the manner in which corruption prosecutions are carried out and the information that may be used in these prosecutions. Prosecutions related to corruption in India are usually initiated under the Prevention of Corruption Act and information regarding corrupt activities and prosecutions of such activities may be obtained under the Right to Information Act. Information may also be obtained from a US FOIA request to agencies that have conducted FCPA investigations implicating Indian officials. All such information can serve as useful means to initiate prosecution, and could also be used as evidence during the trial. Those wishing to publish and utilize information gained in this way may be designated whistleblowers.

In short, this report aims to explore how FOIA information obtained from US government agencies could initiate criminal prosecutions of corrupt officials in India and the legal implications of such use. In this respect, we have also explored how Indian activists who provide information from the US are protected in India.

## CHAPTER I: EVIDENCE AND PROSECUTION

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First, we will outline the basic mechanisms for prosecuting corruption offences in India.

In India, criminal prosecutions are usually initiated in the manner outlined in the Code of Criminal Procedure, 1973 unless any special law prescribes otherwise.<sup>1</sup> With respect to offences pertaining to corruption, India has a special anti-corruption legislation called the Prevention of Corruption Act, 1988 (PoCA). The procedure prescribed requires that on receiving information of the commission of an offence, authorities carry out investigation. If enough evidence is found, the government's sanction to

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<sup>1</sup> Code Crim. Procedure § 4 (1973)..

prosecute must be obtained. Thereafter, judicial cognisance or notice of the offence is taken, and finally, the trial commences. The trial is an adversarial process where the prosecution puts forward evidence to create certainty, beyond reasonable doubt, that the accused is guilty. Information obtained by individuals and NGOs through the RTI or FOIA mechanism can assist authorities at each of the above mentioned stages.

## INVESTIGATION

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Effective investigation of offences is important to ensure that the prosecution is successful. The bodies that can investigate offences relating to corruption are the police, and the Central Bureau of Investigation (CBI). Under the Prevention of Corruption Act, a warrant (by a Metropolitan Magistrate or a Magistrate of the First Class) for investigation will be required in some cases.<sup>2</sup> Otherwise, the offence is cognizable, i.e., investigation and arrest can occur without the warrant of the Court. Under the Prevention of Money Laundering Act, 2002, all offences have been made cognizable as well.<sup>3</sup>

The division of cases between the CBI and the Police is as follows. Cases which are substantially and essentially against Central Government employees or concerning affairs of the Central Government, will be within the domain of the CBI. However, the cases, which are essentially and substantially against State Government employees or are in respect of matters concerning the State Government shall be investigated by the State Police unless the case is entrusted to the CBI by the State Government. However, the CBI shall also be responsible for cases where the interests of the Central Government or any Statutory Body or Corporation set up by it are involved (especially involving large sums of money, or public servants), or for cases involving breach of Central Laws that fall within the domain of the Central Government to enforce, or for 'big' cases of fraud, cheating and embezzlement involving large sums of money or by organized gangs, or cases affecting many states or countries that require a central coordinating agency.<sup>4</sup> The two agencies are supposed to work in a coordinated fashion, and cases may be referenced from one to another according to the necessity of the situation.

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<sup>2</sup> Prevention of Corruption Act § 17, No. 49 of 1988, India Code (1988).

<sup>3</sup> Prevention of Money Laundering Act § 45, No. 15 of 2003, India Code (2003).

<sup>4</sup> Central Bureau of Investigation (Crime) Manual, ¶ 1.10 (2005).

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## CENTRAL BUREAU OF INVESTIGATION

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While the CBI derives its investigative powers from the Delhi Special Police Establishment Act, 1946, the power in question is different from that exercised by the police under Section 156 of the Code. The CBI may receive complaints from general public though they have to keep all the complaints received by them confidential at all the stages.<sup>5</sup> Therefore, complaint in itself cannot be the basis for further action by the CBI. The complaint merely serves as information to the CBI. Before any further action on the basis of the complaint, the complaint has to be verified. Therefore, while obtaining the information through Right to Information Act, the threshold requirements for verification of the complaint should be kept in mind.

The process of verification is secret and it involves consulting the records of the particular department and informal interaction with the Head of the Department or CVO. It should be completed within three months of the receipt of the complaint. The officer in-charge for verification of the complaint prepares a verification report recommending the manner in which the complaint should be disposed off. If the complaint stands verified, a case will be registered.

If a complaint is anonymous or pseudonymous or if the complaint contains vague and unverifiable allegations or if the wrong is of petty nature and is better left to departmental action, the complaint *cannot* be verified. However, verification *should be* conducted if a complaint contains specific and definite allegations involving corruption or serious misconduct against public servants etc., which can be verified and if complaints pertain to the subject-matters which fall within the purview of CBI either received from official channels or from well-established and recognized public organizations or from individuals who are known and who can be traced and examined.<sup>6</sup> “*Specific and definite allegations*” would mean that the nature of the offence and the names of those allegedly involved in the commission of the same should be clear, and the allegations should not be based on guesswork. Therefore, while using the information obtained through the RTI mechanism to file complaints, these factors should be kept in mind.

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<sup>5</sup> Central Bureau of Investigation (Crime) Manual, ¶ 8.5 (2005).

<sup>6</sup> Central Vigilance Commission, 1 Vigilance Manual, ¶ 8.6 (2005).

When the verification of complaint and source information reveals commission of a *prima facie* cognizable offence, a regular case is to be registered as is enjoined by law. However, further preliminary enquiry may be conducted before registering the case, if the complaint indicates serious misconduct on the part of a public servant but is not adequate to justify registration of a regular case under the provisions of Section 154 of the Code of Criminal Procedure.<sup>7</sup>

As soon as sufficient material becomes available to show that *prima facie* there has been commission of a cognizable offence, a preliminary enquiry can be converted into a regular case.<sup>8</sup> Complaints made based on information obtained through RTI or FOIA are likely to be sufficient for preliminary enquiries and may need to be verified by additional sources before a regular case can be taken up. However, this depends on the nature of the information obtained through the RTI mechanism.

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## POLICE

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In India, for cognizable offences, the Police can record the relevant information under Section 154 of the Code of Criminal Procedure (referred to as the First Information Report – “FIR”), and will proceed to investigate the same under Section 156 of the Code of Criminal Procedure.<sup>9</sup> The Police is mandated to register the First Information Report when the information provided by the complainant discloses the commission of a cognizable offence.<sup>10</sup> The Supreme Court, in a recent case, has clarified that there can be *no* preliminary inquiry for offenses registered by the police under Section 154. The rules of the CBI Manual cannot be imported into the CrPC. Therefore, if the information provided discloses a cognizable offense, which many of the provisions under the corruption statutes are, then the police officer is bound to register an FIR. Provided that the information, if true, were to constitute a cognizable offense, this is grounds for mandatory registration of the complaint. The police do not have the discretion to *not* register the complaint or to conduct a preliminary inquiry based on the same.<sup>11</sup> In this regard, the information obtained by the FOIA may be useful in several ways – it may either be useful to the police

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<sup>7</sup> Central Bureau of Investigation (Crime) Manual, ¶ 9.1 (2005).

<sup>8</sup> *Id.* ¶ 9.1.

<sup>9</sup> Code Crim. Procedure §154 and §156 (3) (1973).

<sup>10</sup> *State of Haryana v. Bhajan Lal*, A.I.R. 1992 S.C. 604 (India).

<sup>11</sup> *Lalita Kumari v. Govt. of U.P.*, (2014) 2 SCC 1 (Supreme Court of India).

for establishing that an offense has been committed (for example, a large discrepancy in funds claimed to have been spent and actually spent in a project), or for establishing the identity of the accused (for example, to prove that certain individuals are in charge of particular projects), or in the trial as evidence that the offense was committed by a particular individual. Individuals or NGOs may help initiate investigation and prosecution by filing an FIR with the police. Information obtained through the RTI mechanism can also be the basis of filing FIRs.

Alternatively, a complaint may be made to the magistrate. While based on evidence adduced the magistrate may decide to judicial notice at this stage itself, after obtaining government sanction, the information received from the RTI mechanism is unlikely to be sufficient to allow the magistrate to take cognisance of the offence. Therefore, in such cases, magistrates usually relegate complaints to the police to conduct an investigation under Section 156.<sup>12</sup> Thus, complaints are filed with the magistrate directly, largely in those cases where the police refuses to file the FIR and the magistrate's direction is required to even commence the prosecution.

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#### INTERNAL INVESTIGATION IN GOVERNMENT ORGANIZATIONS

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In India, the departmental investigations are handled by the Chief Vigilance Officers who assist the Head of the Department/Organisation in all vigilance matters.<sup>13</sup> The CVC acts on complaints made to CVOs of a specific Government Departments or Organisations.<sup>14</sup> The CVOs scrutinize these complaints and if they find that any complaint is frivolous or excessively vague, they may refuse to follow up on it.<sup>15</sup> However, if the facts disclosed by the complaint bring out some wrong by a public servant, the CVOs may register the complaint.<sup>16</sup> Once the complaint is registered, the case may be passed on to the CBI for investigation, if it *prima facie* reveals a criminal offence or to the departmental vigilance agency, if it does not make out any criminal wrong in their judgment.<sup>17</sup> The information obtained using the RTI may

<sup>12</sup> Code Crim. Procedure §156 and §190 (1973).

<sup>13</sup> *Id.* ¶ 1.1.

<sup>14</sup> *Id.* ¶ 3.2.

<sup>15</sup> *Id.* ¶ 4.3.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* ¶ 3.6

be used to launch such investigations if they prima facie reveal commission of such offences. The CBI must take the complaints transferred by CVC on priority basis.<sup>18</sup>

It is the obligation of CVOs to properly assist CBI in the investigation of the cases entrusted to them or started by the CBI based on their own sources of information. Though the CVC superintends CBI investigations, it cannot dictate the outcome of the investigation.<sup>19</sup> The CVOs can require the CBI to investigate the case only if the Central Government refers the case to them, or if a private complaint is made against any official.

An analysis of the investigating procedure of the agencies indicates that the kind of information that can be used by these investigating agencies is very wide. Therefore, individuals may provide wide variety of information to help launch investigation. For instance, a list of names obtained under the RTI or through other FOIAs may be provided to the investigation agencies. These may be enough to launch at least a preliminary inquiry, but may also, depending on the information disclosed, be sufficient to launch an investigation. There is a lower threshold required to launch a preliminary inquiry, which means that even if the information obtained by FOIA or RTI is not sufficiently detailed, it may still be used as a basis for considering the matter, and if it appears necessary, to investigate further into the same.

## COGNISANCE

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Prosecution is said to be launched when the court takes the judicial 'cognisance' of the offence.<sup>20</sup> Taking 'cognisance' means taking judicial notice of the offence and indicates the intention to initiate the proceedings.<sup>21</sup> This means that the judge applies her judicial mind to the facts to determine if '*prima facie*', an offence has been committed.<sup>22</sup> The purpose of this provision is to place an additional check to

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<sup>18</sup> *Id.* ¶ 8.11

<sup>19</sup> *Id.* ¶ 1.5,

<sup>20</sup> S.A. Venkataraman v. The State, A.I.R. 1958 S.C. 107 (India).

<sup>21</sup> State of Karnataka v. Pastor P. Raju, (2006) 6 S.C.C. 728 (India).

<sup>22</sup> State of West Bengal v. Mohd. Khalid (1995) 1 S.C.C. 684.

ensure that a person who is not even '*prima facie*' liable is not dragged to the roughness of criminal trial.<sup>23</sup>

Cognisance may be taken in three cases. *First*, it may be taken based upon receiving a complaint of facts which constitute such offence. This complaint may be made by the police or by an individual. *Secondly*, it may be taken based on a police report outlining the facts. *Thirdly*, cognisance may be taken based upon information received from any person other than a police officer, or upon her own knowledge, that such offence has been committed.<sup>24</sup> Since the PoCA does not deviate from the Code, the provisions of the Code continue to apply.<sup>25</sup> Usually, cognisance is taken based on police reports. This police report is created based on investigation of agencies which may be initiated based on the information provided by an individual.<sup>26</sup>

As indicated before, the information from RTI or other FOIAs, is likely to be sufficient to launch investigations, but may not be sufficient for judicial cognisance. The information will require additional verification and support to pass judicial muster. Even if information is obtained through unregulated sources, it is not important to disclose the same. This is because criteria for taking cognizance of an offence lay emphasis on a reliable complainant who can be cross-examined<sup>27</sup> and the disclosure of a cognizable offence, and not on the source of the information itself. Thus, if the information obtained through an RTI request is detailed enough to clearly disclose the offence and the complainant is well placed to justify the reason for making the complaint, it will be sufficient for judicial cognisance.

## SANCTIONS

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<sup>23</sup> See R.V. Kelkar's Criminal Procedure, 222 (K.N.C. Pillai ed. 6<sup>th</sup> ed. 2014).

<sup>24</sup> Code Crim. Procedure §190 (1973).

<sup>25</sup> Prevention of Corruption Act § 5, No. 49 of 1988, India Code (1988).

<sup>26</sup> Prevention of Corruption Act § 17, No. 49 of 1988, India Code (1988); 'Police report' means a report forwarded by the Investigation Officer to Magistrate after the completion of investigation.

<sup>27</sup> Central Bureau of Investigation (Crime) Manual, ¶ 8.5 (2005). See also Central Vigilance Commission, 1 Vigilance Manual (2005).

After conducting investigation and before requiring that cognizance be taken, sanction to prosecute by the Central/State Government is required. Cognizance of an offence against public servant cannot be taken unless it fulfills the conditions of Section 197 of the Code. Section 19 of PoCA also lays down the requirement for sanction before a court takes cognizance. However, the requirements under both legislations are different as they serve different purposes.<sup>28</sup> The order of sanction is only an administrative act and not a quasi-judicial one.<sup>29</sup> Therefore, it need not be reasoned in detail.

Where a public servant is prosecuted for an offence which challenges his honesty and integrity, the State is vitally concerned in it as it affects the morale of the public services and also the administrative interests of the State.<sup>30</sup> For this reason, the discretion to prosecute was taken away from the prosecuting agency and was vested in departmental authority for they could assess and weigh the accusation in a far more dispassionate and responsible manner.<sup>31</sup> Therefore, a valid sanction is condition precedent to a valid prosecution. This sanction is not required for investigation<sup>32</sup> and is only required at the time of taking cognizance.<sup>33</sup> It is not required even for the institution of police case or the submission of the police report.<sup>34</sup>

General sanction under the Code is required only when *first*, prosecution is sought to be initiated against public servants who are 'not removable from office except with the sanction of the Government'.<sup>35</sup>

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<sup>28</sup> P.V. Ramakrishna, A Treatise on Anti-Corruption Laws in India 1409 (13<sup>th</sup> ed. 2011)

<sup>29</sup> Central Vigilance Commission Guidelines ¶ 2(i).

<sup>30</sup> Ramakrishna, *supra* note 25, 1399.

<sup>31</sup> *Id.* 1401.

<sup>32</sup> Subramaniam Swamy v. Director, Central Bureau of Investigation, (2014) 8 SCC 682; *See also* N.K. Singh, *Unshackling the CBI*, The Statesman (Novem, 2014), <http://www.thestatesman.net/news/55933-Unshackling-the-CBI.html?page=1> (last visited on November 27<sup>th</sup>, 2014).

<sup>33</sup> Birla Tyres v. Union of India, 1998 Cr. L.J. 4401 (Cri.); R.S. Nayak v. A.R. Antulay, A.I.R. 1984 S.C. 684 (India).

<sup>34</sup> State of Bihar v. P.P. Sharma, A.I.R. 1991 S.C. 1260 (India).

<sup>35</sup> Code Crim. Procedure §197 (3) (1973).

However, the requirement under POCA applies to ‘any public servant’.<sup>36</sup> *Secondly*, the Code requires that the public servant should have committed the offence while ‘*acting or purporting to act in the discharge of his official duty*’. However, PoCA does not have any such requirement.<sup>37</sup>

In order to curb the delay in granting sanctions, the court has repeatedly stressed the need to follow the guidelines regarding the time limit.<sup>38</sup> In pursuance of the observations made by the court in these cases, the CVC also formulated detailed guidelines for granting sanctions according to which, the grant of sanction cannot be delayed for more than three months except where the consultation with Attorney General is necessary.<sup>39</sup> It has even been accepted that denial of a timely decision on grant of sanction is a violation of due process of law.<sup>40</sup>

## TRIAL

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An individual may also help investigating agencies by providing them evidence that is admissible in court. Under the Indian Evidence Act, *evidence* includes all statements that the Court permits or requires to be made before it by witnesses in relation to the matters of fact under inquiry (oral evidence) and all documents including electronic records produced for the inspection of the Court (documentary evidence).<sup>41</sup> Since direct evidence is difficult to obtain for corruption cases, it must be noted that circumstantial evidence would also be acceptable, provided that it satisfies the requirement of proving a crime beyond reasonable doubt.

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<sup>36</sup> Prevention of Corruption Act § 19, No. 49 of 1988, India Code (1988).

<sup>37</sup> S.A. Venkataraman v. The State, A.I.R. 1958 S.C. 107 (India).

<sup>38</sup> *See generally* Jagjit Singh v. State of Punjab, 1996 Cr.L.J. 2962; State of Bihar v. P.P. Sharma, A.I.R. 1991 S.C. 1260; Superintendent of Police (CBI) v. Deepak Chowdhary, A.I.R. 1996 S.C. 186 and, Vineet Narain v. Union of India, A.I.R. 1998 S.C. 889.

<sup>39</sup> CVC Guidelines, Circulated *vide* office order No.31/5/05 dated 12.5.2005

<sup>40</sup> Subramanian Swamy v. Manmohan Singh, (2012) 3 S.C.C. 6; *See also* Requirement of Sanction, PRS Blog (February 1<sup>st</sup>, 2012) *available at* <http://www.prsindia.org/theprsblog/?p=1301> (last visited on 25<sup>th</sup> November, 2014).

<sup>41</sup> Indian Evidence Act §3, No. 1 of 1872, India Code (1872).

Given that procuring evidence in corruption is difficult, many of the legislations against corruption establish a presumption that reverses the burden of proof.<sup>42</sup> This reduces the elements of the crime that need to be proved by the prosecution. Further, the doctrine of *fruits of a poisonous tree* is not applicable in India, and information collected in an illegal manner is admissible even in Court if it is relevant and its genuineness is proved.<sup>43</sup> This indicates that the information from RTI requests must meet lower thresholds for admissible evidence and the difficulty in establishing the burden of proof are both lower.

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### DOCUMENTARY EVIDENCE

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Apart from providing documentary evidence such as letters,<sup>44</sup> photographs, etc.,<sup>45</sup> the Supreme Court of India has stated that tape recorded talks are admissible as evidence,<sup>46</sup> provided that they were not procured through duress, coercion or compulsion and not extracted in an oppressive manner using force or against the wishes of the accused. This is true even if the accused does not know that the conversation is being recorded (as is the case with photographs clicked without knowledge or permission).<sup>47</sup> It can be used not just to corroborate or contradict witness statements but also as substantive evidence.<sup>48</sup> However, tape recorded conversations will be taken with caution due to the possibility of tampering.<sup>49</sup>

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<sup>42</sup> Prevention of Corruption Act § 20, No. 49 of 1988, India Code (1988), Prevention of Money Laundering Act § 22,23, 24 No. 15 of 2003, India Code (2003).

<sup>43</sup> R. M. Malkani v. State of Maharashtra, A.I.R. 1973 S.C. 57 (India).

<sup>44</sup> Indian Evidence Act §3, No. 1 of 1872, India Code (1872).

<sup>45</sup> Indian Evidence Act §3, No. 1 of 1872, India Code (1872).

<sup>46</sup> S. Pratap Singh v. State of Punjab, A.I.R. 1964 S.C. 72 (India).

<sup>47</sup> Yusufalli Esmail Nagree v. State of Maharashtra, A.I.R. 1968 S.C. 147 (India).

<sup>48</sup> Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdas Mehta, A.I.R. 1975 S.C. 1788 (India).

<sup>49</sup> Yusufalli Esmail Nagree v. State of Maharashtra, A.I.R. 1968 S.C. 147 (India).

Moreover, by virtue of the provisions of the Information Technology Act, 2000,<sup>50</sup> evidence recorded or stored in an electronic device will now fall within 'documentary evidence' and will be admissible if the voice of the person alleged to be speaking is identified by the maker of the record or other persons who know the voice, accuracy is proved by the maker through satisfactory evidence (direct or circumstantial) and the subject matter is relevant.<sup>51</sup> Indian Evidence Act also specifically recognizes secondary evidence in the form of computer outputs (for example, CDs and printouts).<sup>52</sup>

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#### ORAL EVIDENCE: EVIDENCE BY WITNESSES WHO GAVE ILLEGAL GRATIFICATION

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Important sources of oral evidence are witnesses who gave illegal gratification since they are not considered accomplices. As such their evidence does not need corroboration and is admissible as proof of a fact.<sup>53</sup> This is also true under the Prevention of Corruption Act, where the briber is allowed to give a statement without any fear of prosecution.<sup>54</sup>

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#### ASSISTANCE THAT CAN BE GIVEN BY U.S. AUTHORITIES

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India and the US two countries have entered into a mutual legal assistance treaty which indicates what the terms of the collaboration will be. In cases where US authorities provide evidence to Indian authorities, such evidence may be used in judicial proceedings in India.

The procedure to obtain evidence from outside India is found in section 166A of the Code of Criminal Procedure. This section envisages that on the request of the investigating officer or officer ranked above him, a criminal court in India would issue a letter requesting a competent authority in a foreign country to collect evidence on behalf of the Indian authorities. This would then be forwarded to the court which

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<sup>50</sup> Information Technology Act § 2(r), 2(t) No. 21 of 2000, India Code (2000).

<sup>51</sup> R. V. Maqsud Ali [1965] (2) All. E.R. 464 (England).

<sup>52</sup> Indian Evidence Act §65B, No. 1 of 1872, India Code (1872).

<sup>53</sup> C.M. Sharma v. State of Andhra Pradesh, A.I.R. 2011 S.C. 608 (India). Also *see* Indian Evidence Act §134, No. 1 of 1872, India Code (1872).

<sup>54</sup> Prevention of Corruption Act § 24, No. 49 of 1988, India Code (1988).

issued this letter.<sup>55</sup> The evidence so obtained would be deemed to be evidence collected during the course of investigation as under Chapter XII of the Code.<sup>56</sup> This is the formal process of obtaining evidence as codified in statute.

Since no provision allowing the deployment of an alternate procedure to obtain evidence from foreign authorities exists, there was a controversy over whether evidence may be obtained in a manner other than as prescribed under section 166A of the Code. However, various High Courts have clarified that section 166A does not preclude other forms of obtaining evidence from foreign authorities.<sup>57</sup> For instance, evidence obtained through diplomatic channels may legitimately be presented as evidence in courts. This is because section 166A only seeks to provide a mechanism to deem that evidence obtained from sources outside India is evidence collected during investigation by the police pursuant to their powers under Chapter XII of the Code.<sup>58</sup>

Therefore, information obtained by the US authorities through the FOIA in the US or through the RTI in India can be used as evidence in Indian courts, as long as no attempt is made to classify evidence obtained from sources outside India as evidence obtained pursuant to Chapter XII.

## CHAPTER II. RIGHT TO INFORMATION AND INCREASED TRANSPARENCY

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The Right to Information Act, 2005 ('RTI Act') was enacted with the stated objective of setting out a practical regime for citizens to secure access to information under the control of public authorities in order to promote transparency and accountability.<sup>59</sup> Citizens are thus empowered to obtain information regarding public officials and use this as the basis of prosecution. Activists may also use this mechanism to obtain information of internal investigations. This can be used to find whether public officials prosecuted under the FCPA are under investigation by Indian authorities.

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<sup>55</sup> Code Crim. Procedure § 166A (1) (1973).

<sup>56</sup> Code Crim. Procedure § 166A (3) (1973).

<sup>57</sup> *Super Duper TV v. Enforcement Directorate, Government of India* 2013 (4) M.L.J. (Criminal) 35 (India).

<sup>58</sup> *Abdul Latif Adam Momin v. Union of India* 2014 (2) R.C.R. (Criminal) 54 (India).

<sup>59</sup> Right to Information Act , Preamble, No. 22 of 2005, India Code (2005).

## RIGHT TO INFORMATION AND CORRUPTION CASES

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The RTI Act prescribes that public authorities should designate Public Information Officers (PIOs) in all administrative units in order to provide information to persons filing applications for the same under the Act.<sup>60</sup> Information that is sought is usually supplied within thirty days from the receipt of the application by the public authority. In case this information relates to the life and liberty of a person it shall be supplied within forty eight hours of the receipt of the request.<sup>61</sup> It is important to note that the provisions of the RTI Act have an overriding effect over all other laws in force.<sup>62</sup>

RTI activists have been instrumental in bringing to light activities of various corrupt officials and initiating proceedings against the same. Applications filed in 2008 helped uncover the 'Adarsh Society Scam' where apartments meant for war widows and veterans were instead allotted to several politicians and their relatives. Similarly, RTI applications helped reveal various irregularities in the public distribution of food for people below the poverty line. The misappropriation of funds allotted for relief funds has also been uncovered and the responsible officials charged with fraud.<sup>63</sup>

## INFORMATION REGARDING INTERNAL INVESTIGATIONS

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An Indian NGO may use the provisions of the RTI Act to obtain information regarding ongoing investigations. This may be used to check whether action is being taken against public officials who had been prosecuted under the FCPA in the USA.

The provisions of the RTI Act cannot be invoked against certain specified intelligence and security organizations.<sup>64</sup> However, information relating to corruption and human rights may not be excluded

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<sup>60</sup> Right to Information Act , §5(1). ), No. 22 of 2005, India Code (2005).

<sup>61</sup> Right to Information Act , §7(1), No. 22 of 2005, India Code (2005).

<sup>62</sup> Right to Information Act, §23, No. 22 of 2005, India Code (2005).

<sup>63</sup> Vibhuti Agarwal, *A Look at some RTI Success Stories*, Wall Street Journal (October 14, 2011) available at <http://blogs.wsj.com/indiarealtime/2011/10/14/a-look-at-some-rti-success-stories/> (Last visited on March 13, 2015).

<sup>64</sup> Right to Information Act, §§24(1), 24(4), No. 22 of 2005, India Code (2005).

even in the case of exempt organizations.<sup>65</sup> At a time when numerous corruption cases were surfacing, the Indian Government exempted the Central Bureau of Investigation (CBI) from the provisions of the RTI Act.<sup>66</sup> This attracted criticism since the CBI is not an intelligence agency but an investigating agency for specific crimes such as corruption and economic offences.<sup>67</sup>

It was initially understood that the overriding obligation to disclose information relating to corruption would only apply to internal investigations against employees of the exempt organization and not for investigations carried out by the organizations. This interpretation was favored since most cases investigated by the CBI relate to allegations of corruption in some form, and obliging disclosure of such information would render the exemption superfluous.<sup>68</sup>

However it has since been held that information relating to external corruption investigations should also be disclosed.<sup>69</sup> The term 'investigation' has been broadly construed to departmental investigations as well as criminal investigations. It also includes all enquiries, verification of records, assessments etc.<sup>70</sup> Even when organizations operate in both the spheres of intelligence and corruption, allegations of corruption and human rights violations shall not be excluded.<sup>71</sup> Indian NGOs may thus use the RTI Act to obtain information regarding corruption investigations – both internal and external.

## INFORMATION EXEMPT FROM DISCLOSURE

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<sup>65</sup> Right to Information Act, proviso to §§24(1), 24(4), No. 22 of 2005, India Code (2005).

<sup>66</sup> Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, Notification No. G.S.R. 442(E), (June 9, 2011).

<sup>67</sup> See Central Bureau of Investigation, A Brief History of CBI, <http://cbi.nic.in/history.php>.

<sup>68</sup> Subhash Chandra Agarwal v. CPIO, Central Bureau of Investigation, CIC/SM/A/2011/001999, (August 7, 2012).

<sup>69</sup> See Dr S Chellappa v. CPIO, CBI, CIC/SM/C/2013/000128, (July 17, 2013); Sh. Vijay Kumar Gard v. CPIO, CBI, CIC/SM/C/2013/000124, (July 17, 2013); Sh. Harinder Dhingra v. CPIO, CBI, CIC/SM/C/2013/000240, (July 17, 2013).

<sup>70</sup> Shri Govind Jha v. Major General Gautam Dutt, CIC/AT/A/2006/00039 (June 1, 2006).

<sup>71</sup> Superintendent of Police, Chennai v. R Karthikeyan, 2011(266)ELT456 (Mad).

Despite the wide scope of the RTI Act, certain information is statutorily exempt from disclosure. These provisions are used by PIOs to refuse to disclose information relating to internal agencies. The most common provision cited for corruption cases is Section 8(1)(h) that restricts disclosure of information that would impede the process of investigation or apprehension or prosecution of offenders.<sup>72</sup> Other exemptions include information that would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes<sup>73</sup> and information that has no relationship to public activity or interest or which would cause unwarranted invasion of the privacy of the individual.<sup>74</sup>

A narrow interpretation of these exemptions was taken in earlier cases where the Central Information Commission emphasized the need to consider the impact that the disclosure of information would have on the reputation of a public servant. It advocated exempting all investigations and enquiries from disclosure requirements until a decision is reached by the competent authority.<sup>75</sup> However, the courts have later ruled that the mere existence of an investigation is not sufficient to refuse to disclose information.<sup>76</sup>

A PIO is now required to justify the denial of information.<sup>77</sup> He is required to explain how the facts attract an exemption covered by the Act.<sup>78</sup> Even when the information sought is contained in a confidential document, it is to be disclosed unless it can be shown that it falls under the exemption.<sup>79</sup> However, if confidential information is sought by the accused, it is usually denied since it may prejudice

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<sup>72</sup> Right to Information Act, §8(1)(h), No. 22 of 2005, India Code (2005).

<sup>73</sup> Right to Information Act, §8(1)(g), No. 22 of 2005, India Code (2005).

<sup>74</sup> Right to Information Act, §8(1)(j), No. 22 of 2005, India Code (2005).

<sup>75</sup> *Shri Govind Jha v. Major General Gautam Dutt*, CIC/AT/A/2006/00039 (June 1, 2006).

<sup>76</sup> *Bhagat Singh v. Central Information Commission*, WP(C) No. 3114/2007 (December 3, 2007).

<sup>77</sup> Right to Information Act, §19(5), No. 22 of 2005, India Code (2005).

<sup>78</sup> *RN Mishra v. Nibhay Kumar, PIO and Head of Branch*, CIC/SM/C/2011/000117/SG/13230 and CIC/SM/C/2011/000117/SG (July 7, 2011).

<sup>79</sup> *S.R. Goyal v. PIO, Services Department, Delhi*, CIC/WB/A/20060523, (March 26, 2007).

the investigation.<sup>80</sup> There is no statutory restriction on disclosing evidence accumulated during these investigations but such disclosure may be considered to prejudice the investigation.

