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Occupy Information: the Case for Freedom of Corporate Information

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Occupy Information: the Case for Freedom of Corporate Information

Roy Peled*

*“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)

Abstract

The global financial crisis illustrated what was well known for decades, but not as well felt – 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. The summer 2011 worldwide social protests built on that understanding calling for more public control of corporations and mover public oversight on the way they operate. 46 years ago, demand for similar oversight over government operations, and a will to limit government power vis-à-vis the citizenry and to provide the public with tools to become more engaged in democratic processes was the background to the enactment of FOIA. This article argues that today similar tools need to be applied to corporations, as they hold much of the information required to allow democratic participation in current affairs, and because of the great public interest in understanding and overseeing their operations. It suggests to do so by imposing upon them a general duty of disclosure, with specific exceptions. It examines the justifications for FOIA and then their applicability to corporate information. It reviews existing mechanisms in the US 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 whose advantages significantly outweigh its downsides, and which can contribute significantly to a better functioning democratic society and a more responsible corporate world.

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Introduction

When some thirty years ago a Georgetown law professor suggested to dramatically expand corporations' disclosure duties,¹ he was quickly "accused" of suggesting "a Freedom of Corporate Information Act... not quite in tune with today's socio-economic priorities of capital formation, investment incentive, and productivity".² Prof. Stevenson replied by assuring his critic (R. Thomas Howell, currently American Bar Association General Council) that "even a Washington law professor isn't naïve enough to think that such a law has the remotest chance of passage".³ But if there is anything to be learned from 2012 summer protesters from Zuccoti Park, New York to Town Square, Anchorage and from the Rothschild Blvd in Tel-Aviv to St. Paul's Cathedral in London, it is that fundamental notions of naïveté and practicality as well

¹ RUSSEL STEVENSON, CORPORATIONS AND INFORMATION (John Hopkins University Press, 1980)

² R. Thomas Howell, Book Review, 67 A.B.A. J. 619, 626 (1981)

³ Ruseel Stevenson, "Fated to be Misunderstood", 67 ABA A.B.A. J. 964 (1981). Stevenson adds "nor, as the book explicitly state, did I intend to argue that there ought to be such a law". He fails however to mention in his rebuttal to critics that the explicit statement in the book is followed by a parenthesis in which he confesses to "finding a certain appeal in the idea". Stevenson, *supra* note 1 at 186.

as “socio economic priorities” might be changing; that at the least once in a few decades it is worthwhile to re-examine what seem to be unshakable truths about the major institutions that lead our society as well as our legal thinking. This article falls short of such a noble aspiration. It does however, aim to suggest one possible element of such a wider move, namely a fundamental change in the way we currently view the accountability of corporations towards society at large and specifically corporations’ right to conceal information. Such a change requires parting with deeply rooted perceptions of corporations’ rights, their role in society and interaction with it. Believing time is ripe for thinking of what may thus far been deemed unthinkable, I attempt in the following pages to lay the grounds for 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.⁴ Its central function was to restrict the power of the king, while granting power to the press. The freedom of information laws that have since been legislated in more than 90 countries have constituted an important tool in restricting the power of governments, and limiting their ability to curtail civil rights.⁵ Fittingly, the enactment of freedom of information laws was one of the first legislative measures taken by post-communist countries in Eastern Europe,

⁴ For an English translation of the Swedish Freedom of the Press Act of 1766, which is considered the world’s first freedom of information law, see: His Majesty’s Gracious Ordinance Relating to Freedom of Writing and of the Press § 6 (1766), in: JUHA MUSTONEN, THE WORLD’S FIRST FREEDOM OF INFORMATION ACT : ANDERS CHYDENIUS’ LEGACY TODAY 8 (2006)

⁵ "Freedom of information" is the term accepted internationally to describe the right of the public to receive information from the administrative authorities. It is a vague term, and some writers prefer to use "the right to know", or "right of access to information". These express the same idea, and are used in different places in this paper with the same meaning.

subsequent to their release from the yoke of the Soviet Union.⁶ In the more veteran democracies freedom of information has become a central tool in the empowering of the individual citizen in his dealings with the government, through the redistribution of control of the resource of information.

Several private commercial corporations are no less powerful than governments of many UN member states, at least financially.⁷ They nowadays control amounts of information often similar in significance and magnitude to that in the hands of governments. If information is indeed power, as goes the Baconian phrase, then they may control no less power than many governments. Yet, this power and its application is subject to dramatically less exposure than that of governments subjected to FOI laws and general administrative law principles. It is hence worth examining whether tools once used to strike a new balance between the powers of the state and the individual might and should as well be applied to strike a new balance between “legal persons” and flesh and blood natural persons.

This article justifies the use of freedom of information doctrines to curtail the power of corporations⁸ and to empower individuals and groups that come in contact with them. It proposes to impose a "general duty of disclosure" on corporations, in contrast to existing disclosure requirements which only apply to specific positively and

⁶ On FOI legislation in Eastern Europe, and the connection between it and the communist past, and the desire to join the European Union, see: John M. Ackerman & Irma E. Sandovel-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN L REV 85, 103, 122 (2006); Article19, *Promoting Practical Access To Democracy: A Survey of Freedom of Information in Central and Eastern Europe* (2002), available at: www.article19.org/pdfs/freedom-of-information-survey-of-central-and-e.pdf.

⁷ See chapter 2.1 below.

⁸ The term "corporations" in this paper refers to commercial corporations. Some of the arguments presented here will also hold true for non-profit organizations, but others do not, and their separate characteristics require a separate discussion.

explicitly pre-defined issues, such as financial information, nutritional data, pollution emissions, and the like.

The course of discussion will be as follows: First, the accepted justifications for recognizing the right to freedom of information possessed by government agencies are presented. **The second section** of the article reviews the rise in power of private corporations, and their entry into a wide range of activities of public nature. This will serve as basis for discussing the justification of applying tools such as FOI to restrain corporate power. **The third section** presents fields in which substantial freedom of information obligations already exist. This review will serve two purposes: It will show that the principle of obligating corporations to disclose information has already taken root in the systems of law. Secondly, it will serve to bring into focus the differences that exist between the general duty of disclosure recommended by this article, and existing law. **Fourth**, the article examines the application of the widely accepted justifications for freedom of access to government information by private corporations, as well as some additional justification unique to corporations. **The fifth** part reviews models for freedom of corporate information that are already in use in various countries. **The sixth** and final section will establish the justifications for upholding a general duty of disclosure against corporations.

The measures proposed in this paper run counter to the way many view the legal relationships in the triangle of private citizens, corporations and the state. It is the article's modest intent to justify, through the prism of freedom of information, a renewed discussion of these relationships, that were shaped when the power balance between the three was very different.

1. The old Case for Freedom of Government Information

Freedom of information laws exist today in almost all liberal democracies, as well as in several non-democratic states.⁹ In many countries freedom of information is considered a constitutional right.¹⁰ Four central justifications exist for recognition this right, and these will later serve us to examine the degree to which they are applicable to information held by private corporations.¹¹

The Political – Democratic Justification focuses on the right of disclosure as a prerequisite to the proper conduct of a democratic regime, as this right enables the active participation of the citizens in the democratic game. James Madison, the fourth president of the United States, and a co-author of the First Amendment to the Constitution, explained the right's salience as early as 1822:

"A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance, And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."¹²

⁹ For the list of the states in which Freedom of Information Acts were enacted up to September 2008, see: Roger Vleugels, Overview of All 90 FOIA Countries and Territories (2008), *available at*: 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.

¹⁰ 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, *available at*: www.access-info.org/data/File/publications/Access%20Info%20Europe%20Briefing%20Paper%201.doc .

For an extensive discussion of the constitutional characteristics of the right see:

Roy Peled, Yoram Rabin, "The Constitutional Right to Know" 42(2) Columbia Human Rights Law Review 357 (2011).

¹¹ This summary is based on the analysis of justifications appearing in Rabin and Peled, *ibid*.

¹² GAILLARD HUNT, ED., THE WRITINGS OF JAMES MADISON 103 (1910).

A century and a half later, the "participatory democracy" movement recognizing the limitations of formal democracy.¹³ It called for the engagement of citizens in the processes that influence their lives, in ways more active than electing a government to run these processes on their behalf. It goes without saying that participatory democracy requires that citizens have access to the information necessary for making choices. However, choices made by citizens that are based on information filtered by the government cannot be considered free and democratic. This was the background for the enactment of the US Freedom of Information Act in 1966,¹⁴ and in many other democracies in the years to follow.

The Oversight Justification – Transparency enables effective inspection of governmental activities. One aspect of this justification is the well known argument that transparency reduces the level of corruption.¹⁵ In a wider sense, transparency also enables the review of the daily activities of governmental agencies. The public has a right to inspect the activities of public servants, its trustees, in order to examine their efficiency, to uncover the existence of structural and organizational flaws, and to examine other factors that do not necessarily indicate the existence of corruption.

The Instrumental Justification – Information is a necessary condition for the exercise of many civil rights. The closest ties exist between FOI and the right to freedom of expression.¹⁶ This is the rationale for the inclusion of the right "to request and receive

¹³ See among others: BENJAMIN BARBER, *STRONG DEMOCRACY : PARTICIPATORY POLITICS FOR A NEW AGE* (1984); CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970).

¹⁴ Freedom of Information Act 5 U.S.C § 522 (1966) (Hereinafter: FOIA).

¹⁵ 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 2* (2005), available at www.qog.pol.gu.se/conferences/november2005/papers/Lindstedt.odf. For a different view see: Samia Tavares, *Do Freedom of Information Laws Decrease Corruption? 7* (2007), available at <http://mpira.ub.uni-muenchen.de/3560>.

¹⁶ Ackerman and Sandoval-Ballesteros, *supra* note 3, pp. 88-89.

information" in Article 19 of the Universal Declaration of Human Rights of 1948,¹⁷ which deals with "freedom of opinion and expression"; the 1966 U.N. International Covenant on Civil and Political Rights also includes the right to information as a component of freedom of expression in its own Article 19¹⁸ which states the following:

"Everyone 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".

The growing power of civil society organizations, and the growing effectiveness of their campaigns is sometimes accredited with their control of relevant information, and their subsequent ability to stand as equals before government representatives who have traditionally enjoyed a substantial advantage as a result of their exclusive control of information.¹⁹

Indeed, it is difficult to imagine any right that is not defended more effectively by access to the relevant information. Defending the right to privacy may benefit from information relating to database security, mechanisms for collecting information about citizens, the uses made of this information, and more. The right of access to justice loses its meaning if the individual cannot make use of his "day in court" by presenting information relevant to his case. When campaigning to promote social rights such as health, education, housing, and others, the ability to argue plausibly about the ramifications of the different proposed policies requires control of

¹⁷ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

¹⁸ International Covenant on Civil and Political Rights (1966)

¹⁹ JEFFREY M. BERRY, *THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS* 132 (1999); THEDA SKOCPOL, *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* 377 (1999)

information. One could cite endless other examples of instances where access to information could promote, or even be a prerequisite to the defense of civil rights.

The Proprietary Justification – This states that information held by public authorities is, in fact the property of a state's citizens and residents. As such, citizens and residents are entitled to have free access to this information. Control of information by civil servants exists only as a result of their positions as public trustees, and limitations on the access of owners to their property should emanate only from the need to protect the interests of other owners, that is, other members of the general public.

2. Why Corporations? Why Now?

States as we have known them over the past centuries have been unmatched in the power they possessed. Alvin Toffler explains²⁰ that this has been a result of their control of all three important constituents of power: 1. Force, as the state held a monopoly over the application of force in its territory; 2. Capital, in view of the states authority to collect taxes and to determine their rates; 3. Information, as the state was the leading producer and collector of information in its territory, and as it retained control (of varying degrees in the different states) of the education and information systems.

