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# Occupy Information: The Case for Freedom of Corporate Information

ROY PELED\*

*The global financial crisis illustrated that the enormous power amassed by large corporations can have devastating effect on almost every individual around the globe in case of a wave of massive corporate failures. Forty-six years ago, demands for oversight over government operations and the desire for citizens to become more engaged in the democratic process had helped ushered in the Freedom of Information Act (“FOIA”). This article argues for extending a similar general duty of disclosure requirement to corporations because they hold pertinent information required for democratic participation. This article examines the justifications for FOIA and their applicability to corporate information. It reviews existing mechanisms in the U.S. and other countries, that allow for access to some corporate information, and discusses how they fall short of meeting the needs of an open and democratic society. After considering possible arguments against the notion of freedom of corporate information, it reaches the conclusion that, subject to certain limitations, it is a much needed legal reform that can contribute significantly to a better functioning democratic society and a more responsible corporate world.*

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It should be as much the aim of those who seek for social betterment to rid the business world of crimes of cunning as to rid the entire body politic of crimes of violence . . . *The first requisite is knowledge, full and complete; knowledge which may be made public to the world.* Theodore Roosevelt (1901)

## I. INTRODUCTION

The Occupy Protests during the summer 2012, from Zuccoti Park, New York, to Town Square, Anchorage, and from the Rothschild Boulevard in Tel-Aviv, to St. Paul's Cathedral in London, taught us that socioeconomic priorities might be changing; that we must reexamine the major institutions that lead our society and our legal thinking about them. This article suggests the adoption of a fundamental change in how we currently view corporate accountability and specifically corporations' right to conceal information. Such a change requires parting with deeply rooted perceptions of corporate rights and corporations' role in society. In the following pages, I will advocate a policy change that would recognize a general right to receive information from corporations, subject to narrowly construed exceptions.

Nearly 250 years have passed since the enactment of the world's first freedom of information ("FOI") law in the Swedish monarchy.<sup>1</sup> Its central function was to restrict the power of the king, while granting power to the press. Since then, more than ninety countries have instituted FOI laws, and such laws constitute important tools in restricting governmental powers, especially a government's abilities to curtail civil rights.<sup>2</sup> Fittingly, enacting FOI laws was one of the first legislative measures post-communist countries in Eastern Europe undertook once released from the yoke of the Soviet Union.<sup>3</sup> In the

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1. For an English translation of the Swedish Freedom of the Press Act of 1766, considered to be the world's first FOI law, see His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press § 6 (1766) (Peter Hogg's trans.), in Richard E. Freeman, Andrew C. Wicks & Bidhan Parmar, *Stakeholder Theory and "The Corporate Objective Revisited,"* 15 ORGANIZATION SCIENCE 364, 368 (2004).

2. "Freedom of information" is the term accepted internationally to describe the right of the public to receive information from administrative entities. The term is vague, and some prefer to use "the right to know," or "right of access to information" to express the same idea. This article uses these terms to communicate the same idea.

3. For discussions on FOI legislation in Eastern Europe, see John M. Ackerman & Irma E. Sandovel-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85, 103, 122 (2006); Article 19, The Global Campaign for Free Expression, *Promoting Practical Access To Democracy: A Survey of Freedom of Information in Central and Eastern*

more veteran democracies, FOI has become a central tool to empower citizens' dealings with their government by redistribution the control of information.

Based on their financial position, several private commercial corporations are as powerful as the governments of many United Nation member states.<sup>4</sup> Corporations nowadays control information often similar in significance and magnitude to those in the hands of governments.<sup>5</sup> If information is indeed power, then these corporations may control as much power as many governments. Yet these corporations are subject to dramatically less scrutiny than governments, which can be subject to FOI laws and general administrative law principles.

This article argues for applying freedom of information doctrines to curtail the power of corporations<sup>6</sup> and to empower individuals and groups coming into contact with them. It proposes imposing a "general duty of disclosure" on corporations, in contrast to the existing disclosure requirements which only apply to specific positively and explicitly predefined issues, such as financial information, nutritional data, pollution emissions, and the like.

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*Europe* (2002), available at [www.article19.org/data/files/pdfs/publications/freedom-of-information-survey-of-central-and-e.pdf](http://www.article19.org/data/files/pdfs/publications/freedom-of-information-survey-of-central-and-e.pdf).

4. See Part II below.

5. Numerous accounts detail how much information is generated and stored globally by organizations with varying numbers due to the difficulty in measuring this data. But all estimates agree that data is collected in an ever-accelerating pace. For a list of these attempts to assess the amount of global information see, JAMES MANYIKA ET AL., *BIG DATA: THE NEXT FRONTIER FOR INNOVATION, COMPETITION, AND PRODUCTIVITY* (2001), available at [www.mckinsey.com/insights/mgi/research/technology\\_and\\_innovation/big\\_data\\_the\\_next\\_frontier\\_for\\_innovation](http://www.mckinsey.com/insights/mgi/research/technology_and_innovation/big_data_the_next_frontier_for_innovation).

One example of the volume of information held by corporations appeared in a 2008 report on "petabyte power players" customers of the data warehouse company Teradata. These included Ebay petabytes of data, and Wal-Mart storing 2.5 petabytes of data. See Eric Lai, *Teradata Creates Elite Club for Petabyte-Plus Data Warehouse Customers*, *COMPUTERWORLD* (Sept. 10, 2012), [www.computerworld.com/s/article/9117159/Teradata\\_creates\\_elite\\_club\\_for\\_peta\\_byte\\_plus\\_data\\_warehouse\\_customers](http://www.computerworld.com/s/article/9117159/Teradata_creates_elite_club_for_peta_byte_plus_data_warehouse_customers). Just two years earlier it was estimated that all the world's countries outside of North America, Western Europe, and the developed countries of Asia and the Pacific Rim put together hold no more than 8 petabytes of information (held by governments, corporations and individuals together). See John F. Grantz, *THE EXPANDING DIGITAL UNIVERSE: A FORECAST OF WORLDWIDE INFORMATION GROWTH THROUGH 2010* (2007), available at [www.emc.com/collateral/analyst-reports/expanding-digital-idc-white-paper.pdf](http://www.emc.com/collateral/analyst-reports/expanding-digital-idc-white-paper.pdf). In 2012 Microsoft said that for its search engine alone (Bing) it stores no less than 300 petabytes of information. See Paul McDougall, *Microsoft Stress-Tests Windows Server 2012 with Bing*, *INFORMATIONWEEK* (Sept. 10, 2012), available at [www.informationweek.com/big-data/news/software/windows8/240001825/microsoft-stresstests-windows-server-2012-with-bing?cid=SBX\\_bigdata\\_related\\_news\\_Windows\\_8\\_big\\_data&itc=SBX\\_bigdata\\_related\\_news\\_Windows\\_8\\_big\\_data](http://www.informationweek.com/big-data/news/software/windows8/240001825/microsoft-stresstests-windows-server-2012-with-bing?cid=SBX_bigdata_related_news_Windows_8_big_data&itc=SBX_bigdata_related_news_Windows_8_big_data).

6. The term "corporations" in this paper refers to commercial corporations. Some of the arguments presented here will also hold true for nonprofit organizations, but others do not, and their separate characteristics require a separate discussion.

This article will first review the rise in power of private corporations and their entry into a wide range of activities of public nature. This discussion will provide the foundation for the argument that tools, such as FOI, should be used to restrain corporate power. The third section presents areas where substantial right to FOI already exists. This review will serve two purposes: First, it will show that the principle of FOI as it applies to corporations already exists in law. Secondly, it will differentiate between the general duty of disclosure recommended by this article and existing law. The fourth section of this article will examine the extent to which widely accepted justifications for subjecting governments to FOI laws can be reasonably applied to corporations, as well as some additional justification unique to corporations. The fifth part will review models for freedom of corporate information already in use in various countries. Finally, the last section will establish the justifications for extending a general duty of disclosure to corporations.

The measures proposed in this article run counter to the way many view the legal relationships among private citizens, corporations, and the state. This article intends to justify, through the prism of freedom of information, a renewed discussion of these relationships that reflect the contemporary power dynamics among them.

## II. THE STRENGTHENING OF CORPORATE POWER AND CORPORATIONS' GROWING INVOLVEMENT IN THE PUBLIC SPHERE

For centuries, states held power unmatched by other entities brought about because of their control of force, capital, and information.<sup>7</sup> However, activities and services formerly controlled and provided by the state have passed to private hands, and as the power of nations weakens, corporations claim more influence.<sup>8</sup> This

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7. See generally ALVIN TOFFLER, *POWERSHIFT: KNOWLEDGE, WEALTH, AND VIOLENCE AT THE EDGE OF THE 21ST CENTURY* (1990) (stating three important sources of power controlled by the states are 1) Force, as the state hold a monopoly over the application of force in its territory; 2) Capital, because the state has authority to set and collect taxes; and 3) Information, as the state was the leading producer and collector of information, and because it controlled education and information systems).

8. For a discussion of the weakening of the state, see SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (1996); cf. LINDA WEISS, *THE MYTH OF THE POWERLESS STATE* (1998) (arguing that states are not weakening by these processes); for a description of the changes created by globalization in the basic character of state sovereignty, see SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF*

shift in power warrants the need to provide mechanisms to prevent abuses by corporations.

The dramatic strengthening of corporate power over the past century is steadily intensifying. According to one study, of the 100 largest world economies in 2010, forty-two were private corporations.<sup>9</sup> The tremendous influence of these corporations casts a large shadow and extends to multiple facets of society. For example, the policy of a few banks practicing high-risk-taking policy led to the 2008 global economic crisis.<sup>10</sup> General Motors' decision to close its plant in Flint, Michigan turned a once thriving city into a ghost town suffering from high rate of unemployment, drugs, and crimes.<sup>11</sup>

As corporations amass more power, they also increasingly exert more control through privatization. Privatization refers to processes involving the transfer of public property to private hands through deregulation and outsourcing.<sup>12</sup> Privatization invites corporate involvement in the provision of governmental services and in return, privatization brings an increased level of government regulation to the private sphere. An outcome of privatization "has been a pervasive blurring of the boundaries between the public and private sectors."<sup>13</sup> Since FOI laws are considered part of public law and corporate law as part of private law,<sup>14</sup> the blurring of boundaries

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GLOBALIZATION (1996).

9. Democracy Leadership Council, *The World's Top 50 Economies: 44 countries, six firms*, DLC (July 14, 2010), [www.dlc.org/ndol\\_cie5ae.html?kaid=108&subid=900003&contentid=255173](http://www.dlc.org/ndol_cie5ae.html?kaid=108&subid=900003&contentid=255173). A different survey puts the number at 51 of 100 already at the turn of the century. See generally SARAH ANDERASON & JOHN CAVANAGH, *CORPORATE VS. COUNTRY ECONOMIC CLOUD: THE TOP 100* (2d Ed., 2005). Other researchers have criticized these figures, but even according to more conservative estimates, no fewer than thirty-seven corporations were listed among the one hundred largest economies in the world already in 2002. See Paul De Grauwe & Filip Camerman, *How Big Are the Big Multinational Companies*, in *TIJDSCHRIFT VOOR ECONOMIE EN MANAGEMENT* 3 XLVII 311, 317 (2002).

10. See generally MARTIN N. BAILY & DOUGLAS J. ELIOT, *THE US Financial AND ECONOMIC CRISIS: WHERE DO WE STAND AND WHERE DO WE GO FROM HERE?* (2009).

11. *ROGER AND ME* (Michael Moor 1989). The title of the film is based on the attempts made by director Michael Moore to meet with GM CEO, Roger Smith, to discuss his decision to close the plant. The CEO's refusal to be interviewed reflects the corporations working assumption that it owes no explanations to the community, and must only seek the approval of its shareholders. For another description of the all encompassing effect of a corporation on a state, see JAMES PHELAN & ROBERT POZEN, *THE COMPANY STATE, RALPH NADER'S STUDY GROUP REPORT ON DUPONT IN DELAWARE* (1973).

12. See generally Jack M. Beermann, *Privatization and Political Accountability*, 28 *FORDHAM URB. L.J.* 1507, 1519 (2001) (for additional models) [hereinafter *Beermann I*].

13. Ralph M. Kramer, *Voluntary Agencies and the Contract Culture: Dream or Nightmare?*, 68 *SOC. SERV. REV.* 33, 35 (1994).