## SEVERANCE OF CONFIDENTIAL INFORMATION

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Even in cases where the document contains information that is exempt from disclosure, access may be provided to that part of the record which does not contain exempt information and may be reasonably severed from any part that contains exemption.<sup>81</sup> Thus even if the information relates to intelligence and security, it may be severed and only the information regarding corruption may be made available.<sup>82</sup>

The benefit of this provision has been given even for requests by the accused in a case. The RTI Act overrides all laws<sup>83</sup> including the Code of Criminal Procedure which restricts the accused from calling for case diaries.<sup>84</sup> When an accused demands disclosure of information relating to a case against him, the CIC directs the PIO to sever information that would reveal the identity of informers or the source of information and disclose the remaining documents to ensure that the prosecution is not impeded.<sup>85</sup>

Given the wide usage of the Act and the information granted even to the accused in corruption cases, NGOs and activists are not likely to have a problem in obtaining information regarding pending investigations and cases. Information will be exempt from disclosure only when the disclosure would impede the investigation or endanger the safety of an informer. Even in these cases, the confidential information may be severed and the other documents produced.

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<sup>80</sup> Dr. B.L. Malhotra v. The National Small Industries Corporation Ltd., Appeal No. 783/IC(A)2007 (June 6, 2007); Sarvesh Kaushal v. Food Corporation of India, Appeal No. 243/ICPB/2006 F.No.PBA/06/237 and Appeal no. 244/ICPB/2006 F.No.PBA/06/238 (December 27, 2006).

<sup>81</sup> Right to Information Act, §10(1), No. 22 of 2005, India Code (2005).

<sup>82</sup> Superintendent of Police, Chennai v. R Karthikeyan, 2011(266)ELT456 (Mad).

<sup>83</sup> Right to Information Act, §22, No. 22 of 2005, India Code (2005).

<sup>84</sup> Code of Criminal Procedure of 1973, §173(2).

<sup>85</sup> RN Mishra v. Nibhay Kumar, PIO and Head of Branch, CIC/SM/C/2011/000117/SG/13230 and CIC/SM/C/2011/000117/SG (July 7, 2011).

## OPTIONS AVAILABLE TO INDIVIDUALS AND NGOS/ CIVIL SOCIETY GROUPS

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The procedure for prosecution and investigation indicates that private persons or NGOs may assist the initiation of prosecution by providing information which may lead to investigations and aid in launching and carrying on investigation. Individuals or NGOs may help initiate investigation and prosecution by giving information to the police or making a complaint to the Central Bureau of Investigation (CBI). Alternatively, they can give information to the Central Vigilance Commission which may pass it on to departmental authorities to initiate intra-departmental disciplinary proceedings or pass it on to CBI for investigation, if it *prima facie* reveals a criminal offence. They may also file a complaint with the Magistrate Court directly, however, given that individuals rarely have resources to investigate cases properly, the evidence adduced is usually not considered sufficient for the magistrate to take cognizance and magistrates usually relegate complaints to the police for further investigation. It is therefore, suggested that the help of investigating agencies should be taken.

Individuals and NGOs in India typically base their complaints on documentary evidence obtained – either independently or through the RTI mechanism. Mazdoor Kisaan Shakti Sangathan, an NGO, procured documents relating to public works for a people’s audit. This was prior to the formal RTI mechanism. Information gathered from these documents helped establish a prima facie case of corruption and eventually led to the prosecution of local leaders.<sup>86</sup> Information obtained through the RTI mechanism has been used to prosecute a number of major corruption cases. This includes uncovering irregularities in the public distribution system, misappropriation of relief fund and biased selection criteria in higher educational institutions.<sup>87</sup>

### EXAMPLE: ADARSH HOUSING SOCIETY SCAM

This corruption case concerned an apartment complex in Mumbai that was meant to house war widows and veterans. Originally meant to be a six storey building, there was construction of thirty one

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<sup>86</sup> Harsh Mander and Abha Joshi, *The Movement for Right to Information in India*, Human Right Initiative, available at <http://www.humanrightsinitiative.org/programs/ai/rti/india/articles/The%20Movement%20for%20RTI%20in%20India.pdf> (Last visited on April 8, 2015).

<sup>87</sup> Vibhuti Agarwal, *A Look at some RTI Success Stories*, Wall Street Journal (October 14, 2011).

floors and the apartments were allotted to several politicians, bureaucrats and their relatives.

This case was brought to light by activists like Yogacharya Anandji and Simpreet Singh who used the RTI mechanism to bring to light links between the politicians and military officials. The media effectively conveyed details of the same to the public. A public interest litigation was brought before the state High Court and this led to the resignation of Ashok Chavan, the Chief Minister. Investigations were also launched against several other officials.<sup>88</sup> It is also interesting to note that documents from RTI applications were used to contradict the claims that the land was never meant for the use by veterans.

An analysis of the investigating procedure of the agencies indicates that the kind of information that can be used by these investigating agencies is very wide. Therefore, individuals may provide wide variety of information to help launch prosecution. For instance, a list of names obtained under a US FOIA request may be provided to the investigation agencies. These may be enough to launch at least a preliminary inquiry, but may also, depending on the information disclosed, be sufficient to launch an investigation. The important difference between the two is that a preliminary enquiry requires a lower threshold of information, which makes it more likely for the information from the FOIA to be used even when it would not have created the threshold of suspicion required to launch an investigation. Even if names are obtained through other sources, it is not important to disclose the same. This is because criteria for taking cognizance of an offense lay emphasis on a reliable complainant who can be cross-examined<sup>89</sup> and the disclosure of a cognizable offense, and not on the source of the information itself. Thus it is not necessary for complaints to be based on information from an Indian RTI request as opposed to a US FOIA request – there is greater emphasis placed on who the complainant is and what the offense in question is. However, information from an RTI request has a greater degree of credibility – perhaps if only for the simple reason that Indian officials are familiar with it – and will be relied on to take cognizance.

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<sup>88</sup> Prabhakar Kulkarni, *The power of RTI in cracking land scams*, Deccan Herald, (August 17, 2011).

<sup>89</sup> Central Bureau of Investigation (Crime) Manual, ¶ 8.5 (2005). *See also* Central Vigilance Commission, 1 Vigilance Manual (2005).

An individual may also help investigating agencies by providing them evidence that is admissible in court. Under the Indian Evidence Act, *evidence* includes all statements that the Court permits or requires to be made before it by witnesses in relation to the matters of fact under inquiry (oral evidence) and all documents including electronic records produced for the inspection of the Court (documentary evidence).<sup>90</sup> Since direct evidence is difficult to obtain for corruption cases, it must be noted that circumstantial evidence would also be acceptable, provided that it satisfies the requirement of proving a crime beyond reasonable doubt.

Given that procuring evidence in corruption is difficult, many of the legislations against corruption establish a presumption that reverses the burden of proof.<sup>91,92</sup> This reduces the elements of the crime that need to be proved by the prosecution. Further, the doctrine of *fruits of a poisonous tree* is not applicable in India, and information collected in an illegal manner is admissible even in Court if it is relevant and its genuineness is proved.<sup>93</sup> This means that during the trial, both the burden of proof and the threshold for admissibility of evidence are lower. Information from FOIA is therefore less likely to face a challenge on admissibility, and if the information is sufficient to create the *prima facie* presumption that an offense has been committed, it may be enough to convict unless the accused can prove that the offense was not committed. Therefore, FOIA becomes an important tool in this regard.

### CHAPTER III: PROTECTION FOR WHISTLEBLOWERS

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Under the RTI Act of India, NGOs and civil society organizations (CSOs) can facilitate social audits of government processes, activities, programmes, schemes etc and help improve public service delivery and the efficacy and accountability of public officials. They can use the Act to scrutinize various processes, programmes and schemes of any public authority. They can even collect, verify and inspect records and documents of particular works undertaken by the Government Departments and draw

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<sup>90</sup> Indian Evidence Act §3, No. 1 of 1872, India Code (1872).

<sup>91</sup> Prevention of Corruption Act § 20, No. 49 of 1988, India Code (1988).

<sup>92</sup> Prevention of Money Laundering Act § 22,23, 24 No. 15 of 2003, India Code (2003).

<sup>93</sup> R. M. Malkani v. State of Maharashtra, A.I.R. 1973 S.C. 57 (India).

samples of material that are in use.<sup>94</sup> Information obtained under RTI has also been used by the media to create awareness among the masses. The RTI is hence, a tool to encourage journalists and society at large to be more questioning about the state of affairs and to check the unmitigated goings-on in the public realm to promote accountability. It poses an antidote to vested interests which try to conceal or misinterpret information or which try to manipulate media directly or indirectly to plant misinformation.<sup>95</sup>

Newspapers and other sources of media are used as tools to expose and publish the irregularities in the functioning of Government departments or even private sector enterprises.<sup>96</sup> However, it is not uncommon that these NGOs and CSOs themselves become the targets of the “powerful” in the process. The whistleblowers, among the other risks, run a risk of prosecution under defamation laws. This section of the paper, therefore, deals with laws in India that accord protection to the whistleblowers, individual or institutional. It also looks into how blowing the whistle on the basis of information received by RTI requests can carry high personal risk – particularly when there is little legal protection against dismissal, humiliation or even physical abuse.

## WHISTLEBLOWER PROTECTION IN INDIA

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<sup>94</sup> A good example of one such civil rights and social movement and grassroots organizations which spearheaded the right to information movement and used this right as a tool to expose corruption in the government expenditure is the Mazdoor Kisan Shakti Sangathan, Rajasthan, India.

<sup>95</sup> Vishnu Rajgadia, Right to Information: Is Media Playing its Role [http://www.cic.gov.in/best%20practices/rti\\_is\\_media\\_playing\\_its\\_role.htm](http://www.cic.gov.in/best%20practices/rti_is_media_playing_its_role.htm) (last visited on March 31, 2015).

<sup>96</sup> One of the reporters from Hindu Daily of Ranchi, India sought for the information related to the details of the expenses done on the ex-chief minister, ministers and their personal secretaries. Initially the information was denied. But after one month big news was published in the front page with the heading ‘Soochna Ka Kaisa Adhikar Laagu Hai Jharkhand Mein!’ meaning what kind of right to information is implemented in Jharkhand. It was exposed in the news that they were not provided with the information that was sought for. After this the news was published, many reactions arrived and immediately such information was provided. The facts obtained from this information enabled to publish big news.

India has ratified the two UN Conventions: the United Nations Convention against Corruption (UNCAC) and the United Nations Convention against Transnational Organised Crime (UNTOC) and its three protocols which are the main instrumental instruments in the fight against transnational organized crimes. Article 32 of UNCAC provides for protection of witnesses, experts and their relatives from retaliation including limits on disclosure of their identities. Article 33 on 'Protection of reporting persons' envisions State parties to incorporate in their domestic laws provisions on protection of persons reporting of corruption in good faith. The law in India which deals with the disclosure of information by whistleblowers and their protection is the Whistle Blower Protection Act, 2011. This Act establishes a mechanism to receive complaints relating to public interest disclosure on any allegation of corruption under the Prevention of Corruption Act, 1988, wilful misuse of power or discretion by virtue of which demonstrable loss is caused to the Government or demonstrable wrongful gain accrues to the public servant or to any third party, attempt to commit or commission of criminal offence, against any public servant.<sup>97</sup> It provides safeguards against victimization of the person making such complaint and for matters connected therewith.

The Central Government, however, has not enforced the law yet.<sup>98</sup> Therefore, the law that is currently applicable in India is codified under the Public Interest Disclosure and Protection of Informers (PIDPI) Resolution<sup>99</sup> which was issued in 2004 to provide a mechanism for government employees to blow the whistle on corruption.<sup>100</sup> Under this Resolution, the Central Vigilance Commission(CVC), the designated authority to receive whistle-blower complaints relating to corruption or misuse of office in the Central government and its organizations is responsible for keeping the identity of the whistleblowers, making complains under the PIDPI Resolution, secret in order to protect them victimization. The Commission is

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<sup>97</sup> The Whistleblowers Protection Act, No. 17 of 2014, India Code (2011).

<sup>98</sup> The Act received the assent of President on May 9, 2014 and was gazetted on May 12, 2014,

<sup>99</sup> Public Interest Disclosure and Protection of Informers' Resolution" (PIDPI) dated April 21, 2004, <http://ccis.nic.in/WriteReadData/CircularPortal/D6/D06crd/whistleblow.pdf> (last visited on November 28, 2014)

<sup>100</sup> Whistleblower Haryana IAS Officer Used To Get Death Threats, Says His Friend, IndiaToday, October 16, 2012, <http://indiatoday.intoday.in/story/whistleblower-haryana-ias-ashok-khemka-officer-getting-death-threats-says-his-friend/1/224968.html> (last visited November 28, 2014).

also empowered to take actions against motivated or vexatious complaints. An Amendment<sup>101</sup> to the Resolution created an internal mechanism namely Chief Vigilance Officers for receiving complaints from whistleblowers for corruption or misuse of office.

Given the importance of protecting whistleblowing through the use of the RTI mechanism, the Calcutta High Court ruled that an applicant is not be required to give any reason for requesting the information or any other personal details except those that may be necessary for contacting him or prove his *locus standi*.<sup>102</sup> The authority cannot insist upon detailed whereabouts of the complainant particularly when post-box number is provided.<sup>103</sup> Following gruesome violence on RTI activists, courts have asked the government to provide police protection to any RTI Activists under threat and in cases of complaints from the activists,<sup>104</sup> create a monitoring system and a database within 90 days<sup>105</sup> and set up provisions for speedy investigation of cases of threats or attacks on them. The Lokpal and Lokayuktas Act, 2013 that creates an ombudsman in India, too provides for a mechanism for prosecution for whoever makes false and frivolous or vexatious complaints. However, it is not applicable to cases of complaints made in good faith.

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### WHISTLEBLOWING OR DEFAMATION?

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<sup>101</sup> The Department of Personnel and Training (DoPT), Amendment of Government of India's the Public Interest Disclosure and Protection of Informers (PIDPI) vide its Resolution dated June 16, 2014, [http://ccis.nic.in/WriteReadData/CircularPortal/D2/D02ser/371\\_4\\_2013-AVD-III-16062014.pdf](http://ccis.nic.in/WriteReadData/CircularPortal/D2/D02ser/371_4_2013-AVD-III-16062014.pdf).

<sup>102</sup> The Right to Information Act, §6(2), No. 22 of 2005, India Code (2005).

<sup>103</sup> Avishek Goenka v. Mr. Ashish Kumar Roy and Ms Gargi Mukherjee, Writ Petition 333290(W) of 2013, Calcutta High Court (November 20, 2013).

<sup>104</sup> Chief Justice D.D. Sinha and Justice K.K. Tated in a suo-moto Public Interest Litigation Bombay High Court on May 7, 2010; *Bombay High Court; State to provide police protection to activists*, December 20, 2012, <http://www.rtifoundationofindia.com/bombay-high-court-state-provide-police-protection-2919#.VHtLAjGUfCY> RTI Foundation of India. (last visited November 22<sup>nd</sup>, 2014).

<sup>105</sup> Meena Menon, *Whistleblowers at receiving end after using RTI*, June 7, 2010, <http://www.thehindu.com/todays-paper/tp-national/whistleblowers-at-receiving-end-after-using-rti/article467202.ece> (last visited November 28, 2014).

Whistleblowers in India who make public interest disclosure often face severe consequences as sources of information, if their identity or role is disclosed either through legal process or more commonly through internal investigations. Libel and defamation laws are triggered to threaten or deter whistleblowers from making any complaints or any kind of disclosures. One tactic is to use the state machinery to file criminal defamation cases in great numbers to intimidate and punish. Injunctions are also granted in civil defamation suits to silence exposés.<sup>106</sup> The following section therefore delves into what constitutes the offence of defamation under the Indian law.

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### DEFAMATION UNDER INDIAN LAW

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“Defamation is publication of a statement which reflects on a person’s reputation and tends to lower him in the estimation of right-thinking members of society generally<sup>107</sup> or tends to make them shun or avoid him”<sup>108</sup> India offers the defamed a remedy both in civil law for damages and in criminal law for punishment.

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### CIVIL LAW FOR DEFAMATION

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Civil law for defamation is not codified and places reliance on common law, however India does not make any distinction between libel and slander. The three elements necessary to constitute defamation are (i) Malice<sup>109</sup> (ii) The statement must be defamatory (iii) The statement must refer to the plaintiff (iv) The statement must be published. Once these elements are proved, the onus shifts on the defendant to prove that he was justified in making these comments.

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<sup>106</sup> One such example being that of one Madhu Kishwar's attempt to expose a doctor's clinic in Delhi which met with a civil injunction in 1999. More recently in 2002-03, the S. Kumar corporate conglomerate constructing the Mahabaleshwar dam successfully enjoined the Narmada Bachao Andolan, a social movement, from exposing financial dealings even from public records. The Indian law of defamation with its criminalizing posture and gagging writs offends responsible democratic governance founded on free speech. Such litigations, known as SLAPP (Strategic Lawsuit Against Public Participation) in some jurisdictions such as the U.S. are designed to silence opposition and such suits are increasing.

<sup>107</sup> S.N.M Bedi v. Prafulla Kumar Mohanta, A.I.R. 2002 Gauhati 75(India).

<sup>108</sup> Winfield and Jolowicz on Torts, Defamation, Privacy and Related Matters 570 (18<sup>th</sup> ed. 2010).

<sup>109</sup> D.P. Choudhary v. Kumari Mnajulata, AIR 1997 Raj 170.

## JUSTIFICATION OF TRUTH AS DEFENCE:

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In a civil action for defamation, truth of the defamatory matter is a complete and absolute defence,<sup>110</sup> as the truth shows that the plaintiff has no right to recover damages.<sup>111</sup> Even though the publication is made maliciously, the defence is still available.<sup>112</sup> However, belief of truth is not a defence as the defendant will still be liable even if he/she believes the libellous statement to be true.

The RTI Act or even the Whistleblower Protection Act do not make any reference to defamation. However the Supreme Court of India in its ruling in response to a criminal petition filed in *Indirect Tax Practitioners Association v. R K Jain*<sup>113</sup> emphasized that a whistle-blower who tries to highlight malfunctioning of the government or an important institution "should not be silenced" by invoking Articles 129 or 215 of the Constitution or the provisions of the Contempt of Court Act even if the speech or editorials appear to invite contempt of court. *Truth* should ordinarily be allowed as defence if publication of truth is in public interest and bona fide, unless the court finds that it is only a camouflage to escape the consequences of deliberate or malicious attempt to scandalise the court or is an interference with the administration of justice. The court therefore recognized truth as a defence for an external whistleblower who highlighted wrongdoings of a quasi-tribunal through the media by commenting on its performance publicly and rejecting the allegation of lawyers body that it was aimed at scandalising the function of the tribunal. *Second*, the Court in the same case recognized that whistleblowing to the media, law enforcement of watchdog agencies, lawyers or federal, State or local agencies depending upon the severity and nature of the complaint may be permitted. The Whistleblower Protection Act does not however contain any provision for blowing the whistle to the media or lawyers or any other watchdog agency despite submissions made by civil society to include such a provision under some practical safeguards. Another lacunae observed by the Court was that it did not provide an element of internal mechanism for whistleblowing at all. All complaints are required be made to an external regulatory agency such as the CVC in the Central Government or some authority notified by the State Governments in their own jurisdictions that may just delay the process.

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<sup>110</sup> Radheshyam Tiwari v. Eknath, A.I.R. 1985 Bom. 285(India).

<sup>111</sup> Mc Pherson v. Daniels, (1929) 10 B. and C. 263.

<sup>112</sup> Raghunath Damodhar v. Janardhan Gopral. (1891) I.L.R. 15 Bom. 599 (India).

<sup>113</sup> Indirect Tax Practitioners Association v. R K Jain (2010) 8 SCC 281(India). [“*R K Jain*”].

## MAKING FAIR COMMENT: A DEFENCE TO AN ACTION FOR DEFAMATION:

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Making fair comment on matter of public interest is a defence to an action for defamation: (i) the defamatory statement should be a comment, i.e. an expression of opinion rather than assertion of fact; (ii) the comment must be fair and with honest intentions and based upon true facts<sup>114</sup> and; (iii) the matter commented upon must be of public interest that include administration of Government departments, public companies, conduct of public men like ministers or officers of State, local authorities, etc.<sup>115</sup> If there is a publication of a statement of facts making serious allegations of dishonesty and corruption against the plaintiff, then the defendant should prove the truth of such facts to avail of the defence of fair comment.<sup>116</sup>

## ABSOLUTE PRIVILEGE AND QUALIFIED PRIVILEGE AS DEFENCE:

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Law recognizes certain occasions when public interest and right of free speech override the plaintiff's right of reputation. Such occasions are treated in law as 'privileged'. In matters of absolute privilege, no action lies against the person making the defamatory statement even though the statement is false or has been made maliciously. Absolute privilege is recognized in cases like Parliamentary Proceedings<sup>117</sup>, Judicial Proceedings,<sup>118</sup> and State Communications between officer/s of a State to another owing to reasons of public policy. In cases of qualified privileges, it is necessary that the statement is made without malice and is generally available when the statement is made in discharge of a duty or protection of interest, or when the publication is in the form of report or parliamentary, judicial or other public proceedings.<sup>119</sup>

Similar to the defence of truth being absent in the RTI Act or the Whistleblower Protection Act *per se*, the Acts are silent on "fair comment" or "absolute privilege and qualified privilege" as defence to the

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<sup>114</sup> Naveen Jindal & Anr. V. Zee Media Corporation Ltd. & Ors., 209(2014) D.L.T. 267(India).

<sup>115</sup> R.K. Bangia, The Law of Torts 180 (18th ed., 2005).

<sup>116</sup> Radheshyam Tiwari v Eknath, A.I.R. 1985 Bom. 285 (India); R.K. Karanjia v. Thackersey, A.I.R. 1970 Bom 424(India).

<sup>117</sup> India Const. art.105. §2 & art.194. §2.

<sup>118</sup> Judges (Protection) Act, No. 59 of 1985, India Code (1985).

<sup>119</sup> Bangia, *supra* note 64, 184.

whistleblowers. However in the same case of *R K Jain*, the Supreme Court relied upon a UK Case of *Regina v. Commissioner of Police of the Metropolis*<sup>120</sup> where it was observed that it is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make *fair comment*, even outspoken comment, on matters of public interest. It ruled that fair criticism of functioning of institutions or authorities entrusted with the task of deciding rights of the parties gives an opportunity to the operators of the system to remedy the wrong and also bring about improvements. Such criticism cannot be castigated as an attempt to scandalize or lower the authority of the institution except when such criticism is ill motivated or accompanied with extraneous reasons or is construed as a deliberate attempt to run down the institution. Only when the criticism of judicial institutions or institutions transgresses all limits of decency and fairness or there is total lack of objectivity or there is deliberate attempt to denigrate the institution then the Court would use this power.<sup>121</sup>

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### CRIMINAL LAW FOR DEFAMATION

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Whistleblowers are also vulnerable to the risk of facing prosecution under the criminal law for defamation. Under the criminal law of defamation, the burden lies on the prosecution to prove beyond reasonable doubt that an offence of defamation was intentionally committed. Once this is proved, the accused will have to substantiate that they are protected by one of the ten exceptions elucidated under Section 499 of the Indian Penal Code. This Section envisages that whoever by words, *either spoken or intended to be read*, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person is said to be defaming that person. Criminal law too provides *justification of truth* as a defence to an action for defamation. However, besides being true, the imputation must be shown to have been made for public good. The *second* defence to an act of defamation is expressing an opinion in good faith in respect of conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct and no further. If the assertions as opposed to comments made are defamatory, then the assertions may be justified to be falling within the limited cases as specified in Exception 9. Exception 9 says that it is not defamation to make an imputation on the character of another, provided that the

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<sup>120</sup> *Regina v. Commissioner of Police of the Metropolis* (1968) 2 All ER 319.

<sup>121</sup> *Re S. Mulgaokar* (1978) 3 SCC 339.

imputation is made in good faith for the protection of the interest of the person making it or any other person for public good in general.<sup>122</sup> If a person undertakes to criticize the acts of a public man, including a public authority or a public servant, he must be cautious that he does not assert what is not true as the basis of his criticism. He/she is also not bound to conceal willfully anything that would evince that the criticism is not well-founded.<sup>123</sup> The Indian Constitution too, under Article 19 provides legal protection to freedom of speech and expression as a facet of fundamental right however; the right is subject to reasonable restrictions prescribed in Article 19(2), including decency and defamation.

There have been instances where Sections 499 and 500 of the Indian Penal Code have been invoked against the whistleblowers, including those procuring information from the RTI Act.<sup>124</sup> These two provisions are so broad in scope that every insinuation, unless proved to have been made in “good faith”, can land someone in prison. In addition to this, it is a herculean task to prove “good faith”, that too, “beyond reasonable doubt”, since that remains the standard of proof in criminal law. To worsen the situation further, a person can be taken into custody even while this seemingly herculean task is getting done. Controls on information, libel and defamation laws, and inadequate investigation of whistleblowers’ claims, therefore can all deter individuals from speaking out.

The Law Commission of India released a consultation paper in 2014 which sought to unshackle the media from apprehensions of libel chill.<sup>125</sup> Still, a statutory protection for individual whistleblowers and

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<sup>122</sup> Indian Penal Code , § 499 (1860).

<sup>123</sup> William Taylor (1869) 26 C.L.J. 345.

<sup>124</sup> A legal notice was served on an RTI activist and member of NGO-India Against Corruption in September 2012 when she alleged that the President of a political party tried to cover up an irrigation scam, to retract forthwith the "false, baseless and defamatory remarks" and tender a public apology promptly. The RTI activist had on the basis of information procured under the RTI Act made statements to TV channels, which were also widely reported in newspapers. The failure to do as what demanded in the legal notice resultantly exposed her to the risk of legal proceedings against her. The President of that political party also filed a criminal defamation case before a court against a minister of a rival political party for allegedly defaming him by including his name in its political party’s list of “India’s Most Corrupt”. He accused him for deliberately releasing/publishing the aforesaid list mentioning the name of the complainant in a grossly irresponsible manner.

<sup>125</sup> Law Commission Report Consultation Paper on Media Law, May, 2014, <https://docs.google.com/document/d/1FQ03eaM3Q5IZCrPU9Itip-ygFjiPBUC5eT2ClpB6-2I/edit?usp=sharing>

political activists is yet to crystallize in the Indian scenario. Judicial protection, however, has been extended to whistleblowers in cases like *R. Rajagopal v. State of Tamil Nadu*<sup>126</sup> which laid down the legal foundation for exposure of corruption, maladministration by public servant that involved the publication of serious misconduct of public servants by a convict. The case squarely dealt with the *right to know* and the limits of privacy of public servants. The Supreme Court referring to the judgments of the American Court<sup>127</sup>, already referred to in another judgment of the House of Lords in England<sup>128</sup> held that while decency and defamation were two of the grounds in Article 19(2), still any publication against any person will not be objectionable if such publication was based on 'public record'. In the case of 'public official', the right to privacy or the remedy of action for damages is simply not available with respect to their acts pertinent to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are untrue, unless the public official proves that the publication was made with reckless disregard for truth. In such a case, it would be enough for the person who published the news to prove that he reacted after a reasonable verification of the facts. However, where the publication is proved to be false and actuated by malice or personal animosity, damages can be awarded. The public official however enjoys the same protection in respect of his privacy as any other citizen in matters not relevant to his official duties. In matters not relevant to his official duties. The above principle does not, however, mean that the press is not bound by the Official Secrets Act, 1923 or any similar enactment.

The Supreme Court of India has also emphasized that in modern constitutional democracies, it is axiomatic that citizens and the society have a *right to know* about the affairs and vital decisions of the government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. It is now recognized that while a public servant may be subject to a duty of confidentiality, this duty does not extend to remaining silent regarding corruption of other public servants. Public interest is better served more if corruption or maladministration is exposed.<sup>129</sup> It is therefore clear that the Supreme Court has accepted that the right to know is part of the fundamental

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<sup>126</sup>R. Rajagopal vs. State of Tamil Nadu, (1994) 6 SCC 632.

<sup>127</sup> New York Times vs. Sullivan (1964) 376 US 254

<sup>128</sup> Derbyshire v. Times Newspaper Ltd., 1993(2) WLR 449.

<sup>129</sup> Dinesh Trivedi v. Union of India, 1997 (4) SCC 306

right of freedom of speech and expression guaranteed under Article 19(1)(a), subject to the reasonable restrictions, as may be imposed by law under Article 19 (2).

The Whistleblower laws are based upon this principle. Hence, there is an urgent need to insert the essential defences to defamation in the Whistleblower Protection law of the country as well so as to encourage potential whistleblowers with the powerful tool of the RTI Act to not remain silent and accord them protection against civil or criminal prosecutions.

## OTHER RISKS

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There are other potential risks that a whistleblower may have to face even if he/she does not get sued for defamation. The other intangible risks that may accrue to the individual complainants making public interest disclosure range from facing dire consequences like bad reputation, losing out on the job, ostracization from co-workers, discrimination against by future potential employees, boycott from peer-groups or informal associations leading them to mobbing thereby causing the whistle-blower to quit job on his/her own, to harms like insult and injuries in the form of ridiculing, retaliation and boycott.<sup>130</sup> Other severe consequences can be as dreadful as committing suicide due to extreme harassment faced at work or even threats of life/property and/or murder by the wrongdoers. These risks force the complainants to remain silent or complain anonymously. However since the anonymous complaints lack the credibility of information provided, no strong action is initiated against the wrongdoers, rather the culprits become more alert and it is the whistleblower who ultimately becomes the victim in the process.<sup>131</sup> The risk has aggravated all the more since the RTI was legalized by the government in 2005. The Supreme Court of India in its latest action for all purposes ruled that the identity of a whistleblower is not necessary and important if the information about an offence or wrongdoing which he/she supplies is credible enough to proceed with for further information.<sup>132</sup> Therefore the apex court with this order legitimized the practice of anonymous whistleblowing which is a great boon for anonymous

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<sup>130</sup> S Srividhya & C. Stalin Shelly, *Whistle Blowing Protection – A Watch Dog For The Organisation*, 1(10), International Journal of Social Science & Interdisciplinary Research 207 (2012).

<sup>131</sup> Shikha Sachdeva, *Whistleblower protection mechanism-A mandate in the current Indian scenario*, 3(1), International Journal of Commerce, Business and Management 216, 217 (2014).

<sup>132</sup> Center for PIL & Ors v. Union of India, I.A.Nos. 73 & 76/2014 in Civil Appeal No(s).10660/2010 (India).

whistleblowers in India, though contrary to the statutory provision of the Whistleblower's Protection Act that does not allow any action on those public interest disclosures that do not indicate the identity of the complainant or if the identity is found to be incorrect or false.<sup>133</sup>

Therefore, in light of the innumerable instances of individual whistleblowers being harassed, jailed, killed or persecuted<sup>134</sup> it would not be incorrect to conclude that NGOs having an institutional structure and the Media, said to be the fifth pillars of a democracy are better off using the information procured from the Right to Information requests and initiating complaints on the basis of the same.