Focus on the state as the single most powerful force with the most influence over the individual is no longer justified. Entire fields of activity that were formerly controlled solely by the state have passed into private hands. Services that used to be provided by the state are today provided by private corporations. If, in the past, a citizen who was wary of undue limitations upon his liberties needed to fear a hostile neighbor or

²⁰ ALVIN TOFFLER, POWER SHIFT 12 (1990).

government agents, the situation today has changed, and the citizen must be wary of other factors, as the "Leviathan sovereign" has been significantly weakened.²¹

Rivers of ink have been spilt in recording this transfer of power and we will discuss it only briefly in order to establish the claim that corporations have accumulated power that warrants the application of tools that may limit it or may supervise its use.

For the purposes of this discussion two separate factors should be noted – 1) The strengthening of corporations, and 2) Their engaging in fields of a public nature.

2.1. The Strengthening of Corporations

The dramatic strengthening of corporations over the past century seems to be steadily intensifying. According to one research, out of the 100 biggest world economies in 2010, 42 were private corporations.²²

The influence of powerful corporations can be a bi-product of their main industrial or economic activities, for instance when a factory pollutes, or when a high-risk-taking policy of a bank effects its clients, as was indeed the case with the 2008 global economic crisis.²³ It can also be the result of legitimate managerial activities which may have wide-scale and devastating effects for others. This was for instance the case

²¹ 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); For a description of the changes created by globalization in the basic character of state sovereignty, see: SASKIA LASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996); For another position that argues that states are not weakening by these processes, see: LINDA WEISS, *THE MYTH OF THE POWERLESS STATE* (1998).

²² Democracy Leadership Council, *The World's Top 50 Economies: 44 Countries, Six Firms*, July 14 2010, available at: http://www.dlc.org/ndol_ci.cfm?contentid=255173&kaid=108&subid=900003. A different survey puts the number at 51 of 100 already at the turn of the century: Sarah Anderason, John Cavanagh, *Corporate vs. Country Economic Clout: the Top 100*, at: http://idol.union.edu/motahare/Eco354/top_100.pdf. Other researchers have criticized these figures, but even according to their more conservative estimates, no fewer than 37 corporations were listing among the 100 largest economies in the world already in 2002, see: Paul De Grawe, Filip Camerman, *How big are the big Multinational Companies*, *Tijdschrift voor Economie en Management* 311 XLVII (3) (2002).

²³ MARTIN N. BAILY, DOUGLAS J. ELIOT, *THE US FINANCIAL AND ECONOMIC CRISIS: WHERE DO WE STAND AND WHERE DO WE GO FROM HERE?* (2009)

when General Motors decided to close its plant in the town of Flint, MI. The film "Roger and Me" (1989), depicts the way this decision turned the town from a prosperous and thriving city, into a ghost town suffering from unemployment, drugs and crime. The title is based on the attempts made by the director Michael Moore to meet with GM CEO, Roger Smith, in order 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 share holders.²⁴

2.2 Corporations Growing Involvement in the Public Sphere

The term privatization refers to different processes,²⁵ starting from the transfer of public property to private hands through processes of deregulation, and ending with business notions such as "outsourcing". All of these serve to mix the private and the public. Since freedom of information laws are universally considered part of public law (and corporate law part of private law),²⁶ the traditional classifications preordain them to bestow duties on public agencies alone. However, the borders between the

²⁴ For another fascinating 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 DU PONT IN DELAWARE* (1973). The research describes the enormous effect of the chemical products corporation on the State of Delaware since its establishment in 1802, including on government, commerce, health, education, housing and other fields in the small state. One of the difficulties pointed out by the initiator of the research, Ralph Nader, was with receiving information from the company. In his preface to the book, Nader describes the steps that he hoped would be taken by the company as a result of the examination:

One of the first steps in such a self-examination by the DuPont Company is for management to ponder why it must conceal so much that should be public information. The study group came up against this systematic secrecy right from the beginning... The company tried to prohibit interviews with employees on their own time [...] Questions submitted in writing about matters not remotely connected with trade secrets were frequently unanswered or labeled "confidential" when the information would be at all significant" (*id. Xii*)

²⁵ For additional models see: Jack M. Beermann, *Privatization and Political Accountability* 28 *FORDHAM URB. L. J.* 1507, 1519–53 (2001) (hereinafter: Beermann, *Accountability*).

²⁶ 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* p. 2 (University of Chicago Press, 2006).

public and private worlds are becoming increasingly blurred, thus opening the way for our discussion on the application of FOI principles to the “private” sector.

The approach that requires privatization to be accompanied by the imposition of varying degrees of public law obligations has won many supporters in the academic legal community.²⁷ However, the reliance on privatization as the sole justification for imposing public law obligations is overly formalistic. There are many corporations that were never privatized even in the broad sense of the term, and yet operate in fields public by character that may justify the imposing of public law obligations upon them. This, for instance, is arguably the case in regard to cellular communication corporations and internet service providers. Such corporations control infrastructure of extreme public importance. They possess a great deal of information on private individuals, which could at times lead to the breach of individual rights, especially in regard to the right to privacy; A startling example came to the focus of public debate with the release in February 2012 of “the Global Intelligence Files” by Wikileaks.²⁸ These were millions of emails exchanged within ‘Stratfor’ a private commercial global intelligence firm. The firm appears from the files to be a full-blown intelligence apparatus, selling information to private corporations as well as governments, using various techniques traditionally associated with the most secretive official government agencies. Such an organization walks the borderline of what is legal, often breaches at least individuals’ right to privacy,²⁹ and may have a

²⁷ Daphne Barak-Erez, *Civil Rights in the Privatized State: A Comparative View* 28 ANGLO-AM. L. REV. 503 511-13 (1999) ;Barak-Erez, *A State Action Doctrine for an Age of Privatization*" 45 SYRACUSE L. REV. 1169 (1995); David H. Rosenbloom & Suzanne J. Piotrowski, *Outsourcing the Constitution and Administrative Law Norms*, 33(2) ADMIN. REV. OF PUB. ADMIN. 103 (2005), Gillian E. Metzger, *Privatization as Delegation* 103 COLUM. L. REV. 1367, Jack M. Beermann, *Administrative Law-Like Obligations on Private(ized) Entities*, 49 UCLA L. Rev. 1717 (2002)

²⁸ The files can be accessed at: <http://wikileaks.org/the-gifiles.html>.

²⁹ 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

significant impact on decision makers. All these make it clearly public in nature,³⁰ and the information in its possession I will argue, should thus be seen as public. The public may have a legitimate interest in being informed on the conduct of other non-privatized companies: for instance, those defending employee rights have interest in the terms of employment among large corporations which set industry standards; the public debate regarding the price of pharmaceutical products, could benefit by the publishing of information that is in the possession of the private manufacturers; environmental struggles may require information possessed by construction or energy companies, and this even when these companies have not taken part in a privatizing process.

3. Existing Disclosure Requirements

Little by little, there has already been a change over the past few decades in regard to the right of a corporation to withhold information from the public. The sources of this change reflect on the arguments raised for and against greater transparency in corporations.

3.1. Financial Information

If one hundred and fifty years ago it was clear that a private business had the right to publish information or withhold it as it pleased, corporations in the modern economy are required to disclose significant information. This is the case with “public

Bhopal, India tragedy. See: Release Stratford monitored Bhopal activists including The Yes Men for Dow Chemical and Union Carbide

³⁰ The corporation has even been presented as a “shadow” CIA. See: Reuters.com, Wikileaks Targets Global Risk Company Stratfor”, available at: <http://www.reuters.com/article/2012/02/27/wikileaks-stratfor-idUSL5E8DR0120120227>.

companies” traded on the securities exchange,³¹ and to a lesser extent with privately owned companies as well. Meaningful legislative steps to impose obligations of disclosure on corporations were made possible following the general upheaval after the eruption of the economic crisis in 1929.³² Similarly, the public outcry that followed the discovery of the Enron and Worldcom affairs in the first decade of the twenty-first century, served as the background to the bipartisan support for imposition of even more significant disclosure obligations on corporations.³³

Two central reasons stand at the root of legislation that imposes disclosure obligations on corporations: the protection of the investors by supplying them with the information needed to reach an informed decision regarding investments; and the defense of public faith in the market, which is necessary for market growth.

Why has the 2008 global financial crisis, not produced similar legislative progress? At least two somewhat conflicting explanations can be given. The first is a sense that such means have by and large been exhausted as an effective remedy to market failures, and that new preventive measures should be sought elsewhere.³⁴ The second is frustration with existing disclosure requirement that evidently failed to prevent the recent crisis. Looking back at past disclosure legislation, one may argue that the

³¹ The listing of public companies for trade and debt, and their disclosure obligations in the US were imposed in several federal legislations, the important of them being: Securities Act of 1933 (15 U.S.C.A. § 77; Securities Exchange Act of 1934 (15 U.S.C.A. § 78a)(hereinafter: SEC act); The Sarbanes-Oxley Act of 2002 (Public Law 107–204, 116 Stat. 745–810) (hereinafter: SOX act).

For a description of the legislations and their full text see: www.sec.gov/about/laws.shtml.

³² See: Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 JOURNAL OF CORPORATION LAW 1 (1983), p. 8.

³³ The SOX act was legislated with a majority of 334 supporters against 90 opposed in the House of Representatives (See: clerk.house.gov/evs/2002/roll110.xml), and with a majority of 99 supporters with none opposed in the Senate (See: www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=2&vote=00192)

³⁴ see for instance: Emiliou Avgouleas, *The Global Financial Crisis, The disclosure Paradigm, and European Financial Regulation: the Case for Reform XXXX*. The author argues that much information was available to investors to point towards a possible crisis (not withholding other pieces of information unavailable) and yet actors did not respond to available information in the expected way, hence the need for more interventionist regulation than mere disclosure enforcement.

specific tailored requirements enacted, as in previous legislations, answer the needs of past market failures, but fail to cover future developments. In the context of the global financial crisis, two such developments can be thought of – the expansive use of derivatives, which have become a common market tool, exposure to which was kept largely “under the radar” of disclosure requirements; and the exponentially growing phenomenon of bonuses to top financial officers, regardless of their professional achievements, which some argue had to do with their indifference to the risks taken by their companies.³⁵

Three important points should be made looking at current financial disclosure legislation: (1) Information that needs to be disclosed is not a closed list. The Securities Exchange Act requires, in addition to a specified list, that disclosure be made of all information is "necessary or useful for the protection of investors and in the public interest".³⁶ (2) Significant disclosure obligations only apply to companies that are traded on the stock exchange,³⁷ as the basis for disclosure is the concern for the shareholders. Yet groups no smaller than shareholders, such as employees, neighbors, suppliers, consumers and others may suffer from a corporation's conduct (or misconduct), whether publicly or fully privately owned. (3) The content of disclosure obligations is tailored to the defense of shareholders, and not of these other groups.

The grounds for basing obligations of disclosure on the interests of the shareholders, and not those of other individuals affected by the corporation's activity, are not beyond questioning. Financial losses sustained by workers, neighbors and even

³⁵ This point is perhaps best argued in the award-winning documentary film “Inside Job” (Charles Ferguson, Director, 2010).

³⁶ SEC act § 13(l)

³⁷ The law in the US applies to corporations with a value greater than 10 million dollars, whose stocks are distributed among over 500 shareholders. See in the website of the US Securities and Exchange Commission ,www.sec.gov/about/laws.htm.

customers of such companies can at times be greater than losses sustained by shareholders. At present, there is no legal duty to disclose information of the type that appeared in the documents that were uncovered by the Enron investigation, and which attested to the existence of improper practices that took place in the company,³⁸ which included boundless wastefulness, attempts to influence political appointments, the acceptance of employees on the basis of family relations, and more.³⁹ In a freedom of information regime in which an investigative reporter could demand documents from the company which could relate for example to any particular appointment or expenses incurred by the company for decorating the offices of senior employees, and even in regard to failed transactions, the managers of Enron would have had a much more difficult time maintaining their problematic practices. They could not have continued to encourage company employees to buy company stock, had it been made known that they had already sold their own stock in the company. Access to only a small part of the information that was uncovered after the collapse, and investigation at a stage prior to the damage that was done to the livelihoods and savings of tens of thousands of people could have limited the scope of the tragedy. However, any demand to allow access to such information in the present legal situation would be shrugged off and considered ludicrous.