14. Although an interesting and compelling view has been voiced that ". . . the law of corporations should be evaluated more as a branch of *public law*, the kinds of law that concerns society more generally, such as constitutional law or environmental law" and that "[o]nce corporate law is correctly seen as public law, it will be clear that significant changes should be made." KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW* 2 (2006).

challenge traditional classifications and provides the opportunity to apply FOI principles to the private sector as opposed to limiting them to public agencies alone.<sup>15</sup>

Many legal scholars propose imposing public law obligations to accompany privatization.<sup>16</sup> However, relying on privatization alone as a justification is overly formalistic. Many corporations never become privatized in the broad sense of the term, yet operate in the public realms. Cellular communication and internet service providers fit this description because they control infrastructure of extreme public importance and possess an abundant amount of information on individuals such that their conduct may lead to breach of privacy rights of consumers. The release of “The Global Intelligence Files” by Wikileaks in February 2012 highlights this problem.<sup>17</sup> There, millions of emails exchanged within “Stratfor,” a private commercial global intelligence firm, were distributed to the public. The released information documented a full-blown intelligence apparatus that engaged in widespread covert monitoring and the selling of information to private corporations and governments.<sup>18</sup> Based on the clearly public nature of the information, this article will argue the corporation should be viewed as a public entity.

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15. This article does not argue that corporations and governments have become to be one that they are indistinguishable. It does argue that many characteristics of the latter have come to characterize the former as well, and this should bear consequences. States’ monopoly over the use of physical force is at least one significant difference between governments and corporations. Max Weber, *Politics as Vocation* (1919), available at [www.sscnet.ucla.edu/polisci/ethos/Weber-vocation.pdf](http://www.sscnet.ucla.edu/polisci/ethos/Weber-vocation.pdf). But even so, governments are rapidly authorizing corporations to apply forces to reach various ends. For a nonexhaustive list of examples, see P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY* (2003). In some cases they are even given at least a temporary “free hand” to use force. *Id.* at 3–4.

16. Daphne Barak-Erez, *Civil Rights in the Privatized State: A Comparative View*, 28 *ANGLO-AM. L. REV.* 503, 511–13 (1999); Daphne Barak-Frez, *A State Action Doctrine for an Age of Privatization*, 45 *SYRACUSE L. REV.* 1169 (1995); Jack M. Beermann, *Administrative Law-Like Obligations on Private(ized) Entities*, 49 *UCLA L. REV.* 1717 (2002) [hereinafter *Beermann II*]; Gillian E. Metzger, *Privatization as Delegation* 103 *COLUM. L. REV.* 1367 (2003); David H. Rosenbloom & Suzanne J. Piotrowski, *Outsourcing the Constitution and Administrative Law Norms*, 35 *ADMIN. REV. OF PUB. ADMIN.* 103 (2005).

17. THE GLOBAL INTELLIGENCE FILES (Feb. 27, 2012), available at [wikileaks.org/the-gifiles.html](http://wikileaks.org/the-gifiles.html).

18. The files show systematic monitoring of activists whose work was perceived as potentially damaging to Stratfor clients’ interests, for instance those involved in the campaign for victims of the 1984 Bhopal, India tragedy. See *Release Stratford monitored Bhopal activists including The Yes Men for Dow Chemical and Union Carbide*, THE GLOBAL INTELLIGENCE FILES, <http://wikileaks.org/gifiles/releasedate/2012-02-27-00-stratford-monitored-bhopal-activists-including.html> (last visited Feb. 27, 2012). The corporation has even been presented as a “shadow” CIA. See *Wikileaks Targets Global Risk Company Stratfor*, REUTERS (Feb. 27, 2012), available at [www.reuters.com/article/2012/02/27/wikileaks-stratfor-idUSL5E8DR0120120227](http://www.reuters.com/article/2012/02/27/wikileaks-stratfor-idUSL5E8DR0120120227).

### III. EXISTING DISCLOSURE REQUIREMENTS

Slowly but steadily, much has been done over the past century to increase corporate transparency. During the second half of the 20th century the U.S. enacted legislations demanding consumer product disclosure that recognized the right of consumers to receive information on an array of consumer goods and services, including the ingredients used in food products,<sup>19</sup> results of clinical tests performed on pharmaceutical products,<sup>20</sup> any potential harmful components in children's products,<sup>21</sup> information on the danger of medical treatment and quality of health care institutions,<sup>22</sup> and the management of private data.<sup>23</sup> The U.S. similarly enacted laws requiring corporations in the industrial sector to document and report certain actions significantly affecting the environment,<sup>24</sup> including the Emergency Planning and Community Right to Know Act ("EPCRA") passed in 1985 to compel factories to report to state and local authorities all dangerous substances created and released into

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19. See, e.g., Consumer Product Safety Act, 15 U.S.C.A. §§ 2051-2089 (2012); Consumer Credit Disclosure Law, 15 U.S.C.A. §§ 1601-1667F (2012); Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified as amended in scattered section of 21 U.S.C.); Home Mortgage Disclosure Act, 12 U.S.C.A. §§ 2801-2811 (2012); Food, Drug and Cosmetics Act, 21 U.S.C.A. §§ 301-399D (2012); Fair Packaging and Labeling Act (USA), 15 U.S.C.A. §§ 1451-1461 (2012); Consumer Information Act 1978 (Act No. 1/1978).

20. See Food and Drug Administration Amendments Act of 2007, Pub. Law No. 110-85, 121 Stat 823 (codified as amended in scattered sections of 21 U.S.C.).

21. See Consumer Product Safety Improvement Act of 2008, Pub. Law No. 110-314, 122 Stat. 3016 (codified as amended in scattered sections of 15 U.S.C.).

22. See Aharon D. Twerski & Neil B. Cohen, *The Second Revolution in Informed Consent: Comparing Physicians to Each Other*, 94 NW. U. L. REV. 1, 2 (1999).

23. For California law on the management of private data, see Breach Disclosure Statute, Cal. Civ. Code § 1798.29 (2012). Similar legislation was enacted in thirty-three U.S. states. See Paul M. Schwartz & Edward J. Janger, *Notification of Data Security Breaches*, 105 MICH. L. REV. 913, 915 (2006). Such law already exists in Japan, see *id.* at 915 n.8, and is gaining momentum in other countries, see Alana Maurushat, *Data Breach Notification Law Across the World from California to Australia*, UNIVERSITY OF NEW SOUTH WALES FACULTY OF LAW RESEARCH SERIES 11, 15 (2009).

24. For a general description of several of these laws, see U.S. ENVIRONMENTAL PROTECTION AGENCY, [www.epa.gov/epahome/r2k.htm](http://www.epa.gov/epahome/r2k.htm) (last visited Aug. 12, 2012).

The first international binding obligation that requires signatories to disclose pollutant emission was the adopted in 2003 under the Kiev Protocol on Pollutant Release and Transfer Registers. The Protocol became valid in October 2009, after it was ratified by half of the 36 nations. UNECE, [www.unece.org/env/pp/prtr.html](http://www.unece.org/env/pp/prtr.html) (last visited Aug. 12, 2012). The Protocol requires member states to create nation-wide pollutant release and transfer registers open to the public and accessible on the internet.

the environment as a result of their operations.<sup>25</sup> Similar regulations were enacted in the United Kingdom in 2004.<sup>26</sup>

Progress has also been made in the financial sector where public corporations,<sup>27</sup> and to a lesser extent privately owned companies, must disclose significant financial information to the public. The change, however, is far from sufficient. While the economic crisis of 1929<sup>28</sup> and the public outcry following the Enron and Worldcom debacle served as backdrops for meaningful legislative steps in imposing disclosure obligations on corporations,<sup>29</sup> the 2008 global financial crisis did not produce similar legislative progress. Some explain this phenomenon by arguing that legislative changes have, by and large, been exhausted as an effective remedy to market failures, and that new preventive measures should be sought elsewhere.<sup>30</sup> Furthermore, while progress has been made, the current financial disclosure regime applies mostly to publicly traded corporations and not closely-held corporations. The current regulations require that companies disclose pertinent information to shareholders, but do not require disclosure of information to other parties who may require protection and be interested, for instance employees, suppliers, and consumers. Financial losses sustained by workers and consumers may at times be greater than losses sustained by shareholders.<sup>31</sup>

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25. Emergency planning and Community Right to Know Act, 42 U.S.C §§ 1101–11050 (2012).

26. The Environmental Information Regulations 2004, S.I. 2004 No. 3391 (U.K.). The law compels companies to make information available to the public by electronic means. *Id.* at § 4.

27. The listing of public companies for trade and debt, and their disclosure obligations in the U.S. were imposed in several federal legislations, the most important of them being: Securities Act of 1933 §§ 1–28, 15 U.S.C.A. § 77 (2012); Securities Exchange Act of 1934 §§ 1–39, 15 U.S.C.A. § 78a (2012) [hereinafter SEC Act]; The Sarbanes-Oxley Act of 2002 § 1, 15 U.S.C. § 7201 (2012) [hereinafter *SOX Act*]. For a description of the legislations and their full text, see *The Laws that Govern the Securities Industry*, U.S. Securities and Exchange Commission, [www.sec.gov/about/laws.shtml](http://www.sec.gov/about/laws.shtml) (last visited July 31, 2012).

28. See Joel Seligman, *Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1 (1983).

29. The SOX Act was legislated with a majority of 334 supporters against 90 opposed in the House of Representatives (*Final Vote Results for Roll Call*, U.S. HOUSE OF REPRESENTATIVES OFFICE OF THE CLERK (Apr. 24, 2002), [clerk.house.gov/evs/2002/roll110.xml](http://clerk.house.gov/evs/2002/roll110.xml)), and with a majority of 99 supporters with none opposed in the Senate (*U.S. Senate Roll Call Votes 102nd Congress, 2nd Session*, U.S. SENATE LEGISLATION AND RECORDS (July 25, 2002), [www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=107&session=2&vote=00192](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=2&vote=00192)).

30. See, e.g., Emiliós Avgouleas, Univ. of Manchester, *The Global Financial Crisis, the Disclosure Paradigm, and European Financial Regulation: the Case for Reform*, Address at the EUROFRAME conference (June 1, 2009) (arguing that much information was available to investors to point towards a possible crisis, yet they failed to respond in the expected way, necessitating interventionist regulation beyond disclosure enforcement).

31. See, e.g., Freeman, Wicks & Parmar, *supra* note 1, at 346.

Presently, there is no legal duty to disclose information of the type that was uncovered by the Enron investigation,<sup>32</sup> including boundless wastefulness, attempts to influence political appointments, nepotism, and more.<sup>33</sup> In a FOI regime, an investigative reporter could demand certain information from the company, improper practices like the ones in Enron would have been more difficult to hide and potentially limited the magnitude of the tragedy. However, any demand to allow access to such information in the present legal situation would be ignored and considered ludicrous.

While corporations are required to disclose significantly more information than in the past, disclosure remains the exception to the general rule of secrecy.

#### IV. THE CASES FOR AND AGAINST FREEDOM OF CORPORATE INFORMATION

Freedom of information laws exist today in almost every liberal democracy and even in several nondemocratic states;<sup>34</sup> many deem FOI a constitutional right.<sup>35</sup> Four justifications have been used for recognizing FOI in the government context. Using these justifications as bases, this article will apply them to information held by private corporations.<sup>36</sup> After doing so and providing counter arguments

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32. Tim Grieve, *The Decline and Fall of the Enron Empire* (2003), available at [dir.salon.com/story/news/feature/2003/10/14/enron/index.html](http://dir.salon.com/story/news/feature/2003/10/14/enron/index.html).

33. The documents and correspondence that were seized during the investigation of the Federal Energy Regulatory Commission are available in full over the internet on several websites that have added search and referencing services for public use of those interested or the simply curious. See, e.g., *Public Domain Enron Email Corpus and Database*, (July 31, 2012), [www.enron-mail.com](http://www.enron-mail.com). This published material raises serious questions in regard to the balancing of the right of the public to be informed, and the right for privacy, which are worthy of an additional in depth discussion, but which lie outside the scope of this article.

34. For the list of the states in which Freedom of Information Acts were enacted up to September 2009, see Roger Vleugels, *Overview of All 90 FOIA Countries and Territories*, available at [right2info.org/laws/Vleugels-Overview-86-FOIA-Countries-9.08.pdf](http://right2info.org/laws/Vleugels-Overview-86-FOIA-Countries-9.08.pdf).

Since this publication, freedom of information acts have also been legislated in Guatemala, Uruguay, Ethiopia, Indonesia, Malaysia, Russia, the Moldavian islands, Malta, Nigeria and the Philippines. However, in some of these countries, they have yet to come into effect.

35. In two thirds of the countries belonging to the European Union Council, freedom of information is enumerated in the constitution, see Access to Information: A Fundamental Right, A Universal Standard (Jan. 17, 2006), available at [http://www.access-info.org/documents/Access\\_Docs/Thinking/Get\\_Connected/Access\\_Info\\_Europe\\_Briefing\\_Paper.pdf](http://www.access-info.org/documents/Access_Docs/Thinking/Get_Connected/Access_Info_Europe_Briefing_Paper.pdf).

For an extensive discussion of the constitutional characteristics of the right, see Roy Peled & Yoram Rabin, *The Constitutional Right to Know*, 42 COLUM. HUM. RTS. L. REV. 357, 360 (2011).