## CONCLUSION

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India has an extensive framework of laws that facilitate the collection and use of information regarding corruption while protecting whistleblowers. The use of a FOIA request will depend on the specific modalities of the information gleaned. As already discussed, it can be used in different cases in order to get the investigating authorities to launch an investigation, or at least to launch a preliminary inquiry into the matter. In other cases, it may also be used as evidence in courts, though the information being gleaned from an FOIA request is unlikely to be of the level of detail necessary to convict solely on the basis of such information. Therefore, the best use of the FOIA request is probably to compel investigating agencies to look into a particular violation, rather than attempting to get the courts to look into the same, especially as the investigating agencies are likely to have the tools to find further information that might help bolster the case. However, it must be emphasized that this depends on the specific information in question and should not be taken as a blanket ban to approaching the courts. This is especially important as information obtained from the FOIA enjoys a high degree of credibility and therefore might be important for the courts to take cognizance of a particular offense. Further, information gleaned from a FOIA is also useful as a tool of attack by the media on corruption. As already explained, individual complainants and FOIA activists often face massive violence, despite extensive legislative protection for whistleblowers. Though the RTI Act has made every effort to ensure that there

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<sup>133</sup> The Whistleblowers Protection Act, §4(6), No. 17 of 2014, India Code (2011).

<sup>134</sup> Jason, Overdorf, *India's War On Whistleblowers*, February 4, 2013

[http://www.salon.com/2013/02/04/indias\\_war\\_on\\_whistleblowers\\_partner/](http://www.salon.com/2013/02/04/indias_war_on_whistleblowers_partner/)

is no disclosure required when making requests that may injure the applicant, individual complainants do sometimes face personal and social risks. The media and NGOs, due to their specific structure, may be able to avoid these repercussions, and must therefore take an active role in using the FOIA to combat corruption. It is clear, however, that India's FOIA (the RTI Act) is an extremely important tool for combating corruption, and its use must be explored and encouraged.

Bring in the Crowd:  
Populist Cross-Country Information Sharing  
*and*  
Crowdsourcing Anti-Corruption  
*in the*  
Philippines

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STUDENT ORGANIZATION FOR LAW AND INTERNATIONAL DEVELOPMENT

(UNIVERSITY OF THE PHILIPPINES – COLLEGE OF LAW)

HANNAH ISABELLA CHAN (J.D. CANDIDATE 2015)

MARY THERESE APRILLE PARAS (J.D. CANDIDATE 2017)

EFREN II RESURRECCION (J.D. CANDIDATE 2016)

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*“So a crowd is, on numerous occasions,  
actually a better judge than one man,  
whoever he may be.”*

*~Aristotle*

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## I. INTRODUCTION

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The Philippines is known for its history of mass action. The bloodless EDSA revolution of 1986, which paved the way for the restoration of democracy in the country, is just one example. A remarkable feature of this history is how adept Filipinos have been at utilizing developments in technology towards these ends. With the progress of technology, mobile phones and the internet have become potent partners in the Filipino People’s exercise of collective action.<sup>1</sup> Recent corruption scandals in the country have called for the active online presence on the part of the citizens who, in turn, condemned the said depraved acts and pressured the administration to prosecute those involved.<sup>2</sup> A well-informed citizenry tends to be more critical and more active in advocating for an honest government. Thus, transparency and full public disclosure as enshrined in the Constitution continue to be the foundation of any anti-corruption measure.

But transparency cannot stand alone. An ideal anti-corruption campaign concludes with the corrupt actors being successfully prosecuted by the state. While strengthening transparency efforts, anti-corruption advocates must also push for an efficient way to acquire and use information on corruption which has the potential for not only increasing public awareness but ultimately prosecuting the corrupt actors. This information can be used directly by the government to prosecute those involved. It can also be used by the citizens to alert their government to the ongoing corruption, a perception-based strategy that either motivates or pressures the government to act accordingly. Either way, the task is to ensure that information does not become a silent witness.

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<sup>1</sup> Julius Court, *People Power II in the Philippines: The First E-Revolution?*, Overseas Development Institute, January 2001, available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4114.pdf>.

<sup>2</sup> Natasha Gutierrez, *Napoles Daughter Blogs about Lavish Lifestyle*, RAPPLER, July 27, 2013, available at <http://www.rappler.com/nation/34895-napoles-daughter-blogs-lavish-lifestyle>.

Such incriminating information, however, is not always found locally, especially as corruption recognizes no geographical borders. Transnational corruption involves a public official from the country of the bribe-receiver (the “demand side” country) and a person residing or corporation organized elsewhere. With the advent of globalization comes the influx of foreign investment to the country which translates to numerous transactions involving Philippine government officials and foreign corporations. Moreover, as a developing country, the Philippines’ need to minimize its corruption levels is essential to its ability to avail foreign financial grants. Considering the current state of the country’s place in the socio-economic spectrum, the dearth of evidence available in transnational corruption incidents, and the varying degree of openness of government records among different countries, anti-corruption measures, especially information sharing, must necessarily be complemented by international collaboration, whether it be between governments or between civil society groups. As a follow-up measure, there must be an organized way of using the information shared to ultimately effect prosecution.

The main article of Harvard Law and International Development Society (“LIDS”) details how information on transnational corruption involving a U.S. corporation and a government official in the demand side country can be extracted using the U.S. Freedom of Information Act (“US FOIA”). This paper will answer the question how such information can be acquired and used by the Philippine civil society. This paper promotes the full utilization of cross-country sharing of information by involving the collective actions of ordinary citizens. Such a measure will breathe life to the seemingly stagnant freedom of information and people’s right to information.

The first part will discuss the people’s right to information enshrined by the Philippine Constitution and the obvious limitations of such right. This part will then illustrate the process of anti-corruption prosecution and the role of information to its success. It will then examine the existing system of cross-country sharing of information which includes mutual legal assistance treaties and letters rogatory. The problems and challenges that will be discussed next reinforce the need for greater citizens’ involvement in the global fight against corruption. The second part of this paper highlights the role of civil society to civil society exchanges as a viable alternative mode of cross-country sharing of information. This part will analyze how information acquired using the U.S. FOIA can be used by the local civil society groups. Finally, the last part will introduce the concept of crowdsourcing as a tool to implement Harvard LIDS’s proposal.

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# THE ROLE OF INFORMATION IN CRIMINAL PROSECUTIONS

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The potential transfer of information from U.S. civil society to Philippine civil society supplements the existing right of the people to information on matters of public concern. The discussion of the right to information will show the lack of standardized system of accessing information from the government. After which, brief illustrations of the process of corruption prosecution and the anti-corruption institutions provides an institutional backdrop before going into the discussion of the various modes of cross-country exchange of information.

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## THE PHILIPPINE RIGHT TO INFORMATION FRAMEWORK

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The Filipino people are the principals in the fiduciary relations embodied by a democratic system where the government officials act as mere agents of the sovereign. This fiduciary relationship remains as the basis of Philippine democracy. Thus, as in any agency relationship, the principal has a right to know the actions of his agent, lest that the agency problem will occur. Corruption is one form of an agency problem.<sup>3</sup> It is therefore imperative in any anti-corruption measure that people, as the principal, be kept informed of their agent's undertaking. The low risk of detection and low probability of punishment for corrupt offenders has been identified as one of the reasons why corruption has flourished in the Philippines.<sup>4</sup> A World Bank study likewise identified exclusive access to information as a potential driver of corruption.<sup>5</sup> A full public disclosure of information is not only a duty on the part of the government but a necessity as well.

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## THE RIGHT TO INFORMATION

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<sup>3</sup> See generally, Chan et al., *Civil Action in Corruption: Empowering the People in a Captured State Situation*, 1 LIDS GLOBAL 53, (2014).

<sup>4</sup> Jon Quah, *Curbing Corruption in the Philippines: Is this an Impossible Dream?*, 54 PHIL. J. PUB. ADMIN. 1, 14, (2010), available at <http://qjournals.upd.edu.ph/index.php/pjpa/article/viewFile/3783/3472>.

<sup>5</sup> TINA SOREIDE, DRIVERS OF CORRUPTION: A BRIEF REVIEW, 14, 2014.

The people’s right to information on matters of public concern has long been enshrined in the Constitution.<sup>6</sup> This constitutional right to information is intertwined with the government’s constitutional duty of full public disclosure, as stated in Section 28, Article II of the Constitution.<sup>7</sup> These provisions seek to promote transparency in policy-making and in the operations of the government, as well as to provide the people with sufficient information to effectively exercise other constitutional rights.<sup>8</sup> Armed with the right information, citizens can participate in public discussions leading to the formulation of government policies and their effective implementation, and given the proper medium, even the prosecution of corrupt officials.<sup>9</sup>

Read in conjunction with the aforementioned constitutional provisions are a number of statutes promoting transparency and accountability within the government, such as the Code of Conduct and Ethical Standards for Public Officials and Employees (RA 6713), which obligates government officials to disclose their Statements of Assets, Liabilities and Net Worth (“SALN”)<sup>10</sup> pursuant to Article XI, Section 17 of the Constitution;<sup>11</sup> the Anti-Graft and Corrupt Practices Act;<sup>12</sup> and the Government Procurement

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<sup>6</sup> PHIL. CONST., art. 3, § 7.

“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.”

<sup>7</sup> PHIL. CONST., art. 2, § 28. “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.”

<sup>8</sup> *Chavez v Public Estates Authority*, G.R. No. 133250. July 9, 2002.

<sup>9</sup> *Id.*

<sup>10</sup> Code of Conduct and Ethical Standards for Public Officials and Employees, § 8.

<sup>11</sup> PHIL. CONST., Art. XI § 17.

A public officer or employee shall, upon assumption of office and as often thereafter as may be required by law, submit a declaration under oath of his assets, liabilities, and net worth. In the case 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, the declaration shall be disclosed to the public in the manner provided by law.

<sup>12</sup> Rep. Act No. 3019, “Anti-Graft and Corrupt Practices Act”, § 7.

Reform Act, a law which mandates transparency in the procurement process and equal access to information for bidders.<sup>13</sup>

The foregoing have been widely invoked and applied in various cases, most notably to facilitate the conviction in the impeachment proceedings against former President Joseph Estrada and former Chief Justice Renato Corona in what arguably are two of the most high-profile corruption cases in the Philippines in recent memory.

Although the Supreme Court has recognized the self-executing character of the guarantee provisions without need for any ancillary act of the Legislature,<sup>14</sup> it also acknowledges the difficulty of enforcing such provisions due to the lack of an enabling law providing the mechanics for government agencies to disclose information on government transactions.<sup>15</sup>

At present, the right given by the Constitution is restricted to “information on matters of public concern” and by “such limitations as may be provided by law.” Thus, access to official records may be regulated either by statutory law or by the inherent power of an officer to control his office and the records under his custody.<sup>16</sup> The issue would then arise as to the scope of regulatory discretion on what constitutes matters of public concern, as well as the manner by which information is to be accessed by the requesting party.<sup>17</sup> Jurisprudence on this matter, however, has enumerated some recognized limitations, such as national security matters; trade secrets and banking transactions pursuant to the Intellectual Property Code (RA 8283) and to the Secrecy of Bank Deposits Act (RA 1405); criminal matters or classified law enforcement matters; and other confidential matters including diplomatic

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<sup>13</sup> Rep. Act No. 9184 (2002), “Government Procurement Reform Act”.

<sup>14</sup> Legaspi v Civil Service Comm’n. G.R. No. L-72119, May 29, 1987.

<sup>15</sup> Chavez v National Housing Authority, G.R. No. 164527. August 15, 2007. “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.”

<sup>16</sup> Berdin v Mascarinas, G.R. No. 135928, July 6, 2007. “The right of the people to information on matters of public concern is recognized under Sec. 7, Art. III of the 1987 Constitution and is subject to such limitations as may be provided by law. Thus, while access to official records may not be prohibited, it certainly may be regulated.”

<sup>17</sup> Joaquin Bernas, SJ, *Freedom of Information*, PHILIPPINE DAILY INQUIRER, available at <http://opinion.inquirer.net/61203/freedom-of-information-2/comment-page-1>.

correspondence, closed-door Cabinet meetings and executive sessions of Congress, and internal deliberations of the Supreme Court.<sup>18</sup>

Notwithstanding the presence of a number of statutes seeking to implement the aforementioned constitutional provisions, the right to information still lacks a definite scope and a uniform procedure for implementation across various government agencies. Due to the absence of a standardized process for accessing and releasing government records, government offices were said to resort to varying systems of responding to information requests, with some even being denied outright due to their supposedly “confidential” nature. Without a proper system in place, agencies could arbitrarily deny requests or decide on their own time frame for responding to such requests without corresponding sanctions. In either case, those engaged in fraudulent activities are able to take advantage of the absence of procedure to frustrate the exercise of the people’s supposed constitutional and self-executing right to information.

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### THE PROPOSED FREEDOM OF INFORMATION ACT

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The proposed Freedom of Information (FOI) Act aims to address the substantive and procedural gaps deterring the effective implementation of the people’s constitutional right to information and the government’s consequent duty to disclose. The consolidated FOI bill, as it currently stands, makes public disclosure mandatory for all government agencies, including the executive, legislative and judicial branches as well as all constitutional bodies. It covers all kinds of information, in whatever format, which are made, received or kept in or under the control and custody of any government agency pursuant to law, executive order, rules and regulations, ordinance or in connection with the performance or transaction of official business by any government agency, subject to certain exceptions.<sup>19</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> H. No. 3237, 16<sup>th</sup> Cong. 1<sup>st</sup> Sess. (2014), *Freedom of Information Act of 2013*, §§ 3(a), 4, 7; S. No. 1733, 16<sup>th</sup> Cong. 1<sup>st</sup> Sess. (2014), *People’s Freedom of Information Act of 2013*, §§ 3(a), 4, 8. For ease of access, the Philippine Government has provided an online portal for the pending Freedom of information bills at <http://www.gov.ph/foi/>.

Aside from requiring disclosure of records within fifteen days from receipt of request,<sup>20</sup> the consolidated FOI Bill, as approved by the House of Representatives' Committee on Public Information, also incorporates a number of Open Data provisions. These provisions mandate government agencies to publish in the Open Data Philippines website data generated in the implementation of agency mandates, programs, activities and projects, to be updated at least once every quarter of the year.<sup>21</sup>

Moreover, to ensure strict compliance with its provisions, the proposed Act also enumerates such acts or omissions of public officials and employees tantamount to gross neglect of duty necessitating the imposition of administrative and disciplinary sanctions, and even criminal liability, in some cases.<sup>22</sup> With these safeguards in place, FOI supporters believe that bureaucratic corruption endemic to our government could be significantly reduced.<sup>23</sup>

Despite the abundance of support, however, certain sectors remain wary of some alleged problematic provisions in the current FOI bill. The Center for People Empowerment in Governance (CenPEG), for instance, criticizes the broad list of limitations provided for in the bill, as well as the absence of a "sunshine clause" which was necessary to make withheld information available after a specific period of time.<sup>24</sup> Further, considering the extensive reach of corruption and how it links to transparency, accountability and the freedom of information, the absence of a provision in the Act giving recourse to mutual legal assistance treaties between the Philippines and its partner countries could also raise potential problems.

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<sup>20</sup> H. No. 3237, §15(e); S. No. 1733, § 12(f).

<sup>21</sup> *FOI bill moves closer to legislation*, Data.gov.ph, available at <http://data.gov.ph/news/update-foi-bill-moves-closer-legislation> (last accessed April 3, 2015).

<sup>22</sup> H. No. 3237, §§12, 13; S. No. 1733, §§ 21, 22.

<sup>23</sup> Edson Tandoc, Jr., *FYI of FOI: Exploring the Effects of Freedom of Information Laws Around the World*, University of Missouri School of Journalism, available at <http://www.freedominfo.org/>.

<sup>24</sup> Center for People Empowerment in Governance, *FOI: Finally bearing fruit or foiled again?*, Philippine Daily Inquirer, available at <http://opinion.inquirer.net/81439/finally-bearing-fruit-or-foiled-again>.

## ILLUSTRATION OF THE PROSECUTORIAL PROCESS IN THE PHILIPPINES

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### INSTITUTION OF CRIMINAL ACTION

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A criminal action is instituted by filing a complaint with the proper officer for the purpose of conducting the requisite preliminary investigation.<sup>25</sup> The proper officer or the public prosecutor then files the criminal information in court if upon investigation he finds probable cause<sup>26</sup> that an alleged lawbreaker has committed a crime. It is important to note, however, that the filing of criminal information before a court of law and the corresponding enforcement of criminal law against an erring individual begins when the criminal act is brought to the attention of duly constituted authorities,<sup>27</sup> and only when the latter acts on it. Such duly constituted authorities and proper officers, in the context of corruption, will be described briefly in the next sections.

### 2. ANTI-CORRUPTION INSTITUTIONS

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In the Philippines, the main anti-corruption agencies include the Office of the Ombudsman, Office of the Special Prosecutor, the Department of Justice (“DOJ”), the Anti-Money Laundering Council, and the Civil Service Commission. Chief among these agencies is the Office of the Ombudsman, which is vested with the power to investigate corruption and file the criminal information against a public office or employee, upon complaint of any person or on its own initiative.

The Philippine Constitution created the Office of the Ombudsman and mandated it, in no uncertain terms, to “act promptly on complaints filed in any form or manner against public officials or employees of the Government, or any subdivision, agency or instrumentality thereof...”<sup>28</sup> It further grants the

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<sup>25</sup> RULES OF COURT, Rule 110, Sec. 1.

<sup>26</sup> *Manebo v. Acosta*, G.R. No. 169554, October 28, 2009. Defined probable cause as “the existence of such facts and circumstances as would lead a person of ordinary caution and prudence to entertain and honest and strong suspicion that the person charged is guilty of the crime subject of the investigation.”

<sup>27</sup> WILLARD R. RIANO, *CRIMINAL PROCEDURE (THE BAR LECTURE SERIES)* 43, 2011.

<sup>28</sup> PHIL. CONST. Art. XI Sec. 12.

Ombudsman the power to investigate public officials or employees who appear to have committed illegal, unjust, improper, or inefficient acts. In line with its investigative power, the Ombudsman can request assistance and information from various government agencies, as well as publicize information relating to the case.<sup>29</sup> The power granted by law to the Ombudsman to investigate and to prosecute is plenary and unqualified.<sup>30</sup> Section 15(1) of Republic Act (“RA”) No. 6770<sup>31</sup> gives the Ombudsman primary jurisdiction over cases cognizable by the Sandiganbayan, the present anti-graft court in the Philippines.<sup>32</sup>

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<sup>29</sup> PHIL. CONST. Art XI Sec. 13.

<sup>30</sup> Uy vs. Sandiganbayan, G.R. Nos. 105965-70. March 20, 2001.

<sup>31</sup> Rep. Act No. 6770 §15 (1) (1989), “The Ombudsman Act of 1989”:

The Office of the Ombudsman shall have the following powers, functions and duties:

(1) Investigate and prosecute on its own or on complaint by any person, any act or omission of any public officer or employee, office or agency, when such act or omission appears to be illegal, unjust, improper or inefficient. It has primary jurisdiction over cases cognizable by the Sandiganbayan and, in the exercise of this primary jurisdiction, it may take over, at any stage, from any investigatory agency of Government, the investigation of such cases; [...]

<sup>32</sup> Dep’t of Justice vs. Liwag, G.R. No. 149311, Feb. 11, 2005. In sum, RA 8249 §4 provides that the Sandiganbayan shall have exclusive original jurisdiction over:

I.) Violations of RA 3019 (Anti-graft and Corrupt Practices Law);

II.) RA 1379 (Forfeiture of Illegally Acquired Wealth);

III.) Crimes by public officers or employees embraced in Ch. II, Sec.2 Title VII, Book II of the Revised Penal Code namely:

a) Direct Bribery under Art. 210;

b) Indirect Bribery under Art. 211;

c) Qualified Bribery under Art. 211-A; and

d) Corruption of public officials under Art. 212.

Where one or more of the accused are officials occupying the following positions in the government whether in a permanent, acting or interim capacity, at the time of the commission of the offense:

1) Officials of the executive branch occupying the positions of regional director and higher, otherwise classified as Grade 27 and higher, of the Compensation and Position Classification Act of 1989 Republic Act No. 6758) specifically including:

a) Provincial governors, vice-governors, members of the sangguniang panlalawigan, provincial treasurers, assessors, engineers and other provincial department heads;

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- b) City mayors, vice-mayors, members of the sangguniang panglungsod, city treasurers, assessors, engineers and other department heads;
- c) Officials of the diplomatic service occupying the position of consul and higher;
- d) Philippine Army and Air force colonels, naval captains and all officers of higher rank;
- e) Officers of the PNP while occupying the position of Provincial Director and those holding the rank of Senior Superintendent or higher;
- f) City and provincial prosecutors and their assistants; officials and the prosecutors in the Office of the Ombudsman and special prosecutor ;
- g) President, directors or trustees or managers of government owned or controlled corporations, state universities or educational institutions or foundations;
- 2) Members of Congress and Officials thereof classified as Grade 27 and up under the Compensation and Classification Act of 1989;
- 3) Members of the Judiciary without prejudice to the provision of the Constitution;
- 4) Chairmen and members of Constitutional Commissions, without prejudice to the provision of the Constitution;
- 5) All other national and local officials classified as Grade 27 and higher under the Compensation and Position Classification Act of 1989.
- IV.) Other offenses or felonies whether simple or complexed with other crimes committed in relation to their office by the public officials and employees mentioned above;
- V.) Civil and Criminal Cases filed pursuant to and in connection with EO 1, 2, 14 & 14-A issued in 1986;
- VI.) Petitions for issuance of Writ of mandamus, prohibition, certiorari, habeas corpus, injunction and other ancillary writs and processes in aid of its appellate jurisdiction; Provided, jurisdiction is not exclusive of the Supreme Court;
- VII.) Petitions for Quo Warranto arising or that may arise in cases filed or that may be filed under EO 1, 2, 14 & 14- A; and
- VIII.) OTHERS provided the accused belongs to Salary Grade 27 or higher:
- a.) Violation of RA 6713 or the “Code of Conduct and Ethical Standards”
- b.) Violation of RA 7080 or “the Plunder Law”
- c.) Violation of RA 7659 or “the Heinous Crime Law”
- d.) RA 9160 of “Violation of The Anti-Money Laundering Law when committed by a public officer”)
- e.) PD 46 referred to as the gift-giving decree which makes it punishable for any official or employee to receive directly or indirectly and for the private person to give or offer to give any gift, present or other valuable thing on any occasion including Christmas, when such gift, present or valuable thing is given by reason of his official position, regardless of whether or not the same is for past favors or the giver hopes or expects to receive a favor or better treatment in the future from the public official or employee concerned in the discharge of his official functions. Included

Further, the Ombudsman also has the discretion to grant immunity from prosecution to any person whose testimony or production of documents or evidence is necessary to determine the truth in any inquiry, hearing, or proceeding being conducted by the Office of the Ombudsman.

The Sandiganbayan is a constitutionally-mandated court tasked to try and hear cases of corruption. It has original and exclusive jurisdiction to try and decide violations of the RA 3019 or the Anti-Graft and Corrupt Practices Act, crimes committed by public officers or employees in relation to their office, and other offenses as provided for in Presidential Decree No. 1486.<sup>33</sup> It has jurisdiction over government officials and employees of any rank, subject to the limitation that those officials falling below salary grade 27 are not within its jurisdiction. Moreover, if there is an allegation of conspiracy, to avoid repeated and unnecessary presentation of evidence, even private individuals are subject to the jurisdiction of the Sandiganbayan and can be held liable together with the public officer in corruption cases.<sup>34</sup>

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### INFORMATION AND PROSECUTION

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Ideally, sufficient evidence and information related to a crime or offense must pique the interest of public prosecutors which leads to the initiation of the prosecutorial process. In cases of corruption, it is the Ombudsman that inquires and investigates complaints related to corruption. These complaints can be filed “in any form, either verbal or in writing”<sup>35</sup> before the Office of the Ombudsman. In the case of *Department of Justice vs. Liwag*, the Court described the method of filing a complaint with the Ombudsman as “direct, informal, speedy and inexpensive.”<sup>36</sup> The Court added that as the “primary

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within the prohibition is the throwing of parties or entertainment in honor of the official or employee or his immediate relatives.

f.) PD 749 which grants immunity from prosecution to any person who voluntarily gives information about any violation of Art.210, 211 or 212 of the RPC, RA 3019, Sec.345 of the NIRC, Sec. 3604 of the Customs and Tariff Code and other provisions of the said Codes penalizing abuse or dishonesty on the part of the public officials concerned and other laws, rules and regulations penalizing graft, corruption and other forms of official abuse and who willingly testifies against the public official or employee subject to certain conditions.

<sup>33</sup> Pres. Dec. No. 1486, Sec. 4.

<sup>34</sup> *Balmadrid v. Sandiganbayan*, G.R. No. L-58327, Mar. 22, 1991.

<sup>35</sup> RULES OF PROCEDURE OF THE OFFICE OF THE OMBUDSMAN, Rule I, § 3.

<sup>36</sup> *Dep’t of Justice vs. Liwag*, G.R. No. 149311, February 11, 2005.

complaints and action center for the aggrieved layman baffled by the bureaucratic maze of procedures” the Office of the Ombudsman can investigate even without a formal investigation lodged before it.<sup>37</sup> Since the Ombudsman is constitutionally mandated to act promptly on sources other than a formal complaint, reports from the media or evidence collated by civil society groups may then suffice to initiate the investigation. It also follows, therefore, that names of government officials and transactions obtained from the U.S. FOIA and passed on to the civil society can also be used. The strategies to make these pieces of information fall under the radar of the Ombudsman will be discussed in the Part III of this paper.

Information obtained by an informer regarding corrupt transactions need not even be disclosed to the public as a general rule. The disclosure is subject to the discretion of the Ombudsman or the deputies concerned, on a case by case basis. The disclosure shall not be made if it shall prejudice the safety of the witnesses or the disposition of the case.<sup>38</sup>

However, the liberal rules that apply to the filing of complaints to begin investigations conducted by the Office of the Ombudsman are limited only to the initiatory stage of prosecution. This means that the process that allows any party to cause the Office of the Ombudsman to begin its investigation through an informal complaint is limited only to the investigative phase prior to the filing of a formal criminal complaint. Once the investigative phase has terminated, the investigators acting as nominal complainants in the absence of actual complainants, will then have to file, before the Office of the Ombudsman, a complaint under oath which will lead the office to conduct a formal investigation similar to a Preliminary Investigation. It is only after this process that an information is filed before the Sandiganbayan.

This is further clarified in the case of *Olivas vs. Ombudsman*. The Supreme Court in said case said that after the Ombudsman and his deputies have gathered enough evidence, with their investigation having ceased to be merely exploratory, and having decided to bring action, the proceedings then become adversarial. In such cases, stricter rules on the form of the complaint then begin to apply.<sup>39</sup> Section 4 of the Rules of Procedure requires that a complaint be under oath, or the submission of supporting

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<sup>37</sup> *Id.*

<sup>38</sup> RULES OF PROCEDURE OF THE OFFICE OF THE OMBUDSMAN, Rule V, § 2.

<sup>39</sup> *Olivas v Ombudsman*, G.R. No. 102420, Dec. 20, 1994.

affidavits if the complaint is based only on official reports.<sup>40</sup> In prosecutions of graft cases, there must be a “previous inquiry similar to preliminary investigation in criminal cases.”<sup>41</sup> The Court held further that “while reports and even raw information may justify the initiation of an investigation, the stage of preliminary investigation can be held only after sufficient evidence has been gathered and evaluated warranting the eventual prosecution of the case in court.”<sup>42</sup>

Subject only to a finding of grave abuse of discretion, the Ombudsman exercises a wide discretion in filing cases before the Sandiganbayan. The Ombudsman can dismiss the complaint outright if in its assessment, the complaint is without palpable merit, or that the complainant has no sufficient personal interest to the case. Thus, if the Ombudsman finds that the raw information available to pursue a claim against a corrupt official is insufficient, not even the preliminary investigation can commence. An anonymous complaint will be acted upon only if it merits appropriate consideration, or contains sufficient leads or particulars to enable the taking of further action. It is unclear, however, what constitutes a sufficient lead or a complaint which requires further action. Such discretion often leads to a situation where otherwise meritorious cases that citizens believe should be brought are never brought to the attention of the Sandiganbayan. This form of nonfeasance caused former Ombudsman Merceditas Gutierrez her position when she was impeached for refusing to file cases against her appointee, former President Gloria Macapagal-Arroyo.

Having outlined the prosecutorial process and the extent of discretion the public prosecutor or the Ombudsman has in dealing with information or evidence received regarding a corrupt activity, it is now pertinent to discuss how such information can be acquired, i.e., request for information, locally or from another country. The ensuing discussion will provide the necessary springboard for the proposal of reinforcing information-gathering sufficient to break through the wall of discretion exercised by public prosecutors.

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<sup>40</sup> RULES OF PROCEDURE OF THE OFFICE OF THE OMBUDSMAN, Rule II §4.

*Procedure* — The preliminary investigation of cases falling under the jurisdiction of the Sandiganbayan and Regional Trial Courts shall be conducted in the manner prescribed in 3, Rule 112 of the Rules of Court, subject to the following provisions:

a) If the complaint is not under oath or is based only on official reports, the investigating officer shall require the complainant or supporting witnesses to execute affidavits to substantiate the complaints. [...]

<sup>41</sup> *Olivas v Ombudsman*, G.R. No. 102420, Dec. 20, 1994.

<sup>42</sup> *Id.*

## CROSS-COUNTRY SHARING OF INFORMATION

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Mutual Legal Assistance Treaties (“MLAT”) or Letters Rogatory are the existing methods by which the Philippines can obtain information available outside its territory. These methods are not necessarily broken. But as will be discussed in the next subsection, there are challenges and problems in the current system of prosecution and mutual legal assistance that calls for an alternative cross-country exchange of information.

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### MUTUAL LEGAL ASSISTANCE TREATIES

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The Philippines has Mutual Legal Assistance Treaties in force with Australia, the United States, Hong Kong, Switzerland, South Korea, Spain, and more recently, China and United Kingdom.<sup>43</sup> In 2004, the Association of Southeast Asian Nations (ASEAN) member states, including the Philippines, signed the Treaty on Mutual Legal Assistance in Criminal Matters. Mutual legal assistance may also be provided pursuant to the Anti-Money Laundering Act.

Mutual Legal Assistance treaties generally cover assistance in all stages of criminal, civil, and administrative investigations and proceedings. These include: forfeiture proceedings, assistance on taking the testimony of witnesses, provision of documents and items of evidence, exchange of criminal records, execution of searches and seizures, location and identification of witnesses and tracing and confiscation of proceeds of crimes, as well as freezing of assets.<sup>44</sup> There are also provisions for assistance in providing and exchanging information on law, documents and records.

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<sup>43</sup> Mary Grace Quintana, *International Cooperation: Mutual Legal Assistance and Extradition*, 6 UNAFEI GOOD GOVERNANCE SEMINAR 141, 141 (2012), available at [http://www.unafei.or.jp/english/pdf/PDF\\_GG6\\_Seminar/05-6\\_Philippines.pdf](http://www.unafei.or.jp/english/pdf/PDF_GG6_Seminar/05-6_Philippines.pdf).