3.2. Environmental Impact of Corporate Activities

The first explicit and detailed recognition in international law of the right to receive information appears in the "Convention on Access to Information, Public

³⁸ Tim Grieve, *The Decline and Fall of the Enron Empire*, available at: dir.salon.com/story/news/feature/2003/10/14/enron/index.html

³⁹ 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 which have added search and referencing services for public use of those interested or the simply curious. See for example: www.enronexplorer.com; www.enronemail.com, and on the official site - fercic.bps-lmit.com/members/manager.asp. 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.

Participation in Decision Making and Access to Justice in Environmental Matters",⁴⁰ known as the Aarhus Convention. This convention enumerates a long list of matters for which public authorities are required to disclose information, including information on industrial activities in the fields of the manufacture of metals, minerals, chemicals, drugs, paper products, natural gas, and more. The duty to disclose information is placed upon *public* authorities,⁴¹ but the convention obligates the authorities to collect and publish information relating largely to the activities of private corporations, and their environmental effects.⁴² The willingness of states to commit themselves in international law to collect information regarding the activities of corporations operating in their territory, along with the commitment to make this information available to its citizens is no small matter, and results to a great extent from the massive pressure that was exerted on the policymakers in these states, and especially European Union states, by local environmental groups.

In the United States several laws have been passed which were designed to disclose information to the public regarding the environmental impact of industrial operations.⁴³ The principal legislation that regulates this matter is the "Emergency Planning and Community Right to Know Act", (EPCRA) passed in 1985. This legislation obligates factories to report to state and local authorities of all the

⁴⁰Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998), (Hereinafter: the Aarhus Convention), *available at*: www.unece.org/env/pp/documents/cep43e.pdf. For a list of parties and additional information see: www.unece.org/env/pp/welcome.html.

⁴¹ The definition of a "public authority" in the convention is wide, and includes 1. "classic" public authorities. 2. any natural person or legal entity fulfilling a task by legislation; 3. any natural person or legal entity carrying out a work for one of the first two categories; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998) (Hereinafter the Aarhus Convention), in section 2: *available at*: www.unece.org/env/pp/documents/cep43e.pdf.

⁴² *Ibid.*, Appendix 1, section 6(1).

⁴³ For a general description of several of these laws see the Federal EPA website: United States Environmental Protection Agency – EPA *available at*: www.epa.gov/epahome/r2k.htm

dangerous substances that are created and released into the environment as a result of their operation,⁴⁴ and it states explicitly that this information will be available for inspection by the public,⁴⁵ with limited and narrowly defined exceptions designed to defend trade secrets.⁴⁶ Similar regulations were enacted in the United Kingdom, in 2004.⁴⁷ They order effective promotion of the availability of the information also by means of electronic media.⁴⁸

The obligation to create registers which would be open to public inspection in regard to pollution emissions by corporations was also required by an internationally binding convention, the 2003 "Kiev Protocol on Pollutant Release and Transfer Registers",⁴⁹ which was signed as a protocol to the Aarhus Convention and requires the parties to create such registers, and that these registers be open to the public, and accessible on the internet. The protocol goes as far as to set the exclusive exceptions that allow information within the register to remain privileged.

These moves were accompanied by struggles on the part of corporations, which included complaints about divulging trade secrets and about the heavy financial burden imposed on them. They also involved threats to close factories and transfer

⁴⁴ EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT U.S.C 116, *available at*: www.epa.gov/epaosopr/t3/1/e1.cfm

⁴⁵ *Ibid.*, section 11044, and indeed this information is available over the net - www.epa.gov/enviro/html/tris/tris_query.html. At the time this article was concluded, the governmental agency in charge of the registrar, the Environment Protection Agency (EPA) has become the center of heated debate in the run-up to the 2012 presidential elections, with candidates in the GOP primary elections committing to abolish the agency, should they be elected president. *See*: John M. Broder, *Bashing E.P.A. is New Theme in G.O.P. Race*, N.Y. TIMES, August 18, 2011 at A1.

⁴⁶ *Ibid.*, section 11042.

⁴⁷ THE ENVIRONMENTAL INFORMATION REGULATIONS 2004, STATUTORY INSTRUMENT 2004 No.391, *available at*: www.opsi.gov.uk/si/si2004/20043391.htm.

⁴⁸ *Ibid.*, section 4.

⁴⁹ The protocol will become valid in October 2009, after it was ratified by half of the 36 states signed to it. For more information: www.unece.org/env/pp/prtr.htm

them to other countries.⁵⁰ Since September 2001, it has even been argued that these registers could harm public safety by serving terrorist organizations.⁵¹ But these arguments have largely become a thing of the past in the countries where open registers were employed. Despite the arguments regarding the projected harm to trade secrets, the reality of the situation was that once the register was made mandatory in the United States, according to ECPRA, only one percent of the corporations reported on, took advantage of their right to ask the agency to keep certain pieces of information privileged based upon the trade secrets exception in the act.⁵²

3.3. Product Information

During the second half of the 20th century, the US experienced a wave of legislation demanding consumer product disclosure.⁵³ To a great extent this legislation was triggered by the activities of attorney (and later to become presidential candidate) Ralph Nader, who exposed to the US public the existence of dangerous practices in corporations operating in different sectors.⁵⁴ This legislation recognized the right of consumers to receive information regarding the ingredients in food products, the manufacturing countries of each product, safety tests and inspections performed,

⁵⁰ Robert Gottlieb, REDUCING TOXICS: A NEW APPROACH TO POLICY AND INDUSTRIAL DECISIONMAKING 136 (1995).

⁵¹ Ann Davis, *New Alarms Heat Up Debate On Publicizing Chemical Risks*, WALL STREET JOURNAL, May 30, 2002, at A1; United States: Worst-Case Scenarios Spark Accessibility Debate, *available at* www.nti.org/d_newswire/issues/2002/5/30/11s.html

⁵² International Right to Know: Empowering Communities through Corporate Transparency 22 (2003), *available at*: www.foei.org/en/publications/pdfs-members/irtk.pdf

⁵³ These laws include for example: Consumer Product Safety Act, Consumer Credit Disclosure Law, Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353, Home Mortgage Disclosure Act, Food, Drug and Cosmetics Act, Fair Packaging and Labeling Act (USA), Consumer Information Act 1978 (Ireland) .

⁵⁴ STEVEN SODERLIND, CONSUMER ECONOMICS: A PRACTICAL OVERVIEW 209 (2001) . For a description of the justifications for disclosure related to consumer rights and the general public interest, and for a discussion of the limitations of the information as empowering consumers see: Geraint Howells, *The Potential and Limits of Consumer Empowerment by Information*, 32 J OF L & SOC 349-370 (2005). The fields mentioned here do not exhaust the list of those on which duties of disclosure were imposed. For a description of 15 different fields in US legislation see: ARCHON FUNG, FULL DISCLOSURE : THE PERILS AND PROMISE OF TRANSPARENCY 183-208 (2007) .

composition of the price and details of sales contracts. More recent additions to this list include the results of clinical tests performed by manufacturers of pharmaceutical products during their development,⁵⁵ the existence of certain components of children's products that are suspected as being harmful,⁵⁶ and a proposal to obligate informing the public of the discovery of flaws in products.⁵⁷ ⁵⁸ Additional areas in which significant disclosure obligations were imposed in the US include the health care system,⁵⁹ and the managing of databases, especially in regard to the protection of private data.⁶⁰

* *

We therefore find that the process of obligating corporations to publish information is intensifying, and the disclosure obligations are extending to more and more areas of economic activity. Nevertheless, it is equally true that the cautious development from field to field in which disclosure obligation are imposed, serves to preserve the principle that disclosure is the exception to the general rule of secrecy.

⁵⁵ Food and Drug Administration Amendments Act of 2007, Public Law 110–85.

⁵⁶ Consumer Product Safety Improvement Act of 2008, Public Law 110–314 122 Stat. 3016.

⁵⁷ Sunshine in Litigation Act (H.R. 5884);

⁵⁸ On this matter an interesting (and in the writer's opinion erroneous) opinion has been voiced that such disclosure obligation are "forced speech" and therefore are in breach of the corporate freedom of speech, allegedly protected under the First Amendment to the US Constitution. According to this view, disclosure obligations must comply with the constitutional requirements that allow harming civil rights in certain circumstances, see: NB Casarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MISSOURI LAW REVIEW 929 (1998)

⁵⁹ This refers both to information regarding the dangers of medical treatment, and to information regarding the quality of treatment in health care institutions see: Aharon D. Twerski & Neil B. Cohen, *Second Revolution in Informed Consent: Comparing Physicians to Each Other*, *The*, 94 NORTHWESTERN UNIVERSITY LAW REVIEW 1, 2 (1999).

⁶⁰ This following a California law, Breach Disclosure Statute, S.B. 1386 Cal. Civ. Code § § 1798.29. Similar legislation was enacted in 33 additional states in the US, see: PM Schwartz & EJ Janger, *Notification of Data Security Breaches*, 105 MICHIGAN L REV 913, 915 (2006) . Such legislation already exists in Japan (Ibid., p. 915), and is gaining momentum in additional countries, see: A 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)

4. The Cases For and Against Freedom of Corporate Information

We now turn to examine the applicability of justifications for FOI mentioned earlier in this article, to private corporations. After doing so and weighing arguments that could be brought against their applicability, further justifications that are unique to commercial corporations will be discussed.

4.1. Applying General FOI Justifications to Corporate Information

4.1.1. The Political – Democratic Justification

The question here is whether in today's reality it is necessary for citizens to receive information from corporations in order to make educated decisions, and become actively involved in the processes that affect their lives, and the society as a whole?

Take, for example, the healthcare debate. Look first at the failed attempt to reform the system during the Clinton Administration.⁶¹ On one side of the arena was the president of the most powerful country in the world. Working to fail him were the heads of insurance companies that had consolidated under the Health Insurance Association of America (HIAA). The debate resulted in the opponents of the bill taking the upper hand. One of the factors working for the HIAA was the fact that the administration was subject to the Freedom of Information Act, while the companies could run a campaign behind a veil of secrecy. White House attempts to raise funds and generate “popular” activity in support of the reform, were all made public, and

⁶¹ For a description of the public debate around the plan, and the lack of reliable information on its details: Derek Bok, *The Great Health Care Debate of 1993-94*, 2 PUBLIC TALK: ONLINE JOURNAL OF DISCOURSE LEADERSHIP (1998), available at: www.upenn.edu/pnc/ptbok.html; KANT PATEL, HEALTH CARE POLITICS AND POLICY IN AMERICA 383–389 (3rd ed. ed. 2006); L. Disch, *Publicity – Stunt Participation and Sound Bite Polemics : The Health Care Debate 1993–1994*, 21 JOURNAL OF HEALTH POLITICS , POLICY AND LAW 3 (1996); Raymond L. Goldsteen, Karen Goldsteen & James H. Swan, *Harry and Louise and the Health Care Reform: Romancing Public Opinion*, 26 JOURNAL OF HEALTH POLITICS , POLICY AND LAW 1325–1352 (2001)

were accompanied by much criticism.⁶² Opposing organizations requested information in order to expose the campaign's 'behind the scenes' information.⁶³ On the other hand, the fact that the tobacco industry, led by the Philip Morris Corporation, was one of the significant financiers of the opposing campaign was not known at the time.⁶⁴ This was exposed several years later, after a master-settlement agreement was reached in the mega law-suit of 46 US states against the major tobacco companies⁶⁵ which included a provision obligating the publishing of companies' internal documents.⁶⁶ These documents exposed Philip Morris as being involved in the financing of diverse "grassroots" initiatives, and manipulating media coverage of the plan by purchasing advertising space, activating biased "commentators", initiating pseudo-scientific conventions, and more.⁶⁷ Information that might present the private health-care system in a negative light was also suppressed and hidden from the public, and thus prevented the public's ability to estimate the need for reform to deal with system flaws, for example, a problematic system of incentives offered to physicians.⁶⁸

⁶² Online NewsHour: The Healthcare Debate leading up to Clinton's Healthcare Address to Congress, www.pbs.org/newshour/forum/may96/background/health_debate_page1.html; Klein, *The Lessons of '94 The American Prospect*, www.prospect.org/cs/articles?article=the_lessons_of_94.