36. The summary of the justifications as they applies to the government is based on the analysis appearing in Rabin and Peled. Peled & Rabin, *supra* note 35, at 360.

against their applicability, I will further provide justifications that are unique to commercial corporations.

#### A. APPLYING GENERAL FOI JUSTIFICATIONS TO CORPORATE INFORMATION

##### 1. *The Political–Democratic Justification*

The right to information is a prerequisite to a democratic regime because such a right enables citizens to actively participate in the democratic process, a critical element of democracy. Decisions made by citizens based on information filtered by the government cannot be considered free and democratic.<sup>37</sup> While this justifies FOI in the context of the government, can the same be said that involvement in the democratic process requires that citizens have the right to access information held by corporations?

To answer this question, take the healthcare debate under the Clinton administration as an illustration.<sup>38</sup> There, the Health Insurance Association of America (“HIAA”), comprising of heads of insurance companies, was able to successfully prevent the bill from becoming law, in large part because it could run a campaign without having to disclose potentially damaging information, because it was not subject to FOI laws. For example, the fact that the tobacco industry, led by the Philip Morris Corporation, was a significant financier of the opposing campaign was not revealed until years later when the tobacco companies were obligated to release internal documents as part of a master-settlement agreement reached in a lawsuit of forty-six U.S. states against the major tobacco companies.<sup>39</sup>

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37. This was the background for the enactment of the Freedom of Information Act in 1966 in the United States, Freedom of Information Act, 5 U.S.C. § 552 (1966), and in many other democracies in the years to follow. Such as France, “Law on Access to Administrative Documents (1978), Canada “Access to Information Act” (1982), The United Kingdom “Freedom of Information Act” (2000) and Germany”: Informationsfreiheitsgesetz ” (2005). For the full list of FOI Laws, see Vluegels, *supra* note 34.

38. For a description of the public debate around the plan, and the lack of reliable information on its details, see Derek Bok, *The Great Health Care Debate of 1993-94*, 2 PUBLIC TALK: ONLINE JOURNAL OF DISCOURSE LEADERSHIP (1998); KANT PATEL, HEALTH CARE POLITICS AND POLICY IN AMERICA 383–389 (3rd ed. 2006) Lisa Disch, *Publicity - Stunt Participation and Sound Bite Polemics: The Health Care Debate 1993-1994*, 21 J. HEALTH POL., POL'Y & L. 3 (1996) Raymond L. Goldsteen et al., *Harry and Louise and the Health Care Reform: Romancing Public Opinion*, 26 J. HEALTH POL., POL'Y & L. 1325 (2001).

39. Master Settlement Agreement, National Association of Attorneys General, § 4, Nov. 23, 1998, available at [www.naag.org/backpages/naag/tobacco/msa/msapdf/1109185724\\_1032468605\\_cigmsa.pdf](http://www.naag.org/backpages/naag/tobacco/msa/msapdf/1109185724_1032468605_cigmsa.pdf).

These documents exposed Philip Morris as financing diverse “grassroots” initiatives and media advertising campaigns, activating biased “commentators,” initiating pseudo-scientific conventions, and more.<sup>40</sup> But such information that may have negatively affected the private healthcare system was kept from the public, preventing the public from making a well-informed decision about the health care bill.<sup>41</sup> Conversely, because the government was subject to the Freedom of Information Act, any attempts to raise funds and generate “popular” activity in support of the reform were made public, and were accompanied by much criticism.<sup>42</sup> In fact, the opposition could more easily obtain information from the government in order to expose the campaign's “behind the scenes” information.<sup>43</sup>

Corporations are central players in the decision-making processes in any western democracy as they exert as much influence as senior government executives or political parties. In order for citizens to participate in the democratic process, information held by corporations should be made widely and easily available so that the public may form its views when partaking in the political process.

## 2. *The Oversight Justification*

In the context of imposing FOI on the government, the public has a right to inspect the activities of public entities in order to examine these organizations’ level of efficiency and to uncover any structural and organizational flaws and corruption.<sup>44</sup> Effective oversight of government activities requires the government to be

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40. The documents published in the settlement agreement appear on a dedicated Chicago University website that allows document searches and displaying, *see* [legacy.library.ucsf.edu](http://legacy.library.ucsf.edu). For documents exposing the company involvement in anti-reform activities, *see, e.g.*, [legacy.library.ucsf.edu/action/document/page?tid=psy67c00&page=1](http://legacy.library.ucsf.edu/action/document/page?tid=psy67c00&page=1); [legacy.library.ucsf.edu/tid/blz55e00](http://legacy.library.ucsf.edu/tid/blz55e00); [legacy.library.ucsf.edu/tid/san09e00/pdf](http://legacy.library.ucsf.edu/tid/san09e00/pdf).

41. This question stood at the root of class action lawsuits against medical insurance companies in the U.S., and in their context, a request was made for a decision that would require the companies to publicize incentives given to doctors; while the request to submit the class action suits was denied, the courts ordered that the information on controversial incentives be made public.

42. *Online NewsHour: The Healthcare Debate Leading up to Clinton’s Healthcare Address to Congress*; Ezra Klein, *The Lessons of ‘94*, THE AMERICAN PROSPECT, Jan. 20, 2008, [www.prospect.org/cs/articles?article=the\\_lessons\\_of\\_94](http://www.prospect.org/cs/articles?article=the_lessons_of_94).

43. “White House Release Task Force Documents,” ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, <http://www.aapsonline.org/newsletters/oct94.htm>. For the documents themselves *see*, [www.aapsonline.org/clinton/AAPS/TASKFORC.pdf](http://www.aapsonline.org/clinton/AAPS/TASKFORC.pdf) (last visited Sept. 11, 2012).

44. Peled & Rabin, *supra* note 35, at 366.

transparent, which helps to reduce corruption.<sup>45</sup> Similarly, the significant influence of corporations in public discourse warrants important interest in supervising corporate activities carried out in good faith, but that might be flawed due to negligence, lack of professionalism, excess risk-taking or other faults of character or judgment which could affect public interests.

Take as an illustration the accounts that followed the 2003 Columbia space shuttle disaster. In the aftermath of this tragic event, NASA received requests for information regarding possible causes of the explosion pursuant to the Freedom of Information Act (FOIA). While NASA complied with most of the public's requests<sup>46</sup> the involvement of United Space Alliance Corporation ("United Space"), a company owned jointly by Boeing and Lockheed Martin, restricted the amount of information the public could access and thus limited the public's ability to properly evaluate various aspects of the event. Because United Space was not bound by FOIA, it did not have to disclose information, despite testimonies by high-ranking NASA officials stating that United Space's employees were an integral part of the flawed decision-making process that resulted in the disaster.<sup>47</sup>

Considering the public interest in supervising parties involved in the Columbia disaster, there is no substantial difference between NASA and United Space. Yet, current laws do not compel corporations to disclose interested information. Should corporations be held accountable to the general public in this particular scenario, or when they decide to shut down a plant, resulting in thousands in layoffs as was the case in Flint, Michigan,<sup>48</sup> or when a bank collapses putting at stake its clients' life savings? What level of accountability should corporations be subject to the public?

According to Anita Allen, accountability operates in the field of public administration and corporate governance,<sup>49</sup> but FOI laws are mechanics of "state accountability."<sup>50</sup> However, Allen's rationales supporting this proposition—including consent, reliance, relationship,

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45. This is a widespread notion, and in the author's view, a valid one as well. However it is not undisputed. For supporting evidence, see Catherina Lindstedt & Daniel Naurin, *Transparency and Corruption: The Conditional Significance of a Free Press*, 5 QOG WORKING PAPER SERIES, 2005, available at [www.qog.pol.gu.se/digitalAssets/1350/1350633\\_2005\\_5-lindstedt\\_aurin.pdf](http://www.qog.pol.gu.se/digitalAssets/1350/1350633_2005_5-lindstedt_aurin.pdf). For a different view, see Samia Tavares, *Do Freedom of Information Laws Decrease Corruption?*, MPRA PAPER, no. 3560, Nov. 2007, available at <http://mpa.ub.uni-muenchen.de/3560>.

46. NASA, *Summary of Records Released under Freedom of Information Act*, [www.nasa.gov/columbia/foia/index.html](http://www.nasa.gov/columbia/foia/index.html) (last visited Aug. 12, 2012).

47. Rosenbloom & Piotrowski, *supra* note 16, at 106

48. RODGER AND ME, *supra* note 11.

49. ANITA ALLEN, WHY PRIVACY ISN'T EVERYTHING 22 (2003).

50. *Id.*

and public need—only marginally distinguish between states and corporations. Public officials have indeed implicitly conceded to operating in the sunlight, and it is hard to say the same of officials in commercial corporations.<sup>51</sup> However, implicit consent is the result of public atmosphere and expectations. These did not exist a century ago when government officials would not have conceded to the openness we know today. This might change for corporate officials in the future as well; Reliance is often induced by corporations. Clearly GM employees in Flint, Michigan relied on GM for their livelihood, just as people whose life savings depended on the prudence of managers at Lehman Brothers relied on them. Relationships also induce accountability.<sup>52</sup> But employees, customers, providers, even neighbors, are all engaged in relationships that can be seen to render the corporation accountable to them. Finally, people are accountable to the public where there is a compelling public interest, such as that of the accountability of people with AIDS or tuberculosis, because of the government's responsibility to contain highly contagious diseases. But the same might be said for governmental obligation to protect a public interest such as the stability of the financial sector.

According to Allen, accountability requires accessibility and transparency. Allen's justifications fit corporations just as they fit governments and strengthen the argument for corporate transparency.

### 3. *The Instrumental Justification*

The rationale for extending FOI regime to the government is the idea that FOI is instrumental, if not a necessary link, for the exercise of numerous civil rights, including the right to freedom of expression.<sup>53</sup> The ability to advocate for social rights hinges on the ability to access information. The growing effectiveness of civil society organizations to sway public policy has been credited to a greater access to information, which allows these organizations to stand as equals before government representatives, who traditionally

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51. *Id.*

52. *See supra* note 49.

53. John M. Ackerman & Irma E. Sandovel-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85, 88–89 (2006); *see also* Universal Declaration of Human Rights, G.A. res. 217 (III) A, U.N. Doc A/RES/217(III) (Dec. 10, 1948) (“Freedom of opinion and expression” found in Article 19 of the Universal Declaration of Human Rights of 1948 includes the right “to request and receive information.”); *see also* International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (16 Dec., 1966) (Article 19 states that “[e]veryone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds.”).

enjoyed a substantial advantage as a result of their exclusive control of information.<sup>54</sup>

But governments no longer hold a monopoly over the creation or distribution of information. As corporations gain more power and as privatization blurs the boundaries between the private and public realms, corporations are active players in both the creation and distribution of information. As too much unchecked power in the hands of government lead to corruption and at times, human rights abuses, the same is true when power is left unchecked in the hands of corporations; the Wikileaks illustration above serves as an example of such abuse.

As access to information held by the government is necessary to stand as equal before the government, the same is true for needing access to information held by corporations to advance one's viewpoint in society. For instance, in order for interested parties to effectively raise awareness of America's continued presence in Iraq requires access to information such as the fact that more than 64,000 private contractors were left in Iraq after the U.S. withdrew its forces beginning August 2010.<sup>55</sup> But without more stringent laws obligating private corporations to be more transparent, advocates are faced with a difficult task in advancing their position, leaving the public with the false impression that American engagement in Iraq has ceased.

Furthermore, individuals directly affected by the actions of private contractors in Iraq and other war zones may need access to information held by these corporations to effectively hold them accountable for human rights abuses. Contrast these two cases. Using the FOIA, U.S. human rights organizations successfully compelled the CIA as well as the Justice Department's Office of Legal Counsel to turn over information revealing torture methods inflicted on Guantanamo Bay detainees by the CIA.<sup>56</sup> In contrast, despite investigations into reports of detainee abuses by private corporate employees at the Abu-Ghraib prison,<sup>57</sup> the public did not gain similar access to information regarding human rights abuses by

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54. JEFFREY M. BERRY, *THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS* 132 (1999); THEDA SKOCPOL, *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* 377 (1999).

55. COMMISSION ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, *TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS; FINAL REPORT TO CONGRESS* (August 2011) available at [www.wartimecontracting.gov](http://www.wartimecontracting.gov). For many of these documents, see *Accountability for Torture*, ACLU, [www.aclu.org/accountability/released.html](http://www.aclu.org/accountability/released.html) (last visited Aug. 12, 2012).

56. For many of these documents, see *accountability for torture*, ACLU, [www.aclu.org/accountability/released.html](http://www.aclu.org/accountability/released.html) (last visited Aug. 12, 2012).