<sup>44</sup> UNITED STATES TREATY WITH THE PHILIPPINES ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS Article I: The negotiators specifically agreed that the term “investigations” includes grand jury proceedings in the United States and similar pre-charge proceedings in the Philippines, and other legal measures taken prior to the filing of formal charges in either Contracting Party. The term “proceedings” was intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings. It was also agreed that since the phrase “proceedings related to criminal matters” is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For instance,

One well-publicized case is Major General Carlos Garcia's plunder case. The US embassy has recalled the facts in this way:

"In 2007 the U.S. Embassy received a request from the Philippines Office of the Ombudsman under the Mutual Legal Assistance Treaty (MLAT) regarding the Garcia investigation. In response, a U.S. Government investigator provided testimony to the Sandiganbayan and gathered evidence regarding the seizure of \$100,000 from Garcia's sons when they entered the U.S. at San Francisco in December 2003. U.S. criminal charges were subsequently filed against the Garcia sons for attempting to smuggle \$100,000 into the United States. It is a matter of public record that the sons pled guilty in 2010 and were sentenced to time already served, two years' probation and forfeiture of \$100,000. In December the Philippine Department of Justice filed an MLAT request asking for return of the \$100,000, and that process is ongoing.

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In addition, and at the request of the Government of the Philippines, petitions were filed in U.S. district courts for the extradition of Mrs. Garcia and three Garcia sons from the United States to the Philippines."<sup>45</sup>

The \$100,000.00 seized was already forfeited by Philippine authorities. Major General Garcia is currently incarcerated, with plunder cases still pending before the Sandiganbayan. In her 2012 Sponsorship Speech regarding Mutual Legal Assistance Agreements with the People's Republic of China and The United Kingdom, Senator Loren Legarda recalled the value of Mutual Legal Assistance Agreements by

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proceedings to forfeit to the government the proceeds of illegal drug trafficking may be civil in nature; such proceedings are covered by the Treaty.

Paragraph 2 sets forth a list of the major types of assistance specifically considered by the negotiators. Most of the items listed in paragraph 2 are described in further detail in subsequent articles. The list is not intended to be exhaustive, a fact that is signalled by the word "include" in the opening clause of the paragraph and is reinforced by the final subparagraph.

<sup>45</sup> See Embassy of the United States Manila, *US Embassy Clarifies role in Garcia Case*, Jan. 15, 2011, available at <http://manila.usembassy.gov/us-embassy-clarifies-role-in-garcia-case.html>.

citing several instances where it has aided in prosecution of erring officials.<sup>46</sup> The Philippine Senate has since ratified these treaties with China and UK.

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## LETTERS ROGATORY

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In the absence of mutual legal assistance treaties, letters rogatory<sup>47</sup> can be resorted to obtain judicial assistance from overseas. Such letters of request can be used to obtain depositions or gather evidence if permitted by the laws of the foreign country.

Unlike a request through mutual legal assistance agreements, one through letters rogatory may take years since it is traditionally transmitted through diplomatic channels. Under Philippine law, letters rogatory shall be issued only when necessary or convenient and on such terms and with such direction as are just appropriate.<sup>48</sup> They are addressed to the appropriate judicial authority in the foreign country.<sup>49</sup> Depositions in foreign countries may be taken on notice before a secretary of embassy or legation, consul general, consul, vice-consul, consular agent of the Republic of the Philippines<sup>50</sup>, before such person or officer as may be appointed by commission or under letters rogatory,<sup>51</sup> or before any person authorized to administer oaths at any time or place.<sup>52</sup>

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## PROBLEMS AND CHALLENGES

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<sup>46</sup> See Loren Legarda, Privileged Speech, *Mutual Legal Assistance Agreements (MLATs) with the People's Republic Of China And The United Kingdom*, Mar. 6, 2012, available at <http://lorenlegarda.com.ph/mutual-legal-assistance-agreements-mlatswith-the-peoples-republic-of-china-and-the-united-kingdom/>.

<sup>47</sup> Defined as a formal request from a local court to a foreign court for judicial assistance.

<sup>48</sup> RULES OF COURT, Rule 23 §12.

<sup>49</sup> *Id.*

<sup>50</sup> §11 (a).

<sup>51</sup> §11 (b).

<sup>52</sup> §§ 11 (c) & 14.

Using the traditional modes of cross-country exchange of information in the context of the current state of prosecution is not ineffective *per se*. However, there are institutional and systemic problems that need to be addressed in order to have a comprehensive yet effective anti-corruption framework.

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## STATE CAPTURE

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The concept of state capture<sup>53</sup> in the Philippine context goes beyond the interactions between private and public firms and falls short of mapping in precise strokes the realities in the country.<sup>54</sup> It was observed that the captured state situation applied in the Philippine context is more far-reaching as it covers the existence of state capture on government instrumentalities and agencies in general, and even agencies in charge of prosecuting corruption, including the Ombudsman.<sup>55</sup> A captured state situation in the Philippines is reinforced by the existence of *compadre* system,<sup>56</sup> patronage system,<sup>57</sup> and cultural value of *utang na loob*.<sup>58</sup> Common to these systems and values is the concept of reciprocity which is best explained in the context of the Filipino cultural value of *utang na loob*.<sup>59</sup> In light of the risk and complexity of state capture, the certainty of prosecution using the information acquired through transparency measures is in danger of being put to naught. A supplemental process to the existing system can be further fortified to address this state capture problem and to recognize the higher strata the people occupies in a public office-context fiduciary relations.

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<sup>53</sup> Joel Hellman et al., *Seize the State, Seize the Day: State Capture, Corruption, and Influence in Transition*, World Bank Policy Research Working Paper No. 2444, at 2 (2000). Defined state capture as [“\[s\]hap\[ing\] the formation of laws, rules, decrees and regulations through illicit and non-transparent private payments to public officials.”](#)

<sup>54</sup> Chan et al., *Civil Action Against Corruption: Empowering the Filipino People in a Captured State Situation*, 1 LIDS GLOBAL 53, 2014.

<sup>55</sup> *Id.*

<sup>56</sup> John S.T. Quah, *supra* note 4, at 14. [The \*compadre\* system is the extension of kinship ties to a \*compadre\*, a prominent man in the community, who usually acts as an intermediary in government dealings.](#)

<sup>57</sup> *Id.*, at 15. [Patronage is the custom of government officials in position of filling government positions with relatives or persons of their own choosing and is attributed to the Filipino’s reverence for family and \*utang na loob\*.](#)

<sup>58</sup> *Id.*

<sup>59</sup> [Utang na loob, a concept without any direct equivalent in English, is a Filipino brand of duty which implies a deep sense of obligation on the part of the receiver of favor to reciprocate when the appropriate moment comes. See Richard Langston, \*Bribery and the Bible: Applied to the Philippines\*, 74 \(1991\).](#)

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## REFUSAL OF A FOREIGN AUTHORITY TO COOPERATE

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Mutual legal assistance provides for a number of exceptions and limitations. One notable limitation is information regarding political crimes. Since corruption, on the demand side, is generally committed by government officials and employees, the crimes can be framed by an accused as a political prosecution. This can potentially bring the case under the exception which ultimately leads to the refusal of the request.

As regards letter rogatory, compliance is discretionary on the part of the foreign authority to whom the request is directed. The case of *Dulay v. Dulay* narrates the delay in taking depositions because of the refusal of foreign authority to cooperate.<sup>60</sup> In that case, a Philippine trial court directed the Clerk of Court of Boston to take the deposition needed in the case. Said Clerk of Court, however, brushed the request aside and refused to cooperate resulting in the delay.<sup>61</sup>

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## UNCERTAINTY OF PROSECUTION

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In the Philippines, the median duration for the disposition of a corruption case that goes before both the Sandiganbayan, and an appeal to the Supreme Court is 9.8 years.<sup>62</sup> Further, “[i]n the more than twenty years since its founding in 1988, the Ombudsman can hardly point to any case against high-ranking officials that resulted in convictions. Beyond a handful of mayors of small municipalities, no high-ranking official has been penalized, let alone imprisoned for corruption, in the Philippines’ entire history.”<sup>63</sup> In contrast, the Corruption Eradication Commission of Indonesia (“KPK”) has an astounding 100% conviction rate even as it aggressively pursues high-profile cases against high-ranking officials and the most powerful institutions of government, with corruption cases filed and disposed within the span of 8 months.<sup>64</sup>

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<sup>60</sup> *Dulay v Dulay*, G.R. No. 158857, Nov. 11, 2005.

<sup>61</sup> *Id.*

<sup>62</sup> Emil Bolongaita, *An Exception to the Rule? Why Indonesia’s Anti-Corruption Commission succeeds where other’s don’t– a comparison with the Philippines’ Ombudsman*, 2010:4 U4 ANTI-CORRUPTION RESEARCH CENTER 4, 18 (2010) available at <http://www.cmi.no/publications/file/3765-an-exception-to-the-rule.pdf> .

<sup>63</sup> Bolongaita, *supra* note 62 at 5.

<sup>64</sup> Bolongaita, *supra* note 62 at 9-10.

In 1997, it was found that compared to its Philippine counterpart, a person committing a corrupt offense in Hong Kong was 33 times more likely to be detected and punished through the efforts of Hong Kong's Independent Commission Against Corruption.<sup>65</sup> In 2004, former Ombudsman Simeon Marcelo revealed that the conviction rate of cases filed before the Sandiganbayan is a dismal rate of less than 6%.<sup>66</sup> This means that in 2004, an official engaged in corrupt practices had a 94% rate of getting away scot-free.

Over the past decade, the Philippine government has reported some progress in improving the rate of conviction, with impeached Ombudsman Merceditas Gutierrez controversially reporting that in 2008 the Philippines reached its highest annual conviction rate of 73.42%.<sup>67</sup> The Philippines also reports some promising figures, such as findings that between 2009 and 2011, the Sandiganbayan disposed 694 cases, compared to the 377 cases filed and revived during the same period.<sup>68</sup> However these promising figures do not fully represent the length of time required for a successful disposition of the case, with the figures itself indicating that the cases disposed were likely filed prior to the period surveyed.

As of 2013, the Office of the Ombudsman reports that it had a conviction rate of 49.5%.<sup>69</sup> However, this is more properly a conviction ratio, as it only takes into account the ratio of convictions as opposed to acquittals in the total cases decided over the past year. In reality, of the 378 cases disposed by the Sandiganbayan in 2013, convictions were found in only 12.2% of the cases. Over 3/4 of the cases were dismissed, archived, or withdrawn, while in 12.4% of the cases the accused were acquitted.<sup>70</sup>

The high rate of dismissal, archiving or withdrawal of the cases filed before the Sandiganbayan highlight the high level of uncertainty for the successful prosecution of corruption cases in the Philippines. One

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<sup>65</sup> Quah, *supra* note 4 at 14.

<sup>66</sup> *Id.* See also Bolongaita *supra* note 62 at 11.

<sup>67</sup> Malou Mangahas, *PCIJ: Ombudsman a failure despite flood of funds*, Feb. 7, 2011, GMA News Online, available at <http://www.gmanetwork.com/news/story/212397/news/specialreports/pcij-ombudsman-a-failure-despite-flood-of-funds>. Part of the controversy revolves around the fact that the reported figure is skewed by multiple convictions for individuals charged with multiple counts of corruption. Famously, convictions were found on 221 cases of "usurpation" filed against Leovegildo Ruzol, the mayor of the Municipality of Nakar, Quezon. Gutierrez was later Impeached from the Office of the Ombudsman by Congress due to her low conviction rate, and her failure to act on various high-profile corruption cases. She resigned before her impeachment trial could commence.

<sup>68</sup> *Country Review Report of the Philippines*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, 31, (2012), available at <http://www.ombudsman.gov.ph/docs/uncac/Philippines%20Country%20Report.pdf>.

<sup>69</sup> Office of the Special Prosecutor, *Accomplishment Report for Calendar Year 2013*, 2, (2014) available at [http://www.ombudsman.gov.ph/docs/statistics/references/OSP\\_2013.pdf](http://www.ombudsman.gov.ph/docs/statistics/references/OSP_2013.pdf).

<sup>70</sup> *Id.*

major problem, as argued by some Ombudsman prosecutors, is that at times investigators are able to gather only evidence sufficient for a finding of probable cause, thus leading to acquittals during trial as the evidence presented fail to meet the burden of proof beyond reasonable doubt.<sup>71</sup>

Apart from institutional changes to improve the efficiency of the Office of the Ombudsman, part of the problem can be addressed with the help of the public's focus on certain high-profile corruption cases. Another possible solution is to establish a platform to assist government investigators with leads in finding evidence to further boost the Office's investigative capacity.

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### WEAK WHISTLEBLOWER PROTECTION FRAMEWORK

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Anti-corruption initiatives are also disadvantaged by the country's weak whistleblower protection framework. Informants and potential whistleblowers are currently exposed to threats that span from employer retaliation, the imposition of legal liabilities such as through defamation suits, as well as direct threats to the whistleblower's personal security.

Currently, whistleblower protection in the Philippines is limited to those prescribed by Presidential Decree 749,<sup>72</sup> and the Witness Protection Security and Benefit Act ("Witness Protection Act").<sup>73</sup> Although P.D. 749 gives immunity any person who voluntarily gives information and willingly testifies against any public official or employee for corruption-related crimes, it does little to ensure the personal safety of the informant.<sup>74</sup> The Witness Protection Act, on the other hand grants various benefits for qualified applicants to the witness protection program.<sup>75</sup> It also provides penalties for the harassment of witnesses.<sup>76</sup>

However, one major weakness of the current whistle-blower protection framework is that in order to be entitled to the benefits under either law, an informant is required to testify as a witness thus surrendering anonymity. As of this writing, there have been several bills filed to further enhance the

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<sup>71</sup> Bolongaita, *supra* note 62 at 15.

<sup>72</sup> Pres. Dec. 749 (1975).

<sup>73</sup> Rep. Act No. 6981 (1991), Witness Protection Benefit and Security Act.

<sup>74</sup> Pres. Dec. 749 (1975) §1.

<sup>75</sup> Rep. Act No. 6981 (1991) §8.

<sup>76</sup> §17.

protection granted to informers/whistleblowers.<sup>77</sup> Unfortunately, none of the 15 bills pending before congress are close to being passed into law. All bills are still pending before the committee levels of each house of congress having hurdled only the first of three readings required to pass the bill into law.

In sum, while the traditional modes of cross-country exchange of information are not necessarily defective, there is much room for improvement.

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## DEMOCRATIZING ANTI-CORRUPTION

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Provisions of the Philippine Constitution show the people's resolve to keep the government's power checked.<sup>78</sup> This is neither accidental nor intended to be theoretical; as the Constitution is based on the Filipino nation's history, a history founded on revolution.

For 300 years, Filipino heroes fought bravely for independence from the Spanish colonization. It continued until they finally attained independence from their American masters. But its history of revolution did not end when it won its independence from its colonial masters. In 1986, the people through a bloodless uprising gathered together in EDSA to once and for all be free of the authoritarian regime of then-president Ferdinand Marcos. Once again, the people spoke and democracy was restored.

Public participation in the Philippine context is therefore not new. The Filipinos' experience led them to such extreme measures because authorities had also acted outside the bounds of their function—that of an agent to the principal, the people.

Central to citizens' participation is the civil society sector. The Philippine civil society organizations are considered as among the most vibrant in the world. The country hosts the largest number of non-government organizations per capita in Asia, with an estimated 60,000 SEC-registered NGOs.<sup>79</sup> Civil

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<sup>77</sup> Six bills are currently pending before the senate, while nine bills are pending before the House of Representatives.

<sup>78</sup> PHIL. CONST. art. 17 §2; art. 6 §1.

<sup>79</sup> David Wurfel, *Civil Society and Democratization in the Philippines*, In Y. Sato, ed. GROWTH AND GOVERNANCE IN ASIA, 2004 available at

society plays a key role in the fight against corruption. This reflects the Constitution's recognition of an unbridged right of the people and their organizations to effective and reasonable participation at all levels of social, political and economic-decision making.<sup>80</sup> In 2011, the Civil Society Advisory Committee, a group with 70 network members, released a statement calling on Filipino citizens to adopt a zero-tolerance attitude toward corruption in interacting with government, highlighting that the fight against corruption is not only the government's responsibility but of everyone's.<sup>81</sup> In a collaborative anti-corruption discourse, what does public participation mean? What is the nature and extent of civil society involvement? And considering the problems posed by trans-national corruption, how can civil society best use information obtained abroad to successfully launch criminal prosecutions domestically?

### CIVIL SOCIETY TO CIVIL SOCIETY EXCHANGES

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Other than the current model of cross-country exchange of information, one other mode available in the fight against corruption involves civil society collaboration. This is particularly interesting in light of the passage of freedom of information laws in different countries. There must be a mechanism where information acquired from another state, can be used to prosecute corrupt actors. The United Nations Convention against Corruption (UNCAC), of which the Philippines is a signatory, emphasizes the promotion of more efficient and effective anti-corruption measures and international cooperation to prevent and combat corruption.<sup>82</sup>

As discussed in the main article by Harvard LIDS, a U.S. citizen can file an FOIA request to extract names and documents in a concluded FCPA cases. Said U.S. citizen can either publish such information to notify Philippine anti-corruption activists, or directly send information to any of the local civil society groups. This is a cross-country mechanism, similar to the MLATs and letters rogatory, which is necessary primarily because of each sovereign state's jurisdiction over criminal cases. If a government official is

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[http://www.apcss.org/Publications/Edited%20Volumes/GrowthGovernance\\_files/Pub\\_Growth%20Governance/Pub\\_GrowthGovernancech17.pdf](http://www.apcss.org/Publications/Edited%20Volumes/GrowthGovernance_files/Pub_Growth%20Governance/Pub_GrowthGovernancech17.pdf).

<sup>80</sup> PHIL. CONST. art. 13 § 16.

<sup>81</sup> INSTITUTIONALIZING THE FIGHT AGAINST CORRUPTION: A Statement by the Civil Society Advisory Committee On the Occasion of International Anti-Corruption Day, 2011, *available at* [http://www.tan.org.ph/index.php?option=com\\_content&view=article&id=187:institutionalizing-the-fight-against-corruption-a-statement-by-the-civil-society-advisory-committee-on-the-occasion-of-international-anti-corruption-day-2011&catid=37:recent-headlines&Itemid=80](http://www.tan.org.ph/index.php?option=com_content&view=article&id=187:institutionalizing-the-fight-against-corruption-a-statement-by-the-civil-society-advisory-committee-on-the-occasion-of-international-anti-corruption-day-2011&catid=37:recent-headlines&Itemid=80).

<sup>82</sup> UN CONVENTION AGAINST CORRUPTION, Chapter I, Art. 1.

involved, he or she must be criminally prosecuted under the jurisdiction of the country where he or she is an official. Typically, the coercive force of a foreign territory cannot be deployed against an erring government official because the state where the latter resides has a monopoly on the use of force within its territory.

Completing the situation given by Harvard LIDS using the Philippine context, the local civil society may then make use of such names and information in a number of ways to ensure prosecution of government officials involved in an FCPA case.

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## METHODS

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First, a civil society group can use such information as a starting point to refer cases and initiate complaints before the Ombudsman. As already provided in the discussion above, the Ombudsman is mandated to act on complaints filed in any form, even verbal. Theoretically, names or data obtained through the U.S. FOIA accompanied with sufficient information detailing improper acts complained of may also be used to begin the initiatory stage of investigation by the Ombudsman. This is because neither RA 6770, nor the relevant Constitutional provisions, nor even the Rules of Procedure of the Office of the Ombudsman provide for prohibitions as to the actual source of the “tip” or the information relied on. This is subject only to the rules on admissibility of evidence which will only come at the later stage of the prosecution.

Civil society groups and NGOs can initiate prosecution by gathering sufficient evidence of alleged corrupt acts. Currently, some civil-society groups such as the Anti-Trapo Movement of the Philippines (“ATMP”) have filed several cases with the Ombudsman as regards various anomalous acts of some government officials.<sup>83</sup>

Second, the civil society group can feed the information to the Philippine media and publicize the same. This will shield the civil society informant since the media is amply protected by the Philippine

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<sup>83</sup> See Cordon, John Constantine G. "Group files plunder, graft raps vs. Lotilla." The Manila Times. August 28, 2013. <http://www.manilatimes.net/group-files-plunder-graft-raps-vs-lotilla/34012/>; TanDem issued a Manifesto in 2014 entitled “GOVERNMENT INACTION ON CASES FILED VS PCOS ELECTIONS 2010 AND 2013”. This document is available at the organization’s website: [www.tandem.org.ph](http://www.tandem.org.ph). Among the still unresolved cases filed by TanDem are Adaza et al v. Comm’n on Elections, G.R. No. 19256; PCS v Melo and Flores et al.; Aguilar et al. v Comm’n on Elections, G.R. No. 194204; Biliran Kawsa v Flores and Melo et al.; Plazo v Flores and Melo et al.; TanDem et al. v. Comm’n on Elections, G.R. No. 206784; and Bagumbayan et al. v. Comm’n on Elections G.R. No. 206719.

Constitution and laws. Freedoms of speech and of the press are absolute when directed against public officials.<sup>84</sup> Also, there is no legal obligation on the part of the media to reveal the source of any news-report or information appearing in said publication.<sup>85</sup> This can also lead the Ombudsman to initiate an investigation based on such reports. A good example of a media-led exposé involves the pork barrel scandal. In 2013, a series of special reports by the Philippine Daily Inquirer detailed the allegations of a scam involving Janet Napoles and several lawmakers.<sup>86</sup> A month later, the Commission on Audit provided in its special audit report official proof of what initially came to the public consciousness as an unverified news report from Philippine Daily Inquirer.<sup>87</sup> Napoles and three other Senators are now facing plunder charges before the Sandiganbayan and are now detained without the privilege of bail. In a more recent example, the constant barrage of news and exposé of the ill-gotten wealth of the family of Vice-President and presidential hopeful Jejomar Binay helped in the eventual filing of complaint before the Sandiganbayan against the vice president and his son, Makati mayor Junjun Binay. Similarly, reports regarding the anomalous construction of the Philippine National Police Chief's official residence or the so-called "white house," led to further investigations by the media regarding the PNP Chief's other properties.

Third, the civil society group can "name and shame" the public official involved, a method not peculiar to the Philippine setting. If the revelation gathers enough steam, a public prosecutor, captured or not, will not be able to resist the public uproar. For instance, the pork barrel scandal of 2013 may have started with revelations from whistleblower Benhur Luy, but the issue reached its fever pitch when disgruntled netizens discovered online pictures of Jeane Napoles, daughter of alleged pork barrel mastermind Janet Napoles, showing her prodigious spending and extravagant lifestyle. People showed their displeasure by circulating the pictures and posting their disapproval until it came to the attention of the general public, congress and Ombudsman.

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## CHALLENGES

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<sup>84</sup> Philippine Blooming Mills Employment Organization v. Philippine Blooming Mills Co., G.R. No. L-31195, June 5, 1973, *citing* New York Times Co. v. Sullivan, 376 U.S. 254, 270, March 9, 1964.

<sup>85</sup> Rep. Act No. 53, § 1.

<sup>86</sup> Yasmin Arquiza, *Janet Napoles and the unraveling of the pork barrel scandal*, GMA News, December 31, 2013. Available at <http://www.gmanetwork.com/news/story/341906/news/specialreports/janet-napoles-and-the-unraveling-of-the-pork-barrel-scandal>.

<sup>87</sup> *Id.*

However, there is no silver bullet for an issue as complex as trans-national corruption. Even with an alternative mode of cross-country information sharing against corruption, civil society to civil society exchanges also present their own challenges.

First, is the possibility of exposing the informer to a defamation suit.<sup>88</sup> However, imagining the context in which the suit will be filed, it will logically be filed against the informer by at least one of three categories of individuals susceptible to the public figure doctrine in the Philippines:<sup>89</sup>

1. The Public Official.<sup>90</sup>
2. The public figure, who enjoys great fame or notoriety or has thrust himself into public view.<sup>91</sup>
3. The private figure who has become involved in an issue of public interest.<sup>92</sup>

In more recent jurisprudence, it has been held that,

“A public figure has been defined as a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a 'public personage.' [T]he list is, however, broader than this. [...] It includes, in short, anyone who has arrived at a position where public attention is focused upon him as a person.”<sup>93</sup>

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<sup>88</sup> In the Philippines, libel is defined as “a public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status or circumstance tending to cause the dishonor, discredit or contempt of a natural or juridical person, or to blacken the memory of one who is dead.” REV. PEN. CODE art. 353.

Meanwhile, defamation committed with the use of a computer system or any other similar means, such as through the internet, is also prohibited under the Cybercrime Prevention Act of 2012. *See* *Disini v. Sec. of Justice*, G.R. No. 203335, Apr. 22, 2013.

<sup>89</sup> Oscar Franklin Tan, *Articulating the Complete Philippine Right to Privacy in Constitutional Law and Civil Law: A Tribute to Chief Justice Fernando and Justice Carpio*, 82 PHIL. L.J. 78, 131-132, (2008).

<sup>90</sup> *US v Bustos*, G.R. No. 12592, 37 Phil 731, Mar. 8, 1915.

<sup>91</sup> *Ayer Productions v Capulong*, G.R. No.82380, Apr. 29, 1988.

<sup>92</sup> *Borjal v CA*, G.R. No. 126466, Jan. 14, 1999.

<sup>93</sup> *Guinguing v Court of Appeals*, G.R. No. 128959, September 30, 2005.

Generally, truth can be used as a defense in libel cases.<sup>94</sup> Further, pursuant to the public figure doctrine, the current state of our libel laws require *actual malice*<sup>95</sup> to be presented before a criminal conviction for libel can hold against an informer who allegedly defamed a public figure. Conversely however, if the utterances are false, malicious, or unrelated to the public officer's duty or public interest, then civil and criminal liability can arise against the informer.<sup>96</sup>

Moreover, jurisprudence shows that the law does not make distinctions when the informer charged with defamation is a foreigner or a local resident.<sup>97</sup> Both are subject to the same liabilities and defenses. So too are members of the press, or officers of NGOs susceptible to defamation suits. Although a wide latitude is given to criticisms against public officers and public figures, under the constitutional framework of the Philippines, defamation is still unprotected speech.<sup>98</sup>

Second, it is also important to note that information obtained from foreign sources by the domestic informant, when publicized through the media or other platforms are likely to be inadmissible under the Rules of Evidence unless they are properly authenticated. This contemplates circumstances when the domestic informant brings the information he received to the media or through social media to initiate a name and shame campaign. The rules on admissibility of evidence are governed by the Revised Rules on Evidence ("Rules on Evidence") of the Rules of Court. Section 36 of Rule 130 of the rules on evidence holds that a witness can testify only to facts within his personal knowledge—that is: it is derived from his own perception. Thus, the published content itself cannot generally be cited as admissible testimony in court. Once the domestic informant transmits the information for publication through a third party, the publication of such information—not being derived from his/her own perception is deemed hearsay. This is in accordance to the established doctrine that newspaper clippings hold no probative value, it being hearsay in nature.<sup>99</sup>

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<sup>94</sup> REV. PEN. CODE art. 361.

<sup>95</sup> Under the actual malice rule, the "truth has been sanctioned as a defense, much more in the case when the statements in question address public issues or involve public figures." *See Guinguing v Court of Appeals supra* note 93.

<sup>96</sup> *Fermin v People*, G.R. No. 157643, Mar. 28, 2008.

<sup>97</sup> *Ayer Productions v Capulong, supra* note 91.

<sup>98</sup> *Fermin v People*, G.R. No. 157643, Mar. 28, 2008.

<sup>99</sup> *Kilosbayan Inc. v Comm'n on Elections*, G.R. No. 128054, Oct. 16, 1997.

Finally, there is the issue of state sovereignty. The issue of state sovereignty is particularly important in cross-country information sharing. State sovereignty is a well-entrenched principle in international law that a state does not have a right to interfere with the internal affairs of another state. It prohibits one state to demand that another state take any particular internal action. A United Nations General Assembly resolution states that “[N]o State has the right to intervene directly or indirectly for any reason whatsoever in the internal or external affairs of any other State.”<sup>100</sup> This issue affects both requesting and complying states. From the perspective of the foreign country where the information will be sourced, sovereignty is a weighty issue in requesting information because this might intrude into the right of that state to prosecute acts that also violates their laws. MLATs and letters rogatory are in fact created partly because of this issue. On the part of the requesting state which in this case is the Philippines, the Philippine constitution is clear that the paramount consideration in its relations with other states shall be national sovereignty, territorial integrity, national interest, and the right to self-determination.<sup>101</sup> Since criminal prosecution is a power that rightly belongs to the state which has jurisdiction to the criminal offense, an unsolicited assistance from a foreign officer can be construed as interference in this context.

With these challenges in mind, this paper proposes a model to best utilize civil society to civil society exchanges as the preferred mode for the cross-country information-sharing.

## CROWDSOURCING ANTI-CORRUPTION EFFORTS

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To effectively prosecute against corruption in the Philippines, transparency is only the first step. The problem of state capture highlights issues that affect the wide discretion granted to the Office of the Ombudsman. Unless a private right of action is dovetailed with the right to information, the prosecution of corruption remains at the mercy of government anti-corruption bodies. Even the passage of the Philippine FOI law can lead only to a mass of information without any means of using them.

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<sup>100</sup> UN General Assembly Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, 9 December 1981, available at <http://www.un.org/documents/ga/res/36/a36r103.htm>.

<sup>101</sup> PHIL. CONST., Art. II, Sec. 7.

One solution to this problem is to harness the productive power of people's collective action, a form of social accountability which can complement the legal process of prosecution. Engaging the citizens is considered as an important reform initiative in fighting corruption.<sup>102</sup> Filipino citizens, therefore, must take ownership of the well-being of the country by taking an active part in sharing their ideas, as well as taking part in the governance process.<sup>103</sup> To make such collective action operational, a platform can be created where ordinary citizens can report and organize information on corrupt activities that will compel anti-corruption agencies to act. Combining the strength of social media with the use freedom of information statutes can be potent tools in the country's anti-corruption efforts. Maximizing social media for this purpose requires an organized effort. One innovative way to do this is through crowdsourcing. This allows people to collectively contribute their individual expertise, knowledge and effort in fight against corruption.

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#### ONLINE CROWDSOURCING AS AN ANTI-CORRUPTION TOOL

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Online crowdsourcing<sup>104</sup> as a process is said to be expanding fast in Asia.<sup>105</sup> This trend has drawn the current tech-savvy generation as a strong tool used to boost the productivity of both for profit and non-profit organizations. It can also be used as an anti-corruption platform by organizing incriminating information and using it to prosecute corrupt government officials. Crowdsourcing as an anti-corruption tool, however, is not new. It has been used by different countries with varying results. For example, India and neighboring countries have an I Paid A Bribe (IPAB) program that allows anonymous reporting of actual corrupt acts. Indonesians have a government-run website, *Lapor*<sup>106</sup>, where citizens can report improper conduct of public servants. Russia has RosPil<sup>107</sup> a state procurement monitoring site.

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<sup>102</sup> Alex Brillantes & Maricel Fernandez, *Toward a Reform Framework for Good Governance: Focus on Anti-Corruption*, 54 PHIL. J. OF PUB. ADM. , Nos. 1-2 (2010).

<sup>103</sup> *Id.*

<sup>104</sup> Merriam-Webster Dictionary defines Crowdsourcing as a "process of obtaining needed services, ideas, or content by soliciting contributions from a large group of people, and especially from an online community, rather than from traditional employees or suppliers."

<sup>105</sup> Alec Lynch, *Crowdsourcing is Booming in Asia*, Techcrunch.com, available at <http://techcrunch.com/2012/12/08/asias-secret-crowdsourcing-boom>, last visited 30 December 2014.

<sup>106</sup> See *Lapor* website at <http://lapor.ukp.go.id>.

<sup>107</sup> See RosPil website at <http://rospil.info>.