⁶³ Many documents uncovered by such petitions are available at the web site of the right wing conservative group - Judicial Watch :www.judicialwatch.org/CL-healthcare.

⁶⁴ The determination of Philip Morris and other cigarette manufacturers to fight the reform resulted from the fact that one of its sources of financing was meant to be the raising of cigarette sales taxes.

⁶⁵ Master Settlement Agreement, *available at*: www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf.

⁶⁶ Ibid Section 4.

⁶⁷ 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/. For documents exposing the company involvement in anti-reform activities, see for example: legacy.library.ucsf.edu/action/document/page?tid=psy67c00&page=1; legacy.library.ucsf.edu/tid/blz55e00; legacy.library.ucsf.edu/tid/san09e00/pdf.

⁶⁸ This question stood at the root of class action lawsuits against medical insurance companies in the US, 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: Mark A. Hall, *Theory and Practice of Disclosing HMO Physician Incentives*, 65 LAW AND CONTEMPORARY PROBLEMS 207 (2002)

Moving the successful reform campaign of the Obama administration, we find an even more robust FOI regime that governs the administration's activities. For instance, as a result of more recent FOIA court cases,⁶⁹ the administration was obligated to disclose information regarding meetings that were held in the White House with the heads of the health care system during the months of February – June, 2009 (some of which visited the white house seven times during this period).⁷⁰ On the other hand, during the decade prior to the passing of the reform, health care corporations spent a legendary sum of 3.5 billion dollars for lobbying expenses in Washington,⁷¹ but were exempted from disclosing information regarding these activities, making it impossible to know the identity of the financiers of a series of aggressive anti-Obama ads, and whether they were in fact the insurance corporations.⁷²

⁶⁹ Citizens for Responsibility and Ethics in Washington v. Dept. of Homeland Security, 592F.Supp.2d 111 (2009). This case was eventually settled when the Obama administration agreed to disclose the requested information voluntarily. However, the administration appealed a similar ruling in a spate case brought by a more conservative watchdog group in Judicial Watch v. United States Secret Service 803 F.Supp 2d 51. Even in regard to the first case, the information provided was only partial, see: Dan Eggen, *White house Discloses Meetings with Health Care Executives*, WASHINGTON POST, July 22, 2009; Bill Dedmann, *After Lawsuit, Obama Opens a Bit of Info on Meetings with Health Care Executives*, MSNBC.COM, July 22, 2009.

⁷⁰ Even in regard to the 2009 settled case, the information provided was only partial, see: Dan Eggen, *White house Discloses Meetings with Health Care Executives*, WASHINGTON POST, July 22, 2009; Bill Dedmann, *After Lawsuit, Obama Opens a Bit of Info on Meetings with Health Care Executives*, MSNBC.COM, July 22, 2009. The Bush Administration refused to submit similar information relating to the meetings of Vice President Cheney with representatives of private corporations in matters of proposed reform in the energy market and won an appeal to the Supreme Court against a decision requiring that it disclose the information. For the decision, see: District Court for the District of Columbia et al. No. 03—475, 542 U.S. 367 (2004), available at: www4.law.cornell.edu/supct/html/03-475.ZS.html. For the decision of the Federal Court of Appeals denying the petition for disclosure in light of the Supreme Court decision see: *Cheney v. United States*, 406 F.3d 723, 729 (D.C. Cir. 2005), available at: cases.justia.com/us-court-of-appeals/F3/406/723/512508

⁷¹ Lobbying Spending Database | OpenSecrets, available at: www.opensecrets.org/lobby/top.php?indexType=c.

⁷² Ben Protess, Lagan Sebert, *Anatomy of an Attack Ad*, Huffington Post, 9/24/2009 available at: <http://huffpostfund.org/stories/2009/09/anatomy-attack-ad>; Brian Montopoll, *Groups Seek to Influence Healthcare Debate without Disclosing Donors*, CBSNews Politics, 3/16/2010, available at: http://www.cbsnews.com/8301-503544_162-20000531-503544.html

Corporations are a central player in the decision making processes that take place in any Western democracy nowadays. Their influence in many cases is no less than that of senior government executives or political parties, yet the ability to follow their course of action, and cause others to be aware of and to respond to it is much smaller. The democratic principle justifies to an ever increasing degree that information regarding the activities of such corporations, and the way in which they affect the decision making processes and the markets in which they operate, should be made widely and easily available so that the public may form its views regarding these processes.

4.1.2 The Oversight Justification

The entrance of corporations into public domain activities creates important public interest in supervising 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.

After the 2003 Columbia shuttle disaster, a large number of requests under the Freedom of Information Act were submitted to NASA regarding inspection of the readiness of shuttle, contracts with external suppliers regarding work associated with the launch, launch preparations, the investigation of the explosion, compensation settlements with the families of the victims, and additional information. NASA practiced a policy of openness to public scrutiny and complied with most of the requests, and even presented the requested information on its website.⁷³ Nevertheless, the ability of the public to properly evaluate various aspects of the event was limited, because of the involvement of another important organization, United Space Alliance Corporation, (owned jointly by Boeing and Lockheed Martin). This private

⁷³ www.nasa.gov/columbia/foia/index.html.

corporation was not bound by the provisions of the FOIA, and therefore did not disclose information despite the testimony of high ranking officials at NASA that corporation people had constituted an integral part of the flawed decision making process preceding the disaster.⁷⁴ Considering the public interest in supervising the relevant organizations involved in this incident, there is no substantial difference between NASA and the United Space Alliance. However, the current law provides a legal tool to inquire into the actions only of the former.

When a corporation decides to shut down a plant, sending thousands to unemployment as was the case in Flint, MI,⁷⁵ or when a bank collapses putting at stake its clients' life savings, are they to be held accountable by the general public? Does the public have a right to oversee their activities and look into them to protect its interests?

Anita Allen offers several different grounds to the idea of accountability. She identifies two forms of accountability in our society: government and corporate, and states that freedom of information laws are a mechanism of "state accountability".⁷⁶ However, the grounds of accountability she offers – reliance, relationship and public need to name three,⁷⁷ suggest little distinction between states and corporations. Corporations often create reliance among people. Clearly GM employees in Flint relied on it 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. Employees, customers, providers, even neighbors, are all engaged in relationships that can be seen to render the corporation accountable to them. Public need is a another ground for stability recognized by Allen. People are accountable to

⁷⁴ Rosenbloom & Piotrowski., above ftn 21, p. 106

⁷⁵ See above Chapter 2.

⁷⁶ ANITA ALLEN, WHY PRIVACY ISN'T EVERYTHING 25 (2003)

⁷⁷ *Id.*, at 25.

the public where there is a public or governmental obligation to protect a public interest, such as the stability of the financial sector.

Accountability requires accessibility and transparency, says Allen. As I tried to point above, her justifications fit corporations just as they fit governments and hence strengthen the argument for corporate transparency.

4.1.3 The Instrumental Justification

Information necessary for the protection of human rights is, to an increasing extent, relegated to the hands of private corporations. First, privatization directly appoints corporations to positions relevant to exercising rights, for instance, when they are licensed to operate a prison or to provide health services. Secondly, the increasing power of corporations intensifies their potential for harming human rights, for instance, when they collect massive amounts of personal data, when they are responsible for massive pollution or simply when they are the source of livelihood for tens (or hundreds) of thousands of employees.

As mentioned in chapter 1 above, the closest ties exist between FOI and the right to freedom of expression. It is easy to see how information held by corporations can be necessary to express one's (or a group's) views effectively, for instance on the matter of healthcare reform (see discussion of the political-democratic justification above). Many other debates on matters of national interest today require disclosure of corporate information. The withdrawal of American forces from Iraq beginning in August 2010, left the war-torn country with a vast number of private contractors. A 2011 Congressional report put this number at more than 64,000.⁷⁸ Clearly, groups engaged in the debate on the US role in Iraq have a real and legitimate interest in

⁷⁸ 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.

learning about the actions of these contractors in order to be able to raise public awareness to the continued American presence in the country well after the last of its soldiers left the country. But reality is that the lack of accountability requirements from such private corporations makes this a much more difficult task, and helps defeat such attempts, leaving the public with the (false) impression that American engagement in Iraq has by and large come to an end.

Furthermore, the direct defense of individuals affected by the work of private corporations as contractors in Iraq and other warzones, might require information held by these corporations. The campaign run by US human rights organizations against practices of torture afflicted on detainees in Guantanamo bay, yielded wealth of information obtained through FOIA (albeit following lengthy legal debates).⁷⁹ These include, among many others, memos prepared by the Justice Department's Office of Legal Counsel, detailing and authorizing torture methods used by the CIA.⁸⁰ In another venue of the "war on terror", the Abu-Ghraib prison, as in other prisons in Iraq, much of the alleged abuses against detainees were practiced by employees of private corporations.⁸¹ While investigations were held into these allegations following leaked photos and witness reports to the media, no similar wealth of information is available regarding the relevant aspects of corporate work in these cases. What were the internal memos directing employees of Titan and CACI, two private contractors providing translation and interrogation services to the US 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? Some relevant

⁷⁹ For many of these documents see the "accountability for torture" ACLU project website:

<http://www.aclu.org/accountability/released.html>

⁸⁰ See: The Bush Administration's Secret OLC memos, *available at*:

<http://www.aclu.org/accountability/olc.html>

⁸¹ For a detailed description of such allegations, see: Complaint, Al Rawi v. Titan Corp., No. 04CV 1143 R, 2004 WL 1380538 (S.D. Cal. June 9, 2004)

information was disclosed in the course of litigation. Yet, as a matter of the public's right to know, private contractors activity remains immune from inspection. As a result of the exposure of the Abu-Ghraib scandal and similar incidents, the problem of lack of transparency in the work of private contractors and its harsh implications to the effort to protect human rights in Iraq, drew attention from legislators and international institutions. In 2007 then senator Barak Obama introduced a bill to increase transparency in the work of military contractors.⁸² The UN Human Rights Council issued a report calling on the US "to ensure that all requirements for transparency and oversight apply when contracting"⁸³

4.1.4 The Proprietary Justification⁸⁴

The conventional perception of property is that a person's property is his "sole and despotic dominion",⁸⁵ 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 serves its owners – the shareholders, and them alone. However, over the past decades, a much more varied view has emerged regarding the entitlements that stem from property.

⁸² S. 674 (Obama) — Transparency and Accountability in Military and Security Contracting Act of 2007. The bill never became law.

⁸³ 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 (2010)

⁸⁴ In the confines of the discussion here, it is not my intention to deal with the question of the proprietary status of information. This is an interesting question which has been discussed extensively in legal academic writing and in case law, see: Weinrib, *Information and property*, 38 UNIVERSITY OF TORONTO LAW JOURNAL 117 (1988); Pamela Samuelson, *Legally speaking: is information property?*, 34 COMMUNICATIONS OF THE ACM 15–18 (1991) ANNE WELLS BRANSCOMB, WHO OWNS INFORMATION (1995). My fundamental premise here is that it is accepted today to recognize that information is to be regarded as property. The question at the heart of the discussion here is what proprietary regime ought to be applied to information in the possession of commercial corporations.