57. For a detailed description of such allegations, see Second Amended Complaint, *Al Rawi v. Titan Corp.*, No. 04CV 1143 R, 2004 WL 1380538 (S.D. Cal. June 9, 2004).

employees of the private corporations employed in the facility.<sup>58</sup> While some relevant information was disclosed in the course of litigation, the activities of private contractors remain immune from inspection.<sup>59</sup>

#### 4. *The Proprietary Justification*<sup>60</sup>

The rationale for extending FOI to the government is the idea that information is property, and public authorities are trustees while citizens are owners and beneficiaries of such property. As such, citizens are entitled to have free access to such information, and control of information by civil servants is justifiable as a result of their positions as public trustees. Any limits on the public's access to such information should emanate only from the need to protect the interests of other owners, that is, other members of the general public.

Similarly, corporation could be said to be trustee of information, holding it in trust for its owner, the public. However, since the owners of a corporation are shareholders, information belongs to the shareholders, and them alone, and thus a corporation does not owe an obligation to the public to use or access its property. Underlying this rationale is the conventional perception that a person's property is his "sole and despotic dominion,"<sup>61</sup> and that he can utilize this property as he sees fit, including denying others the right to use or access it. In this view, a corporation may exclude others from using and accessing its information.

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58. What were the internal memos directing employees of Titan and CACI, two private contractors providing translation and interrogation services to the U.S. military, in regard to treatment of detainees? How were complaints dealt with, if at all? What were the standards for hiring individuals to work for these companies?

59. While the exposure of the Abu-Ghraib scandal moved legislators and international institutions to act, no substantive change came of it. In 2007, then Senator Barak Obama introduced a bill to increase transparency in the work of military contractors, but the bill never became law. Transparency and Accountability in Military and Security Contracting Act of 2007, S. 674, 110th Cong. (2007). The U.N. Human Rights Council issued a report calling on the U.S. "to ensure that all requirements for transparency and oversight apply when contracting." Human Rights Council, *Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, A/HRC/15/25/Add.3 (July 2, 2010). Nevertheless, the U.N. report did not have much meaningful impact on the U.S.

60. For purposes of this discussion, I do not intend to address the question of the proprietary status of information. Information is currently recognized as property. The question here is what proprietary regime ought to be applied to information in the possession of commercial corporations. Extensive writings have addressed the proprietary status of information. See, e.g., Arthur S. ; ANNE WELLS BRANSCOMB, WHO OWNS INFORMATION (1995).

61. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1847)

Over the past decades, however, scholars have proposed new views on the rights and entitlements of property ownership.<sup>62</sup> The “stakeholder theory,”<sup>63</sup> which arose in the mid-1980s,<sup>64</sup> defines a stakeholder as “any group or individual that is affected by, or can affect the achieving of the objectives of the organization.”<sup>65</sup> This view spawned new theories about the duties corporations owe to their stakeholders,<sup>66</sup> including the sharing of information with stakeholders.<sup>67</sup> These theories, however, deal with the *expectation* that a corporation will, on its own and as part of its “social responsibility,” determine to what level they would recognize the interests of its stakeholders. Thus the question as to how much corporations must disclose to their different “stakeholders” remains a determination made by corporate management and owners.

Other scholars have suggested more far-reaching approaches to the division of rights within a corporation. Robert Dahl considers giant corporations such as General Motors to be political institutions and, as such, ownership in them should not be treated as belonging to the field of private property.<sup>68</sup> Joseph Singer, in a 1988 article,<sup>69</sup> claims that since employees have a possessory right to their place of employment,<sup>70</sup> employees should be allowed to receive information relevant to help them determine whether the owners are drawing dividends in a way that might jeopardize the stability of the business, or information that would allow them to recognize signs that the business might be closing.<sup>71</sup> John McCall argues that employees’ right to co-determine corporate policy (from coffee-break schedule to

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62. See, e.g., M. A. Honroe, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107 (A. G. Guest ed., 1961); STEPHEN MUNZER, A THEORY OF PROPERTY (1990).

63. The theory was first presented in R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984). For a review of different uses of the term, see

64. Similar ideas were presented as early as 1932, see

65. See R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH at 46 (1984).

66. See, e.g., *Dodge v. Ford Motor Company*, where the court ruled that “The business corporation is organized and carried on primarily for the profit of stockholders. The powers of the directors are to be employed for that end.” 204 Mich. 459, 170 N.W. 668 (Mich. 1919).

67. In a rating of 12 levels of interest on “interest holders” in the life of the corporation, informing was rated as third by the writers, Friedman and Mills. It should be noted that informing is discussed there, and this is a term that leaves the initiative in the hands of the organizations. It is less intrusive than an obligation to provide access to information seekers. However, the difference is not necessarily substantial in regard to organizations that are not hiding information for improper purposes.

68. Robert A. Dahl, *Governing the Giant Corporation*, in CORPORATE POWER IN AMERICA 10, 18 (Ralph Nader & Mark J. Green eds., 1973).

69. Joseph Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

70. *Id.* at 699.

71. *Id.* at 740.

closing plants) should trump current understanding of property rights.<sup>72</sup>

Important for our discussion here is that today's discourse on property recognizes various kinds and degrees of proprietary rights. Ownership is no longer necessarily seen as a right that precludes all others from access to the property, especially when the property is publicly situated. Furthermore, property owners are often subjected to various limitations on how to manage their private property.<sup>73</sup> Thus, that information is held by a corporation cannot preclude its duty to allow the public to access to such information.

## B. DEFENDING "CORPORATE RIGHTS"

Countering the idea that the public has the right to be informed is the rationale that corporations have guaranteed constitutional rights.<sup>74</sup> While the presumption that corporations should be afforded basic constitutional rights was not the initial interpretation of the U.S. Constitution,<sup>75</sup> any doubt otherwise is put to rest following the U.S. Supreme Court's ruling in *Citizens United v. Federal Elections*

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72. John J. McCall, *Employee Voice in Corporate Governance: A Defense of Strong Participation Rights*, 11 BUSINESS ETHICS QUARTERLY 195, 195 (2001).

73. For instance zoning laws and regulatory takings.

74. *Int'l. Dairy Foods Ass'n. v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) (holding that a Vermont state law requiring the labeling of products manufactured from growth hormone injected cows unconstitutional because it violates the corporation's freedom to refrain from speech). See Dean Ritz, *When Silence is Not Golden: Negative Free Speech and Human Rights for Corporations*, 5 BY WHAT AUTHORITY 2 (2003), available at [poclad.org/bwa/spring03.htm](http://poclad.org/bwa/spring03.htm).

75. The recognition that U.S. corporations are guaranteed constitutional rights came nearly a century after the ratification of the U.S. Constitution. The initial interpretation of the U.S. Constitution was that only flesh and blood human beings are afforded constitutional rights; in fact, in 1855, the U.S. Supreme Court still referred to corporations as an "artificial invention." *Dodge v. Woolsey*, 59 U.S. 331, 366 (1855) (Campbell, J. dissenting) (stating that "it cannot be" that "a mere legal entity, an artificial person, invisible, intangible, can be a citizen of the United States in the sense in which that word is used in the Constitution."). This changed in 1886, when a comment was added to the report of a U.S. Supreme Court ruling in *Santa Clara Cnty. v. S. P. R. Co.*, 118 U.S. 394 (1886). The report documented oral exchange in courtroom by the justices expressing their opinion, before the parties begun arguments, that a corporation should be considered a "person" and should enjoy the right of due process under the Fourteenth Amendment. Despite frequent misquotes that cite it as a precedent, in reality, it is not part of the ruling. See, e.g., *Home Ins. Co. v. City of New York* 8 S. Ct. 1385, 1387 (1886); *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.* 262 US 544, 500 (1923); *First Nat. Bank of Boston v. Bellotti* 435 US 765, 822.

For recount of the statements between the justices, see Frank Wagner, *Davis Strikes Again!*, 23(2) THE CATCHLINE: BULLETIN OF THE ASSOCIATION OF REPORTERS OF JUDICIAL DECISIONS (2005), available at [arjd.washlaw.edu/Catchline\\_april\\_2005.htm](http://arjd.washlaw.edu/Catchline_april_2005.htm). A copy of the original correspondence is available at [www.de-fact-o.com/factread.php?id=33](http://www.de-fact-o.com/factread.php?id=33).

*Committee*.<sup>76</sup> There, the Court ruled that corporations are afforded the right to freedom of expression, and Congress may not limit corporations' right to make political expenditures for electioneering communications, a form of speech, unless there is a compelling government interest.<sup>77</sup> While the Court admitted corporations are merely "associations of citizens,"<sup>78</sup> it struck down statutory provisions requiring corporations that spend money on electioneering communications to disclose their identity.<sup>79</sup> Since *Citizens United*, corporations enjoy immense freedom to spend on election campaigns.<sup>80</sup>

Advocates of corporations possessing constitutional rights base their position on the following rationales: (1) the recognition of corporate right protects the people *standing behind* the corporation, namely, the shareholders; (2) in effect, this protects individuals' freedom of association; and (3) corporations perform a vital function in society. This article will respond to each of the rationales put forward.<sup>81</sup>

First, the assertion that constitutional protection for corporations is necessary to protect constitutional rights of its shareholders is without merit. There is no reason why shareholders should not be brought center stage to examine the actual harm they may personally sustain. For example, assume a surprise inspection by the tax authorities at a company's headquarters amounts to violation of the corporation's constitutional rights to privacy. Here, what needs to be examined is whether such an inspection breaches the *shareholders'* right to privacy without having to resort to examining the constitutional rights of the corporation. One could examine the two rights separately and indeed, such analysis may lead to different results.<sup>82</sup> In the same fashion, one need not consider whether the marking of milk products in Vermont violates the corporation's "right

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76. *Citizens United v. Federal Elections Committee*, 558 U.S. 310, 130 S.Ct. 876 (2010).

77. *Id.* at 898.

78. *Id.* at 900.

79. *Id.* at 913.

80. *See, e.g., Speechnow.org v. Fed. Election Comm.*, 599 F.3d 686 (D.C. Cir. 2010) (holding that Political Action Committees ("PACs") that spend money on electioneering activities, but do not contribute to other PACs or directly to candidates' campaigns, may receive unlimited donations from undisclosed donor's).

81. These arguments were presented by Prof. Aharon Barak, retired President of the Supreme Court of Israel in H CJ 4593/05 *United Mizrahi Bank v. the Prime Minister of Israel* (2006) (in Hebrew).

82. The corporation's right to privacy is protected under the Fourth Amendment of the Constitution. In *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978), the Supreme Court held that spot inspection of federal safety authorities at a workplace violated the corporation's constitutional right of privacy.

not to be forced to speech” but whether forcing such speech upon the corporation is the same as forcing it upon *shareholders*.

Second, the basis for allowing corporations to assert protection under the U.S. Constitution as a mean to protect individuals’ freedom of association—because people should not be deprived of constitutional rights when they act collectively—is also flawed. Freedom of association entitles individuals to certain rights such that denial of some of these may indeed render freedom to association meaningless. To deny unions’ collective bargaining power, for example, would effectively render freedom of association meaningless. But other rights, while beneficial to the freedom of association, are not the *raison d’etre* for the freedom of association, and the denial of them cannot be said to violate this right. For instance, providing incorporated businesses with lower tax rates clearly benefits these businesses, but raising taxes cannot be said to violate shareholders’ freedom of association, even if higher taxes make incorporation less appealing.

Finally, the rationale that corporations should be afforded constitutional because corporations perform a vital function in society is meritless. While corporations undoubtedly fulfill a vital role in society, this fact alone does not justify affording them constitutional rights. Much like corporations, governments also provide society with vital functions and yet governments are not given any constitutional rights, nor claim any natural or pre-legal rights. They are allowed to carry out only those actions explicitly established by law.

But while the rationales for allowing corporations to assert rights under the U.S. Constitution are precarious at best, we will proceed assuming that corporations are indeed entitled to them.

### *1. The Breach of the Right to Property*

The basis for asserting that corporations should not be subject to a FOI regime is that doing so would violate their right to property, which we must also assume constitutes the right to prevent public access.<sup>83</sup> But even when we assume that corporations possess the right to property, scholars such as Hanoch Dagan maintain that under certain contexts, the right to property *itself* obligates the owner to

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83. For a comprehensive description, supporters, and critics of the concept that property right does not necessarily encompass the right to exclude others from use and access, see generally Hanoch Dagan, *Exclusion and Inclusion in Property*, 109 TEL-AVIV UNIV. LEGAL WORKING PAPERS SERIES (2009).

grant public access.<sup>84</sup> According to Dagan, property ownership is a relationship status between the owner and his community, such that in return for society making available its resources to protect the owner's property,<sup>85</sup> society then bears an obligation to protect its members who are not the owners of such property.<sup>86</sup> Indeed, where public access to proprietary information does not harm the owner's reasonable enjoyment of such property, permitting public access is not merely *appropriate* but a *duty* that originates from the owner's social responsibility that is integral to his property right.<sup>87</sup>

It is important to distinguish the following two arguments about property rights. First is the argument that the value of a corporation depreciates when information about certain property is disclosed. For instance, "the Coca Cola formula" is a valuable property that would lose value if disclosed to the public). In this scenario, the public should not have access rights. Distinguish this argument from the second argument, which asserts that the corporation would lose profits if it were required to disclose information it deems harmful to the corporation, which is different from preventing public access to an invention as in the Coca Cola formula. Under the second scenario, the public should have access rights. Publishing an internal report exposing a bank's corruption by management, for example, could likely result in profit losses, but withholding such information harms stakeholders who hold some access rights.