The Philippines has its own anti-corruption crowdsourcing platform, Check My School (CMS),<sup>108</sup> which allows citizens to monitor public school projects and services in the Philippines. The result of its pilot year of implementation is promising. According to a study made by World Bank Institute, CMS complements the government's efforts in encouraging school administrators to involve the community in school affairs.<sup>109</sup> It also taps into local networks of socially-active individuals and mobilizes volunteers to conduct data validation activities.<sup>110</sup>

Even the Philippine Department of Finance and Bureau of Customs have started using crowdsourcing through *Customs ng Bayan*<sup>111</sup> a website designed to support their transparency and accountability operations. In essence, the online portal features regular releases of trade activities of 17 main collection districts of customs. It invites the general public to join the monitoring and has a mechanism where people can report irregularities in customs.

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## FEATURES, BEST PRACTICES AND PHILIPPINE READINESS

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There is no fixed blueprint to a successful anti-corruption crowdsourcing website. However, a closer look at various crowdsourcing websites reveals certain features which can be duplicated to increase the possibility for success: citizen mobilization, government support, high internet penetration and dedicated organization.

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## WILLINGNESS TO MOBILIZE AND QUALITY OF CITIZEN PARTICIPATION

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Mobilization is the essence of crowdsourcing. The term itself highlights the need for a crowd from which collective efforts are obtained. Yuen Yuen Ang wrote that one of the main reasons why China's

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<sup>108</sup> See Check My School website at [www.checkmyschool.org](http://www.checkmyschool.org).

<sup>109</sup> Jennifer Shkabatur, *Check My School: a Case Study on Citizens' Monitoring of the Education Sector in the Philippines* (2012), available at <http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/CaseStudy-CheckMySchool.pdf>.

<sup>110</sup> *Id.*

<sup>111</sup> See Customs ng Bayan website at <http://www.dof.gov.ph/customsngbayan>.

version of IPAB failed was due to the lack of motivation, and quality online participation in politics.<sup>112</sup> She noted that even before the government crackdown, the website had been suffering internally, with the number of contributors to the site dwindling.<sup>113</sup> In contrast, Indonesia's *Lapor* enjoys a healthy public participation and was reportedly receiving a thousand crowdsourced reports per day.<sup>114</sup>

The Philippines has enormous potential in this aspect considering that Filipinos often use mass action as a political remedy. In recent years, mass action has successfully partnered with technology to bring about ouster of then President Joseph Ejercito Estrada in People Power II, the second people-led revolution in the Philippines, which was mobilized primarily through text messages (SMS).<sup>115</sup> It only took 88 hours after the premature adjournment of the senate impeachment trial by allies of then President Estrada for a massive rally to be organized and facilitated in EDSA.<sup>116</sup> Fast forward to the social media era, the pork barrel scandal, as stated previously, heightened the vigilance of the people online which eventually led to the filing of complaints against those concerned. The *Million People March*, a campaign calling for the total abolition of the pork barrel, was considered as the first massive rally organized mostly through the use of social media.

## GOVERNMENT SUPPORT

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While Yuen Yuen Ang's article shifted the focus of the main cause of failure of IPAB China from government censorship to internal and socio-political problems, she did not exactly eliminate the censorship as a major cause. In fact, she mentioned that government censorship and the unwillingness to allow independent non-government involvement in monitoring corruption led to the decline in the

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<sup>112</sup> Yuen Yuen Ang, *Authoritarian Restraints on Online Activism Revisited: Why 'I-Paid-Bribe' Worked in India but Failed in China*, 02 November 2013, *Comparative Politics*, Vol 47 (1), pp. 21-40, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2244661&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244661&download=yes).

<sup>113</sup> *Id.*

<sup>114</sup> Enricko Lukman, *Indonesia's anti-corruption website is now getting 1,000 crowdsourced reports every day*, TECHINASIA.COM, 21 October 2013, available at <https://www.techinasia.com/lapor-indonesia-200000-users>.

<sup>115</sup> Julius Court, *People Power II in the Philippines: The First E-Revolution?*, Overseas Development Institute Publications, available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4114.pdf>. See also Aries Arugay, *Societal Accountability and Democratization in the Philippines*, available at [http://paperroom.ipsa.org/papers/paper\\_5211.pdf](http://paperroom.ipsa.org/papers/paper_5211.pdf).

<sup>116</sup> *Id.*

people's enthusiasm for the campaign.<sup>117</sup> Rightly so, it seems that most successful crowdsourcing sites enjoy government support either directly or indirectly. For example, government officials have been reportedly supporting and endorsing IPAB in India. *Lapor*, on the other hand, is run by the government itself.

In the Philippines, CMS enjoys the support of the Department of Education, while *Customs ng Bayan* is created by the Department of Finance and Bureau of Customs to police importation, as well as their own ranks. Philippine Finance Secretary Cesar Purisima said that “[e]ven before the passage of the Freedom of Information Law, we find value in crowdsourcing the anti-corruption effort through a radical change in our data transparency policies for public accountability.”<sup>118</sup> While it is still too early to tell, this shows the Philippine government's (or at least the present Aquino administration) willingness to support anti-corruption crowdsourcing.

#### INTERNET PENETRATION

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Since crowdsourcing is mostly done online, the number of people attracted by crowdsourcing sites usually determines its eventual success. Social media is at the forefront of online activism and is an obvious choice as a crowdsourcing platform. John Bertot et al. recognized social media as a potential measure for anti-corruption efforts:

In terms of anti-corruption, social media has four major potential strengths: collaboration, participation, empowerment, and time. Social media is collaborative and participatory by its very nature as it is defined by social interaction. It provides the ability for users to connect with each and form communities to socialize, share information, or to achieve a common goal or interest. Social media can be empowering to its users as it gives them a platform to speak. It allows anyone with access to the Internet the ability to inexpensively publish or broadcast information, effectively democratizing media. In terms of time, social media technologies allow users to immediately publish information in near real time.<sup>119</sup>

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<sup>117</sup> Yuen Yuen Ang, *supra* note 112.

<sup>118</sup> Official Gazette, *DOF, Customs launch the Customs ng Bayan website, as part of a radical data transparency campaign*, 16 January 2014, available at <http://www.gov.ph/2014/01/16/dof-boc-bare-radical-data-transparency-campaign>.

<sup>119</sup> John C. Bertot, Paul T. Jaeger, Justin M. Grimes, *Using ICTs to create a culture of transparency: E-government and social media as openness and anti-corruption tools for societies*, *Government Information Quarterly* 27, 264-271, 27 April 2010, available at

The World Bank estimates that 37% of the Philippine population or roughly 37 million Filipinos use the internet.<sup>120</sup> This number shows tremendous growth—the highest in Southeast Asia.<sup>121</sup> While the number is not an indication that Filipinos will use their time for anti-corruption initiatives, Dr. Emmanuel Yujuico in his article recognizes the potential of the internet for political mobilization of Filipinos.<sup>122</sup> Notably, social media and online networking sites are frequently used by Filipinos. Wave7, a survey covering 65 countries conducted by UM, shows Filipinos leading the world in social media engagement.<sup>123</sup>

#### DEDICATED FOCAL POINT

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For such a project to succeed, there must be a dedicated and organized non-profit organization as focal point. IPAB India was established by the Janaagraha Centre, an NGO composed of highly educated and committed professionals. The organization also acts as an agent that filters and validates information and one that keeps the project's goal intact, i.e. attacking corruption systematically. Yuen Yuen Ang made a comprehensive anecdote on the value of having a professional and legitimate organization such as Janaagraha Center in the center of crowdsourcing efforts. Rospil may have been started alone by Aleksy Navalny, but it now has a team of legal experts supported by site followers who are engineers and professionals that help his team in analyzing data. *Lapor* is being managed by the President's Delivery Unit of Development Monitoring and Oversight (UKP4) in partnership with Open Government Indonesia.

In the Philippines, CMS is primarily controlled and supported by the Affiliated Network for Social Accountability in East Asia and the Pacific (ANSA-EAP). However, too much dependence with ANSA-EAP

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<http://m.dorkatron.com/docs/CIS720/PPP%20Secondary%20Exam/eGovernance%20-%20Bertot%20Jaeger%20Grimes.pdf>.

<sup>120</sup> An estimate based on the size of the Philippine population in 2013 according to the National Statistics Office, *see* [www.census.gov.ph](http://www.census.gov.ph).

<sup>121</sup> Amarpal Singh, *2013 Southeast Asia Digital Future in Focus*, available at <http://www.comscore.com/Insights/Presentations-and-Whitepapers/2013/2013-Southeast-Asia-Digital-Future-in-Focus>.

<sup>122</sup> Emmanuel Yujuico, *Digital Democracy and Voter Mobilisation in the Philippines*, 10, available at [http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SR005/Phil\\_Yujuico.pdf](http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SR005/Phil_Yujuico.pdf).

<sup>123</sup> Joel Locsin, *Pinoys lead the world in social media engagement—study*, GMA News Online, 30 June 2014, available at <http://www.gmanetwork.com/news/story/367983/scitech/technology/pinoys-lead-the-world-in-social-media-engagement-study>.

can also be a cause of concern in terms of sustainability.<sup>124</sup> This is presently addressed by assigning volunteers (called *infomediaries*) to do the online updating. There seems to be no obstacles to having the Janaagraha Center and Check My School frameworks improved and replicated by a proposed anti-corruption crowdsourcing site.

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#### ADVANTAGES OF CROWDSOURCING ANTI-CORRUPTION EFFORTS

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Apart from utilizing the strength of the people's collective anger against corruption, one key advantage of the use of a crowd-sourcing platform in reinforcing the country's anti-corruption efforts is that it allows a committed non-government organization to limit the liabilities of potential informants. This addresses the concerns that may be raised in instances of retaliatory defamation suits, especially considering the weakness of the current whistleblower protection framework. The platform can provide a mechanism for confidentiality between the informant and the host non-government organization that maintains the anonymity of the informant, while at the same time publishing the information in order to heighten the collective vigilance of the public. This way, the whistleblower/informant is given some degree of protection even as we await the passage of stronger whistleblower protection laws. Further, because of the anonymity of the informant, liability for defamation suits is absorbed by the organization.

On the other hand, if the organization is sought to be made liable under a defamation suit, it can utilize its organizational competence whereupon by effectively screening the information it gathers, it should find sufficient basis to establish the veracity of the claims it published. Under these circumstances, it can then use truth as a defense to successfully be acquitted from the defamation suits.

At the same time, the platform's committed team of professionals and investigators can then begin to gather more information, such that though the published information is not itself admissible in court, the organization has developed sufficient leads, finding vital documents and contacts that can then be turned over to the DOJ or the office of the Ombudsman, so that they may begin to gather evidence which can be admitted in court regarding such allegations of corruption. The hopeful passage of the FOI Law will greatly supplement these efforts. In the same way, if information validly obtained abroad has been transmitted to the platform, such information can be made admissible if validly authenticated by the foreign source before the Philippine courts.

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<sup>124</sup> Jennifer Shkabatur, *supra* note 109.

Issues on the breach of sovereignty through inter-country exchanges of information can also be addressed by the platform. First it is important to note that so long as it is the Philippine government that requests access to information found on the supply-side country, through MLATs and Letters Rogatory, then there is no breach of sovereignty as it is in fact the will of the state to request for assistance, and such assistance is limited to the transmittal of pertinent information. What appears problematic is the unsolicited transmittal of information from a foreign country. However, these may be addressed through the use of a civil society to civil society exchanges. When an alien possesses relevant information regarding corrupt transactions happening in the Philippines, he is free to transmit this information to the civil-society led non-government organization that hosts the crowdsourcing platform. If its committed team of professionals find merit in such claim, then the information is published, then the investigations for more leads and other information are also begun. When this information is transmitted to the DOJ and the Office of the Ombudsman, then it is effectively an act of members of Philippine civil society, thus there is no breach in sovereignty. To further enhance this point, it will be important to note that the prosecution of the corruption cases is under the full control and discretion of the Philippine government through its prosecutors, and the office of the Ombudsman.

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### III. CONCLUSION

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Corruption is a problem faced by the whole world. It is a problem that is not easy to prevent and suppress as it is usually performed hidden from the public view. A full public disclosure and rigorous exercise of the right to information may throw such bad practices in the spot light, a clear deterrence since corrupt transactions, for the most part, are kept private. But such cannot be done in spurts. Since corruption is recognized as a systemic problem, the people themselves must collectively contribute to erase the stigma of systemic corruption, and provide a clear public prohibition through their voices to an act that has long been acknowledged by corrupt actors as commonplace. As a tool to implement this right to information and to aid in the eventual prosecution of corruption, a populist cross-country exchange of information may be implemented; crowdsourcing sites may then be used to act as a repository of information related to corruption, as well as a venue for people to contribute their knowledge, experience and time. This is not to denigrate the image of public prosecutors, especially the present Ombudsman who is well-known for her honesty and fairness, and her outstanding record lately of prosecuting high-level government officials such as senators and a national police chief. This is in fact

a proposed complement to the present prosecutorial process which realizes the idea of democracy and allows the country to fulfill its international commitment under UNCAC. Concededly, anti-corruption measures should not be based merely on best practices other countries enjoy in their respective jurisdictions. Civil society collaboration in cross-country exchange of information and anti-corruption crowdsourcing are not merely practices that can be implemented or replicated because they work in other countries; they are practices that reflect the Filipino people's history and experience, and may very well merged perfectly into the nation's anti-corruption system.

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The Path Forward:  
*of*  
Freedom of Information Laws  
*and*  
Combatting Corruption in Singapore

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APRIL 2015

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## INTRODUCTION

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“Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism and other threats to human security to flourish.” – Speech by the Secretary General of the UNODC to the General Assembly of the United Nations, 31 October 2003<sup>1</sup>

Singapore has seen remarkable growth in the past 50 years. Gross domestic product (GDP) has grown at an annual rate of 6.9%<sup>2</sup>, and GDP per capita has increased from SGD\$1,580 to SGD\$71,318 (Adjusted at 2014 Market Prices)<sup>3</sup>. With Singapore has a heavy reliance on foreign investment, there is a corresponding emphasis on eradicating corruption in Singapore. As V K Rajah JA noted in *Public Prosecutor v Ang Seng Thor*<sup>4</sup>, “the preservation of a corruption-free environment has always been a cornerstone of governance in Singapore...”

This strong stance has borne results. Transparency International’s Corruption Perception Index in 2014 ranked Singapore as the 7th least corrupt country in the world<sup>5</sup>, and the Political & Economic Risk Consultancy ranked Singapore as the least corrupt of 16 major Asia-Pacific economies in its 2014 Report on Corruption in Asia, a position Singapore has occupied since 1995<sup>6</sup>. Furthermore, 2014 saw corruption complaints and cases fall to a 30 year-low<sup>7</sup>.

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<sup>1</sup> <http://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html> - Retrieved 30 Dec 2014

<sup>2</sup> <http://www.bloomberg.com/news/articles/2015-03-22/lee-kuan-yew-singapore-s-founding-prime-minister-dies-at-91> - Retrieved 26 Mar 2015

<sup>3</sup> Data obtained from [www.singstat.gov.sg](http://www.singstat.gov.sg)

<sup>4</sup> [2011] 4 SLR 217; [2011] SGHC 134. This case concerned a CEO and joint managing director of a public company’s conviction on two charges of corruption. The Public Prosecutor appealed against the lower court’s sentence (which imposed no more than a \$200,000 fine and automatic disqualification from directorship in any company for five years). The SGHC allowed the appeal and substituted a total sentence of 12 weeks’ imprisonment and a \$50,000 fine.

<sup>5</sup> Singapore ranked 7th in the world on Transparency International’s Corruption Perception Index in 2014: <http://www.channelnewsasia.com/news/world/singapore-drops-two/1507562.html> - Retrieved 27th Dec 2014

Also noted by District Judge Shawn Ho in *Public Prosecutor v Lo Hock Peng* [2015] SGDC 23 at [14]

<sup>6</sup> As noted by District Judge Shawn Ho in *Public Prosecutor v Lo Hock Peng* [2015] SGDC 23 at [14]

<sup>7</sup> <http://www.straitstimes.com/news/singapore/courts-crime/story/cases-registered-investigation-graft-busters-fall-30-year-low-2015> - Retrieved 04 April 2015

While Singapore's success in combating corruption is undeniable, room for improvement always remains. This paper will consider whether there is a need for freedom of information statutes or laws in Singapore vis-à-vis promoting local anti-corruption efforts and foreign anti-corruption efforts. Part II considers the kind of information the state would have access to under the existing system, and the nature of transnational assistance available to foreign bodies. Part III will canvas some arguments for allowing private individuals to obtain information from the government in Singapore's context. Finally, Part IV will suggest three possible means by which anti-corruption activists may attempt to obtain information from the relevant authorities, and evaluate their effectiveness in Singapore's Context.

## THE SINGAPOREAN ANTI-CORRUPTION REGIME

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Singapore's anti-corruption regime is operated primarily by state actors. Investigations are handled by the Corrupt Practices Investigation Bureau (CPIB). This specialized body is constituted under the Prevention of Corruption Act<sup>8</sup> (the "PCA") to specifically address corruption in Singapore, and reports directly to the Prime Minister's Office<sup>9</sup>. Information obtained by the bureau forms the basis of the prosecution by the Attorney-General in his capacity as the Public Prosecutor<sup>10</sup>.

For individuals wishing to extract information from the state, or more specifically, the CPIB, two matters arise. Firstly, the nature and scope of the information held by the bodies. And secondly, the availability of the information through existing channels.

### THE NATURE AND SCOPE OF THE INFORMATION EXTRACTED

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The CPIB has a wide range of investigative powers. Part IV of the PCA<sup>11</sup>, provides for two scenarios arising, depending on whether the investigation is conducted under the order of the Public Prosecutor.

Section 17 of the PCA<sup>12</sup> provides for ordinary powers as set out under the Criminal Procedure Code<sup>13</sup> ("CPC") for investigations conducted without the order of the public prosecutor<sup>14</sup>. Under this, an officer

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<sup>8</sup> See *Prevention of Corruption Act* (Cap 241, 1993 Rev Ed Sing), Part II

<sup>9</sup> Ibid, See also <http://www.pmo.gov.sg/about-prime-ministers-office> (Retrieved 15 Jan 2015) for the organizations directly under the Prime Minister's Office.

<sup>10</sup> *Constitution of the Republic of Singapore*, (1999 Rev Ed), Art 35(8)

<sup>11</sup> (Cap 241, 1993 Rev Ed Sing)

from the CPIB may order the production of documents or other information<sup>15</sup>, and call and examine witnesses<sup>16</sup>. Furthermore, as corruption carries a maximum sentence of a fine of \$100,000 or imprisonment for up to 5 years or both<sup>17</sup>, it is an arrestable offence for the purposes of the CPC<sup>18</sup>, which allows for an arrest without warrant.

In cases whereby the Public Prosecutor has given an order to conduct investigations, much greater powers of investigation are afforded to the CPIB. Apart from the powers regularly afforded under the CPC<sup>19</sup>, Section 18 provides that order made by the Public Prosecutor “shall be sufficient authority for the

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<sup>12</sup> *Ibid*, at 17

<sup>13</sup> (Cap 68, 2011 Rev Ed Sing)

<sup>14</sup> *Prevention of Corruption Act* (Cap 241, 1993 Rev Ed Sing), s 17

<sup>15</sup> *Criminal Procedure Code*, (2011 Rev Ed Sing), s 20. Under s 17 of the PCA, an officer of the CPIB is deemed to be an officer not below the rank of inspector of the police (above the sergeant rank required in s 20 of the CPC)

However, as noted in several cases, the demand for documents have to be specific – the courts are wary of demands that amount to a ‘fishing expedition’. See *SM Summit Holdings Ltd v Public Prosecutor* [1997] 3 SLR(R) 138; [1997] SGHC 255 at [117], and *Public Prosecutor v IC Automation (S) Pte Ltd* [1996] 2 SLR(R) 799; [1996] SGHC 170 at [62]-[63]. Furthermore, such documents have some relation to or connection to the subject matter of the investigation, be it in assisting or shedding light on the investigation or some link in evidence. The touchstone of this is whether at the time of the request, the document or thing requested appeared to be relevant to the investigation: See *Public Prosecutor v Toeh Choon Teck* [1963] MLJ 34

<sup>16</sup> *Criminal Procedure Code* (Cap 68, 2011 Rev Ed Sing), s 21 and s 22

A person need not be formally charged for the provisions to apply – they are in force from the moment an arrest is made: *Mohamed Bachu Miah v Public Prosecutor* [1992] 2 SLR(R) 783; [1992] SGCA 56 at [57] (in considering a materially similar provision in the previous edition of the CPC). Similarly, a statement may be taken after the person has been formally charged - *Mohamed Bachu Miah v Public Prosecutor* [1992] 2 SLR(R) 783; [1992] SGCA 56 at [65]. The police is not obliged to inform the accused that he may decline to answer incriminating questions: *Lim Thian Lai v Public Prosecutor* [2006] 1 SLR(R) 319; [2005] SGCA 50 at [17]-[18]. A failure to do so is not a breach of the accused’s constitutional rights: *Public Prosecutor v Mazlan bin Maidun* [1992] 3 SLR(R) 968; [1992] SGCA 90 at [37].

<sup>17</sup> *Prevention of Corruption Act* (Cap 241, 1993 Rev Ed Sing), s 5

<sup>18</sup> *Criminal Procedure Code* (Cap 68, 2011 Rev Ed Sing), Schedule 1

<sup>19</sup> See *Prevention of Corruption Act* (Cap 241, 1993 Rev Ed Sing), s 19:

“The Public Prosecutor may by order authorise the Director or a special investigator to exercise, in the case of any offence under any written law, all or any of the powers in relation to police investigations given by the Criminal Procedure Code.”

This essentially affords the CPIB the ordinary powers as exercised under s17 (investigations without the Public Prosecutor’s order)

disclosure or production by any person of all or any information or accounts or documents or articles as may be required by the officer so authorised”<sup>2021</sup>.

The CPIB is empowered to search premises, and seize documents. While search and seizure ordinarily requires a warrant to be issued by a Magistrate or District Judge<sup>22</sup>, the CPIB need not submit itself to the approval of the courts to conduct searches and seizures. Under section 22(1) of the PCA, the Director or any Magistrate may –if he has a reasonable cause to believe that such place has evidence pertaining to the investigation after such inquiry he thinks necessary – direct, by warrant, officers from the CPIB to enter premises by force if necessary, and seize and detain any such document, article or property<sup>23</sup>. In cases where a delay may allow the evidence to be tampered with or disposed, officers of the CPIB are empowered to conduct a search and seizure without warrant<sup>24</sup>.

The wide powers of investigation permit the CPIB to build up extensive evidence of wrongdoing as the case requires. This naturally provides a prominent target for activists to seek disclosure, be it to compel prosecutions locally or overseas.

## AVAILABILITY OF THE INFORMATION EXTRACTED

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### FOR LOCAL BODIES

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There is currently no freedom of information law in Singapore to enable private individuals to obtain information from governmental bodies. Although, public records are systematically transferred to the National Archives and declassified for members of the public to access under the National Heritage

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<sup>20</sup> *Prevention of Corruption Act* (Cap 241, 1993 Rev Ed Sing), s 18(1)

<sup>21</sup> As an aside, even greater powers are afforded to the CPIB when the offence concerns persons in the service of the government or any public body: See Section 20 and 21 of the PCA for the power to order the production of bank documents by banks, furnishing of sworn statements, accounting of property and inquiries into taxation from the person investigated and family members or possible trustees or agents. Also, the person in charge of the body in question is bound to furnish any document under their possession or control to the Public Prosecutor at his request. Section 21(2) provides for criminal sanctions against persons failing to comply with such orders. In summary, corruption in the government and public bodies is taken very seriously, with extremely broad powers of investigation, and harsh sanctions for those who impede the investigation.

<sup>22</sup> *Criminal Procedure Code* (Cap 68 2011 Rev Ed Sing), s 26(1)

<sup>23</sup> *Prevention of Corruption Act* (Cap 241 1993 Rev Ed Sing), s 22(1)

<sup>24</sup> *Prevention of Corruption Act* (Cap 241, 1993 Rev Ed Sing), s 22(2)

Board Act<sup>25</sup>, this arguably, is insufficient. As noted by Mr Sim Boon Ann (Member of the incumbent PAP government, Member for Tampines GRC) in the 2002 budget debate on the Ministry of Information, Communication and the Arts, the National Heritage Board Act does not set out a timeframe for declassification, nor does it confer a statutory right on the individual requesting the information<sup>26</sup>.

While there has been healthy debate over this in parliament<sup>27</sup>, the government of the day has consistently opposed enacting such legislation on national security grounds<sup>28</sup>, or on more mundane

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<sup>25</sup> *National Heritage Board Act* (Cap 196A, 2009 Rev Ed Sing). See also the 2001 budget debate for the Ministry for Information and the Arts (*Parliamentary Debates Singapore: Official Report*, vol 73 at col 575 (09 March 2001)), where the Senior Parliamentary Secretary to the Minister for Information and the Arts (Encik Yatiman Yusof) noted that public records were released into the public sphere periodically under the National Heritage Board Act (Cap 196A, 2009 Rev Ed Sing) after a 25-year period (with more sensitive documents having a longer embargo period).

<sup>26</sup> (*Parliamentary Debates Singapore: Official Report*, vol 74 at col 2063 (22 May 2002))

<sup>27</sup> Politicians from both sides of the political spectrum have proposed freedom of information laws:

See: Mr Sim Boon Ann (Member of the incumbent PAP government, Member of Parliament for Tampines) in the 2001 budget debate for the Ministry for Information and the Arts (*Parliamentary Debates Singapore: Official Report*, vol 73 at col 574 (09 March 2001)) and again in 2002 (*Parliamentary Debates Singapore: Official Report*, vol 74 at col 2062 (22 May 2002))

See also: Member for Aljunied GRC (Opposition) Mr Pritam Singh in the 2011 Debate on President's Address (*Parliamentary Debates Singapore: Official Report*, vol 88 at pg 366 (20 October 2011)) Where he advocated for a Freedom of Information Law.

<sup>28</sup> In particular, note the debate between the then Nominated Member of Parliament (NMP) Ms Braema Mathiapparanam and Mr Lim Hng Kiang (Minister, Prime Minister's Office) (See *Parliamentary Debates Singapore: Official Report*, vol 76 at col 2425 to 2432 (14 August 2003)) – where the NMP attempted to obtain clarity of the nature of information held by the government, and how to grant greater access to this information. In response, the Minister, Prime Minister's Office said the following at col 2429:

“As a general rule, we do not believe in hiding bad news, we do not believe in hiding data, we do not believe in projecting a misleading impression by suppressing awkward facts. **Our approach is to bring out the facts openly and discuss them.** But we do recognise that there could be some sensitivities involved and, therefore, sometimes, **before we present the facts, we really have to prepare the ground, because we do not want the facts to come out too cold and the ground is not readily prepared.**”  
[Emphasis added]

He then went on to note that the information the NMP sought was available through the proper channels, and in her particular case (regarding a breakdown of the statistics of those less-well off), the information she sought was not available due to the unique nature of the request (the government did not specifically collect information on the number of households headed by women living in 1 or 2 room flats that earned below a certain amount (and whether the households were single, divorced or widowed), but rather collected broader statistics). While he did note that it is possible to look into a broader Freedom of Information Act, he justified the withholding of certain information

reasons, such as there being no current need for such laws – thereby conserving limited governmental resources<sup>29</sup>.

Furthermore, even in cases brought to trial, the court has been unwilling to order a full disclosure of information collected in investigations<sup>30</sup>. At best, the information released to the defence is limited to that which the public prosecutor has deemed to be relevant to the case<sup>31</sup>. This has been justified on public policy grounds, where it is necessary to observe confidentiality of the information obtained, and the process of investigation, lest disclosure affect the effectiveness of investigations<sup>32 33</sup>. Nevertheless, as judgments are available to the public<sup>34</sup>, information adduced in court may possibly form the basis of another prosecution<sup>35</sup>.

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(primarily defence, intelligence and financial reserves) on national security grounds. This has been the consistent stance of the government over the years; treating national security as a trump to prevent the release of information.

See also the reply by the Senior Parliamentary Secretary to the Minister for Information and the Arts (Encik Yatiman Yusof) to Mr Sim Boon Ann in the 2001 budget debate for the Ministry for Information and the Arts (*Parliamentary Debates Singapore: Official Report*, vol 73 at col 575 (09 March 2001)), where he noted that such disclosure, even in other countries, is subject to national security considerations. While public records were released into the public sphere periodically under the National Heritage Board Act (Cap 196A, 2009 Rev Ed Sing) after a 25-year period, more sensitive documents would have a longer embargo period.

<sup>29</sup> See Mr David T. E. Lim's (Acting Minister for Information, Communications and the Arts) reply to Mr Sim Boon Ann's push for a freedom of information statute in the 2002 MICA budget debate (*Parliamentary Debates Singapore: Official Report*, vol 74 at col 2070-2071 (22 May 2002))

<sup>30</sup> See *Criminal Procedure Code*, (2011 Rev Ed Sing), s 19(3) concerning pre-trial disclosure to the accused. Only relevant facts will be disclosed to the accused – the accused has no access to all the information collected in the course of the investigation.

<sup>31</sup> See generally *Criminal Procedure Code*, (2011 Rev Ed Sing), Part IX, and Part X for the requirements for disclosure in the pre-trial conference.

<sup>32</sup> See *Abdul Rashid s/o Syed Ibrahim v Public Prosecutor* [2001] SGDC 263 at [27].

<sup>33</sup> However, this does not amount to a breach of natural justice (in particular the right for a fair hearing) as this is a preliminary inquiry, with no judicial determination being made at this stage. See *Law Society of Singapore v Chan Chow Wang* [1974]-[1976] SLR(R) 237; [1974] SGHC 16 at [38].

<sup>34</sup> Judgments are freely available to the public for 3 months at <http://www.singaporelawwatch.sg/>. After which key judgments are archived and remain accessible to the public at <http://www.singaporelaw.sg/sglaw/>.

<sup>35</sup> In a dispute over the rights to the trademark for the lifestyle dining chain "Ku De Ta" in Hong Kong and Singapore, conflicting evidence was given by one of the defendants. The trial judge in Hong Kong took the unprecedented step of referring the matter to the Attorney-General of Singapore (See <http://business.asiaone.com/news/ku-de-ta-case-hk-judges-referral-spore-g-legal-first-here> - Retrieved 25 February 2015). At the time of writing, it is not known whether the Attorney-General of Singapore will pursue the matter.

As it is, private individuals have no room to obtain information from the state. At best, they are limited to findings of fact made by the judges at trial, which may not provide the full picture, or to information released under the National Heritage Board Act<sup>36</sup>, which would often be far too late for any meaningful action to be taken against individuals.

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#### FOR FOREIGN BODIES

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Transnational assistance is premised on a request made by a foreign state, with no room for private individuals or actors. Short of extradition<sup>37</sup>, requests for assistance are governed by the Mutual Assistance in Criminal Matters Act<sup>38</sup> (“MACMA”). The purpose of the act is to allow enhanced international co-operation of criminal matters, and signifies’ Singapore’ commitment to combat crime on a global scale<sup>3940</sup>.