⁸⁵ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1847)

Contemporary writings in this matter propose new views on the essence of the status of ownership, how it is acquired and its scope.⁸⁶

A renewed examination of the influence of shareholders and other groups on the corporation took place with the rise of the 'stakeholder theory'⁸⁷ in the mid-1980s.⁸⁸ According to this concept, a stakeholder is 'any group or person that is affected by, or can affect the achieving of the objectives of the organization'.⁸⁹ On the basis of this theory, arguments were developed in regard to the duties of the corporation to its stakeholders,⁹⁰ and suggestions were made regarding the practical application of these duties. The sharing of information with stakeholders is one of the more modest applications that were proposed in this context.⁹¹

These theories, however, deal with the **expectation** that the corporation will, on its own and as part of its “social responsibility”, recognize the interests of the stakeholders. Policies have been formulated as *recommendations* to corporations or at the very most, as a call to act out of a sense of duty. Thus the question of level of disclosure compatible with respect to “stakeholders” remained to be determined by corporate management and owners.

⁸⁶See for example: M. A. Honore, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107 (A. G. Guest ed., 1961); STEPHEN MUNZER, A THEORY OF PROPERTY (1990).

⁸⁷The theory was first presented in: EDWARD R. FREEMAN, STRATEGIC MANAGEMENT, (STAKEHOLDER APPROACH 1984). For a review of different uses of the term since its inception: Edward R. Freeman & John McVea, A STAKEHOLDER APPROACH TO STRATEGIC MANAGEMENT SSRN eLIBRARY (2001), *available at*: ssrn.com/paper=263511

⁸⁸But similar ideas were presented as early as 1932, in a article that preceded its time, see: Merrick E. Dodd, *For whom are corporate managers trustees?*, 45 HARVARD LAW REVIEW 1145 (1931).

⁸⁹EDWARD R. FREEMAN, STRATEGIC MANAGEMENT : A STAKEHOLDER APPROACH (1984).

⁹⁰Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 THE ACADEMY OF MANAGEMENT REVIEW 65–91 (1995) .

⁹¹In 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: ANDREW FRIEDMAN & MILES SAMANTHA, STAKEHOLDERS : THEORY AND PRACTICE 167–168 (2006). 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.

Other scholars at the time have suggested more far-reaching approaches regarding the division of rights in the corporation. Robert Dahl considers giant corporations such as General Motors to be political institutions and argues that, as such, the question of their ownership should not be treated as if it belonged to the field of private property.⁹² Joseph Singer claims in a 1988 article⁹³ that employees have a possessory right to their place of employment,⁹⁴ which requires their being allowed to receive information that might indicate to them 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 in advance signs that the business might be closing.⁹⁵ John McCall argues that employees right to co-determine corporate policy (from coffee-break schedule to closing plants) should trump current understanding of property rights.⁹⁶

The important aspect for our discussion is that the property discourse today recognizes various kinds of proprietary rights and of varying degrees. Ownership in itself is no longer seen as necessarily allowing preclusion of all others from access to the property, especially when it is publicly situated, and property owners are often subjected to various obligations on the management of their own private property. This suffices to allow us to conclude that the ownership of information by a corporation must not in itself prevent us from recognizing a corporation's duty to allow access to its information.

4.2. Defending "Corporate Rights"

⁹² Robert A. Dahl, *Governing the Giant Corporation*, in *CORPORATE POWER IN AMERICA* 10, 18 (Ralph Nader & Mark J. Green eds., 1973).

⁹³ Joseph Singer, *The Reliance Interest in Property*, 40(3) *STANFORD L REV* 611 (1988) .

⁹⁴ *Ibid.* p. 699.

⁹⁵ *Ibid.* p. 740.

⁹⁶ John J. McCall, *Employee Voice in Corporate Governance: A Defense of Strong Participation Rights*, 11(1) *BUSINESS ETHICS QUARTERLY* 195 (2001).

The recognition of the constitutional rights of corporations might deal a "fatal blow" to the right of the public to be informed. Such recognition for example led a US federal court of appeals to rule that a Vermont state law was unconstitutional,⁹⁷ because it required the labeling of products manufactured from cows that had received growth hormone treatments, as this ran counter to the corporation's right to freedom of speech (More specifically, in this case – the freedom to refrain from speech⁹⁸).

The assumption that a corporation is protected by basic constitutional rights is not to be taken for granted. The wording of the major international human rights documents refer to "humans", as the beneficiaries of these rights. Legalists are sometimes surprised by the incredulity of first year law students being taught that a corporation is a "person". The truth is however that most people (the natural ones, that is) share this incredulity. US corporations were recognized as bearers of constitutional rights nearly a century after the ratification of the Constitution. The initial interpretation of the US Constitution was that the beneficiaries could only be flesh and blood human beings.⁹⁹ This changed in 1886, when a comment was added to the report of a US Supreme

⁹⁷ **International Dairy Foods Association v Amestoy** 92 F.3d 67 (1996)

⁹⁸ The argument of the right to refrain from speech was raised in an intervention filed by the Monsanto corporation, 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.

The reader is invited to form an opinion on this argument also in view of the fact that 10 years later the attorneys of Monsanto demanded that the authorities in the US prevent other dairy product manufacturers from voluntarily labeling their products as "hormone free", based on the argument that these statements are designed to scare the consumers, see: Stephen J Hedges, *'Hormone free' milk labels cause stir*, Chicago Tribune p.11, April 15, 2007; C Cusimano, *It Does a Body Good?: RBST Labeling and the Federal Denial of Consumers Right to Know*, 48 *SANTA CLARA L. REV.* 1095–1127, 1096 (2008). A federal appeals court has overruled an Ohio Department of Agriculture regulation designed to prevent dairy processes from presenting their produce as "hormone free" – *International Dairy Foods Association V. Boggs*, 622 F.3d 628.

⁹⁹ In 1855 the US Supreme Court still referred to corporations as an "artificial invention":

The case is one between a corporator and the corporation, and jurisdiction cannot be affirmed unless the court is prepared to answer the question whether 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; and relying upon the case of *Marshall v. Baltimore & Ohio Railroad Company*, with a long list of antecessors, I am forced to conclude that it cannot be (*Dodge v. Woolsey* 59 U.S. 18 331 366 (1855))

Court ruling, documenting oral exchange in courtroom by the Justices expressing their opinion that a corporation should be considered a "person" and should enjoy the right of due process under the 14th Amendment.¹⁰⁰ This comment, not even a *dictum* as it was never part of a court decision, was later given *stare decisis* effect, (mis)quoted in many subsequent decisions.

Supporters of recognizing the constitutional rights of corporations cite several arguments to justify their position: (1) that this recognition protects the people *standing behind* the corporation; (2) that, in effect, this protects the rights of association of individuals, and (3) that corporations perform a vital function in society. I shall respond to each of these.

(1) Inasmuch as the justification for recognizing the rights of the corporation is based on the individuals "hidden" behind its veil, there is no reason why these individuals should not be brought to center stage to examine the actual harm that they might personally sustain from limiting the "constitutional rights" of the corporations they own. Thus, for example, we must ask whether indeed a surprise inspection of the tax authorities of a company's offices amounts to harming the constitutional rights to privacy or private property of the individuals behind it,¹⁰¹ or whether the marking of

¹⁰⁰ Santa Clara County v. Southern P. R. Co., 118 U.S. 394 (1886). The story of this comment is historically fascinating, given the huge effect of the case on US constitutional law. Despite frequent misquotes that cite it as a precedent, in reality, it is not part of the ruling. It appears in the ratio written by the court registrar that precedes the text of the ruling, as a quote of a verbal statement by the Chief Justice delivered before the parties had begun arguments. It is worth mentioning that the registrar himself was a former CEO of a railroad company. 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. The copy of the original correspondence between the Chief Justice and the Registrar may be viewed in the following: www.de-facto.com/fact_read.php?id=33.

¹⁰¹ The right is protected under the Fourth Amendment to the constitution. In the case of Marshall v. Barlow's, Inc., 436 U. S. 307 (1978), it was argued that spot inspection of federal safety authorities at a workplace violated the employer's constitutional right of privacy, and this argument was accepted by the US Federal Court of Appeals.

milk products in Vermont really forces speech upon *the individuals* standing behind the corporation.

(2) Disregarding claims of corporate rights would not harm the freedom of association. The freedom of individuals to associate would remain unaffected. They can do together everything they are allowed to do separately as individuals. Fulfilling the right to associate requires that individuals be allowed to act collectively. It does not necessarily entail enjoyment of the formal status of a limited corporation. This certain type of association grants the associated rights they did not hold previously, and can hence bestow upon them new duties, affecting only the newly created entity.

(3) Undoubtedly, corporations do fill a vital role in society, as is also true of governments. Yet governments are not afforded any "constitutional rights". They are allowed to carry out only those actions explicitly established by law. They claim no "natural" "pre-legal" rights. Governments operate well in this rule of law without it harming their ability to contribute to society.

Despite its shaky foundations, this discussion proceeds with the premise, anchored in numerous court rulings, that corporations are entitled to constitutional rights.

4.2.1. The Breach of the Right to Property

In order to argue that enforcing a freedom of information regime on a corporation would violate its right to property, we must also assume that this right constitutes the right to prevent others from accessing its information. It is true that many would consider preventing others from using property as a central characteristic of the right to property. However, as illustrated above, alternative approaches are increasingly

voiced,¹⁰² which propose removing this obstacle from our way. Hanoch Dagan maintains that under certain conditions and in certain contexts the right to property *itself* obligates its possessor to allow others to gain access to his possession. This component of the right to property is derived from the fact that ownership is a status constituting a relationship between the owner and other individuals in the community for the purpose of promoting social values. As the right to property bases a demand from society to make its resources available to defend the ownership of the individual, it is only reasonable to recognize society's obligations to the interests of its other members, who are not the owners of the property.¹⁰³

Our discussion focuses on the question of the right to information. Indeed, according to Dagan, under certain circumstances where the use of information by others does not harm the owners reasonable enjoyment of it (as is often the case with information), allowing access of the general public to it is not merely an *appropriate* practice, *despite* its harming of a right to property, but is actually an *obligation originating in* the owner's right to property, and the social responsibility that is an integral component of this right.

One need not subscribe to Dagan's perception regarding the meaning of property rights in order to agree that the right to property in different contexts can be understood in different ways. In our day to day lives, most of us find it rather easy to accept the right of a person to deny entry of an uninvited guest to his private home. We will not question her motive. Yet we will do so when the owner of a store denies access to customers, perhaps on the basis of considerations such as race or the

¹⁰² For a comprehensive description of this concept and its supporters, and criticisms, see: Hanoch Dagan, *Exclusion and Inclusion in Property* 109 TEL-AVIV UNIVERSITY LEGAL WORKING PAPERS SERIES (2009)

¹⁰³ See also: Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL LAW REVIEW 1255 (2006).

expressing of opinion.¹⁰⁴ The exclamation that this is "my property" cannot **by itself** justify the banishing of an individual from a property, even when it is private.

It is important to make a distinction between an argument that the corporation property rights are harmed by information losing its value when disclosed (i.e., “the Coca Cola formula” where the information itself is valuable property created by the corporation to enjoy its value), and the argument that the corporation is being harmed by the loss of profits that may result from the disclosure of information (where the information documents certain circumstances or a certain truth). The second argument is basically a defense of the corporation's right to make a profit by withholding the truth. The publishing of an internal report exposing the existence of corruption in the management of a bank could likely result in the loss of profits to the bank, but the withholding of the report harms the property rights of the stakeholders, and according to the perception of property rights as a social responsibility, it would shake the very foundations upon which the ownership status is based.

Other harm to corporation property by an imposed duty to disclose information to requestors should be considered – and results from the expenses that the company would incur by administering such a regime. This is potentially the most serious critic against the transparency model suggested here. Handling information requests, locating the requested information, its production and delivery –all involve expenses that might total significant amounts of money. The fact that we wish to supervise corporations and limit their ability to harm human rights does not mean that they should also be obligated to cover the expenses of the active advancement of civil rights. We will refer to this when the details of the policy proposed in this article are discussed later on.

¹⁰⁴ Marsh v. Alabama 326 US 496 (1946).