## 2. Breach of the "Freedom of Commercial Speech"

Some argue that disclosure rules constitute "forced speech" and thus violate the right of corporations to refrain from speaking.<sup>88</sup> This argument has two weaknesses. First, the right to refrain from providing *factual* information is counter to declared objectives of commercial free speech, which supports the search for truth.<sup>89</sup>

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84. See generally HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS (2011).

85. Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 772 (1999).

86. See also Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255, 1259 (2006).

87. Conceptions of property rights like that of Dagan's allow us to perceive this right in different forms under different contexts. It is easy, for example, to accept that an owner has a right to deny an uninvited guest entry into her home without questioning her motive. Yet we will question the motive of a storeowner who denies customers access into his store, if he does so due to such factors as the customers' race. The storeowner cannot simply justify his action by claiming that he has an absolute, unfettered right to exclude.

88. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTING'S L.J. 577, n.206 (1989); TR Piety, *Against Freedom of Commercial Expression*, CARDOZO L.REV., 2586.

89. *Abram v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting, "the best test of truth is

Withholding information, particularly factual information, undermines this objective and, therefore, should not be allowed to enjoy constitutional protection for commercial freedom of speech.<sup>90</sup>

Second, the argument conflates the distinction between (1) the existing disclosure duties and (2) the recognition of the right to access corporate information. Compelling disclosure requires corporations to actively take steps to present information to the public. Corporations are forced to “act” counter to their desires. One might argue, with some difficulty as described above, that this breaches the corporations’ freedom to refrain from speech. On the other hand, recognition of a right to access corporate information is in this sense a much “softer” enforcement of speech because it merely requires corporations to give public access to their documents, where minimal action is required and where the corporations are not providing any particular expression on the issue.<sup>91</sup> Corporations, for example, would allow public access to raw data and research results conducted by their research department, relating to the effects of the hormones. Corporations would not be required to make any declarations, for instance, in SEC filings. They would merely provide information in its present state to the requesting party.

### 3. *Right to Privacy*

Whether corporations are guaranteed the right to privacy such that it enjoys protection from FIO laws is inconclusive according to case law. For much of the early half of the 20th century, the U.S. Supreme Court refused to extend the same privacy rights to corporations that are available to individuals.<sup>92</sup> But in 1978, the

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the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution); *Whitney v. Cal.*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring, “If there be time to expose through discussion the falsehood and fallacies . . . the remedy to be applied is more speech, not enforced silence”).

90. One might mistakenly conclude that the same may be applied to individual speech. Yet forcing an individual to speak breaches his right to liberty, a right not easily applied to a corporation. For reasons discussed above, forcing the corporation “to speak” has little to do with forced speech of the individuals “behind it,” and hence the same objections do not apply.

91. Both systems are not necessarily interchangeable. At times a FOI rule of law could make disclosure obligations unnecessary, but sometimes it would still be practically necessary to obligate the manufacturer to disclose the information on his own to the consumer exposed directly to the products, and not to wait for a request of information from the public.

92. *See, e.g., Hale v. Henkel*, 201 U.S. 43, 70 (1906) (holding that a corporation may not withhold documents based on the argument that disclosure violates corporations’ right against self-incrimination under the Fifth Amendment); *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (holding that while General Motors enjoys some rights to privacy, it cannot demand the same extent of privacy protection offered to individuals); *see also, U.S. v. Agriprocessors, Inc.*,

Supreme Court deviated from its previous decisions when it held that a law permitting labor law enforcement agencies to conduct surprise inspections of private businesses as unconstitutional as a breach of the corporation's privacy right under the Fourth Amendment.<sup>93</sup> Yet again, the Supreme Court changed course in 2011 when it held that a corporation does not enjoy "personal information" exemption in section 7(c) of the U.S. FOIA in *AT&T v. FCC*.<sup>94</sup> There, the Court upheld the FCC's decision to disclose to a FOIA requestor information collected in the course of an investigation into alleged corporate misconducts when the corporation was implementing a federal government program. Notwithstanding this recent decision, and despite a checkered history in this area, we can surmise that corporations do enjoy some degree of privacy protection, albeit not to an equal level or degree offered to individual.<sup>95</sup>

Some scholars, such as Richard Posner,<sup>96</sup> argue that corporations should be granted even *greater* degree of privacy protection than that enjoy by individuals. In most cases, Posner reasons, individuals avoid disclosing information not so they could be "left alone,"<sup>97</sup> but rather to interact with others and to use private information to mislead and manipulate others.<sup>98</sup> Conversely, businesses withhold information to promote the public interest of compensating entrepreneurs.<sup>99</sup>

Posner's argument, however, fails for two reasons.<sup>100</sup> First, there is no justification to prefer the right to privacy where withholding information may likely prevent the public from having well-informed public debates. A great deal of the information withheld by corporations meets this description.<sup>101</sup> Second, Posner's argument that

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No. 08–CR–1324–LRR, 2009 WL 2255729, at 4 (N.D. Iowa 2009). (adopting the rule in *Morton Salt*, the court dismisses the claim that a corporation can be considered a person for purposes of privacy protection).

93. *Marshall v. Barlow's, Inc.*, 436 U. S. 307, 325–26 (1978).

94. *F.C.C. v. AT&T*, 131 S.Ct. 1177, 1185 (2011) (the court opined that while there are precedents establishing that a corporation can legally be "a person," there is no such rule to suggest that "personal" includes "corporate").

95. As a point of comparison, in Australia the Supreme Court in the year 2001 rejected the argument that a corporation has a right to privacy. See generally Lee A. Bygrave, *A Right to Privacy for Corporations? Lenah in an International Context*, 8 *CONTEXT* 130 (2001).

96. Richard A. Posner, *An Economic Theory of Privacy*, 2 *REGULATION* 19 (1978).

97. Louis Brandies & Samuel Warren, *The Right to Privacy*, 4 *HARV. L. REV.* 193, 195–96 (1890).

98. Posner, *supra* note 97 at 20.

99. See *supra* note 98, at 25. Interestingly, Posner does not contemplate whether corporations, too, withhold information to manipulate others.

100. The writer's opinion is that there are good reasons to not apply these conclusions to the privacy of individuals, and the right to receive information from them, as Posner suggests, but for the purposes of this discussion we need not expound on this point.

101. It is worth noting that often information is kept secret to protect its value when it was attained with great effort. However, such information is not the majority of information held by

corporations should be given a greater degree of privacy protection than individuals because of individuals' desire to interact with others, and hence should waive privacy protection, is just as easily applicable to corporations. The existence of any corporation depends on continuous interaction with workers, neighbors, investors, and consumers.

Even when we assume that corporations have constitutionally protected privacy rights, the public's right to be informed is not undermined. These two interests—corporations' privacy rights and individuals' right to be informed—can be balanced. Where withholding information is motivated by “privacy,” the corporation is usually attempting to withhold information that might expose unpleasant facts about it, or act to counter a misrepresentation foisted upon it by the public. Even if this privacy claim is valid, in such cases it should be given little weight in comparison to the public's interest in supervising corporate practice—similar to how minimal weight given to sex offenders in the balance with the public's interest.<sup>102</sup> Privacy, like patriotism, could become “the last refuge of the scoundrel.”

### C. ADDITIONAL JUSTIFICATIONS

- *Promoting the Values of Trust*: Trust is a social institution of extreme importance,<sup>103</sup> but absent external obligations, it would be surprising to find a manufacturer who would voluntarily disclose that he uses components of inferior quality in his products. But should corporations expect such information to become public, they would more likely practice a priori honesty.
- *Discovering the Truth and Judicial Efficiency*: While discovery proceedings<sup>104</sup> may lead parties to reveal documents of great public interest, such a finding is coincidental and relies on

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corporations, and we refer to protecting such value towards the end of this article.

102. See Rafshoon G. Scott, *Community Notification of Sex Offenders: Issues of Punishment, Privacy and Due Process*, 44 EMORY L.J. 1663, 1647–50 (1995).

103. Some consider trust to be a supreme principle, underlying entire fields of law, primarily contracts law. See Eli Bukspan, *The Notion of Trust as a Comprehensive Theory of Contract and Corporate Law: A New Approach to the Conception that the Corporation Is a Nexus of Contract*, 2 HASTINGS BUS. L.J. 229, 231–34 (2006).

104. See FED. R. CIV. P. 26–37; Rule 34(c) compels even nonparties to produce documents. Some view discovery as a form of “focused freedom of information act, see, e.g., Beermann II, *supra* note 16 liberal discovery rules can function like a more focused version of FOIA, opening a great deal of private information to access by opponents in civil actions, which in turn may lead to public disclosure of that information”).

costly legal proceedings.<sup>105</sup> Nevertheless, justifications for document disclosure during legal proceedings equally support the discovery in the prelegal phase of a dispute. Such discovery might void the need for legal action altogether and save the parties expensive billable hours.<sup>106</sup>

- *Fair Competition, Financial Efficiency, and Economic Growth:* While champions of free market principles may argue that market forces will implement information disclosure but for economic inefficiencies,<sup>107</sup> scholars have successfully disputed this idea,<sup>108</sup> and the recent global economic crisis has turned up the volume in support of greater corporate transparency, while arguments advocating secrecy have been less frequent.<sup>109</sup> Furthermore, some economists argue information disclosure would lead to improved risk assessment, which would benefit investors<sup>110</sup> and the market as a whole.<sup>111</sup> Finally, general disclosure obligation would induce more *fair* competition because such an obligation may reduce a company's

105. Discovery takes place when the services of attorneys are already retained, and judicial time is being consumed. See Amy Luria & John E. Clabby, *An Expense out of Control: Rule 33 Interrogatories After the Advent of Initial Disclosures and Two Proposals for Change*, 9 CHAP. L. REV. 29, 30–31 (2005).

106. For the impact of Civil Procedure Rules on the volume of cases that survive pretrial proceedings, see Stephen C Yeazell, *Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 649–54 (1994).

107. ADRIAN HENRIQUES, *CORPORATE TRUTH: THE LIMITS TO TRANSPARENCY* 13 (2007).

108. Think of Nobel Prizes in Economics conferred upon scholars whose theories focus on economic insights that the market itself has failed to recognize. For instance Daniel Kahneman, demonstrating that fairness is a commodity that consumers are willing to pay for—a revelation that came after centuries in which businesses did not attribute the existence of any real “market” for fair play. Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Fairness and the Assumption of Economics*, 59 J. BUS. 285 (1986).

109. Joseph Stiglitz, Nobel Peace Prize in economics laureate, has described the connection between the lack of information and the fall of the Lehman Brothers investment bank:

The reason Lehman Brothers went down is twofold; they owned a lot of these bad assets but also because the products were so non-transparent, because they've engaged in so much of this accounting gimmickry that no one had any confidence. The financial markets are based on trust . . . . What's happened has been the lost of that trust.

Joseph Stiglitz on the Fall of Lehman Brothers (2008), available at [bigthink.com/josephstiglitz/joseph-stiglitz-on-the-fall-of-lehman-brothers](http://bigthink.com/josephstiglitz/joseph-stiglitz-on-the-fall-of-lehman-brothers).

110. Investors would benefit because financing expenses is lowered where information is more readily accessible, and thus investors will not be paying the premium for risks and the expenses of financing investigation,

111. The market would benefit because low financing costs promote investments and growth Robert K. Elliot & Peter D. Jacobson, *Costs and Benefits of Business Information Disclosure*, 8 ACCT. HORIZONS 80, 81, 89 (1994). Additional advantages include a more educated allotment of investments, a more lively transfer of funds, as a result of more easily concluded transactions, and finally, it would make it much easier to identify those responsible for externalities. *Id.* at 90, 92.

competitive advantages from practicing unfair behaviors. Companies that attempt to reduce costs by using inferior components, for example, would likely tarnish their public images. Thus, disclosure would more accurately reflect the company's behavior and enhance consumer ability to decide on which company they wish to support.