Under MACMA, requests for assistance (for example, in obtaining information from local entities) shall be made to the Attorney-General of Singapore by the central authority of the government of the state requesting assistance.<sup>41</sup> Such requests must contain specific details as to the purpose of the request,<sup>42</sup> the nature of the assistance being sought<sup>43</sup>, identification of the person or authority that initiated the

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See also *Foo Jong Long Dennis v Ang Yee Lim and another* [2015] SGHC 23. Documents disclosed through discovery process typically fall under the *Riddick* principle, which is an implied undertaking that the document disclosed will not be used for any collateral or ulterior purpose. However, the Court held in *Foo Jong Long Dennis* (at [66]) that the *Riddick* principle ceases to apply once it is used in open trial – that it, the document could be thereon be used in another suit unless the party disclosing the document made an application for the implied undertaking to continue. At the time of writing, it is not known if the matter is being appealed.

<sup>36</sup> (Cap 196A, 2009 Rev Ed Sing)

<sup>37</sup> See *Mutual Assistance in Criminal Matters Act* (Cap 190A, 2001 Rev Ed Sing), s 4

<sup>38</sup> (Cap 190A, 2001 Rev Ed Sing)

<sup>39</sup> See the Second Reading of the [Mutual Assistance In Criminal Matters \(Amendment\) Bill](#), (Not yet published) Vol 92 (08 July 2014) (The Senior Minister of State for Law (Ms Indranee Rajah))

<sup>40</sup> See also MACMA s 3 for a list of matters which Singapore may render assistance in under the act.

<sup>41</sup> *Ibid* at s 19(1). See the Second Reading of the Mutual Assistance In Criminal Matters (Amendment) Bill, (Not yet published) Vol 92 (08 July 2014) (The Senior Minister of State for Law (Ms Indranee Rajah)) in response to the question posed by Assoc Prof Assoc Prof Fatimah Lateef regarding the list of legal representatives who can participate in the Mutual Legal Assistance framework.

<sup>42</sup> MACMA s 19(2)(a)

<sup>43</sup> *Ibid*

request<sup>44</sup>, and be supported by the necessary supporting documents as set out in s19(2)(c) of the MACMA<sup>45</sup>. Should the request meet the requirements under s 19 of the MACMA, and not be disqualified on the grounds listed under s 20<sup>46</sup>, the matter will be referred to the competent minister and be subject to his approval.<sup>47</sup>

The minister may reject the request if it could prejudice a criminal matter in Singapore, is contrary to the public interest of Singapore, or if it would be against the interests of the sovereignty, security and public order of Singapore to do so.<sup>48</sup> As a matter of state policy, assistance will be normally granted to countries with existing treaties covering assistance in criminal matters if the requirements of MACMA are satisfied<sup>49</sup>. For requests from countries with no existing treaty, assistance will be granted if the country requesting has given an undertaking to provide similar assistance to Singapore<sup>50</sup>.

Singapore is able to provide support in several matters, from service of documents, to enforcement of foreign confiscation orders<sup>51</sup>. In the case of extracting information from private entities under a production order, an application will be made to the High Court, where the Court may reject an order should it be found wanting<sup>52</sup>. This provides a third layer of checks to the system. In considering whether a production order should be made, the court will “balance the competing public interests of financial confidentiality and privacy on the one hand, and on the other hand of ensuring that Singapore is not a

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<sup>44</sup> MACMA s 19(2)(b)

<sup>45</sup> MACMA s 19(2)(c)

<sup>46</sup> MACMA s 20.

<sup>47</sup> See MACMA s 41, and *Re Section 22 of the Mutual Assistance in Criminal Matters Act*[2009] 1 SLR(R) 283; [2008] SGCA 41 at [13].

<sup>48</sup> See the Second Reading of the Mutual Assistance In Criminal Matters (Amendment) Bill, (Not yet published) Vol 92 (08 July 2014) (The Senior Minister of State for Law (Ms Indranee Rajah).

<sup>49</sup> See *Re Section 22 of the Mutual Assistance in Criminal Matters Act*[2009] 1 SLR(R) 283; [2008] SGCA 41 at [6] and [11]. See MACMA 19 and 20 for a list of the conditions to be satisfied.

<sup>50</sup> See MACMA s 16(2) and s 18 and *Re Section 22 of the Mutual Assistance in Criminal Matters Act*[2009] 1 SLR(R) 283; [2008] SGCA 41 at [6].

<sup>51</sup> For a list of matters, see MACMA, Part III, Division 2 to Division 8.

<sup>52</sup> MACMA s 22.

haven for money laundering and a heaven for those wishing to enjoy or protect ill-gotten gains by parking them here.”<sup>53</sup>.

However, MACMA in its current iteration is unable to support the ambitions of private individuals at home or abroad in obtaining disclosure from the state. While MACMA does not preclude international co-operation with non-state bodies<sup>54</sup>, the wide scope of powers granted by MACMA is contingent on the application by a foreign state body. Furthermore, judgments released under applications to the Courts have had critical details redacted<sup>55</sup>. Private individuals are thus unable to benefit from MACMA, be it through a direct application of MACMA to their case, or an indirect application through facts released in application to the High Court.

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<sup>53</sup> See *Re Section 22 of the Mutual Assistance in Criminal Matters Act* [2009] 1 SLR(R) 283; [2008] SGCA 41 at [13] and [15].

<sup>54</sup> See MACMA s4.

<sup>55</sup> See generally *Re Section 22 of the Mutual Assistance in Criminal Matters Act* [2009] 1 SLR(R) 283; [2008] SGCA 41, and *Re Section 22 of the Mutual Assistance in Criminal Matters Act* [2008] SGHC 96 (Court of Appeal and High Court decisions respectively).

## FREEDOM OF INFORMATION IN THE SINGAPOREAN CONTEXT

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Singapore runs on the Westminster system<sup>56</sup> tailored to meet local conditions<sup>57</sup>. While the adoption of Constitutionalism<sup>58</sup> has given rise to *Marbury v Madison* levels of judicial review<sup>59</sup>, the political check through democracy still remains the primary means of holding the government accountable<sup>60</sup>.

Alexander Meiklejohn has argued that there is thus a duty for a member of the public to be politically informed so as to be effective participants in the workings of democracy in the Westminster model. While this consequentialist<sup>61</sup> argument was made in the context of justifying freedom of speech in a democratic society<sup>62</sup>, the same principle may be extended to freedom of information. In the context of combating corruption, a freedom of information law may permit interested citizens to compel the disclosure of information from the government, so as to assess the performance of the government in exercising their right to vote<sup>63</sup>.

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<sup>56</sup> *Jeyaretnam Joshua Benjamin v Attorney-General* [1987] SLR(R) 472; [1987] SGHC 36 at [9] per F A Chua J

<sup>57</sup> *Cheong Seok Leng v Public Prosecutor* [1988] 1 SLR(R) 530; [1988] SGHC 48 Per Chan Sek Keong JC as he then was at [44] and *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239; [2007] SGHC 207 at [143] per Chan Sek Keong CJ

<sup>58</sup> The idea that power should be restrained. See generally Carl J Friedrich, "Limited Government: A Comparison" (New Jersey: Prentice-Hall, 1974) and Donald S Lutz, "Thinking about Constitutionalism at the Start of the Twenty-First Century" (2000) 30(4) *Publius* 115

<sup>59</sup> *Marbury v Madison* 5 US (1 Cranch) 137 (1803). The courts in the American tradition may scrutinize executive and legislative acts. This is in contrast with the British tradition of Parliamentary supremacy, where courts confined themselves to reviewing executive acts. In Singapore's context, Art 4 of the *Constitution of the Republic of Singapore* (1999 Rev Ed) enshrines the Constitution as the supreme law. This has been acknowledged in *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR (R) 78; [1998] SGHC 10 at [14] citing Yong Pung How CJ in *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR(R) 209; [1994] SGHC 207 at [50].

<sup>60</sup> Li-Ann Thio, *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012) at 05.010

<sup>61</sup> See Kent Greenawalt, 'Free Speech Justifications' (1989) 89 *Columbia L Rev* 119 at 125, 128 – 131. Such arguments would evaluate whether a practice has value if it contributes to some desirable state of affairs – and is dependent on the factual connection between a practice and the supposed results of the practice

<sup>62</sup> See Eric Barendt, "Freedom of Speech" (Oxford: Clarendon Press, 1985) at pages 8-23. The author notes 3 different grounds for freedom of speech- Mill's Argument from Truth, Free speech as an aspect for self-fulfilment, and Meiklejohn's citizen participation in a Democracy

<sup>63</sup> See also Glenn Patamore, "Making Sense of Representative Democracy and the Implied Freedom of Political Communication in the High Court of Australia" (1998) 7(1) *Griffith L Rev* 97 at 99-110. In this work, Glenn Patamore identifies 3 theories behind democracy – Protective, Participatory, and Elite. While each society would have aspects of each theory, the argument for freedom of information in the context of combating corruption would

As noted earlier in Part II.B.1., this matter has been raised numerous times in Parliament. Mr Joshua Benjamin Jeyaretnam, an opposition member of Parliament, has emphasized the need to increase transparency in governmental affairs to promote good governance<sup>64</sup>. More recently, the Worker's Party, Singapore's most successful opposition party, included the right to freedom of information as part of their election manifesto in the 2006 and 2011 General Elections<sup>65</sup> - One of their members, Mr Pritam Singh has justified the right for private individuals to obtain information from the government on the basis of combating misinformation in the public, and allowing individuals to make better decisions in their capacity as citizens of a democratic society. Across the political divide, several members of the incumbent government have advocated freedom of information legislation. Most prominently, in 2001 and 2002, then member for Tampines GRC, Mr Sim Boon Ann pressed for such legislation in budget debates over the Ministry for Information, Communication and the Arts, citing the ability of such legislation to act as a check on governmental exercise of power, and facilitating the citizenry in making informed choices.<sup>66</sup>

However, the government has raised 2 primary grounds of objection to freedom of information legislation.

The first ground of objection rests on the necessity for secrecy in national interest. It has been noted that other nations with freedom of information laws have subjected disclosure and applications to caveats<sup>67</sup>. While the government has reiterated that it does not believe in hiding data, it defends the

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tend towards the protective and elite theories of democracy as the emphasis is on holding the government to account, for their decisions or otherwise.

<sup>64</sup>*Parliamentary Debates Singapore: Official Report*, vol 43 at col 221-224 (20 December 1983). The member of Parliament rose in opposition to a bill that threw 'a veil of secrecy over all affairs of a statutory body or a Government company'. Mr Joshua Benjamin Jeyaratnam against raised this point in a motion to for the "Removal of fear in People's Lives" (*Parliamentary Debates Singapore: Official Report*, vol 69 col 675 – 716 (31 July 1998)) in the closing

<sup>65</sup> *Parliamentary Debates Singapore: Official Report*, vol 43 at page 366 (20 December 1983). Member for Aljunied GRC, Mr Pritam Singh noted that the Worker's Party consistently advocated for a Freedom of Information Act to allow a citizen to compel government agencies to release information, albeit with due restrictions on sensitive materials pertaining to national security concerns.

<sup>66</sup> See *Parliamentary Debates Singapore: Official Report*, vol 73 at col 573-574 (03 Mar 2001) and *Parliamentary Debates Singapore: Official Report*, vol 74 at col 2062 (22 May 2002)

<sup>67</sup> *Parliamentary Debates Singapore: Official Report*, vol 73 at col 575 (09 March 2001)

need for secrecy on the basis that it would affect the national interest<sup>68</sup>. Most recently, in an oral response to a question on the impact of WikiLeaks revelations in 2011, the then Minister for Home Affairs, Mr K Shanmugam cautioned against weakening the secrecy rules in order to maintain the proper function of government, which necessarily requires some degree of secrecy<sup>69</sup>.

The second ground of objection rests on the limited resources available to service such requests. In reply to Mr Sim Boon Ann's queries in the 2002 budget debate for the Ministry of Information, Communication and the Arts, Mr David T. E. Lim (Acting Minister for Information, Communications and the Arts) argued that there was no current need then to impose an additional burden on the government and its bodies to fastidiously account to members of the public. In this, he cited cost concerns, and the diversion of civil servant's efforts from addressing public benefits to individual requests for information, hindering governmental processes. He argued that the system was sound and working well, although he did note that the Ministry would review its policies as society developed.<sup>70</sup>

At this juncture, the following two points bear notice. Firstly, freedom of information is not an absolute right, or intrinsic good. In the context of Singapore's democratic society is a means of ensuring good governance through an educated and politically active citizenry. Secondly, while the positive aspects of freedom of information are recognized, this desire for greater transparency must be balanced against the deleterious effects disclosure may have national security and the public good. This is especially so when one considers the broad powers of the CPIB to extract information<sup>71</sup> – as the fall-out may embarrass individuals (who may not have been convicted in a court of law), or even have transnational repercussions.

There are several competing factors in a right to freedom of information. The right to request must be sufficiently accessible to the member of the public, and yet not be unduly onerous on the government. The statute must be able to compel bodies to release information of sufficient utility or shed some light

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<sup>68</sup> *Parliamentary Debates Singapore: Official Report*, vol 76 at col 2429 (14 August 2003) (The Minister, Prime Minister's Office, Mr Lim Hng Kiang). At col 2432, the Minister raised two examples of national interest – security or economic interest, or the political and social stability enjoyed in Singapore, and Singapore's financial reserves.

<sup>69</sup> *Parliamentary Debates Singapore: Official Report*, vol 87 at col 1984 (10 January 2011)

<sup>70</sup> *Parliamentary Debates Singapore: Official Report*, vol 74 at col 2070-2071 (22 May 2002)

<sup>71</sup> See Part II.A. above.

on the process such that it allows citizens to hold the government to account, while adequately protecting sensitive information that could damage the public interest. It is submitted that the interests are not absolute, but it is a matter of degree to which they operate in the context of a particular request. Ultimately, a framework for balancing these competing considerations in an acceptable manner must be emplaced for responsible disclosure of information.

## LIBERALISING INFORMATION:

### FOUR ROUTES TO A FREEDOM OF INFORMATION LAW IN SINGAPORE

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Given the analysis above, it may be useful in Singapore's continued fight against corrupt for information to be released for the prosecution of corrupt actors in Singapore and Overseas by NGOs. Existing mechanisms favour a state-state process which, though effective, may have limited efficacy in deterring regional corruption owing to concerns of comity. Foreign NGOs may have existing pathways of obtaining information via their own governments, but these pathways may be more apparent than real if the very people susceptible to corruption are the ones who hold the information.

At the same time, an overly radical approach to freedom of information may disturb an otherwise organised and well-established anti-corruption regime. There is a further need to balance the right to privacy and the potential benefit of releasing such information. This applies with greater force to public bodies, who should be left free to discharge their functions without having to pay undue attention to frivolous claims for information to be released. For a small country like Singapore, national security has always been a pressing concern. Therefore, overarching Wikileaks-style attempts to oblige public bodies to disclose everything, even sensitive information, is unlikely to be well-received or even workable.

In this light, we consider three possible ways in which Singapore can promulgate a nuanced and useful freedom of information process.

### THROUGH CONSTITUTIONAL REINTERPRETATION: A CONSTITUTIONAL RIGHT TO INFORMATION?

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We propose to start with the most radical: enshrining a constitutional right to information. As it stands, Singapore's constitution already guarantees the right to free speech under Article 14<sup>72</sup>. Therefore, a possible avenue for securing a right to freedom of information would be to adopt an expansive

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<sup>72</sup> *Constitution of*

approach to this right, and interpret the right to information into the constitution. However, those familiar with Singapore's approach to socio-political rights, particularly free speech, may quickly identify difficulties which this proposal. As this implicates the thorny issue of constitutional interpretation, a short excursion into Singapore's constitutional law is necessary<sup>73</sup>.

Upon independence in 1965, a constitutional commission was appointed in to consider how to protect minority rights, ensure adequate representation and avenues for redress in order to "ensure bias in favour of multiculturalism and the equality of our citizens"<sup>74</sup>. This commission, led by then Chief Justice Wee Chong Jin, opined that the protecting the fundamental rights and freedoms of citizens was an integral part of any modern state. It was considered 'an accident of history' that the Constitution in 1965 did not have any such provisions, for the Singapore Constitution was then drafted with Singapore's merger with Malaya in mind<sup>75</sup>.

Thus, the Wee Commission recommended adopting, with some modifications, the Bill-of-Rights-styled fundamental freedoms then provided for in the Federal Constitution of Malaysia. A right to information was not considered. However, perhaps of relevance here is that the then Art 10 of the Constitution of Malaysia, which provides the freedom of speech, assembly and association, were recommended for retention without much discussion<sup>76</sup>.

An inquiry into how Singapore has defined freedom of speech is instructive for how Singapore courts may treat the related concept of freedom of information. We find in Art 14 of the present Singapore Constitution the following provisions:

#### **Freedom of speech, assembly and association**

14. —(1) Subject to clauses (2) and (3) —

(a) every citizen of Singapore has the right to freedom of speech and expression;

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<sup>73</sup> For a detailed look into Singapore's constitutional history, see Kevin Tan 1989

<sup>74</sup> *Report of the Constitutional Commission, 1966* (Singapore Government Printer, 1996) at para [1]

<sup>75</sup> *Ibid* at para [26]

<sup>76</sup> *Ibid* at para [37]

...

(2) Parliament may by law impose —

(a) on the rights conferred by clause (1) (a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;

This may be contrasted with the First Amendment of the Constitution of the United States of America:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Another useful comparison can be made with Art 10 of the ECHR:

## **ARTICLE 10**

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The differences are self-evident. Nowhere in the First Amendment is any reference made to national security and public interest. Instead the American clause, unlike Singapore's, expressly protects the rights of the press. Further and in contrast, Singapore's article 14 contemplates that freedom of speech may be curtailed to prevent defamation.

It has thus been held that freedom of expression in Singapore is and must be balanced against freedom from defamation. The SGCA has also relied on differences between the US First Amendment and Singapore's art. 14 to reject the proposition that publications must demonstrate a "clear and present danger" obstructing the administration of justice before the publisher is guilty of contempt.

The English provision seems more closely aligned with Singapore's. Indeed, despite minor differences in wording, one might be tempted to conclude that both are substantially the same: both have express enabling provisions which allow restrictions on freedom of speech; both identify national security, public interest and morality, deterring crime, and protecting reputation as valid reasons to curtail freedom of speech. However, these similarities are more apparent than real. Laws derogating from freedom of speech in Singapore can be justified as laws which Parliament "considers" either "necessary" or "expedient". The UK provision only permits limitations which are "necessary". Textually speaking, the former tends towards a broader, subjective approach to the Singapore Parliament's powers while the latter militates towards an objective and restrictive reading of how far the UK Parliament can impose laws subtracting from freedom of speech.

Nonetheless, the Privy Council in *Ong Ah Chuan v Public Prosecutor*, considering an appeal from Singapore, opined that:

The way to interpret a constitution on the Westminster model is to treat it not as if it were an Act of Parliament but `as sui generis, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law`. As in that case, which concerned fundamental rights and freedom of the individual guaranteed by the Bermuda Constitution, their Lordships would give to Part IV of the Singapore Constitution `a generous interpretation, avoiding what has been called `the austerity of tabulated legalism`, suitable to give to individuals the full measure of the [fundamental liberties] referred to`.

*Ong Ah Chuan* has been consistently endorsed in Singapore: see *Yong Vui Kong v Public Prosecutor and another matter* [2010] SGCA 20; *Quek Hock Lye v Public Prosecutor* [2015] SGCA 7.

However, one cannot take this argument too far. In *Ong Ah Chuan* itself, despite the aspirational pronouncements by the Privy Council as cited above, the court accepted that a statutorily-prescribed death penalty for drug trafficking was not unconstitutional. The PC also accepted that a presumption that anyone carrying more than 15g of diamorphine was “trafficking” drugs did not violate natural justice. Subsequent Singapore courts endorsing *Ong Ah Chuan* were, in fact, relying on the case for this. No SGCA case has cited the paragraph reproduced above.

It should be apparent by now that Singaporean courts refrain from a broad interpretation of fundamental freedoms. The Singapore Court of Appeal held in *Review Publishing* that the UK law of defamation, influenced as it is by the ECHR and the HRA, has limited persuasiveness in Singapore and must be read in the light of differences in constitutional and political regimes:

277 In contrast [to the UK], we do not have a law directing the courts to have special regard, where journalistic materials are concerned, to the extent to which it is or would be in the public interest for the materials in question to be published (cf s 12(4)(a)(ii) of the HRA). Furthermore, as counsel for the Respondents pointed out to us, in our political context, the notion that “[t]he press discharges vital functions as ... a watchdog” (per Lord Nicholls in *Reynolds* (HL) at 205) is not accepted. The media has no special role beyond reporting the news and giving its views on matters of public interest fairly and accurately. This can be seen from the following extract (cited by the Respondents’ counsel) of a remark made by the then Prime Minister, Mr Goh Chok Tong (“Mr Goh”), in *Asiaweek* (3 December 1999):

If things are wrong, the media can report it. But the watchdog - meaning that [the media] can investigate every matter, espousing [its] own views and setting [its] own agenda - I would not agree with that. If you want to set up a political agenda, then you have to be in the political arena. Otherwise you don't have the accountability and responsibility of looking after the place. We have got to face the people. If we misgovern, they will chase after us. Our head will be on the chopping block. The media's head is not on the chopping block. [emphasis omitted]

...

278 ... Our political context therefore militates against applying the *Reynolds* rationale to extend the scope of the traditional qualified privilege defence where the publication of matters of public interest is concerned. The media can, however, as Mr Goh acknowledged, report on “things [that] are wrong” (for instance, where there is corruption in the Government). When “things are wrong” in relation to matters that affect the way in which the State is governed, citizens obviously have a right to know about what

has gone wrong. It also goes without saying that Mr Goh's statement that the media can report on "things [that] are wrong" does not mean that the media is free to publish defamatory statements.

It is telling that the court went as far as to rely on ministerial statements made a decade ago on a magazine. One might think this stems from lack of better authority. However, the tenor of the judgment suggests that the court simply thought the proposition so self-evident that further discussion was unnecessary. Statements made by the Cabinet were presented as dispositive of Singapore's political culture. The court's reasoning no doubt stems from the belief that, at least in the context of the private law on defamation (which has public law ramifications), the proper authority to decide where the lines are drawn lies in the Executive and/or the Legislature.

One may think that such a cautious approach to rights runs counter to the entire purpose of enshrining them in the Constitution. Nonetheless, it should be noted that Singapore's Constitution is young and, given Singapore's political circumstances, malleable. The Constitution is amendable by a supermajority of two-thirds of the Parliament, a status which the ruling party has enjoyed uninterrupted since Singapore's Independence in 1965. By contrast, it is perhaps an understatement to say that amending the US constitution is an enormously difficult process, potentially involving both intra and inter-state political tussles. Given that Singapore's Parliament is in the unique (though admittedly abusable) position of being able to exercise its power as the elected representatives of the people to adjust and amend the Constitution in accordance with the country's social, economic and political needs, any argument that the Judiciary (which by definition cannot consider a wide range of relevant social concerns) should take the lead in constitutional and political change is tenuous at best and factually insensitive at worst.

It is thus suggested that barring Parliamentary recognition of the utility of freedom of information, it is unlikely that a constitutional right to information will gain any foothold in Singapore. Even if eventually provided for, its application as a substantive right by the courts is not likely to stretch very far, particularly if any FOI request runs up against national security considerations.

Through an Introduction of a new FOI statute: A New Statutory Regime for Freedom of Information

Another possibility is through introducing a new statute endorsing the Freedom of Information.

Typically, statutes are enacted after extensive public consultation with all groups deemed to have an

interest in the process. Depending on how it is written, a new statute may require its own subsidiary legislation, or designate an appropriate government agency to handle the requests. This would result in increased costs for the relevant government bodies.

However, it is worth noting that common law countries typically use a standalone FOI statute. In the US, the relevant legislation, the Freedom of Information Act applies to government agencies on a federal level, although some US states have enacted similar statutes to widen the scope to include government bodies on a state level. In the US, requests are handled by a centralised Department of State<sup>77</sup>.

In the UK, the relevant legislation is also known as the Freedom of Information Act 2000, which applies to public bodies over which the Westminster parliament has jurisdiction (the English, Irish, and Welsh parliaments). The Scottish Parliament is governed by the Freedom of Information (Scotland) Act 2002. Unlike the US, the UK regulation governing the request would be contingent on the information requested. Furthermore, the UK requires independent commissioners to oversee the release of information<sup>78</sup>.

In India, two different FOI statutes have been passed, with the current one being the Right To Information Act<sup>79</sup>. Compared to the equivalent UK act, the Indian act allows for fewer reasons to refuse the disclosure of information<sup>80</sup>. In India, unlike the US, the Right to Information Act is carried out by independent oversight bodies, rather than internal government bodies<sup>81</sup>.

Similar to the US, both Australia and Canada have federal FOI statutes, which are the Freedom of Information Act 1982 and the Access to Information Act. Canada also has a complementary Privacy Act, which allows an individual to request for his/her own personal records from the government. Neither of the countries have independent commissioners handling the release of information; Canada instead has

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<sup>77</sup> <http://foia.state.gov/Request/Guide.aspx> (last accessed 1 April 2015).

<sup>78</sup> <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/what-is-the-foi-act/> (last accessed 1 April 2015).

<sup>79</sup> <http://rti.gov.in/rtiact.asp> (last accessed 1 April 2015).

<sup>80</sup> <http://www.theguardian.com/society/2012/apr/10/india-freedom-of-information> (last accessed 1 April 2015).

<sup>81</sup> <http://www.opensocietyfoundations.org/voices/freedom-information-india-two-million-requests-now-what> (last accessed 1 April 2015).

an Information Commissioner, who reports to the Canadian Parliament<sup>82</sup>, while Australia has an Information Commissioner who reports directly to the government<sup>83</sup>.

For completeness, it is worth noting that Hong Kong has a Code on Access to Information, but this is not legally binding<sup>84</sup>. Some Malaysian states have also enacted FOI statutes, but there are none on a Federal level<sup>85</sup>.

The above discussions shows that the majority of common law countries with FOI provisions choose to enact an independent FOI statute. It also briefly introduces the factors that need to be considered when enacting an FOI statute, such as the breadth of information that may be requested, the exemptions to any requests, and the agency (whether an independent commission or a governmental body) such requests may be directed to, and the governing body the agency should report to (be it the Executive or Legislative branch of the government). In this respect, a standalone FOI statute should balance the need for oversight against the need to conserve public resources.

## THROUGH A MODIFICATION OF EXISTING STATUTES: MODIFICATION OF MACMA TO ALLOW NON-STATE ACTORS TO REQUEST FOR INFORMATION

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Lastly, and perhaps the least radical would be through incremental modification of the MACMA to allow non-state actors to request information. Since only foreign state actors may request such information at present, extending the scope of the MACMA to allow non-state actors to request information would allow disclosure of information through an existing statute with benefit of oversight from the Attorney-General of Singapore, and the High Court of Singapore.

There may, however, be difficulty in carrying out such modification as it may raise issues of internal sovereignty.

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<sup>82</sup> <http://www.oic-ci.gc.ca/eng/abu-ans-wwd-cqf-brochure.aspx> (last accessed 1 April 2015).

<sup>83</sup> <http://www.oaic.gov.au/about-us/what-we-do/australian-information-commissioner-act> (last accessed 1 April 2015).

<sup>84</sup> <http://www.access.gov.hk/en/code.htm> (last accessed 1 April 2015).

<sup>85</sup> <http://www.ucl.ac.uk/constitution-unit/research/foi/countries/malaysia> (last accessed 1 April 2015).

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## 1. CURRENT POSITION IN SINGAPORE

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The current position in Singapore is that only the Attorney-General has the power to request information as per s 7 of the MACMA. This is due to the narrow wording of the statute. S 8 further limits the exercise of this power by requiring the Attorney-General to be satisfied that there are “reasonable grounds for believing that such evidence would be relevant to any criminal proceedings’ in Singapore. Requesting information under the MACMA for such purposes is hence very difficult and restricted.

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## 2. UK POSITION

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In contrast, the UK takes a broader approach to this. The UK equivalent of the MACMA is the UK Crime (International Co-operation) Act 2003). Under s 7 of the UK Crime (International Co-operation) Act 2003, a request can be made by either a judicial authority or a by a designated prosecuting authority. “Judicial authority” includes any judge or justice of the peace under s 7. A judicial authority may issue a letter of request on the application of either a prosecuting authority or, where proceedings have been instituted, on behalf of the person charged. Already, it is clear that there is greater scope of persons allowed to request for information.

Yet there are also 2 requirements under s 7(3) which need to be fulfilled: a designated prosecuting authority can only issue a request if (a) it appears to the authority that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed and (b) the authority has instituted proceedings in respect of the offence in question or it is being investigated. Note that this is a conjunctive requirement; both requirements must be met.

It is worth noting that it is not necessary to issue an MLA request every time evidence or other information is required from abroad. The English Court of Appeal in *R v Redmond* stated that s 3empowers an application to be made by letter of request seeking assistance; it does not require it — see the use of the word “may” in s.3(1), (2) and (3)’ at [25]. The court then helpfully elucidated the following passage:

Nicholls, Montgomery and Knowles, *The Law of Extradition and Mutual Assistance* 2002, at para.14.16, under the heading “Informal Mutual Assistance”, states:

“Not all mutual co-operation in the investigation of crime requires the involvement of the MLAS [the Mutual Legal Assistance Section of the judicial co-operation unit in the Home Office]. Although requests which require the UK to provide formal legal assistance in the form of search warrants, etc, must be sent to the MLAS for processing in accordance with the 1990 Act, where more informal investigative assistance is required, then there is nothing to prevent the authorities of a requesting State from approaching the police in the United Kingdom directly with a request to provide assistance.”

These demonstrate that the UK position is slightly wider as it allows for the person being charged to make an application to the judicial authority to use a letter of request on his behalf, unlike the extremely narrow Singaporean position which allows only the Attorney-General to make such a request. However, the scope of the UK’s provision still does not include and room for NGOs to issue such letters of requests directly and would likely still have to navigate through the existing legal prosecutorial framework. In this sense, it is still rather restrictive.

Additionally, the scope of evidence considered to be admissible is restrictive, there are a number of grounds for refusal of a mutual legal assistance request: (a) national or public interest; (b) severity of punishment; (c) political offences; (d) the rights of suspects charged with criminal offences; (e) double jeopardy; (f) bank secrecy; and (g) human rights considerations.

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### 3. DISADVANTAGES OF MACMA

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One of the most regularly voiced complaints of this method is that it can take a long time to go through the formal and official procedures to change a law. It takes time to draft a request which complies with the requested country’s laws and procedures, for the request to be processed and forwarded to the appropriate authority responsible for processing it and then for execution of the request.

A difference in criminal procedures from country to country can also cause problems. This is particularly apparent between civil- and common-law countries. For example, in European civil law countries, the investigating magistrate oversees the investigation and has wide powers to summon witnesses, order production of documents, and generally follow whatever course of investigation is appropriate. This may prompt the investigator and the prosecutor to conduct an investigation generally on the magistrate’s behalf. But common-law based countries may only permit the carrying out of certain specific tasks

which must be itemized in the request and may not allow the granting of a mandate to carry out and follow a general line of inquiry. It would be more difficult to make use of the MACMA where different methodologies are involved<sup>86</sup>.