4.2.2. Breach of the “Freedom of Commercial Speech”

It is argued that disclosure rules constitute “forced speech” and hence violate the right of corporations to refrain from expression.¹⁰⁵

Two weaknesses of this argument should be noted: First, the defense of the corporation's interest to refrain from providing *factual* information runs counter to one of the declared objectives of freedom of speech in general, and commercial free speech in particular – which is to support the search for truth.¹⁰⁶ Withholding information, and particularly factual information, harms the search for the truth, and therefore should not be allowed to enjoy constitutional defense for commercial freedom of speech.¹⁰⁷

Second, one must make a distinction between the existing disclosure duties and the recognition of a right to freedom of corporate information. Imposing an obligation of discovery requires the corporation (in reality its employees) to take a number of active steps designed to present the information to the public. The corporation is forced to “act” counter to “its desire”, and to what it perceives as its interests. One might argue (with difficulty as described above), that this constitutes a breach of the corporation's freedom to refrain from speech. Recognition of a right to access corporate information is in this sense a much “softer” enforcement of speech. It requires the corporation to allow the public to access the documents that it possesses with minimal action and no

¹⁰⁵ Mayer, *Personalizing the impersonal : Corporations and the Bill of Rights*, 41 HASTING'S LAW JOURNAL (FORMERLY : HASTINGS JOURNAL) 577, 206 (1989); Tamara R Piety, *Against Freedom of Commercial Expression*, CARDOZO LAW REVIEW, 2586 (2008) .

¹⁰⁶ *Abram v. United States*, 250 U.S. 616, 630 (Justice Brandeis: “the best test of truth is 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. California*, 274 U.S. 357, 377 (Justice Brandeis: “If there be time to expose through discussion the falsehood and fallacies... the remedy to be applied is more speech, not enforced silence”

¹⁰⁷ 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.

active expression expected from it.¹⁰⁸ Thus, for example, it would allow free access to the results of the research conducted by the corporation relating to the effects of the hormones, and the raw data that was collected in these studies but would not require the corporation to make any declarations on its behalf as is required for instance in SEC filings. All that it is required to do is to provide existing information in its present state, and to deliver it 'as is' to the requesting party.

4.2.3. Right to Privacy

Does a corporation have a right to privacy, based upon which it can withhold information? The case law is not conclusive on this point, though a recent Supreme Court ruling answers at least some aspects of this question in the negative.

In 1906 the US Supreme Court ruled that a corporation may not withhold documents based upon the argument that this might lead to its self incrimination. The acceptance of such an argument according to the court would cancel out all of the discovery rules that apply to corporations.¹⁰⁹ In 1950 the US Supreme Court ruled that General Motors (and corporations in general), enjoy some rights of protection to their privacy, but that they cannot demand the same extent of privacy protection that is offered to individuals.¹¹⁰ Yet a Supreme Court ruling from 1978 struck down as unconstitutional a law allowing labor law enforcement agencies to conduct surprise inspections in

¹⁰⁸ Both systems are not necessarily interchangeable. At times a freedom of information 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.

¹⁰⁹ Hale v. Henkel, 201 U.S. 43, 70 (1906).

¹¹⁰ United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) . A recent decision by the US Federal Court in Iowa, dated July 2009 adopts this rule, and dismisses the claim that a corporation can be considered a person for purposes of privacy protection. United States v. Agriprocessors, Inc., N.D. Iowa (July 28, 2009) 12.

private businesses, as it breached an aspect of the corporation's privacy which is defended under the Fourth Amendment to the Constitution.¹¹¹

A 2011 decision by the Supreme Court in the case of *AT&T v. FCC*¹¹² ruled that a corporation cannot enjoy the protection of the “personal information” exemption in section 7(c) of the US FOIA. The court opined that while it is long established that a corporation can legally be “a person”, there is no such rule to suggest that “personal” includes “corporate”. With the absence of such rule, the court declared, it is the common meaning of “personal” as opposed to “company” (“personal matter” as opposed to “company matter” for instance), that should be the rule. Thus the court overruled a 3rd circuit court of appeals decision that upheld an appeal by AT&T against the FCC’s decision to disclose to a FOIA requestor,¹¹³ information collected in the course of an agency investigation into alleged misconduct by the corporation when implementing a federal government program.

It can be concluded that in the US some protection of the privacy of corporations does exist, but not to a level that equals what is offered to the individual.¹¹⁴

According to Richard Posner,¹¹⁵ the information which is held by corporations should enjoy a *greater* degree of privacy protection than that of individuals. His reasoning is that in most cases individuals avoid providing information not in order ‘to be left alone’, as coined by Brandeis and Warren,¹¹⁶ but rather to interact with others, and to make use of their private information to mislead others and manipulate their

¹¹¹ *Marshall v. Barlow's, Inc.*, 436 U. S. 307 (1978).

¹¹² *FCC v. AT&T* 562 US (2011)

¹¹³ *AT&T v. FCC*, 582 F. 3d 490 (2009)

¹¹⁴ In Australia the Supreme Court in the year 2001 rejected the argument that a corporation has a right to privacy, see: LA Bygrave, *A right to privacy for corporations? Lenah in an international context*, 8 PRIVACY LAW AND POLICY REPORTER 130 (2001).

¹¹⁵ RA Posner, *An economic theory of privacy*, GEORGIA L. REV. (1978) .

¹¹⁶ Louis Brandies, Samuel Warren, *The Right to Privacy*, 4 Harvard L Rev 193

actions.¹¹⁷ Conversely, businesses withhold information for the purpose of promoting the important public interest of compensating entrepreneurs.¹¹⁸ Do corporations ever withhold information for the purpose of manipulating others? Surprisingly, Posner does not refer to this possibility.

Still, two significant conclusions result from Posner's position.¹¹⁹ First, where withholding information creates a misrepresentation of the situation, and prevents information from affecting the public debate in which others have an interest, there is no justification for preferring the right to privacy. It is my claim that a great deal of the information that is withheld by corporations meets this description.¹²⁰ Second, the desire to interact with others (and to not be left alone) detracts from the right to privacy. Yet (unlike in the case of individuals), a corporation's sheer existence depends on continuous interaction with workers, neighbors, investors, and especially consumers. Posner's arguments, if added to a realistic view of the nature of corporations as we know them, pull the rug from under their claim to privacy.

Even if we assume that a corporation has a constitutional right to privacy, this does not in itself negate the right of the public to be informed, but instead requires the balancing of the two. Under circumstances where the withholding of information is motivated by "privacy" *per se*, the corporation is usually attempting to withhold information that might expose unpleasant facts about it, or act to counter a misrepresentation foisted upon the public. Therefore, the recognition of the right to

¹¹⁷ Posner, above fn 94., p. 22, note 93.

¹¹⁸ *Ibid.*, p. 25.

¹¹⁹ 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.

¹²⁰ 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, and we refer to protecting such value towards the end of this article.

privacy should be given little weight in the process of balancing rights. Privacy like patriotism could become ‘the last refuge of the scoundrel’.

4.3. Additional Justifications

The disclosing of corporate information may have social influences that could further justify its obligation, above and beyond the interests of those discussed in regard to information held by strictly public agencies.

Promoting the Values of Trust, Decency and Good Faith

Trust is a social institution of extreme importance. No society can exist if the individuals within it do not possess an adequate degree of trust in each other. Under such circumstances, each individual in the society would always be busy preparing for the worst possible eventualities that might befall him as a consequence of the actions of his peers. Some consider trust to be a supreme principle, underlying entire fields of law, primarily contract law.¹²¹ Trust violating actions are usually made in secret. In the absence of an external obligation, it would be surprising to find a manufacturer that would announce to its customers that he has begun using components of inferior quality in his products, or to find an employer informing his employees that he is negotiating with a potential buyer for the business which will cause them great hardship, arousing them to interfere in the negotiations. But should corporations *expect* such information to become public, it is likely they would feel encouraged to practice a priori honesty and behavior based on good faith, thus enjoying more trust from the public.

4.3.1. Discovering the Truth, Access to Court, and Judicial Efficiency

¹²¹ 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 BUSINESS LJ (1) 229 (2006).

From among the legal tools that exist today, the one most similar to that which is recommended in this article are the rules of discovery for documents.¹²² These rules require a litigant to present any document that is requested for examination by the other side.¹²³ Some view this process as a form of "focused freedom of information act".¹²⁴ Indeed, often the discovery proceedings can lead to the revelation of documents possessing a good deal of public interest. Yet this form of discovery is coincidental and relies on the existence of a costly legal proceeding –it takes place when the services of attorneys are already retained, and judicial time is being consumed.¹²⁵ The arguments justifying the disclosure of documents during legal proceedings equally support the discovery of documents in the pre-legal phase of a dispute. Such discovery might void the need for legal action all together, as indeed many proceedings belatedly end following their discovery phase. Ripped from other court tactics and strategies that are weaved into the pre-trial discovery phase, may also turn access to corporate information much more simple and cheap than discovery rules as currently applied.

4.3.2 Fair Competition, Financial Efficiency and Economic Growth

The champions of free market principles might argue that disclosure would have already been implemented by market forces if it were economically efficient.¹²⁶ At the basis of this argument is the assumption that the invisible hand in its wisdom sets down the efficient economic principles in the free market. There is, at least today if

¹²² In the US Federal law this process is based on: Federal Rule of Civil §§ 26-37, available at: http://www.law.cornell.edu/rules/frcp/#chapter_v

¹²³ Rule 34(c) compels even nonparties to produce documents.

¹²⁴ Beermann, above ftn 21, p. 1723 ("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").

¹²⁵ 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 (2005).

¹²⁶ ADRIAN HENRIQUES, CORPORATE TRUTH : THE LIMITS TO TRANSPARENCY 13 (2007)

not many years ago, no shortage of proof that this is not always the case. This was true years before the global economic crisis that erupted in 2008 and the different “occupy X” movements with their wide support in public opinion and certain academic circles. 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 for¹²⁷ – a revelation that came after centuries in which businesses did not attribute the existence of any real "market" for fair play.

As a result of the global economic crisis, arguments regarding the advantages of secrecy have been heard slightly less frequently while the voices of those supporting a greater degree of transparency have intensified. Joseph Stiglitz, another Nobel Peace Prize in economics laureate, has described the connection between the lack of information and the fall of the Lehman Brothers investment bank, which signaled the height of the crisis:¹²⁸

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.

Other economists are of the opinion that improved risk assessment is a major benefit that would result from the disclosure of information. This would benefit the investor

¹²⁷ Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Fairness and the Assumptions of Economics*, 59 THE JOURNAL OF BUSINESS S285-S300 (1986)

¹²⁸ Joseph Stiglitz on the Fall of Lehman Brothers (video) (2008), available at bigthink.com/josephstiglitz/joseph-stiglitz-on-the-fall-of-lehman-brothers

because financing expenses would be lower in a market where the information that could interest a potential investor was more readily accessible (and for this reason the price would not need to include the premium for risks and the expenses of financing investigation), and also would benefit the market as a whole, as low financing costs promote investments and growth.¹²⁹ Additional advantages would 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.¹³⁰

The question that should be asked in the context of the legal discussion is: What would be the effect of a general obligation of disclosure on *fair* competition only, as unfair competition is not worthy of consideration when designing the appropriate legal policy. A general obligation of disclosure might reduce the effects of competitive advantages that result from unfair behavior, for instance, when corporations reduce costs by employee abuse, by use of inferior components or by dubious incentive systems to distributors. It is likely to also affect the public images of corporations in a way that would reflect them more accurately (while enabling the public to consider issues such as employee exploitation, breach of human rights, environmental behavior and the like), and it could provide full and reliable information regarding the components of the product and malfunctions that have been discovered in it, and more. Thus, new and currently unavailable considerations would be introduced into the competition, and would be attached the value the public relates to them.

¹²⁹ Robert K. Elliot & Peter D. Jacobson, *Costs and Benefits of Business Information Disclosure*, 8 ACCOUNTING HORIZONS 80–96, 81, 89 (1994)

¹³⁰ *Ibid.*, p. 90, 92.