## V. CORPORATE DISCLOSURE POLICIES ARE WHERE THE WORLD IS (SLOWLY) HEADING

### A. THE UNITED STATES

When the U.S. enacted the FOIA<sup>112</sup> in 1966, it was the fourth nation in the world to sign into law anything like it.<sup>113</sup> Since then, many countries have instituted similar FOI laws, and some have even extended various degrees of FOI laws to corporations, a practice that has yet to be seen in the U.S.

FOIA provides that only an "agency" shall make available to the public certain information<sup>114</sup> and empowers federal courts to order an "agency" to produce "agency records improperly withheld from an individual requesting access."<sup>115</sup> Thus, only "agency records" are subject to FIOA. The Supreme Court, in *Forsham v. Harris*<sup>116</sup> has interpreted the "agency records" narrowly and formalistically as to protect records possessed by a privately controlled organization from being subject to FIOA, despite the fact that the language of the Act allows for a more expansive reading.<sup>117</sup>

In *Forsham*, the Court held that a private corporation does not become a public agency because it received grants from a federal agency. There, a diabetes treatment organization initiated a series of FOIA requests to the Department of Health (DOH) seeking access to *raw data* that was collected in a research that studied the effects of

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112. Freedom of Information Act, 5 U.S.C. § 552 (1996).

113. Following the enactment of similar laws in Sweden (1766), Colombia (1848), and Finland (1951). For a complete chronological list of freedom of information legislation see Vleugels, *supra* note 34.

114. 5 U.S.C. § 552(a)

115. 5 U.S.C. § 552(a)(4)(B).

116. 445 U.S. 169 (1980). For an interpretation of the decision, see Aman C. Alfred, *Information, Privacy and Technology: Citizens, Clients or Consumers?*, in FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION: ESSAYS IN HONOUR OF SIR DAVID WILLIAMS 323, 329 (Jack Beatson & Yvonne Cripps eds., 2000).

117. *E.g.*, see Justice Brennan dissent in *Forsham v. Harris*, 445 U.S. at 187.

certain drugs on diabetes treatment. The study was conducted by scientists employed at a private organization, which received grants from DOH for the study. The findings from the study were submitted to the DOH, but the *raw data*, which included fifty-five million data entries, was never received by the DOH. The Court rejected the argument that data generated by a private organization may be considered “agency records” for the purposes of the Act, merely because the private organization received federal study grants.<sup>118</sup> While Congress “sought to expand public rights of access to Government information when it enacted [FOIA]. . . that expansion was a finite one,” the Court wrote.<sup>119</sup> The fact that Congress refrained from including private organizations in the scope of FOIA has a positive meaning of protecting corporations from being subject to FOIA.<sup>120</sup>

The *Forsham*’s decision, which continued to direct federal judges over the next decades,<sup>121</sup> created a strange legal situation where information possessed by a government agency must be accessible to the public, but is closed at the moment where the agency pays a private organization to produce similar information. Furthermore, the decision tended to disregard the price of keeping the information secret. The discussion focused on the need to protect the private organization, and largely ignored considering the right of the petitioner and the right of public access.<sup>122</sup>

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118. *Forsham*, 445 U.S. at 182.

119. *Id.* at 178.

120. *Id.* at 180–82. In his dissent, Justice Brennan wrote that because the government agency had used the requested information in its decision making process, it should be considered information belonging to the agency. *Id.* at 189-90. He further noted, that the “[g]overnment by secrecy is no less destructive of democracy if it is carried on within agencies or within private organizations serving agencies. The value of the record to the electorate is not affected . . .” *Id.*

121. *See, e.g.*, *Tax Analysts v. U.S. Dept. of Justice*, 913 F. Supp. 599 (D.D.C. 1996); *Stanley v. DOD*, 1999 U.S. Dist. LEXIS 23585 (S.D. Ill. June 22, 1999); *Burka v. U.S. Dept. of Health and Human Services*, 87 F.3d 508 (D.C. Cir. 1996). Courts have also concluded that FOIA does not apply to private prisons; *See Nicole B. Casarez, Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REF. 249, 249 (1995) [hereinafter *Casarez II*].

122. A more flexible discussion of the right to receive information from private organizations operating in the United States exists in academic discourse. *See, e.g.*, *Casarez II, supra* 121; Rosenbloom & Piotrowski, *supra* note 16; *Beerman II, supra* note 16, at 1507; Mathew D. Bunker & Charles N. Davis, *Private Governance*, 75 JOURNALISM & MASS COMM. Q. 464 (1998); *Casarez II, supra* 121; Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COMM. L.J. 21 (1999); Craig D. Feiser, *Protecting the Public’s Right to Know: The Debate Over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. U. L. REV. 825 (2000); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism and Democracy*, 46 B.C. L. REV. 989 (2005).

Dissatisfied with the ruling in *Forsham*, the U.S. Congress in 1998 established an explicit provision that provides any research information created by public funding would be subject to the Act.<sup>123</sup> In 2007, this provision was expanded to cover any information prepared for a government agency.<sup>124</sup> Still, neither U.S. case law nor the legislator has ever discussed the possibility of ordering a private corporation to disclose information when it does not have any connection to a public agency.<sup>125</sup>

## B. THE UNITED KINGDOM

The U.K. Freedom of Information Act (“U.K. FOIA”)<sup>126</sup> applies fully to private organizations in regard to only one field—the suppliers of medical services under the National Health Insurance Act.<sup>127</sup> The U.K. FOIA also gives the minister charged with administering the Act the *authority* to apply the Act to an organization that “appears to the Secretary of State to exercise functions of a public nature.”<sup>128</sup> While the Act appears to grant the minister expansive authority, attempts to subject additional organizations to the Act have been disappointing. The two years consultation that began in 2008 to include additional organizations, for example, produced poor results,<sup>129</sup> as the government rejected the majority of the public’s suggestions, and announced its intention to apply the law to only four organizations, all of which perform functions of an overt public character or are mostly funded by taxpayers.<sup>130</sup> The department rejected suggestions to apply the U.K.

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123. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

124. Open Government Act (2007), Pub. L. No. 110-175, 121 Stat. 2524 (2007).

125. Does *FCC v. AT&T*, 131 S.Ct. 1177 (2011), mark a change in the court’s view? While the decision shows little sympathy to the concerns of the communication mega-corporation, the answer is most likely negative. The case deals with information clearly held by a federal agency, and the court’s opinion is based on textual analysis, rather than a substantial discussion on the merits of access to the information requested.

126. Freedom of Information Act 2000 (ch. 36), available at [www.opsi.gov.uk/Acts/acts2000/ukpga\\_20000036\\_en\\_1](http://www.opsi.gov.uk/Acts/acts2000/ukpga_20000036_en_1).

127. *Id.* §§ 44, 45.

128. *Id.* § 5(1).

129. A report by the Department of Justice of the consultation process offers an impressive account of transparency in the governmental decision making process. It offers a rather detailed description of submissions received at the ministry and its considerations in accepting or rejecting them. Freedom of Information Act 2000: Designation of Additional Public Authorities—Response to Consultation, available at <http://www.data.parliament.uk/DepositedPapers/Files/DEP2009-2167/DEP2009-2167.pdf>.

130. The four organizations subject to U.K. FIOA are 1) Association of Chief Police Officers, which plays a role in the development of police services; 2) Financial Ombudsman

FOIA to powerful corporations such as big retail chains, private schools, and corporations that provide vital services or operate on the basis of a contract with a public authority.<sup>131</sup> The government provided three reasons for its decision:

1. The high costs that might be imposed on the corporations;
2. The projected additional workload that would beset the government administration to implement the legislation; and
3. The "economic climate" that has changed since the beginning of the consultation, such that the government should not burden corporations in economically distressed times.

Yet another round of consultation was launched in 2011,<sup>132</sup> and in this round, the government asked a long list of corporations, including McDonalds,<sup>133</sup> to opine on the possibility of being subject to the Act.

### C. ISRAEL

The Israeli Freedom of Information Law<sup>134</sup> applies exclusively to "classic" public agencies, which, the Israeli Supreme Court has stated, is a "closed list."<sup>135</sup> A 2005 amendment added government-owned corporations—entities that operate in the field of private law, and some include private shareholders—to the list of agencies subject to the law.<sup>136</sup>

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Service, which among other tasks, resolves disputes between consumers and financial institutions; 3) University and College Admission Service; and 4) "Academies," i.e., nonprofit educational institutions.

131. Freedom of Information Act 2000: Designation of Additional Public Authorities—Response to Consultation, at 14–16.

132. See *Extending the coverage of Freedom of Information Act 2000 under Section 5*, MINISTRY OF JUSTICE IMPACT ASSESSMENT PAPER, Mar. 4, 2011, available at [www.cfoi.org.uk/MoJ\\_draftimpactassessments5.pdf](http://www.cfoi.org.uk/MoJ_draftimpactassessments5.pdf).

133. See Martin Roesenbaum, *A Big Mac with extra FOIs, please*, BBC NEWS, Jan. 9, 2012, [www.bbc.co.uk/news/uk-politics-16443404](http://www.bbc.co.uk/news/uk-politics-16443404).

134. Freedom of Information Law 5758-1998, available at [www.freedominfo.org/wp-content/uploads/documents/Israel--FOIL1998.pdf](http://www.freedominfo.org/wp-content/uploads/documents/Israel--FOIL1998.pdf).

135. AdminA 3493/06 Alroy v. the Eged Pension Fund [2006]. In another case the Supreme Court refused to bring the committee in charge of appointing judges under the scope of the law, in spite of its clear public nature. The court ruled that "the legislator has chosen not to leave the list of public agencies open, enumerating ten categories of agencies. Hence, only those organizations that fit under one of those categories are to be considered public agencies for purposes of the law," HCJ 2283/07 Jurists for Eretz Israel Legal Forum for the Israeli Land v. the Committee for Judicial Appointments [2008].

136. Freedom of Information Law (amendment 5) 5767-2007. Israel's Government Corporations Law defines any company where the state holds more than 50% voting rights as a "Government Corporation." Government Corporations Law 5735-1975 § 1.

Under Israel's FOI law, the public may request information from corporations in two ways. First, if the information requested is of contracts and communications between private corporations and public agencies, the requestors may appeal to the public agency to attain such information.<sup>137</sup> Second, if the information requested are reports that the corporation is required to submit to regulators or the information is of the type that are collected by regulators under their statutory authority, the requestors may request such information by filing requests with the appropriate regulators that supervise or contract with the private organization.

Even with such a robust FOI regime, courts rely heavily on exemptions under FOI law designed to protect commercial secrets<sup>138</sup> and interests to waive disclosure obligations. In *Keshet Broadcasting v. The Second Authority for Television & Radio*,<sup>139</sup> the Second Authority, the regulator of commercial broadcast in Israel, decided to disclose tender bids submitted by the petitioners that won a TV broadcasting concession. This was in response to a FOI request submitted by two NGOs—the Movement for Freedom of Information in Israel and the Directors and Scriptwriters Association. The Supreme Court ruled that the main objective of the FOI law was to expose the way public agencies operate to the public, not to “cause harm to anyone providing the government agency with information.”<sup>140</sup> Thus, “only a very strong public interest could justify exposing financial information of a private and commercial organization.”<sup>141</sup> Despite strong public interest in a public resource (e.g., broadcast waves) and a clear public interest in supervising one of only two commercial TV channels in that nation, the court treated the private corporations as owners of the information they were obliged by law to hand to the public authority, and thus the corporations could bar public access.

The court concluded that Israel's FOI law was not designed to bring about the delivery of information that was obtained by the

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137. Israel's Supreme Court has ruled that such connections should be exposed as a general rule, and are “Information with a clear public character.” AdminA 6576/01 Liran v. HaHevar LeYizum CPM v. Liran PD 56(6) 817 [2002].

138. Section 9(b)(6) to the law. The courts interpret this exemption widely, in contrast to other exemptions designed to benefit public agencies which are interpreted much more narrowly. This displays an intent to leave private corporations unaffected by the “transparency revolution.” It might be expected that if the law were to be amended to cover private entities, and the legislator would make clear its will to see corporations accountable to the public, a change in judicial interpretation would follow.

139. AdminA 10845/06 *Keshet Broadcasting v. The Second Authority for Television and Radio Channel Two* [2007].

140. *See supra* note 139, at 18.

141. *Keshet*, art. 101.

public agency from a private organization. The Israeli parliament explicitly rejected this notion in relation to environmental affairs. The “Environmental Information Law”<sup>142</sup> and its regulations state explicitly that in regard to pollutant emissions information, private information obtained by a public agency is to be disclosed.

Much like in the U.S., courts are more willing to release corporate information during the discovery phase of litigation than when the public requests information outside of the litigation context.<sup>143</sup>

#### D. SOUTH AFRICA

South Africa provides a robust framework, unparalleled to other nations, for granting the public access to information.<sup>144</sup> Article 32 of the South African constitution<sup>145</sup> provides everyone “the right of access to any information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights.” Indeed, South Africa is the first nation to legally grant the public rights to access information from private entities, regardless of the entities’ statutory status, public character, or relationship to a public authority.<sup>146</sup>

Under the Promotion of Access to Information Act (2000) (“PAIA”)<sup>147</sup> a requester must be given access to any record of a

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142. Freedom of Information Law 5765-2005 (amendment 3 – Environmental Information).