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#### 4. INTERNAL SOVEREIGNTY - OVERLAPPING RIGHTS:

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Issues of internal sovereignty may also arise as there may be overlapping rights. This is because there is a tension between the right to privacy and the right to information. This is particularly so because governmental bodies have wide power of investigation and definitely will obtain confidential information over a period of time. There is a need to balance the right to privacy and the right to information in order to avoid excessive intrusion into the privacy of individuals.

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<sup>86</sup> See also MACMA s 19(2)(c)(v))

## CONCLUSION

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Singapore has a strong domestic anti-corruption regime in place. However, the current framework has no room for non-state actors in it. Investigations are handled by the state and the fruits of their inquiries are inaccessible to the average member of the public.

For demand-side countries, foreign requests for information must relate to specific information and originate from state-bodies. While this does not exclude the possibility of co-operation with non-state actors (specifically international organisations per MACMA s4), the lack of a freedom of information statute locally leaves no alternative for NGOs to obtain information for use in their home country.

Ultimately, balance must be found with suitable controls. A wide reaching freedom of information law runs the risk of laying bare the vast ocean of data produced by the government at all levels, with repercussions to both the state and the individual (especially for individuals who have been investigated). While the current system may be lacking in some areas, it works. Any laws seeking to grant a right to freedom of information must balance the benefit granted by giving citizens the right to obtain information with the need to retain some secrecy in state matters for efficient government, and conserving the limited resources available to the state. Furthermore, in considering foreign actors, care must be taken to adjust their rights relative to that of the citizens of Singapore. It would be strange indeed if a foreigner had greater rights to information than a citizen in his own country!

The decision whether to have an FOI law is one for the citizens of the country to consider each generation. With the increasingly liberal slant civil society in Singapore is taking and a greater demand for accountability, we could well see Singapore enact a comparable FOI law tailored to its unique circumstances<sup>87</sup>. This might pave the way for NGOs to obtain such information. Until then, information remains under lock and key in Singapore. Till a more comprehensive and satisfactory solution is devised, it might be better not to open Pandora's Box.

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<sup>87</sup> See, for example, this Guardian article comparing the UK and Indian FOI statutes and observing that the circumstances in which each statute was brought about were different. This has resulted in the statutes having different powers and penalties: <http://www.theguardian.com/society/2012/apr/10/india-freedom-of-information> (last accessed 1 April 2014).

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The Role  
*of*  
Freedom of Information Laws  
*in the*  
Global Fight Against Corruption

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## INTRODUCTION

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According with a study of the World Justice Project, regarding the impunity of corruption acts committed by public officials, Argentina was ranked 92 from 97 countries.<sup>1</sup> The World Economic Forum study about Ethics and Corruption ranked Argentina 139 out of 144 countries.<sup>2</sup> The same institution ranked Argentina 147 from 148, when it comes to public trust in politicians. We need a change.

Argentina has legislation and institutions aimed to prevent and prosecute corruption. Nevertheless, there is a huge gap between the anti-corruption legislation and its enforcement. Why does this happen? One of the main causes is that the Constitutional checks and balances system does not work properly. Institutions and the judicial branch are often slow, inefficient, and vulnerable to the executive branch's influence. Besides, the lack of transparency and clear rules in the selection of public officials, and even prosecutors and judges, suggests that the different branches do not have a real autonomy.<sup>3</sup>

Besides, Argentina has an insufficient degree of transparency and accountability.<sup>4</sup> Furthermore, during the past few years, government officials have been accused of practicing in illegal enrichment<sup>5</sup>, money laundering, trading in influence<sup>6</sup> and bribery<sup>7</sup>.

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<sup>1</sup>CLARÍN NEWSPAPER. *Argentina, between the countries with more political impunity* (2014), available at: [http://www.clarin.com/politica/Argentina-paises-mayor-impunidad-politica\\_0\\_1070292986.html](http://www.clarin.com/politica/Argentina-paises-mayor-impunidad-politica_0_1070292986.html) (last visited Feb. 28, 2015)

<sup>2</sup>WORLD ECONOMY FORUM. *Competiveness Ranking* (2014), available at: <http://reports.weforum.org/global-competitiveness-report-2014-2015/rankings/#indicatorId=EOSQ041> (last visited Feb. 28, 2015)

<sup>3</sup>TRANSPARENCY INTERNATIONAL. *Corruption Challenges*, available at: <http://www.transparency.org/country#ARG> (last visited Feb. 2, 2015)

<sup>4</sup>One of the most evident examples of this lack of transparency is the Argentina government's agency responsible for the collection and processing of statistical data, National Statistics and Censuses (INDEC), does not provide accurate information on any subject. The official data does not reflect the inflation rate, the unemployment, customer price index, the politician's enrichment, or the poverty rate. LA NACIÓN NEWSPAPER. *The FMI critic the*

This research is directed to answer the following questions: “*What if the citizens used the Freedom of Information Act (FOIA) to obtain the names of the corrupt officials within their own country? What if those names could be used in the future civil or criminal suit against those officials?*”. In order to answer them, we will study Argentina’s current situation, taking into account a description of Argentina’s general background, corruption related jurisprudence, the current legislation and its enforcement, and the possibility of including to our traditional legal tools, some new ones, such as the FOIA.

## CHAPTER I

### PROSECUTION IN ARGENTINA

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#### 1. DISCRETION TO LAUNCH PROSECUTION IN ARGENTINA

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##### 1.1 PROSECUTORS: LACK OF INDEPENDENCE DUE TO POLITICAL PRESSURE

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The prosecutors are in charge of the investigations of possible commissions of a crime against the Public Administration.

According to Argentina’s Federal Constitution and legal system (the pertinent legislation is the *Ley Orgánica del Ministerio Público 24.946*), prosecutors are appointed by the President from among a list of candidates provided by the *Ministerio Público* after a series of previous personal

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*INDEC statistics. (04/16/13), available at: <http://www.lanacion.com.ar/1573207-nueva-critica-del-fmi-a-las-polemicas-estadisticas-del-indec> (last visited Feb. 2, 2015)*

<sup>5</sup>JUAN CRUZ SANZ. *Investigated: Boudou increased heritage for more than \$100,000*. Info Bae. (2014), available at: <http://www.infobae.com/2014/09/01/1591795-investigado-boudou-incremento-su-patrimonio-poco-mas-100-mil-pesos> (last visited Feb. 28, 2015)

<sup>6</sup>Futher information can be found in <http://reports.weforum.org/global-competitiveness-report-2014-2015/rankings/#indicatorId=GCI.A.01.01.03> (last visited Feb. 28, 2015)

<sup>7</sup>Futher information can be found in <http://reports.weforum.org/global-competitiveness-report-2014-2015/rankings/#indicatorId=EOSQ150> (last visited Feb. 28, 2015)

interviews and exams. This presidential decision must have a subsequent conformity by the National Senate.

Prosecutors have an especial stability on their job, for they hold their Offices during good behavior.<sup>8</sup> Also, the aforementioned statute grants prosecutors with certain immunities, essentially similar to those granted to judges and congressmen. For example, article 14 of the *Ley Orgánica* (Organic Law) establishes that prosecutors shall not be arrested under any circumstance, except when caught *in fraganti*. Furthermore, according to article 18 of such statute they may only be removed on the grounds of poor performance, negligence or commission of a crime, and only through an especial procedure conducted by a specific court within the *Ministerio Público*, officially named *Tribunal de Enjuiciamiento*.

Unfortunately, during the last ten years of the President Cristina Kirchner's Administration, political pressure has been intensified (sometimes even through extortion) to slow down, block or stop both prosecutors and media investigations regarding crimes related to public official's corruption<sup>9</sup>. And, among others, it is primarily this fact that increases the inadequacy of the current legal regime for prosecuting corruption. Constant, aggressive and even threatening political pressure is usually successful. Therefore, though the Federal Constitution's assures that the *Ministerio Público* will have independence, impartiality and freedom to investigate (this can be inferred from article 120, that states that the *Ministerio Público* shall have financial and functional autonomy from any other branch), factual reality demonstrates the system's inefficiency.

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<sup>8</sup>ORGANIC ACT. Nº 24.946, Article 15.

<sup>9</sup>REUTERS. THE NEW YORK TIMES. *Intimidation, Meddler Stalk Argentine State Prosecutors*. (2015), available at: [http://www.nytimes.com/reuters/2015/02/13/world/americas/13reuters-argentina-prosecutor-intimidation.html?\\_r=0](http://www.nytimes.com/reuters/2015/02/13/world/americas/13reuters-argentina-prosecutor-intimidation.html?_r=0) (Last visited, May 30, 2015).

DAVID KOPEL. THE WASHINGTON POST. *Argentina's free press is in grave danger. Book review of "Tiempos turbulentos"*. (09/02/15), available at: <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/09/argentinas-free-press-is-in-grave-danger-book-review-of-tiempos-turbulentos/> (Last visited, May 30, 2015).

But along with political pressure, there is another cause that must be taken into account: judges and prosecutors' wielding to such pressures. It is a regrettable but certain that this kind of political pressure and unfair attempts to avoid prosecution from public officials, exist along several countries in the world. What is essential is the reaction to them. The establishment of a strong democratic and fair legal conscience in judges and prosecutors, focused exclusively in the discovery of the truth and the punishment of the law offenders, regardless of any pressure or bribery offers. In Argentina, the problem does not necessarily rely on the lack of these values, but rather on the lack of an effective protection to judges and prosecutors willing to stand by them.

#### 1.1.1 THE "CAMPAGNOLI CASE"

This case is useful to explain this whole scenario. During 2013, prosecutor José María Campagnoli was conducting an investigation that discovered a complex network of money laundering for which a local businessman (named Lázaro Báez), with intense commercial and personal ties to the Presidency, was responsible for. Soon after the release of this report, Campagnoli was removed from his office by the *Tribunal de Enjuiciamiento* and almost banned from returning to it.

A trial for alleged "irregularities" in the course of his investigation by the competent judicial authority (also in this case, the *Tribunal de Enjuiciamiento*), which was promoted by the General Attorney Gils Carbó (a strong political ally of the current Administration) was unsuccessful to remove him, and Campagnoli was reinstated. The technical reason that was argued to remove Campagnoli was that along the investigation he "abused his power" as prosecutor by exercising duties out of his jurisdiction (exceeding his mandate), putting "the progress of the criminal investigation"<sup>10</sup> in jeopardy. Political pressure, the outrage of the majority of the Argentine people and the development of the very trial aborted the plan (the majority of the members of the court did not find sufficient evidence of those charges and

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<sup>10</sup>JOSÉ MARÍA CAMPAGNOLI. *Juicio a la Justicia* (2014) p.11

declined to continue the proceedings), but it surely revealed the potential Government's power to prevent investigations regarding corruption cases, and prosecutors in charge of those, to reach the ultimate truth.

Taking into account this example, it seems that though legally and officially the prosecutors hold discretion to launch prosecution, certain features of reality gives the system a complexity that should not have. Members from Executive branch, either directly or through their political allies in the *Ministerio Público*, possess a great power of influence over the majority of the investigations conducted by prosecutors. Discretion, in certain cases and in an indirect but actual way, ultimately lies on them as well.

## 1.2. OTHER ORGANIZATIONS

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### 1.2.1. ANTI-CORRUPTION AGENCY

In Argentina, the specialized agency that deals with corruption is the "Anti-Corruption Office" (AO). It was created by statute 25.233 and it is responsible for creating and coordinating the anticorruption program inside the Executive Branch (Ministry of Justice and Human Rights). It works together with the *Ministerio Público*, and controls the Executive Branch's activities. It is presided and represented by an Administrative Control Prosecutor, who is appointed and eventually removed by the President, after a proposal from the Ministry.<sup>11</sup>

The AO controls the behavior of the Public Sector, which includes the Administration, State owned corporations and every entity which has State participation. It is only allowed to carry out investigations over the national public area.<sup>12</sup>

It works through DIOA (Investigation Division in the Anti-Corruption Agency) which has the faculty to investigate the public agents conduct and the right use of the state resources and the

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<sup>11</sup>EXECUTIVE ORDER 102/1999. Art. 6(Available at: <http://www.anticorruccion.gov.ar/102-99.pdf>)

<sup>12</sup>EXECUTIVE ORDER 102/1999. Art. 1 (Available at: <http://www.anticorruccion.gov.ar/102-99.pdf>)

DPPT (Transparency police – making office), which helps the government in the design of corruption policies.<sup>13</sup>

The Anti-Corruption Agency carries out investigations of presumptive acts of corruption reported by citizens, media, and other public offices or their own denounces. The OA will take the case to court and filed for criminal charges, if these facts are proved or fulfill the requirements of “Inter - American Convention against Corruption”. The conditions which are shown in the article 6 of this agreement are:

*a. The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;*

*b. The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;*

*c. Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party;*

*d. The fraudulent use or concealment of property derived from any of the acts referred to in this article; and*

*e. Participation as a principal, co-principal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to in this article.<sup>14</sup>*

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<sup>13</sup>EXECUTIVE ORDER 102/1999. Art. 9. (Available at: <http://www.anticorruptcion.gov.ar/102-99.pdf>)

The article 5 of statute 25.233 allows the Anticorruption Office to intervene as a third party in trials where the State's patrimony is involved.

### 1.2.2. PROCELAC

In 2012, the PROCELAC (an especial Ministerio Público's Office in charge of financial crimes and money laundering) was created by the resolution nº 914/12. It has the responsibility to carry out almost all the investigations to discover cases involving such crimes, and provide assistance to the prosecutors to push them to court.

The prosecutor that is currently in charge of PROCELAC is Carlos Gonella. He was named after bypass all the steps set out in the Constitution for the selection of public prosecutors. The appointment was made official through the publication of Decree 1149/13 in the Official Gazette, in which the Executive branch published the appointment of 40 prosecutors.

Gonella was questioned by the ad-hoc appointment in PROCELAC, from where it was blamed for delaying and handled the complaint against the Kirchner's close friend and associate, Lazaro Baez. However, when he was summoned by Congress before the Senate Committee on Arrangements, he explained his conduct on that record, and scored 42 positive votes and 17 rejections.

### 1.2.3. FISCALÍA DE INVESTIGACIONES ADMINISTRATIVAS

The FIA (Fiscalía de Investigaciones Administrativas) is also within the *Ministerio Público* and it carries out investigations regarding public officials' behavior working in the national public administration and the private entities where the State has stock participation. It is under the direction of the National Prosecutor of administrative investigations, who is appointed by the Executive Branch from among a list of candidates previously selected by the *Ministerio Público*.

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<sup>14</sup>INTER- AMERICAN CONVENTION AGAINST CORRUPTION. March 29<sup>th</sup> of 1996. Art. 6.

The FIA examines if any administrative rule is infringed and, in that case, the Prosecutor Office starts an internal administrative procedure. In case the procedure indicates that the public official had violated a criminal law, then the case is taken to court.

The FIA complies with the art.120 of the Argentine constitution amendment from 1994. It states that the Office of General Prosecutor is independent from the Executive branch to act and it is financially autonomous. This measure has been taken to deepen the independence of powers. This point was discussed in 2008, when the general prosecutor restricted the functions of the FIA to intervene in corruption cases.

In the fourth report of the MESICIC (The Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption), one of the recommendations was to *“consider the possibility of specifying, in a legal provision, the functions established for the Fiscalía de Investigaciones Administrativas in the LOMP, so that it can have the powers necessary to obtain, on a timely basis, the information it requires to prepare its investigations, and to ensure that its intervention in administrative summary proceedings and in the criminal cases brought for administrative irregularities and acts of corruption committed by employees of the National Administration, is timely and effective, and is not hindered by the various different interpretations that exist regarding the scope of its powers”*<sup>15</sup>.

Regarding the FIA, it is possible to find an exception to the general Argentine problem regarding corruption cases. Proper legislation is required in order to assure their members will perform their duty in an adequate and efficient way, on one hand, and to establish the boundaries and faculties they would have in doing so.<sup>16</sup>

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<sup>15</sup>MECHANISM FOR FOLLOW-UP ON THE IMPLEMENTATION OF THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION.Fourth report. March 18, 2012, Washington DC: [http://www.oas.org/juridico/PDFs/mesicic4\\_arg\\_en.pdf](http://www.oas.org/juridico/PDFs/mesicic4_arg_en.pdf) (last visited Feb. 20, 2015)

<sup>16</sup>When it comes to the aforementioned agencies, what is needed is the ease of political pressures and, if so, effective and unswerving non-wielding to them.

### 1.3. NGOS AND CIVIL SOCIETY GROUPS

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Statute 26.550 allows legal persons to intervene as accusers in a criminal procedure involving crimes related to violations of Human Rights. Taking into account the serious amount of damage corruption can generate in a democratic system, and the wide interpretation that several International Treaties signed by Argentina gave to the word "victim" of a crime (considering it applicable not only to persons but also to entities), corruption crimes may be considered a Human Rights violation, and therefore would fall within the scope of the before mentioned statute.<sup>17</sup>

Consequently, it seems reasonable to argue that NGOs and civil society groups can effectively file complaints and initiate criminal prosecutions as accusers. Legal entities can become parties to the process, as long as they act within the rules and limitations established by the statute law.<sup>18</sup>

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### 2. PROSECUTIONS IN ARGENTINA: GENERAL PROCEDURE

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According to the Argentinean criminal system, corruption cases in general fall under the technical name: "Crimes against the Public Administration" (the term Administration is interpreted widely; consequently, every person exercising any public activity as part of their duties or in a particular situation will be *legally considered* public official and therefore part of the Administration).

These sorts of crimes are considered a serious offence, and prosecutions are typically launched by the prosecutors. No particular requirement (except the reasonable suspicion of the

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<sup>17</sup> CITIZEN ACTION AND FIGHT AGAINST CORRUPTION PROGRAM. *Some notes about the participation of NGOs at corruption process, available at:* [http://acij.org.ar/wp-content/uploads/Informe\\_\\_Participacion\\_Organizaciones\\_como\\_Querellantes.pdf](http://acij.org.ar/wp-content/uploads/Informe__Participacion_Organizaciones_como_Querellantes.pdf) (For more information on this issue).

<sup>18</sup>The prosecutor, on the other hand, has the legal obligation of initiating prosecutions when crimes are suspected to have been committed, except the ones that have to be necessarily initiated by the victim called "de acción privada".

commission of a crime of this nature that the prosecutor has become aware of) is needed for the prosecutor to initiate the process.

This kind of institute is known in Argentina's criminal law as "*acción pública*"<sup>19</sup> (criminal complaint). In these cases, prosecutors *must* initiate the process, due to the particular nature of the crime and the interests the State must protect.<sup>20</sup>

The exercise of the *acción pública* by the prosecutor cannot be suspended, interrupted or ceased. Only in specific legal established exceptions this can be possible. This is known as the "procedural legality principle": prosecutors are always obligated to launch the procedure to investigate any possible commission of a crime that became aware of.

In corruption cases, this legal principle aims to secure a productive continuity in the prosecution's investigation, for it can only be stopped, momentarily or permanently, when the statute says so (art.5 Argentine Criminal Procedure Code).

However, these basic features of Argentina's legal system have been heavily compromised and distorted. Prosecutors who investigate public officials' corruption are threatened with removal from office and can hardly perform their duties without intense political pressures and deliberate delays and sabotages that interfere in their investigations (a good example of this is the Campagnoli case, as was previously explained).

## 2.1 CRIMINAL PROCEDURE CODE'S REFORM

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<sup>19</sup> Along with the *acción pública*, there are other kinds of institutes such as the *acción privada*, where only the victim of the crime may initiate prosecution and decide to end it at will (for example, in a defamatory accusation), and the *acción dependiente de instancia privada*, where also the victim alone can initiate prosecution, but when this happens, may not prevent the judicial authorities to continue the process (or example, in a sexual abuse).

<sup>20</sup> However, it must be considered that, according to Argentina's criminal procedure system (art.71 Argentine Criminal Code), all prosecutions are launched through *acción pública* unless the statute establishes otherwise.

On December 3th 2014, the National Congress approved an important reform to the Criminal Procedure Code<sup>21</sup>. The main intention is to give the prosecutors more official powers and duties to handle their investigations, with minimal judicial intervention.

Under the former Code, judges could still investigate crimes along with the prosecution. This judicial faculty no longer exists. Now, given the higher relevance given to the *principio de oportunidad*, the *Ministerio Público Fiscal* has control and discretion when it comes to launch or halt prosecution.

The current Administration's parliamentary opposition is claiming that this reform does not have exclusively the intention to make the criminal system more efficient<sup>22</sup>. There are strong suspicions that the reform may hide an attempt to give more power to prosecutors with favorable views of the Government (the current Argentine General Attorney has shown a public alignment with President Kirchner), and leave the public officials' corruption crimes unpunished.<sup>23</sup> However, some scholars recognized the legal virtues of the new Code<sup>24</sup>.

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### 3. LEGITIMACY OF EVIDENCE

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In Argentina, it is essential that proceedings and the gathering of evidence fully respect the due process of law, in particular the rights of defendants. This is stated in the National

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<sup>21</sup>ARGENTINA NATIONAL CODE OF CRIMINAL PROCEDURE, available at: <http://www.ppn.gov.ar/sites/default/files/C%C3%B3digo%20Procesal%20Penal%20de%20la%20Naci%C3%B3n.pdf> (Last visited, May 30 2015)

<sup>22</sup>LA NACIÓN NEWSPAPER. *The ruling approved de new code of criminal procedure (2014)*, available at: <http://www.lanacion.com.ar/1749657-pese-al-rechazo-opositor-el-oficialismo-aprobo-anoche-el-nuevo-codigo-procesal-penal> (last visited Feb. 20, 2015)

<sup>23</sup>CLARÍN NEWSPAPER. *With the drive, the Congress approved the new code of criminal procedure (2014)*, available at: [http://www.clarin.com/politica/impulso-Diputados-Codigo-Procesal-Penal\\_0\\_1260474407.html](http://www.clarin.com/politica/impulso-Diputados-Codigo-Procesal-Penal_0_1260474407.html) (last visited Feb. 20, 2015).

<sup>24</sup> For instance: RICARDO D. SMOLIANSKY. *El nuevo Código Procesal Penal de la Nación (2014)*, available at: [elDial.com - DC1E69](http://elDial.com - DC1E69) (Last visited May 30, 2015)

Constitution<sup>25</sup>, the procedural statutes and also in two doctrines, which are the “exclusionary rule” and a “fruit of the poisonous tree doctrine”.

The “exclusionary rule” forbids the unreasonable search and seizure to be used in a process. The evidence obtained from the unlawful search may not be introduced in court. The “fruit of the poisonous tree doctrine” is an extension of the exclusionary rule. It establishes that evidence gathered with the assistance of illegally obtained information must be excluded from trial. Thus, if an illegal interrogation leads to the discovery of physical evidence, both the interrogation and the physical evidence may be excluded, the interrogation because of the exclusionary rule, and the physical evidence because it is the “fruit” of the illegal interrogation.<sup>26</sup> This doctrine, similar to the rule established in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), arises from a Supreme Court ruling “*Montenegro, Luciano Bernardino s/Robo*”.<sup>27</sup>

The FOIA is a legal and lawful tool through which the information can be obtained; thus the names and additional data obtained are legit and it cannot be excluded by the judges. Furthermore, the information legally obtained through FOIA does not affect the procedural guarantees of the accused, because it complies with the process transparency giving the chance to the accused to defend himself. Neither the “exclusionary rule” nor the fruit of the poisonous tree doctrine” could be applied to the names, data or other kind of evidence

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<sup>25</sup>NATIONAL CONSTITUTION. Section 18 specifically explains the due process of law stating that “*no habitant of the Nation can be punished without a previous trial base on a law prior to the committed act.; neither judged by special commissions or excluded from judges appointed by the law prior to the punishable act. No one can be obliged to testify against himself, nor arrested without a reasoned order of a competent authority. The right of defense of a person on trial is inviolable*”.

<sup>26</sup>LAW DICTIONARY. Available at :[https://www.law.cornell.edu/wex/fruit\\_of\\_the\\_poisonous\\_tree](https://www.law.cornell.edu/wex/fruit_of_the_poisonous_tree) (last visited Apr. 5, 2015)

<sup>27</sup>The Supreme Court concluded that although the accused confessed the crime he has committed, he did it after a cruel treatment from the police officers. For this reason, the confession obtained was considered illegal by the Supreme Court because it violated section 18 of the National Constitution that states that nobody can be forced to testify against himself. That is why, all evidence obtained illegally is not considered by the judiciary.

obtained through FOIA. Therefore, they can be used to initiate an investigation and launch prosecution.

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#### 4. CASE LAW

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- **Siemens AG<sup>28</sup>**: The Company admitted to the Securities and Exchange Commission (SEC) the payment of bribes to the Argentine government for public tender. This tender included the printing of new ID cards and electoral roll, and the electronic migration control system. The Company declared that the money paid was initially to win the process of the tender and, later, to avoid that the Argentinean government cancelled the contract.

After the investigation held in the United States of America by the SEC, various public officials involved in the case were accused in Argentina for receiving those bribes. The case is still under process.

- **IBM, Inc.**: In December 2000, the SEC filed a settled administrative action against IBM, arising from a contract awarded to its wholly owned subsidiary, IBM-Argentina, to modernize and fully integrate the computer systems of a government owned bank, *Banco de la Nación Argentina* ("BNA"). In connection with this contract IBM-Argentina's senior management circumvented IBM's established procurement review procedures and caused IBM-Argentina to enter into a \$22 million subcontract with a local company. Approximately \$4.5 million of that amount was subsequently diverted to certain BNA officials. The entire \$22 million was inaccurately recorded in IBM's books and records as legitimate subcontractor expenses. In resolving the matter, the SEC found that IBM violated the books and records provisions, and was ordered to pay a \$300,000 civil penalty.<sup>29</sup>

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<sup>28</sup>CIPSE, "the Procedural Criminal Code's reform"

[http://www.cipce.org.ar/upload/biblioteca/la\\_reforma\\_procesal\\_penal\\_frente\\_a\\_la\\_corrupcion.\\_de\\_cipce\\_e\\_inecip\\_9536810480.pdf](http://www.cipce.org.ar/upload/biblioteca/la_reforma_procesal_penal_frente_a_la_corrupcion._de_cipce_e_inecip_9536810480.pdf) (Last visited Feb 20, 2015)

<sup>29</sup><http://www.justice.gov/criminal/fraud/fcpa/docs/response2-appx-b-pdf>(last visited Feb. 28, 2015)

In Argentina, in 2009 the four public servants and the three businessmen that were accused, pleaded guilty to having committed the corrupt acts.<sup>30</sup> In 2010, sixteen years after the case started in 1994, they were all condemned to prison.<sup>31</sup>

## CHAPTER II

### FREEDOM OF INFORMATION ACT

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#### SECTION I: APPLICABILITY OF U.S. EVIDENCE

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##### 1. EFFECTIVENESS OF OBTAINING NAMES OF CORRUPT OFFICIALS

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Obtaining names of corrupt officials can be particularly useful, especially when certain circumstances represent an obstacle for criminal prosecution against them. This allows the possible legal actions as well as the naming and shaming technique to take place as corrupt officials are identified.

It is important to point out that there are no instances in Argentina where information obtained under de FOIA has been used to initiate prosecution for corruption related offences. If there are names obtained through FOIA, they could be very useful to launch an investigation in Argentina. It will be a starting point in a specific case so that the prosecution can advance and the truth can be finally discovered. There are many clues about which public officers might be the ones who corrupt but there is no information enough and prosecutors do not investigate as

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<sup>30</sup>LA NACIÓN NEWSPAPER. *The seven accused at the case IBM - Banco Nación are declared guilty* (2009), available at:<http://www.lanacion.com.ar/1198415-se-declaran-culpables-los-siete-acusados-del-caso-ibm-banco-nacion> (last visited Apr. 5, 2015)

<sup>31</sup>The ex-president of IBM died before the process had finished and therefore was absolved.[http://www.cipce.org.ar/upload/biblioteca/la\\_reforma\\_procesal\\_penal\\_frente\\_a\\_la\\_corrupcion\\_de\\_cipce\\_e\\_inecip\\_9536810480.pdf](http://www.cipce.org.ar/upload/biblioteca/la_reforma_procesal_penal_frente_a_la_corrupcion_de_cipce_e_inecip_9536810480.pdf)(last visited Apr. 5, 2015)

they should. So, in this sense, using FOIA to have access will be an enormous support or skill to get this person to process.

All data gathered will unconditionally produce effects in our country and for sure create different feelings and emotions in society. Social pressure and media involved can trigger into several consequences and affect the political and economic situation of the country.

In Argentina, previous experience has shown that public opinion's constant pressure for efficient criminal investigations, and even private citizens' will to investigate by providing information to proper authorities, can lead to excellent middle and long term results.

A clear and recent example can be found on the reasons that motivated the current criminal prosecution against those involved in violations of Human Rights during the last military dictatorship in Argentina, better known by the name of "Juntas" (1976-1983). In 1983, at the end of the military dictatorship, statute 22.924 was enacted, stating self-amnesty to members of the military forces. Later on, The National Commission for Forced Disappearances (CONADEP), led by writer Ernesto Sábato, was created. Two years later, the *Juicio a las Juntas* (2002) largely succeeded in proving the crimes of the various juntas which had formed the self-styled National Reorganization Process. Most of the top officers were sentenced to life imprisonment: Jorge Rafael Videla, Emilio Eduardo Massera, Roberto Eduardo Viola, Leopoldo Galtieri, among others. Raúl Alfonsín's government voted two amnesty statutes in order to avoid the escalation of trials against soldiers involved in human rights abuses: Final Point Statute of 1986 and the Duty of Obedience Statute of 1987.

In 1989, President Carlos Menem issued four decrees (Decree 1002/89, Decree 1003/89, Decree 1004/89, and Decree 1005/89) on which he decided to indult 220 members of the Army and 70 civilians that were responsible for violations against Human Rights. By 1990, President Carlos Menem repeated this political action by issuing six more decrees on the subject (Decree 2741/90, Decree 2742/90, Decree 2743/90, Decree 2744/90, Decree 2745/90, Decree 2746/90), in favor of civilians and members of the Army that were involved in crimes and

violations against the Human Rights; and the National Congress also passed two statutes designed to ensure that no criminal prosecution shall proceed. However, several Argentine citizens (many of which were related to the victims of the said crimes) opposed to these policies and started an activism movement. So they formed NGOs (for instance, H.I.J.OS, which meant "Sons and Daughters for Identity and Justice against Oblivion and Silence) and started naming and shaming campaigns, seeking the immediate criminal prosecution for the pardoned perpetrators of Human Rights during the last military dictatorship. Without engaging in acts of physical violence, they began to identify the military men allegedly involved in such crimes, locating their homes and organizing large demonstrations towards there, to protest against their freedom.

This movement had a strong social impact and gained wide acceptance among Argentina's society and its political class. In 2003, with the arrival of President Kirchner to office, those NGOs succeeded their goal with the support of the national government and several political parties. In year 2005, the two statutes banning criminal prosecution were declared unconstitutional by the Supreme Court<sup>32</sup>, and the absolved militaries gradually began to have their day at court.