5. It's where the world is (slowly) heading

5.1 The United States

The U.S. Was once a global leader in transparency. When its Freedom of Information Act¹³¹ (FOIA) was signed in 1966 it was the fourth of its kind in the world.¹³² It was enacted together with the Government in the Sunshine Act,¹³³ which established that government agency meetings would be held with open doors.¹³⁴ Many other countries have since caught up, and in regard to corporate information it can be said that some have a more progressive approach than of the US.

When examining requests for the disclosure of information from organizations that are not overt public agencies as defined by the Freedom of information Act, the federal courts apply two tests: 1. Can the organization be defined as a “government agency”; 2. Conversely, can the requested **information** be considered as belonging to a government agency, irrespective of the position of the organization possessing the information.

The leading case in this matter was handed down in 1980. In the case of *Forsham v. Harris*,¹³⁵ a physicians’ organization specializing in the treatment of diabetes requested that the Department of Health provide it with the data that was collected in a study of the effects of certain drugs for the treatment of diabetes. The study was

¹³¹ FREEDOM OF INFORMATION ACT, 5 U.S.C. 552 (1966).

¹³² 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, above, ftn 5.

¹³³ 5 U.S.C 552b (1976).

¹³⁴ In addition to the federal legislation, similar enactments were made all over the US. However, the actual application of this rather demanding law by the authorities remains debated, see: Jeniffer A. Basch, *Seventeen Years Later: Has the Government Let the Sunshine in?* 61 Geo. Wash. L. Rev. 1476 (1993).

¹³⁵ 445 U.S. 169., 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 325–348, 335 (Jack Beatson & Yvonne Cripps eds., 2000).

conducted by a private organization of scientists and physicians, themselves diabetes specialists, with a DOH grant. The findings of the study were submitted to the Department, but the raw material which included 55 million data entries was never requested by the Department.

In the first section of the decision the court rejected the premise that a private organization may be considered a government agency for the purposes of the act, for actions funded by the taxpayer.¹³⁶ According to the majority opinion written by Justice Rehnquist, the fact that Congress refrained from including private organizations in the scope of FOIA has a positive meaning, defending the “autonomy” of private organizations and *preventing* the court from ordering them to disclose information. Throughout the decision, there is no reference to the interest of the petitioners or to the public interest in the disclosure of the requested information. The minority opinion of Justice Brennan does just that. It opens with a description of the objectives of the Freedom of Information Act – “to establish a community of informed voters in the US, so vital to a democratic society”.¹³⁷ Justice Brennan was of the opinion that as the requested information had been used in the decision making process of a government agency, it should be considered information belonging to the agency. The minority opinion can be summarized in his words:

Government 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 by whether the relationship between

¹³⁶ Forsham Case, *Ibid.*, p, 182

¹³⁷ *Ibid.*, p, 188

the agency and the private organization is governed formally by a procurement contract, a "joint venture" agreement, or a grant.¹³⁸

The *Forsham* precedent which continued to direct federal judges over the next decades,¹³⁹ created a strange legal situation in which information possessed by a government agency was open to the public, but from the moment the government agency had paid another organization to produce similar information, it was removed from the public sphere and could not be inspected or questioned.

Two aspects of this case are worth noting: First, the approach practiced here and in following cases dealing with the question of what agencies and information items came under the scope of the act was narrow and formalist. Only an organization that was a government agency in the strictest sense of the term, and only information that was under the physical control of such an agency were considered as subject to the provisions of the act. This was the court's interpretation, despite the fact that the language of the act allows for a more expansive one. Second, the court decision tended to disregard the price of keeping the information secret (unlike the discussion in the opinion of Justice Brennan, as mentioned above). The discussions revolved around the need to defend the status of the private organization, but the rights of the

¹³⁸ *Ibid.*, p, 190

¹³⁹ See for example: *Tax Analysts v. United States DOJ*, 913 F. Supp. 599 (1996); [Stanley v. DOD](#), 1999 U.S. Dist. LEXIS 23585 (S.D. Ill. June 22, 1999); *Burka v. United States HHS*, 87 F.3d 508; *Public Citizen's Health Research Group v. the Department of Health, Education and Welfare* 668 F.2d 537 (1981). The attempt to apply this decision and others to private prisons in the US has led to the conclusion that under the existing tools, the US Freedom of Information Act will leave operation of such prisons almost exempt from public scrutiny. See: Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 UNIVERSITY OF MICHIGAN LAW REVIEW 249 (1995).

petitioner for the information, or the public interest of the discovery were not a central, and certainly not a decisive consideration.¹⁴⁰

The US Congress expressed its dissatisfaction with the existing approach in the case law. In 1998 Congress established an explicit provision that followed the minority opinion in the *Forsham* case, and set down that any research information that was created by public funding would be subject to the act.¹⁴¹ In 2007 this provision was expanded to cover any information prepared for a government agency.¹⁴² Still, neither US case law nor the legislator has ever discussed the possibility of ordering a private corporation to disclose information in its possession when it does not have any connection to a public agency.

Does the recent *AT&T v. FCC*¹⁴³ case 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 itself 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.

5.2 The United Kingdom

¹⁴⁰ A more flexible discussion of the right to receive information from private organizations operating in the United States exists in academic discourse. See for example Casarez, *Ibid.*, note 59; Rosenbloom & Piotrowski, *supra* note 21; Jack M. Beer mann, *Privatization and Political Accountability*, 28 FORDHAM URBAN LAW JOURNAL 1507 (2001); Mathew D. Bunker & Charles N. Davis, *Privatized government functions and freedom of information: Public accountability in an age of private governance*, 75 JOURNALISM AND MASS COMMUNICATIONS QUARTERLY 464–477 (1998); Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FEDERAL COMMUNICATIONS LAW JOURNAL (1999); Craig D. Feiser, *Protecting the Public's Right to Know: the Debate Over Privatization and Access to Government Information Under State Law*, 27 FLORIDA STATE UNIVERSITY LAW REVIEW 825 (2000); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism and Democracy*, 46 BOSTON COLLEGE LAW REVIEW 989 (2005)

¹⁴¹ 105 P.L. 277.

¹⁴² Open Government Act (2007) Public Law 110–175.

¹⁴³ See chapter 4.2.3 above.

The UK Freedom of Information Act¹⁴⁴ applies fully to private organizations in regard to only one field – the suppliers of medical services on the basis of the National Health Insurance Act.¹⁴⁵ Beyond this, the Freedom of Information Act gives the minister charged with the administering of 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".¹⁴⁶ In 2008 the Government began a consultation process toward implementing the act on additional organizations. The result after almost two years of consultation was poor and disappointing. In a report by the Department of Justice summarizing the process,¹⁴⁷ it rejected the majority of suggestions made by members of the public, and announced its intention to apply the law to only four organizations, all of which perform functions of an overt public character, or which are mostly funded by taxpayers.¹⁴⁸ The department rejected suggestions to apply the Freedom of Information Act to powerful corporations such as big retail chains, corporations providing vital services, private schools, and corporations that operate on the basis of a contract with a public authority.

The Department of Justice cited three reasons for the narrow approach it had taken regarding the implementation of the Freedom of Information Act on private corporations: 1. The high costs that might be imposed on the corporations;

¹⁴⁴ Freedom of Information Act 2000 (c. 36), full text *available at*: www.opsi.gov.uk/Acts/acts2000/ukpga_20000036_en_1.

¹⁴⁵ *Ibid.*, §44, 45.

¹⁴⁶ *Ibid.*, §§ 5(1)

¹⁴⁷ FREEDOM OF INFORMATION ACT 2000: DESIGNATION OF ADDITIONAL PUBLIC AUTHORITIES – RESPONSE TO CONSULTATION, , www.justice.gov.uk/consultations/docs/consultation-response_section5.pdf. The report itself 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.

¹⁴⁸ The following organizations were to be covered by the law: Association of Chief Police Officers, which plays a role in the development of police services; Financial Ombudsman Service, which among other tasks, resolves disputes between consumers and financial institutions; UCAS – University and College Admission Service; and “Academies”, i.e., not-for-profit educational institutions.

2. The projected additional workload that would beset the government administration appointed to implement the legislation (The Freedom of Information Commission and the tribunal, which rules in cases of disputes between information requestors and the authorities); 3. The "economic climate" that has changed since the beginning of the consultation (probably signifying a will not to burden corporations in such times).

However yet another round of consultation has been launched in 2011.¹⁴⁹ In this round the government has asked a long list of private corporations, as private as iconic McDonalds, to opine on the possibility of being brought under the scope of the act, as far as its public actions are concerned. In McDonald's case this would be a degree awarding program recognized by national public authorities.¹⁵⁰

5.3 Israel

The Israeli Freedom of Information Law¹⁵¹, applies exclusively to "classic" public agencies. The Israeli Supreme Court has stated that the list of the government agencies appearing in the law is a "closed list".¹⁵² A 2005 amendment brought government-owned corporations under the scope of the act. The corporations operate in the field of private law, and some include private shareholders.¹⁵³

¹⁴⁹ See the Ministry of Justice Impact Assessment Paper of March 4, 2011 titled: "Extending the coverage of Freedom of Information Act 2000 under Section 5", available at: www.cfoi.org.uk/MoJ_draftimpactassessments5.pdf

¹⁵⁰ See: Martin Roesenbaum, *A Big Mac with extra FOIs, please*, BBC.co.uk January 9, 2012, available at: www.bbc.co.uk/news/uk-politics-16443404

¹⁵¹ Freedom of Information Law 5758-1998, available at: www.sviva.gov.il/Environment/Static/Binaries/Articals/Freedom_of_Information_Law_1988_1.pdf

¹⁵² AA 3493/06 Alroy v the Egged 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 v the Committee for Judicial Appointments (2008).

¹⁵³ 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.

There are two possible ways of receiving information from private corporations which the act does not cover: by application to a public agency regarding its contacts with the private organization, and by applying to the regulator possessing information regarding private organizations under its supervision.

The first possibility requires a connection between the corporations and a public agency. The Israeli Supreme Court has ruled that such connections should be exposed as a general rule, and are “Information with a clear public character”.¹⁵⁴ However, the basis for these rulings is the supervision of the public authority, and not the private corporation, which is considered “an innocent bystander” affected by the confrontation between the citizen and the authority.

When information is requested of a regulator with the intention of exercising direct public supervision of the private organization itself, the courts give a great deal of weight to the exceptions that are designed to protect the interests of the private organization – central to them, the commercial secrets exemption.¹⁵⁵

In *Keshet Broadcasting v. The Second Authority for Television and Radio*,¹⁵⁶ the respondent decided to disclose tender bids submitted by corporations that won a TV broadcasting concession. The background to this petition was allegations that there was a considerable discrepancy between the commitments made by the corporations and based upon which their tenders had won, and their broadcasts in reality. The

¹⁵⁴ AA 6576/01 **Liran v HaHevar LeYizum** PD 56(6) 817.

¹⁵⁵ Section 9(b)(6) to the law. It is important to state that if and when there is a proposal to amend the law to cover private entities, the current exemption that applies to public agencies would clearly apply to these entities, including the commercial secrets exemption, common in FOI legislation around the globe. Yet the wide interpretation given to this exemption by courts, in contrast to other exemptions designed to benefit the public agency, which are interpreted much more narrowly, reflects on the courts’ approach. It displays its 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 its will to see corporations accountable to the public, a change in judicial interpretation would follow.

¹⁵⁶ AA 10845/06 **Keshet Broadcasting v The Second Authority for Television and Radio** (2007).

Supreme Court ruled that the main objective of the Freedom of Information Act was to expose the way public agencies operate to the public, and not to “cause harm to anyone providing the government agency with information, or whose information had reached its hands”. For this reason the justices stated that “only a very strong public interest could justify the exposing of the financial information of a private and commercial organization”.¹⁵⁷ Here too, despite the public resource (broadcast waves) at the heart of the debate and the clear public interest in supervision of one of only two commercial TV channels operating in the country, the court made the assumption that the private corporations were the owners of the information, and that the public had no right to this information.