143. *See e.g.*, ORC 21945/08 High Net v. Hot (92009) (The Tel Aviv District Court ruled in 2009 that the “Hot” cable broadcasting company would have to disclose to the defendants complete information regarding customers’ complaints received by the companies, as well as the results of internal service satisfaction surveys the company conducted. This demand for disclosure would have been dismissed as ludicrous if it had been made by a consumer organization for the purpose of publishing the company’s service record.); *see also*, CAA Levayev v. Rephaeli (2009) (The court ordered billionaire Lev Levayev to disclose minutes from his company’s board of directors meetings to a board member who wanted to prove a claim he had made in a legal proceeding against Levayev, to which the billionaire had withheld vital information from a bank negotiating the purchase of company shares. A similar request for information made by a journalist would not have been heard in the Israeli law system.).

144. Despite the sophistication of South African freedom of information regime, the public does not frequently use its right to receive information from private organizations Richard Calland. *Prizing Open the Profit Making World*, in *THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD* 214, 232 (Ann Florini ed., 2007).

145. S. AFR. CONST., 1996, available at [www.info.gov.za/documents/constitution/index.htm](http://www.info.gov.za/documents/constitution/index.htm).

146. This unusual legislation may be understood in the context of an accelerated privatization process that was taking place at time of its enactment. *See*, Afeikhena Jerome, *Privatization and Regulation in South Africa—An Evaluation*, Paper presented at the 3d International Conference on Pro-Poor Regulation and Competition: Issues, Policies and Practices, Cape Town - South Africa 7-9 September 2004, available at [www.competition-regulation.org.uk/conferences/southafrica04/Afeikhena.pdf](http://www.competition-regulation.org.uk/conferences/southafrica04/Afeikhena.pdf).

147. Promotion of Access to Information Act 2 of 2000 (S. Afr.) [hereinafter *PAIA*]. For a description of the legislative process and failed attempt to prevent the application of PAIA to

private organization if that “record is required for the exercise or protection of any rights.”<sup>148</sup> While PAIA provides for several exceptions for mandatory disclosure, section 70 of the PAIA overrides these exceptions. Section 70 provides that a private organization must grant a request for access to a record if disclosure would reveal evidence of substantial violations of the law or imminent danger to the public or environment, or when the public interest in disclosure outweighs the interest for the particular exception.<sup>149</sup>

Notwithstanding the expansive language of the Article 32 and PAIA, courts, however, have construed the public right to access information of private corporations narrowly. In *Institute for Democracy in South Africa v. African Nat'l Congress*, the Institute for Democracy in South Africa (IDASA) petitioned the High Court of South Africa in Cape County to compel the private corporations to the suit to disclose records of their contributions to political parties.<sup>150</sup> At issue was whether the record requested is required for the exercise or protection of the constitutional rights to “fair elections” and to “free political choice.”<sup>151</sup> Construing these rights narrowly, the High Court only referred to them as rights to direct participation in elections. Holding for the private corporations, the Court found that IDASA failed to demonstrate why the requested information was necessary for the exercise or defense of the rights direct participate in elections.<sup>152</sup>

Departing somewhat from the decision in *IDASA*, the South Africa Supreme Court of Appeals, held that a contractual right can serve as a basis to obligate a corporation to grant a requester information access under PAIA.<sup>153</sup> There, the court ordered the South African Airlines Corporation to disclose the full details of the company’s seat reservation, as opposed to partial data, for one of its flights to the company’s retired employee where he was an denied

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private entities, see Gideon Pimstone, *Going Quietly About Their Business: Access to Corporate Information and the Open Democracy Bill*, 15 S. AFR. J. ON HUM. RTS. 2 (1999); Doug Tilton, Richard Calland, *In Pursuit of Open Democracy and Freedom of Information – A South African Campaign Study*, 8 CHRI NEWS (2001), available at [www.humanrightsinitiative.org/publications/nl/articles/south\\_africa/in\\_pursuit\\_of\\_open\\_democracy\\_foi.pdf](http://www.humanrightsinitiative.org/publications/nl/articles/south_africa/in_pursuit_of_open_democracy_foi.pdf).

148. PAIA, art. 50(1)(a).

149. PAIA, art. 70.

150. *Inst. for Democracy in S. Afr. et al. v. African Nat'l. Cong. et al.*, 2005 (5) SA 39 (C).

151. *Id.* at ¶ 81.

152. See *supra* note 150; see also, *Clutchco (Pty) Ltd v. Davis*, 2005 (3) SA 486 (SCA) (the court declined a shareholder’s request to access the company’s accounting records in order for him to properly evaluate the value of his stocks where he claimed the unreliability of the company’s financial statements, because the shareholder did not show cause to doubt the reliability of the financial report. For a criticism of the lower court’s decision to uphold the appeal, see

153. *Clause v. Info. Office of S. Afr. Airways*, 2006 SCA 163 (RSA) at para. 7.

automatic upgrade to first class before other passengers when seats are available. This benefit was part of his retirement package. The retired employee wished to prove that the company had upgraded other passengers before making the seat available to him first.

Undoubtedly, the recognition of public access to corporate information empowers citizens in their dealings with corporations. Yet, courts often continue to give deference to corporations' decision to deny access to information, unless the requestor can demonstrate a material need for such information in order to protect a right that would otherwise be difficult to defend, and that the interest for access outweighs interest of the corporation for nondisclosure.

Most FOI laws around the world have been enacted over that past twenty years,<sup>154</sup> yet little attention has been given to the question of corporate information. Still, a slowly accelerating trend can be identified where more recent FOI laws recognize some partial aspects of the right to access corporate information.<sup>155</sup>

## VI. FROM THE EXISTING TO THE PROPOSED

This article has thus far presented a variety of existing arrangements for receiving some information from corporations.

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154. These information laws have been acted at a time when many of the legislating countries were undergoing an accelerated process of privatization (especially in the Eastern European countries), and when there was a heightened awareness of the growing power of corporations.

155. *E.g.*, The New Zealand FOIA of 1982 is one of the oldest FOI laws, and yet it established a rather broad approach to the disclosure of information possessed by private corporations, even in comparison to the more recent legislation of other countries. Official Information Act 1982 (N.Z.). The legislation applies to information possessed by a contractor that is performing work for a public authority, on condition that the information came into his possession in relation to the work that is being performed for the authority. *Id.* at art. 2(5).

The Irish FOIA uses a similar approach. The Freedom of Information Act 1997 (Act No. 13/1997) (Ir.) § 6(9).

The Dutch FOIA establishes in section 3(1) that any person has the right to receive information from a corporation performing work for an executive authority, on the condition that the information exists in documents relating to an executive matter. Government Information (Public Access) Act (1991).

A recent call for amending an FOI law to cover corporations was delivered in Bangladesh by the country's Chief Information Commissioner, stating that: "Most of the corporate companies and giant financial institutions in the country remain out of the jurisdiction of the act. But people have the right to know about their activities and financial dealings." *CIC Suggests Amending RTI Act for Transparency*, THE DAILY STAR, July 21, 2010, [www.thedailystar.net/newDesign/news-details.php?nid=147630](http://www.thedailystar.net/newDesign/news-details.php?nid=147630). For more on the CIC's views on the matter, see *Bangladeshi Commissioner Supports Wider Coverage*, FREEDOMINFO.ORG, Aug. 4, 2010, [www.freedominfo.org/2010/08/bangladeshi-commissioner-supports-wider-coverage](http://www.freedominfo.org/2010/08/bangladeshi-commissioner-supports-wider-coverage).

This article will now examine why these mechanisms are insufficient if our wish is to enjoy the advantages of transparency as a tool to enable public oversight of corporations. Next, the article will demonstrate how a “general disclosure duty” for corporations can be framed to meet the shortcoming of these other models, without severely harming legitimate corporate concerns.

#### A. WHAT IS PROPOSED?

This article proposes a model that imposes a legal duty on corporation for “general disclosure” of information. Similarly to existing Freedom of Information Laws, the model creates a presumption of openness that is rebuttable only if the request falls under certain procedural categories, or if the information is one that falls under certain exemptions. Unlike existing FOI laws, however, additional substantial or procedural exceptions may be needed to protect legitimate corporate interests.

The model is not far-reaching once certain reasonable limitations are established. As we know it, FOIA includes a long list of exemptions. Such exemptions will clearly apply to private corporations as well. For instance “trade secrets”<sup>156</sup> will remain exempt from disclosure, meeting many of the legitimate fears that may arise from a general disclosure regime.<sup>157</sup>

#### B. WHY EXISTING MODELS FALL SHORT

##### 1. *Specified Disclosure Obligations*

One method of imposing a legal duty of disclosure is to specify certain fields that would be subject to disclosure obligations, such as finance, consumerism and the environment. Experience demonstrates that legislators in democratic countries are attentive to the promotion of transparency, and thus there is a high likelihood that significant progress could be accomplished in this way. However, this model suffers from the following disadvantages:

A biased list of disclosure: Imposing disclosure in any one field requires robust lobbying efforts that include effective public relations

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156. FOIA, 5 U.S.C. § 552(b)(4).

157. On the other hand, other exemptions that clearly conflict the proposed model will have to be omitted, for instance “financial information obtained from a person.” *Id.*

campaigns and the involvement of influential individuals or by garnering enough political will. Finance, consumer affairs, and the environment, classic examples of the specified disclosure model, have benefitted from strong lobbying efforts. The environment movement, for example benefitted from powerful public relations being supported by celebrities and environmental activists in wealthy countries. Other areas that do not have the same support to lobby for their causes, such as the protection of worker rights<sup>158</sup> and minorities against corporations,<sup>159</sup> face a steep uphill battle. Imposing a general obligation of disclosure would allow the weaker players to demand and receive the information that they need, regardless of the other strengths of their campaign.

Delayed disclosure: In many situations, disclosure laws come only after the public incurs significant harm. Food labeling requirements, for example, came only after the public had become more aware of manufacturers' manipulations of products.<sup>160</sup> Financial disclosure laws followed the financial crisis of 1929 and the Enron and Worldcom affairs. Disclosure requirement for pollutant emissions followed the deaths of thousands in Bhopal, India, from the release of methyl isocyanate into the air from a nearby factory.<sup>161</sup> Access to corporate information might have led to the exposure of priceless information at a much earlier stage that could have prevented harm.

Limited Disclosure: While specific disclosure requirements have led to the exposure of vast amounts of information from private corporations, the amount of information of public importance held in the corporate hands is so vast that no legislator can view the information picture in its entirety to decide what should be exposed and what would be of interest in the future. "Much important data

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158. In the mid-1980s there was an attempt in the European Commission to enact a directive that would impose a duty on any employer of a thousand or more employees to share with them information on a series of matters. The proposal known as the "Vredeling Directive" (named after the Commission's Dutch Labor commissioner Henk Vredeling) was defeated by pressure of large employers in Europe, and even employers from the U.S. who invested large sums of money in lobbying against it. See generally LABOR AND AN INTEGRATED EUROPE (Llyod Ulman, Barry Eichengreen & William T. Dickens eds. 1993).

159. For example, in South Africa, in the case of *Pretorius v. Nedcor Bank* an individual whose bank refused to grant a loan petitioned to receive information from the bank regarding its risk assessment criteria regarding loan requestors. The case dealt with the highly sensitive issue of racially or geographically based customer discrimination. See Richard Calland, *Prizing Open the Profit Making World*, in THE TRANSPARENCY FOR AN OPEN WORLD 232 (Ann Florini ed. 2007).

160. Ilyse D. Barkan, *Industry Invites Regulation: The Passage of the Pure Food and Drug Act of 1906*, 75 AM. J. PUB. HEALTH 18, 20 (1985).

161. Christine Overdeest & Brian Mayer, *Harnessing the Power of Information for the Next Generation of Environmental Law: I. Collection and Construction of Information: Harnessing the Power of Information Through Community Monitoring: Insights from Social Science*, 86 TEX. L. REV. 1493, 1508 (2008).

simply cannot be expressed in a form suitable for standardized disclosure.”<sup>162</sup> Thus, only a general rule of disclosure would enable individuals and independent groups to navigate this ocean of information in search of items that, to their best judgment, are publicly important.

Disclosing in Conflict of Interest: In the current disclosure model, corporations are given too much discretion in how they present their information to the public. Even if they carry out their legal duties in good faith, corporations may have conflicts of interest that cause them to edit the disclosed information. A general disclosure system would allow access to the corporation’s raw information, without mediation beyond the technical function of delivering the document.