Another example related to naming and shaming tactics is the strategic litigation of the case Carmen Aguiar de Lapacó, 1999, 12.059, Inter-American Commission for Human Rights. In this case, Mrs. Aguiar de Lapacó, whose daughter was detained and later disappeared during the military dictatorship, filed a petition (with several NGOs' legal assistance, such as Plaza de Mayo's Grandmothers, whose objective was to search for the sons and daughters of the persons disappeared, usually appropriated by the military) to the Inter-American Human Rights

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<sup>32</sup>In Argentina, the Supreme Court precedents are not legally bounding. The jurisprudential principle is that each ruling is only restricted to the concrete facts of the case that motivated the ruling. However, throughout its history the Court has ruled that the lower courts do have the "moral duty" (D. Bernardo Pastorino, 1883) or the "institutional duty" (SantínJcinto c. ImpuestosInterno, 1948) to follow the substance of their precedents. A lower court may contradict a Supreme Court precedent if "sufficient arguments" are given, and as long as that contradiction does not imply a disregard for the Court's higher authority and prestige.

Commission in order to obtain information of what had really happened to her. Argentine judicial authorities had previously denied Mrs. Aguiar de Lapacó this information, and did not recognize her right to know the truth so to mourn her daughter appropriately. The Commission granted the request, and commanded Argentina to provide such information. A new right was created in this case, the right of truth.

This modus operandi can perfectly be applied to enshrine Argentine society reaction against public official's corruption. To obtain their names may constitute the very beginning of an entire social movement, to prevent that corruption crimes remain legally unpunished.

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## 2. AUTHORITIES AND COURTS ACCEPTANCE OF THE U.S EVIDENCE.

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In the frame of Siemens Case, Federal Judge Ariel Lijogot the approval of the German Justice to summon some members of the old management staff, to give a statement and get other relevant information. That evidence was key in the investigation to get to a sentence.

Argentina's Criminal Procedure establishes different means of evidence. This evidence will be legal if it respects procedural due process. The characteristic in the evidence system is that there is no hierarchy between the different proofs.

In addition, the judge is enabled to convene to give statement any suspicious of committing the crime and to send request of information to foreign judges or foreign agencies. So, Argentinean courts would accept evidence provided from US authorities. The idea is "to facilitate the provision of evidence and the execution of sentences in criminal cases and the confiscation and transfer of the proceeds of crime between the Republic and foreign States; and to provide for matters connected therewith"<sup>33</sup>. And this is expressly provided in two legal instruments, the International Cooperation in Criminal Matters Act 75, 1996 and the Agreement on Mutual Legal Assistance in Criminal Matters and Extradition, 2000.

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<sup>33</sup>International Cooperation in Criminal Matters Act of 1996, No 24.767.

This last agreement has been in force since 1990 and it was signed by United States and Argentina. If the Argentinean court need specific information from the United States, the article 4 from the convention establishes that the request must be written and shall comply with certain requirements. Furthermore, the agreement states in article 7 that the evidence or any information obtained through this mechanism will be valid only for the case where it was requested.

Notwithstanding the foregoing, the MLAT (Mutual Legal Assistance Treaty) process is not the same as the FOIA process, because they tend to different objectives. MLAT has an important political influence to be used, because you need a public administrative permission, while FOIA has nothing to do with the State or any political circumstance; anyone can ask information through FOIA and it will be given easily.

## SECTION II: POSSIBLE ADVERSE CONSEQUENCES OF DISCLOSING INFORMATION OBTAINED THROUGH FOIA

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### 1. PROTECTION OF WITNESSES

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#### 1.1 THE NATIONAL PROGRAM FOR THE PROTECTION OF WITNESSES AND SUSPECTS

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The National Program for the Protection of Witnesses and Suspects (Statute 25,764 August 12, 2003) intended to preserve the security of defendants and witnesses who have collaborated transcendent and effectively in a judicial federal inquiry. The Act provides that the Argentine Government must ensure the provision of protective measures for this group of people, if these are suffering any kind of danger to their life or physical integrity. However, the same statute leaves room for protection is available also in other cases dealing with offenses linked to organized crime or institutional violence situations, which have national interest.

## 1.2 LACK OF REGULATIONS: NEW BILL PROJECT DESIGNED TO PROTECT CORRUPTION WITNESSES<sup>34</sup>

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The aforementioned witness protection system is not efficiently applied. This originates two serious problems: first, the danger of whistleblowers being exposed to public officials; second, the disclosure of incriminating evidence of corruption is discouraged, creating impunity that must be stopped. It is unacceptable that witnesses should leave their country because the government did not protect them.

Although, according to the first article of the PNPT, which stands for National Program for the Protection of Witnesses and Suspects, the protection is also available when they deal with offenses linked to institutional violence and whose research is of significance and national interest.

## 1.3. NEGATIVE UN REPORT ON WITNESS PROTECTION<sup>35</sup>

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The United Nations made a report on the protection of Witnesses that points out that in Argentina there are inappropriate statutes, lack of budget and inexperienced professionals on the subjects.<sup>36</sup>

Witnesses do not receive adequate protection under the current system and this fact was recognized by several authorities within the institutions responsible for the protection of witnesses.

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<sup>34</sup> LA NACIÓN NEWSPAPER. *New Bill Project to protect witnesses of corruption* (2014), available at <http://www.lanacion.com.ar/1693250-impulsan-un-proyecto-de-ley-para-proteger-a-los-testigos-de-hechos-de-corrupcion>

<sup>35</sup> MARIA ARCE. CLARÍN NEWSPAPER. *Hard UN report on the Protection of Witnesses* (2011), available at [http://www.clarin.com/politica/Duro-informe-ONU-proteccion-testigos\\_0\\_454154780.html](http://www.clarin.com/politica/Duro-informe-ONU-proteccion-testigos_0_454154780.html)

<sup>36</sup> Julio López was a witness of the Etcheolatz case (a convicted former police officer during the Argentinean dictatorship) after collaborating in the case, in 2006, he went missing and still haven't been found. It is known that the political forces are responsible for this fact. LA NACIÓN NEWSPAPER. <http://www.lanacion.com.ar/autor/caso-julio-lopez-t46973> (last visited Jun. 2, 2015).

Another shortcoming is the limited scope that protection programs have within the country. For example, the PNPT has no capacity to develop research and therefore is unable to assess threats in depth. Instead of working to neutralize the threat, programs end up hiding the witnesses. Witnesses are practically left to themselves.

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## 2. PROTECTION OF JOURNALISTS

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Not only witnesses are in danger when they expose compromising information; journalists are too. Every author that publishes his work is at risk of having to face a lawsuit and defend their work.<sup>37</sup>

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### 2.1 POSSIBLE CRIMINAL SANCTIONS

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Journalists are usually accused of violating Sections 109 up to 117 of the Argentinean Criminal Code. These articles state the “crimes against the honor”, that includes the false imputation of a natural person or calumny, and intentional dishonor or slander, both when it is not associated with public interest or a non-assertive matter. Also, these articles state that the sanction for those crimes is a fine. Furthermore, the articles include the case in which a third party reproduces or publishes offenses.

Slander is an offense against honor which lies on a discrediting imputation. In this crime the defendant might also be affected by proceedings to investigate the fact that he was falsely attributed, though the agent might not have denounced it to the legal authority. The accused of this will only be able to prove the truth of the accusation when the offense attributed to the offended person, would have resulted in criminal proceedings; and if the complainant asked for proof of the allegation made against him. In these cases, if the truth of the allegations is proved, the accused shall be exempted from punishment.

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<sup>37</sup>Such as the example of journalist Daniel Patcher, from *Buenos Aires Herald*, who anticipated Nisman death, after revealing this information he had to leave the country because he was being followed and threatened. LA NACIÓN NEWSPAPER. *The journalist who advanced information about Nisman’s death left the country after complaint about suspicious follow-ups*(2014), available at <http://www.lanacion.com.ar/1762847-el-periodista-que-adelanto-la-muerte-de-nisman-dejo-el-pais-tras-denunciar-seguimientos-sospechosos>

It was remarked the need to repeal the rules criminalizing calumnies, slander statutes and contempt statutes, which are strong disincentives in the making of complaints against the authorities, when the allegations are difficult to prove, as with most acts of corruption. The responsibility in these cases should be pursued only in a civil court. Since these subjects have been widely addressed by the Commission and the Inter-American Court in individual cases and rapporteur reports, there are so international standards in this matter, which could be used as part of the claims of anti-corruption organizations.<sup>38</sup>

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## 2.2 THE "CAMPILAY" DOCTRINE

In Argentina, one of the most widely used tools in this area is the doctrine derived from the case *Julio Cesar Campillay v. La Razón*<sup>39</sup>. The *Campillay* doctrine states that, in order to escape responsibility, who publish information must propagate information from relevant sources and do not disclose the identity of those involved in the facts.

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## 2.3 POTENTIAL VERB MOOD

Regarding the use of potential verb mood, the opinion of the Attorney General notes that the rule is not only the use of a given verbally but potentially -the consideration of the full meaning of the discourse, which must be conjectural and unassertive because if it were not enough with the mechanical use of almost magical "would be ..." to assign someone anything, even the worst, without having to answer for it.

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## 3. TRUTH AS A DEFENSE

In 2007, the Executive Power issued the 606/2007 Decree which created the "Truth and Justice" program and placed it under the Chief of the Cabinet of Ministers orbit. The Chief of Cabinet

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<sup>38</sup>CENTRO DE ESTUDIOS LEGALES Y SOCIALES, DERECHOS HUMANOS EN ARGENTINA (2011), [http://www.cels.org.ar/common/documentos/cels\\_final\\_2011.pdf](http://www.cels.org.ar/common/documentos/cels_final_2011.pdf).

<sup>39</sup> Julio Cesar Campillay v. La Razón, Crónica and Diario Popular, SupremeCourt of Argentina, Fallos: 308:789 (1986).

was appointed with the responsibility of coordinating and articulating, with other state agencies, the necessary tasks so that Argentina "impulses and institutionally strengthen the process of truth and justice that deals with crimes against humanity, committed by state terrorism"<sup>40</sup>. Also, this program was aimed to ensure containment, protection and peace of the witnesses, victims, lawyers and court officials involved in cases or investigations relating to crimes against humanity, and their families.

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#### 4. EXTRALEGAL RISKS

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The disclosure of information can be risky when the content may expose politicians and public officials, and there can be unpleasant consequences.

A reporter from *La Nación Newspaper*, one of the most important national newspapers, wrote about how corruption is a pitiful everyday problem in Argentina that has been happening over the years. "It often happens that a newspaper report of an act of corruption is cavalierly ignored and the person who investigated, attacked without checking whether the facts are or not truthful. Or that the accused officer is called to offer a long monologue that destroys the editor, the medium where it was published and journalism as a profession, to finally rule from the microphone that proved once again that the journalist and the Journal lied, and that everything was annulled."<sup>41</sup>

There have been many cases of prosecutors and reporters being threatened in Argentina. The most important and recent example is the recently deceased prosecutor. Alberto Nisman died under controversial circumstances, and was threatened countless times to desist from his

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<sup>40</sup>Chief Cabinet of Ministers. Decree 606 of 2007. The Argentine government also wanted this program to improve the state's ability to obtain reliable information and to provide concrete support for the investigation of crimes against humanity, in order to facilitate and protect the judicial process. Therefore this decree provided that its goal –to accomplish an effective fight against state terrorism, and to avoid, by its condemnation, similar situations in the future- was to identify and propose legislative changes so that there is an effective conduct of the trials and adequate protection of the people involved in the investigations

<sup>41</sup>JORGE FERNÁNDEZ DÍAZ. *LA NACIÓN NEWSPAPER. The most painful silence* (2013), available at <http://www.lanacion.com.ar/1580500-el-silencio-que-duele-mas>

investigations on the AMIA case – the major terrorist attack in the history of Argentina-. A month prior to his death, he had accused the President and other public officials, who were apparently involved in the case, and went to several TV shows, and radios, to explain what he had been investigating. The day after he was founded dead, he was supposed to explain the Congressman his report. This case shows the extralegal risks to report cases of corruption in Argentina.

### **CHAPTER III**

## **FREEDOM OF INFORMATION: THE BREACH BETWEEN THE LEGISLATION AND ITS ENFORCEMENT**

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### **1. PRELIMINARY COMMENTS**

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Even though Argentina has freedom of information statutes, the access to information and its accuracy are engaged. According to a resolution from the Freedom of Press Organizations Committee, issued on January 17 2014, Argentina was included on a list of countries with conflicts related to access to public information.<sup>42</sup> Moreover, seven organizations have reported that the access to public information had suffered serious setbacks in Argentina (from low amount of reliable information to lack of independent enforcement authorities).<sup>43</sup> This context makes the use of FOIA particularly beneficial, and even necessary.

### **2. FREEDOM OF INFORMATION STATUTES AVAILABLE IN ARGENTINA.**

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#### **2.1 STATUTES RELATED TO ACCESS TO INFORMATION**

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<sup>42</sup>INTER-AMERICAN PRESS ASSOCIATION, INTERNATIONAL PRESS ORGANIZATIONS NAME MAIN PROBLEMS FOR FREEDOM OF EXPRESSION (2014), *available at* <http://www.sipiapa.org/en/international-press-organizations-name-main-problems-for-freedom-of-expression>

<sup>43</sup>ASOCIACIÓN POR LOS DERECHOS CIVILES, RIGHT TO ACCESS TO PUBLIC INFORMATION IN ARGENTINA (2011), *available at* <http://www.feim.org.ar/pdf/EPU-AI.pdf>

Although there are some statutes related to the access of information, none of them include specific provisions about cases of corruption and their scope is limited. At national level, the right of access to information is granted by the articles 33, 42 and 75.22 of the National Constitution<sup>44</sup>.

The article 33 of the National Constitution establishes the unenumerated rights (similar to the ninth amendment of the Bill of Rights of the United States). This article gives constitutional status to those rights arising from the human dignity and the democracy that are not expressly recognized.

These rights are not self-executive and precise a specific regulation to be applied. In 2003, the Executive power issued the Decree N° 1172, exercising his exclusive faculty to regulate that area.

The 1172-2003 decree regulated five matters related to access of information:

- a) Public Hearings: it regulates the participation of the citizens in the Public Hearings and establishes the general framework for their development.
- b) Lobby of the Executive Branch: 'Management of Interests' means: all types of activities, carried out by natural or legal people, public or private, by himself or on behalf of a third person; with or without profit, whose purpose is to influence in the exercise of any functions and / or decisions of agencies, organizations, companies, corporations, agencies and any other entity that operates under the jurisdiction of the Executive Branch.

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<sup>44</sup>NATIONAL ARGENTINEAN CONSTITUTION. Article 33: *"The declarations, rights and guarantees which the Constitution enumerates shall not be construed as a denial of others rights and guarantees not enumerated, but rising from the principal of sovereignty of the people and from the republican form of Government"*. Article 42: *"As regards consumption, consumers and users of goods and services have the rights to the protections of their health, safety and economics interest; to **adequate and truth information** ..."* Article 75.22: *"Treaties and concordats have a higher hierarchy than laws"*. So in this point should be included: The American Convention on Humans Rights (article 13.1), The International Pact on Civil and Political Rights (article 19) and The Universal Declaration of Human Rights (articles 19). They all say that *everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive information and idea through any media and regardless of frontiers.*

c) Participatory Rulemaking: the decree regulates the mechanism of participatory rulemaking and establishes the general framework for their development.

d) Access to Public Information and Access to Open Meetings of the Regulators of Public Services Entities: the decree established a general framework for its development.

It is applicable to institutions, organizations, companies, corporations, agencies and any other entity that operates under the jurisdiction of the Executive Branch<sup>45</sup> According to the same clause, its provisions are equally applicable to private organizations that have been awarded with grants or contributions from the national public sector, as well as institutions or funds whose administration, custody or preservation is the responsibility of the Federal Government; through their jurisdictions or agencies and private companies who have been granted by permit, license, grant, or other contract forms, delivery of a public service or exploitation of property in the public domain.

Decree 1172/03 lays down in its articles 3 and 4 a public hearing as a tool for the citizens, by which any affected or citizen with a particular interest will be able to participate on the public process of the decision – making, so they access to public information and exercise their right to hold opinions.<sup>46</sup>

The Statute Nº 104 of Buenos Aires City can be mentioned as an example of local regulation. It states that every person has the right to require and receive complete, truthful, timely and adequate information, of any organ belonging to the Central Administration, independent entities, Corporation and State Companies; as well as those companies and corporations where the State has an interest. Information must be provided in written documents, photographs, recordings, in any format and the one that has been created or obtained by the required organ that is in its possession and under its control.

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<sup>45</sup>Decree 1172 of 2003, Chapter 2, Article 2.

<sup>46</sup> Decree 1172 of 2003, Chapter 2, Articles 3-4.

It will not be provided information that damages the person's right to privacy, telephone or domicile data or database. Information proceeding from third parties that has been obtained by the Public Administration in a confidential manner and all information that is protected by the bank secret or any type that is protected by the professional secret will not be provided. In case that there is an existing document containing partial information with a limited access in the terms of the article mentioned, the rest of the information required must be provided.

Public access to information is free unless the applicant reproduces it. Reproduction costs are borne by the applicant. The information request must be written, identifying the applicant, without being subject to any formality in particular. It cannot be required the purpose of the request. A certificate must be delivered to the applicant of requirement information.

Applications must be answered within a period that must not exceed ten (10) business days. The period may be extended in exceptional circumstances for another ten (10) business days due to circumstances that make difficult to gather the required information. Where appropriate, the authority must communicate before expiration of ten (10) days, the reasons why using the exceptional extension.

If after the period specified in the preceding article ends, and the demand for information had not been satisfied or if the answer to the indictment shall have been ambiguous or partial, is considered as a sign of refusal in providing the information, being enabled the applicant to proceed *law action* under administrative jurisdiction of the City of Buenos Aires. The denial of information must be provided by an officer of equivalent rank or higher to the General Director, explaining the regulation that protects the negative.

It is considered a serious misconduct when a public official or agent arbitrarily obstructs access to required information, or provides incomplete information or hides, in any way, the implementation of this statute.

The lack of efficient from Public Administration is an easy way to constantly obstruct the access to public information, added to the official public's arbitrariness. So, it could happened that

they do not give you access because they just do not want to; or they give it but with delay or incomplete or, is also common, that you are given an irrelevant information or something that nothing has to do with what you asked for.

## 2. 2. RECENT SUPREME COURT RULINGS ON ACCESS TO INFORMATION

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In October 14, 2014 the Supreme Court confirmed the judgments of the Federal Court of Appeals on Administrative Matters which had upheld two *amparo*<sup>47</sup> actions against the National Ministry of Justice and Human Rights, and against the National Ministry of Federal Planning Public Investment and Services.

These two judgments meant a change in the ruling on access to information as they stand that the right to request information in the hands of the State is held by everyone, without the need to prove specific interest or grievance. The standing is broad, according with the “principle of maximum disclosure” which applies in this matter. This means a broader access to information by the whole citizenship without the need to prove any interest on the case, improving democracy. The current ruling on access to information is determined by these judgments. In both cases, the *amparo* actions were filed by former National Deputy Ricardo Gil Lavedra, after the rejection of the requests for information, which was presented within the terms of the 1172/2003 Decree, which regulates access to public information at a federal level.

In the case “Gil Lavedra, Ricardo R. c/. EN – Ministerio de Justicia y DDHH”, Mr. Gil Lavedra initiated an *amparo* action in order to make the General Inspectorate of Justice Public Registry of Commerce (it is a public registry of commerce, known as *Inspección General de Justicia* or *IGJ*) disclose information regarding several corporations.

In “Gil Lavedra, Ricardo y otro c/ Estado Nacional – Ministro de Planificación Federal Inversión Pública y Servicios s/amparo” case, Mr. Gil Lavedra, along with other Argentine lawmakers, initiated *amparo* actions requesting to the Federal Planning Ministry (*Ministerio de*

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<sup>47</sup>THE LAW DICTIONARY. *Amparo*: In Spanish-American law. A document issued to a claimant of land as protection to him, until a survey can be ordered, and the title of possession issued by an authorized commissioner.

*Planificación*) to hand over the documents about a public bidding to build two dams in the south of the country.

In both cases, the Appellate Court upheld the *amparo* actions and ordered the addressed agencies to hand over the solicited information under the terms of the 1172 decree. The Federal Government filed extraordinary appeals and in both cases, the Supreme Court rejected the challenges, confirming the appealed decisions.

The Supreme Court recalled that “the right to request information in the hands of the State is held by everyone, without the need to prove specific interest or grievance. The standing is broad, according with the “principle of maximum disclosure” which applies in this matter.”

On the other hand, in re “Oehler, Carlos A c/ Secretary of Tourism and Culture of the Jujuy Province - State Province s/ constitutional motion”<sup>48</sup>, the plaintiff made a complaint to the Supreme Court because it had been rejected their extraordinary appeal previously filed.

Carlos A. Oehler promoted an “amparo” remedy, seeking that the Secretary of Tourism and Culture of the Province of Jujuy, informed him if the Provincial Tourism Council and the Inter

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<sup>48</sup>*General Attorney's Office*. The Superior Court of Justice of Jujuy, confirms the judgment given by the local administrative litigation (Room II), dismissing the appeal filed by the victim against the Secretary of Tourism and Culture of the Jujuy Province. It must be remembered that, the plaintiff had initiated the action as a Member and Chairman of the Committee on Tourism, Transport and Communications of the Chamber of Deputies of the province already alluded, in order to make the Ministry send the documents he requested. It is considered that, the *amparo* remedy is not suitable for channeling of such claim. Also, the applicant had other means. At the same time, he justified the mean used, not only in the generic right to free access to public information sources, but in his capacity as a deputy. It is considered that the plaintiff is a mere citizen, and does not hold own legal interest. The plaintiff said that he arbitrary incurred, since the sentence is without merit and some of the claims raised have been dismissed, as well as departing from the applicable rules to the case. Believes that it has been placed a *capitis diminutio* on him for dishonoring his post as deputy; and, consequently, fewer rights than the rest; who have rejected their own grievances, which demonstrated they had incurred; that at no time he intended to assume the representation of the Legislature. In the opinion of the General Attorney, it is inadmissible the use of the *amparo* remedy as it doesn't directed against a judgment of res judicata or firm; because there are other suitable channels to funnel the claim (Legislature Rules of itself so provides and the 117 article of the Jujuy Provincial Constitution). In turn, to apply for these remedy, it is required that the effect caused by the delay, be of irreparable gravity, and this is not the case. The plaintiff has not established prior exhaust of all the means, to access the extraordinary remedy.

Notably, the withdrawal of the appeal does not arise from the absence of these rights, but by the merits of the wrong action. There is no institutional gravity to justify the validity of the act.

Tourism Facilitation Committee was formed; and, if so, send a certified copy of the instruments that have provided its constitution; in the event that they had not made in the manner and deadlines established in the 5319 provincial statute, report the reasons that would justify such failure; and finally, expressing all other relevant information on the matter, attaching relevant documentation.

The provincial court dismissed the constitutional challenge, arguing the lack of active legitimating of the plaintiff, which did not correspond to confer legal protection to those who promote a trial with the sole aspiration to obtain the restoration of a *state of iure*, without alleging breach of law, or victim role.

The 10 article of the 4444 Provincial Act, invoked by the plaintiff from the beginning of the lawsuit, states that "the right of free access to public information sources may be exercised by any natural or legal person in the Province, without the need of giving the reasons that motivated them". The transcript precept, unlike what was stated in the judgment, does not require the proof of a breach of law, or setting the role of victim or the proof of a direct and immediate link with the damage caused by the challenged act or omission. It expressly exempts the applicant to indicate the reasons for his claim. Therefore, simply as a citizen, according to the literal meaning of the rule, it is suitable an intervention to authorize judges to exercise their jurisdictional condition.

This year, as a consequence of Supreme Court's judgment in the case "CIPPEC", the IGJ has set up, by the 1/2015 resolution, a new procedure to guarantee the access to public information of foreign corporations (except the ones that are under the control of the Securities and Exchange Commission) that regularly work in Argentina in relation to its corporate purpose, branches establishment, or any other permanent representation of companies that make capitalization and savings transactions, partnerships and foundations.

According to that Resolution, the IGJ has the faculty to request all the information and documents that may be useful to control corporations. Everything obtained under this faculty is public and is available to be reviewed by those who are interested.

It is important to point out that there could be a conflict between two rights recognized in the National Constitution: the protection of data (*habeas data*) and the right to access information under the control of a government institution. Based on that, the need for formalities to require information to the IGJ arises and they must be set up.

To fulfill the objective of this regulation, the resolution provides some limits to the access to public information. First, it states that the IGJ is allowed to give information but it will not accept requirements implying the information production by the IGJ. Other exception is that the IGJ is not allowed to give information related to industrial, commercial, scientific, financial or technical secrets or intern notes, recommendations or opinions as part of the prior process to the emission of an administrative act or decision not included in a registry. Finally, in order to preserve the right of privacy and honor, the person whose sensitive information is involved, must express consent. The resolution also distinguishes the information related to a public organism, totally or partially, and the information related to any private person.

This procedure also establishes that it will not be necessary to prove interest to get the information and that a canon must be paid. However, in order to guarantee the right to public information, there will be able a special procedure for those who cannot pay.

Despite this resolution means an important progress for de the access to public information, we must make a constructive, but hard, critic to it. The resolution does not include public limited companies, the ones that represent the most useful way to corrupt. That is way we are not so optimistic about the positive effect that the resolution might have in the transparency and fight against corruption order.

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### 3. INFORMATION ABOUT INTERNAL INVESTIGATION CARRIED OUT BY AN AGENCY

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Despite the 1172/2003 decree, in the executive branch, there is no way to get information about internal investigations; because there is not a special governmental authority that provides this service. Instead the provision of information about internal investigations to the public is given by the government's employees from the different governmental organisms. This generates a lack of coordinated response to the request of information.

According with a recent study by the *Center for the Implementation of Public Policies Promoting Equity and Growth* or CIPPEC (*Centro de Implementación de Políticas Públicas para la Equidad y el Crecimiento*), that draws the results of an investigation focused on the Access to Information un public companies, if a citizen files an information request to obtain information from any of the 14 public companies (which represent the 85% of the total public companies where the Government is involved) about any internal investigations carried out by an agency which affects in any way these public companies, it will probably be denied or will not receive all the information requested. Because only 65% of the public companies that were asked in this study, had accepted the request of information. From this 65%, only 50% of the public companies gave all the information requested, and the 50% remain only gave 10% of the information.<sup>49</sup>

In the judicial branch, the way to get information about internal investigations is under the National Justice Regulation, adopted by the Supreme Court (called *Acordada Nº 12/52*). Articles 63, 64 and 66 allow the access to the judicial dossier to: a) Any party of the process and their attorneys; b) Any person allowed by one of the parties attorneys; c) Any Argentinean attorney (without matter if it is representing one of the parties), -but first the attorney has to request the access to the clerk, or has to join one of the parties or one of the party's attorney-; d) Any journalist (only when the final judgment has been pronounced). Article 64 includes some

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<sup>49</sup> CIPPEC, THE IMPLEMENTATION GAP OF DECREE 1172 ON ACCESS TO INFORMATION, Buenos Aires, January 2014 (last visited May 28, 2015)

limitations to the access: a) When the dossier contents are classified as reserved,<sup>50</sup> or b) When the judicial process is related to family or divorce matters.

On the other hand, this year, as a consequence of Supremes' Court judgment in the case "CIPPEC", the General Inspection of Justice (IGJ) has set up, by the resolution 1/2015, a new procedure to guarantee the access to public information of foreign corporations (except the ones that are under the control of the Securities and Exchange Commission) that regularly work in Argentina in relation to their corporate purpose, branches establishment, or any other permanent representation of companies that make capitalization and savings transactions, partnerships and foundations.

Due to the abovementioned, the IGJ has the faculty to request all the information and documents that may be useful to control corporations. Everything obtained under this faculty is public and able to be reviewed for those who are interested.

In spite of this, by harmonizing both rights it is understood that the idea of this procedure can be to set up the needed formalities to require information to the IGJ.

To fulfill the aim of this regulation, the resolution provides some limits to the access to public information. On the first place, it states that the IGJ is allowed to give information but it will not accept requirements implying the information production by the same institution. Other exception is that the IGJ is not allowed to give information related to industrial, commercial, scientific, financial or technical secrets or internal notes with produced recommendations or opinions as part of the process prior to the issuance of an administrative act or decision, not part of a record. Finally, to give out sensitive information it must be authorized by that person, if not the right to privacy or the right to honor can be violated.

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<sup>50</sup> According with the Civil and Commercial Procedure Code, a dossier can be classified as reserved because of judicial decision or at the request of a party. The motives could be the complexity of the process or the persons involved for example.

In the frame of these limits, the resolution makes difference between the information from the public organism, and the information from private people.

This procedure also establishes that it will not be necessary to prove interest to get the information and a fee must be paid. Despite this it, so that the right to public information is guaranteed, there will be able a special procedure for those who cannot pay.

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#### 4. AVAILABILITY OF INFORMATION, NAMES AND EVIDENCE IN ARGENTINA.

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In the public sector, as there are no strong regulations about free access to public information, the requests for information are left to their fate. Therefore, there is no time-line, and provision of information is a matter of goodwill of the public officials.

In this way it is not just a matter of getting access to information but also about the kind of information that Public Organism offers. In many cases Organisms pretend that they offer full access to information, but in reality the information offered is poor or not useful. A clear example is the INDEC (National Institute for Statistic and Census) that tries to offer information on inflation but it is always not true, trying to hide the economic difficulties that our country is going through.<sup>51</sup>

However, if the information requested is denied, one is able to demand the public agency who denied it, specifying the information one needs and the reasons of the request, according to the 1072/2003 decree. The procedural roads are the following one ones: (i) Habeas Data Action<sup>52</sup>; (ii) *Amparo* Action because of delay<sup>53</sup>.

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<sup>51</sup>LA NACIÓN NEWSPAPER. *Poverty and destitution: another lie of the INDEC* (2012), available at <http://www.lanacion.com.ar/1521820-pobreza-e-indigencia-otra-mentira-del-indec>.

<sup>52</sup>NATIONAL ARGENTINEAN CONSTITUTION. Article 43, second paragraph: *“Any person shall file this action to obtain information on the data about himself and their purpose, registered in public records or data bases, or in private ones intended to supply information; and in case of false data or discrimination, this action may be filed to request the suppression, rectification, confidentiality or updating of said data. The secret nature of the sources of journalistic information shall not be impaired.”*

Also Public Agencies have on their websites a link called “Public Information”, from where you can access to databases. The problem of these databases is that they are usually not updated, incomplete or simply have no relevant information.

## CONCLUSION

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Argentina is currently facing enormous challenges. As it was stated above, the main causes are lack of transparency and disclosure of important information, the huge gap between the legislation and its enforcement, the deficient checks and balances system, the considerable absence of independent judges and prosecutors, the missing protection of witnesses, and the impunity of politicians and public officials.

This general framework has led to a proliferation of corrupt acts carried out by public officials. The available legal tools we have in Argentina are certainly not enough to face this issue. Therefore, we consider that the Freedom of Information Act can be an efficient additional tool to punish the corrupt officials for the acts already performed and generate a chilling effect on the rest of the public officials. FOIA information requests would be definitely useful in addressing corruption.

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<sup>53</sup>NATIONAL ARGENTINEAN CONSTITUTION. Article 43, first paragraph: *“Any person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten right and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality. In such case the judge may declare that the act or omission is based on an unconstitutional rule. ”*