## 2. *Disclosure by Regulators*

As the public’s trustee, regulators should collect and disclose information from corporations they deem appropriate to protect the public’s interest while balancing the interests of corporations for nondisclosure. But such a model suffers from at least three disadvantages. First, the model suffers from similar biases problems as described in the “Specified Obligation Disclosure” model as only those issues that gain sufficient political will be subject to disclosure. Second, the regulators’ ability to examine information collected is limited by the resources at their disposal. Thus, a general disclosure obligation that utilizes the full extent of the power of the public would result in a better and more efficient use of the information held by the regulator.<sup>163</sup>

Another problem with this model is the lack of supervision. In the absence of access to raw information, the public is unable to ascertain whether the regulator has made the full information available, and whether she acted properly with the information

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162. RUSSEL STEVENSON, CORPORATIONS AND INFORMATION 13 (1980)

163. An example of the utilization of public power in the public sphere is the “MPs expenses scandal” in the U.K. In the course of this scandal, hundreds of thousands of expense claims filed by MPs for items ranging from dog food to chimney sweeping at private homes. The information was released following a five-year legal debate and caused a scandal that brought about the resignation of the house speaker, five cabinet ministers and several MPs. Once the information was published, first in the *Daily Telegraph* to which it was leaked before its official release, and later in other newspapers, the public at large was asked to review the millions of documents to help the press identify items of interest (in what is known to internet savvies as “cloudsourcing”). For an overview of the scandal, see *MPs Expenses*, BBC NEWS, May 25, 2010; for the crowdsourcing operation launched by “the Guardian” newspaper, see *Investigate Your MPs Expenses*, THE GUARDIAN, <http://mps-expenses.guardian.co.uk> (last visited Aug. 12, 2012)

available to her. Even qualified regulators will occasionally make mistakes. A report prepared for the U.S. Congress in 1990 showed that of 198 drugs that were approved by the FDA in 1976-1985, no less than 102 that were later found to be significantly dangerous.<sup>164</sup> Thus, some of these mistakes could have been prevented if individuals and consumer protection groups were given access to inspect the information.

Another problem relates to the connection between the regulator and the corporations. Regulators engage in daily working relationships with their regulated corporations. Some may have been previous employees of these companies or wish to become one in the future. Even assuming such a problem does not exist, the regulator needs the corporation's cooperation. Thus, regulators are likely to identify with corporate concerns rather than those of the public they represent.<sup>165</sup>

### 3. *Disclosure through Discovery of Documents in Legal Proceedings*

A great deal of information is discovered during the discovery process of legal proceedings. While expanding the scope of existing disclosure obligations in legal proceedings may be a viable option, such a model is neither efficient nor just. The model is inefficient because the requestor *must* go through a number of unnecessary hearings and lengthy depositions to gain access to such information. The model is unjust because those unable to devote time or lack financial resources will likely be forced to abandon their case. If individuals could manage to get the information without needing a court order, they could more reliably assess their chances in court, and would not be forced to abandon their case. This would serve to promote the general interest of the public to discover the truth and the private interests of individual plaintiffs.

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164. The report is discussed in the minority opinion in *Int'l Dairy Foods*.

165. This phenomenon is known as "Regulatory Capture." See Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1105 (1954); see generally Toni Makkai & John Braithwaite, *In and Out of the Revolving Door: Making Sense of Regulatory Capture*, 12 J. PUB. POL'Y 61 (1992).

## C. POSSIBLE MODELS FOR RECOGNITION OF FREEDOM OF CORPORATE INFORMATION

### *1. Applying the Act to Corporations Enjoying Taxpayer Funding*

Corporation that derive a certain minimum percent of income from taxpayer money would be considered "public authorities" for the purposes of the act. Taxpayer dollars includes money received in government grants, contracts, etc., regardless of the formal mode of transaction. More recent FOI laws adopt such a model.

The upside to this model is that it significantly widens the application of the Act to private organizations. The downside, however, is that the basis for distinguishing between those corporations that enjoy government funding and those that do not is problematic. The model presupposes that because taxpayers fund these companies via the government, some property arises and attaches to the information. This model addresses only the proprietary justification for disclosure, which is not necessarily the most compelling. I have shown that there are other justifications that would apply to corporations who do not enjoy public funds, and those would not be covered by this model. Furthermore, this model would create some uncertainty by raising such questions as to whether government grants the same as government payments for services.

### *2. Applying the Act to Organizations Fulfilling a Public Service*

FOIA would apply to any organization "fulfilling a public service." Regulators may choose to define classes of activities an organization must operate to be considered "fulfilling a public service," which may include but not limited to activities in education, health, communications, environment, and infrastructure. While the more modern FIO laws have adopted this model, those countries constitute a minority of the world's ninety FOI laws.

The prominent advantage of this model is that it significantly expands a large number of corporations subject to the proposed act that are deemed fulfilling a public service. But as discussed throughout this article, many corporations in purely commercial and non-public fields may also be of interest to the public, mainly due to the enormous power they amass. Thus, an energy or infrastructure would both be subject to disclosure obligations, for example, where there is a public interest in ensuring equality to employees and

consumers, and where relating to a chain of coffee shops which apparently would not be subject to the provisions of the act.

### 3. *Applying the Act to Information of Public Nature*

Organizations subject to FOIA are determined by the content of the information necessary for the exercise or protection of human rights, and not the organizations' statutory status. This model borrows from South Africa PAIA's framework. The advantage of this model is that, if interpreted broadly, it grants the public rights to access almost any piece of information. There is, however, negligible difference between this model and the general disclosure described below. The disadvantage of this model is that it is subject to narrow judicial interpretation, as seen in the South African case,<sup>166</sup> even when the language may not call for it. Also, the model presupposes that absent a positive justification, the default position is nondisclosure.

This model also has three procedural problems. First, the requestor often does not know if the requested information is necessary for the protection of his rights. For example, a member of a minority group requesting to access a company's hiring guidelines to determine whether it practices racially discriminatory practices could mislead the requestor by disclosing that its hiring guidelines do not refer to any protected class when the guidelines do indeed require prospective employees is a native speaker of the nation's language. Second, the requestor bears the burden to show that the information in question has a bearing on the requestor's rights. The presumption should be for disclosure unless the corporation can show a valid and strong argument against disclosure, as the corporation is in a better position to do so. Third, requiring the requestor to bear the burden of proof gives corporations the ability to put up legal hurdles that would make it bureaucratically complex and burdensome for the requestors and thus effectively deterring future disclosure inquires.

## D. GENERAL DISCLOSURE OBLIGATION

A key feature of the U.S. and other FOI laws is that public authorities are required to respond to any request,<sup>167</sup> irrespective of

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166. See section VI.D; see generally *Inst. for Democracy in S. Afr. et al. v. African Nat'l Cong. et al.*, 2005 (5) SA 39 (C).

167. See e.g., 5 U.S.C. § 552(a)(3)(A) (1966).

the requestor's motive.<sup>168</sup> Unlike these FOI laws, however, a general disclosure model for corporations recognizes that there are occasions when the corporation has "legitimate interest" in refusing to disclose the requested information. A corporation refusing an information request must show why such request serves an "illegitimate interest" or no interest at all. The law should make clear that the threshold for disclosure is low, such that only those frivolous requests are dismissed. Illegitimate requests are ones that mainly serve the financial interest of another person or corporation because compelling corporations to reveal information that serves no other purpose but the financial interest of another would be unreasonable and unfair. Disclosure should not be used as a tool for companies to compete with one another in the marketplace. In applying this type of disclosure requirement to corporations, legislators could simply add a section to the U.S. FOIA that states that the provisions of the FOIA also apply to commercial corporations, with exceptions tailored to corporations listed in a separate clause.

### *1. Advantages*

The first advantage of this model is that it subjects all profit-oriented organizations, with prescribed exceptions listed in regulations, to disclosure requirements.<sup>169</sup> To encourage the idea that access to information is a right, the requestors do not need to examine the nature of the organization (e.g., the organization's operations and activities), or the sources of its funding, reducing the requestors' need to expend extraneous resources to investigate organization nor legal fees to ascertain whether he has such a right to request information.

Second, because this model creates a presumptive right for the requestors' access to corporate information, social change organizations, which are the entities likely to make information disclosure requests, would be more encouraged to avail themselves to the right. Relatedly, corporations bears the burden of proving that they meet one of the prescribed exceptions of the legislation and thus

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168. As is clearly stated in several FOI laws, including: *Freedom of Information Act 1982* (Cth) s 11(2) (Austl.); *The Freedom of Information Act 1997* (Act No. 13/1997) (Ir.) § 8(4); *Promotion of Access to Information Act 2 of 2000* § 11(3) (S. Afr.); *Freedom of Information Law, 5758-1998* (Isr.) § 7(a).

169. The regulations may, for instance, exempt small organizations such as those employing less than a certain number of employees, or with annual income that is lower than a set threshold.

bear the costs of making a defense, as opposed to the requestors, who are often the ones with less resources to carry such a burden.

Finally, the model applies generally to the type of information that can be requested since there would not be a pre-determined limitation on the content that can be requested. This means that there is less room for legal disputes and delay tactics even before a request is considered on its merits. It also means less room for corporations to manipulate the characterization of information. This will teach corporations to no longer rely on legal tactics to avoid disclosure and instead take the measures to adjust their organizations to be more transparent.

## 2. *Disadvantages*

While the broad scope of this model yield the aforementioned advantages, it also produces some distinct disadvantages. First, it would be unjustifiable, for instance, to impose the same disclosure obligation on a local grocery store as to a retail chain due to the different degrees of influence they have on matters of public concerns. While a local grocery store may have an interest in such local matters as where to locate waste facilities in a city, corporations hold much more influence over public matters at large. Also, small businesses generally lack the resources to comply with information requests. To rectify this problem, organizations of a certain size, as measured by some combinations of number of employees or assets, should be exempt from the general disclosure obligation. While this may cause some uncertainties, these cases would exist on the margins because smaller organizations are rarely the kind of organizations that hold information that could have a significant impact on society as larger corporations.

The second disadvantage of the general disclosure obligation is the danger of forcing corporations to disclose information to any requestors, including those seeking information to harm the company, those engaging in commercial espionage, or those who have other inappropriate motives. A possible solution to this problem is to institute an identification requirement for information seekers. This identification requirement would enable the private corporations, in good faith, to carefully weigh to whom the information is disclosed. Where disclosure would triggers security or industrial espionage concerns, legislators could easily include these scenarios to the disclosure exemption list; these types of exemptions already exist in

most FOI laws.<sup>170</sup> Additionally, to curtail those from engaging in “obsessive” requests,<sup>171</sup> corporations should be allowed to dismiss frivolous or vexatious requests outright. To prevent corporations from abusing this right, include language in the statute to clarify that the ability to dismiss frivolous requests only applies to unusual situations.

The final disadvantage of this model is compliance costs.<sup>172</sup> As a solution, there can be a general rule that the requestors bear the costs of the inquiry and where corporations are required to disclose only the information readily available. This rule would be more forgiving than the current FOIA that requires public authorities to conduct extensive search and retrieval operation.<sup>173</sup>

## VII. CONCLUSION

Just as the right to freedom of information redistributed power between the government and its citizenry, it should now redistribute power between corporations and individuals to protect the public interest by ensuring the proper conduct of corporate activity. This article has argued that corporations do not have an inherent right to deny individuals access to information. Imposing a general duty to disclose on corporations requires a revolution of thought. Corporate employees must become accustomed to the idea that they may need to explain to the public, under certain circumstances, their actions. Corporations will need to be more upfront and honest. The public, and especially journalists and civil society organizations, must be educated to ask for meaningful information that could improve society and advance the defense of civil liberties. Legislators may need to establish proper mechanisms to ensure corporate compliance while avoiding placing too much burden on them. Courts will need to be active in clarifying the legal standard. Challenging as the task may be, the result will be a significant contribution to the protection of the public interests.

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170. See e.g., exemption 4 of FOIA that covers “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”

171. Indeed some FOI laws try to deal with this problem. Section 14(1) to the U.K. FOIA (*supra* note 34) allows a public authority not to comply with a request on the grounds that it is “vexatious.” The British Information Commission has issued guidelines on when a request is to be viewed as vexatious: ICO, [www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/practical\\_application/vexatious\\_requests\\_a\\_short\\_guide.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/vexatious_requests_a_short_guide.pdf).

172. For an estimate of the annual cost of FOI in several countries, see *The Best Things in Life are Free: How Much Does FOI Cost?*, CONST. UNIT BLOG, Apr. 11, 2010, [www.constitution-unit.com/2011/04/11/the-best-things-in-life-are-free-how-much-does-foi-cost](http://www.constitution-unit.com/2011/04/11/the-best-things-in-life-are-free-how-much-does-foi-cost).

173. 5 U.S.C. § 552(a)(3)(C) (1966).

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