The argument that the act was not designed to bring about the delivery of information that was obtained by the public agency from a private organization, was explicitly rejected by the Israel’s parliament in relation to only one matter: the “Environmental Information Law”,¹⁵⁸ and its regulations which state explicitly that in regard to pollutant emissions information, private information obtained by a public agency is to be disclosed.

Like in the U.S., things are very different in the discovery phase of civil proceedings. Thus, for example, the Tel Aviv District Court ruled in early 2009 that the “Hot” cable broadcasting company would disclose to the defendants who were sued by it for libel, complete information regarding complaints made by customers and received by the company, together with the results of internal service satisfaction surveys conducted by it.¹⁵⁹ This demand for disclosure would have been summarily dismissed as ludicrous and without merit if it had been made by a consumer organization for the

¹⁵⁷ Keshet case, above fn 126, article 101.

¹⁵⁸ Freedom of Information Law 5765-2005 (amendment 3 – Environmental Information)

¹⁵⁹ ORC 21945/08 **High Net v Hot** (2009).

purpose of publishing the service record of a company. In another case, the court ordered the billionaire Lev Levayev to disclose minutes of the meetings of the board of directors of his company “Africa-Israel”, to a board member who wanted to prove a claim he had made in a legal proceeding against Levayev, according to which the billionaire withheld vital information from a bank negotiating the purchase of company shares.¹⁶⁰ A similar request for information made by a journalist would not have been heard in the Israeli law system. These two examples illustrate how the court will go a long way to release corporate information for the sake of a procedural interest of a party to litigation, but the right of the public to be informed still bears little weight if at all, when dealing with corporate information.

5.4 South Africa

The South African constitution¹⁶¹ is one of the most advanced in the world in its protection of human rights.¹⁶² It was the first to give constitutional status to some rights and recognizes others to an unprecedented extent.¹⁶³ This can be explained when considering the background to the drafting of the constitution –the rejection of the apartheid regime that had denied the basic human rights of the majority of the citizenry – along with the active involvement of civil society organizations in the drafting.¹⁶⁴

¹⁶⁰ CAA **Levayev v Rephaeli** (2009)

¹⁶¹ Constitution of the Republic of South Africa (1996), available at: www.info.gov.za/documents/constitution/index.htm

¹⁶² When asked what rights he would recommend the Israeli parliament to include in a future constitution, Aharon Barak, former Chief Justice of the state’s Supreme Court replied: “You can, for instance, take the South African Constitution as it is, or with a few omissions from its wide list of rights” ARIEL BENDOR, ZE’EV SEGAL, *THE HAT MAKER* 93 (2009), in Hebrew.

¹⁶³ Among these are protection from sexual-orientation based discrimination (article 9(3)), employee rights (article 23), environmental rights (article 24), the right to adequate housing (article 26), the right to social security and health (article 27) and the rights of the child (article 28).

¹⁶⁴ See: Synnove, Skjelten. *A People's Constitution: Public Participation in the South African Constitution-Making Process* (2006); Jagwanth, Saras, *Democracy, Civil Society and the South*

This progressive way of thinking came to bear also on the Constitution's Article 32, entitled "Access to Information":

Everyone has 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.

Additional details were set in the Promotion of Access to Information Act (2000) (PAIA).¹⁶⁵ South Africa became the first state to legally recognize the right to receive information from private entities, regardless of their statutory status, their public character, or the existence of a relationship with a public authority. This unusual legislation may be understood in the context of an accelerated privatization process that was taking place at time of its enactment. Specifically, the transition from apartheid to democracy within public agencies was a hasty process stemming from the country's liberation from apartheid, but exploitation and discrimination in the private sector tend to be removed much more slowly.

According to PAIA, the main difference between requesting information from a private entity and from a public agency is that the petitioner from a private organization is entitled to receive the information only if it is needed for the exercising or defending of a right.¹⁶⁶ For this reason, requests for information from

African Constitution: Some Challenges (2005), available at: unesdoc.unesco.org/images/0012/001295/129557e.pdf.

¹⁶⁵ The Promotion of Access to Information Act 2000 (act 2 of 2000)(hereinafter: PAIA). For a description of the legislative process and the struggle against failed attempts to reduce its applicability to private entities, see: Gideon Pimstone, *Going Quietly About Their Business: Access to Corporate Information and the Open Democracy Bill*, 15 **South African Journal of Human Rights** 2 (1999); Doug Tilton, Richard Calland, *In Pursuit of Open Democracy and Freedom of Information – A South African Campaign Study* 8(2) **CHRI News** (2001), available at: www.humanrightsinitiative.org/publications/nl/articles/south_africa/in_pursuit_of_open_democracy_fo_i.pdf

¹⁶⁶ *Ibid.*, article 50(1)(a)

private organizations must state the right to which they refer, and the way in which the information would assist in its defense or exercise.¹⁶⁷ The part of the provision that deals with receiving information from private organizations lists several exceptions to the right to receive information, which are different than the exceptions to the right to receive information from a public agency. All of these are subject to section 70 of the act which states that the private organization must disclose the information in any case, even when an exception applies, if this disclosure will lead to the exposure of violations of the law or to the existence of a danger to the public, and the interest in disclosure of the information outweighs the interest protected by the exception. This last provision means that the corporation may not withhold information requested by a citizen or a journalist exposing crimes which were committed by the corporation or individuals in it, and it is obligated to cooperate with civil efforts to expose such incidents.

The sophisticated language of this legislation has brought to South Africa a freedom of information regime that is unparalleled in other countries. Despite the fact that the public does not frequently use its right to receive information from private organizations,¹⁶⁸ it is still the case that petitions to receive information are submitted in South Africa, especially by civil society organizations, that could not be imagined in other countries.

However, the picture in the case law is more complicated. In such cases, the courts examine whether the additional condition to petitions for information from private organizations, i.e., the existence of a right which the information helps to defend or exercise, exists. In several cases, the court practiced a narrow interpretation to the

¹⁶⁷ Ibid., article 53(2)(d)

¹⁶⁸ Richard Calland, *Prizing Open the Profit Making World*, in *THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD* 214, 232 (Ann Florini, ed. 2007)

public's right to receive information from private corporations. The main precedent in this matter was laid down in the case of the petition of IDASA - Institute for Democracy in South Africa. The organization petitioned the court after private corporations rejected its request for information regarding their contributions to political parties.¹⁶⁹ The High Court of Cape County stated that the rights which could establish a cause for ordering the disclosure of information from a private corporation were only those enumerated in the Constitution.¹⁷⁰ The court further ruled that the relevant rights in this case were the rights for “fair elections” and for a “free political choice”.¹⁷¹ However, the court interpreted these rights in a limited way which referred only to direct participation in the elections, and therefore found that the petitioners failed to demonstrate why the requested information was necessary for the defense or exercising of these rights.¹⁷²

In an additional case that came before the Supreme Court of Appeals, a person who had owned 30% of the stocks of his father's corporation requested the disclosure of the corporation's accounting information,¹⁷³ claiming that this information was necessary for properly evaluating the value of his stocks in preparation of possible negotiations towards their sale. The son refused to rely on the company's audited financial reports, which he claimed were not trust worthy. The court ruled that as the appellant did not show cause to doubt the reliability of the financial report, he should only be allowed to review those documents that ought be disclosed according to the South Africa Company Act (which does not include the requested documents).

¹⁶⁹ Institute for Democracy in SA and Others v. African National Congress and Others, Case No : 9828/03, 2005 (10) BCLR 995 (C).

¹⁷⁰ Ibid., p. 36.

¹⁷¹ Articles 19(1) and 19(2) to the South African Constitution.

¹⁷² IDASA case, above ftn 169 p. 47

¹⁷³ Clutchco (Pty) Ltd v. Davis 2005 (3) SA 486. (SCA). For a criticism of the lower court's decision to uphold the appeal, arguing that it undermines the South African Corporations Law, see: Natania Locke, *Access to a Company's Accounting Records by Means of the Promotion of Access to Information Act 2 of 2000*, 17 SA MERC L J 221 (2005)

In a more recent case the South Africa Supreme Court of Appeals,¹⁷⁴ took an approach different from that declared by the Court in the IDASA case, ruling that a contractual right too can serve as a basis to oblige a corporation to provide a requestor with information according to PAIA. The court ordered the South African Airlines Corporation to disclose full details regarding the seat reservations that were made in a company flight to a retired steward. As a retired employee, the steward was entitled to be upgraded to first class on the basis of available seats, but the staff on a flight he took refused his requested upgrade, claiming that first class was already full to capacity. The steward wished to prove that the company had upgraded other passengers that had not purchased first class tickets, and based on this to sue the company. The company agreed to provide the steward with information regarding the number of passengers that flew in each class, but not the raw information from the computerized reservation system that he had requested, and which reflected the actual reservations made. The court severely criticized the airline, and ordered that it pay punitive expenses for refusing to disclose information that in the language of the decision, the company was “clearly” obligated to disclose.¹⁷⁵

In conclusion, the South African experience shows that the mere recognition of the right to receive corporate information empowers citizens in their relations with corporations. However, often the courts still continue to recognize the right of the corporations to withhold their information, and only the existence of proof of a material need of disclosing this information for the purpose of protecting a right that would otherwise prove difficult to defend, outweighs an initial advantage given to the private corporation to govern its own information.

¹⁷⁴ Claase v. Information Office of South African Airways, Case no. 39/2006 SCA, para. 7.

¹⁷⁵ Ibid., para. 10.

5.5 Other Countries

In spite of the fact that most freedom of information laws around the world have been enacted over that past twenty years, 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, little attention has been given to the question of corporate information. Still, some of these laws deal with some partial aspects of the right to access corporate information.

The New Zealand Freedom of Information Act of 1982¹⁷⁶ 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. 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.¹⁷⁷

The Irish Freedom of Information Act makes use of a similar approach.¹⁷⁸

The Dutch Freedom of Information Act,¹⁷⁹ 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.

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

¹⁷⁶ Official Information Act 1982 (Act no 156 of 1982).

¹⁷⁷ Ibid., article 2(5).

¹⁷⁸ The Freedom of Information Acts 1997 § 6(9).

¹⁷⁹ Government Information (Public Access) act (1991).

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".¹⁸⁰

A 2011 FOI laws index, published by the Center for Law and Democracy (a Canada-based NGO promoting participatory democratic values), surveyed among other indicators, whether national FOI law covered private bodies that perform “public functions” or receive “significant public funding”.¹⁸¹ While these are broad terms, it is interesting to note that no connection was found between a country's level of democratic development and perceived openness, and an inclusion of private bodies under FOI laws. Many young democracies, mostly in Eastern Europe, Africa and South America received the full score under this indicator, while foundational democracies such as the US, UK, Australia and Canada received zero points. A stronger connection however, was found between the date of the FOI law and inclusion of private bodies (under the above limited definition). More than two thirds of countries whose FOI law dates to 2003 or later covered such bodies at least partially (28 out of 39) compared to less than one fifth of the older laws (eight out of 50).

Evidently more recent FOI laws are more aware of the problems posed by privatization and the growing engagement of private bodies in public functions. However, these provisions are usually limited to the public aspects of the corporation's activities, and implemented on the basis of strict criteria.

¹⁸⁰ The Daily Star, CIC SUGGESTS AMENDING RTI ACT FOR TRANSPARENCY (July 21, 2010), *available at*: www.thedailystar.net/newDesign/news-details.php?nid=147630. For more on the CIC's views on the matter, see: Freedominfo.org, BANGLADESHI COMMISSIONER SUPPORTS WIDER COVERAGE, *available at*: <http://www.freedominfo.org/2010/08/bangladeshi-commissioner-supports-wider-coverage/>.

¹⁸¹ The index and its full data can be accessed and the Centre for Law and Democracy website at: www.law-democracy.org/?page_id=1114. The analysis presented here was made by the author based on the electronic sheets presented there.

6. From the Existing to the Proposed

I have so far presented a variety of existing arrangements that allow for receiving some information from corporations. I 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, and their use of their ever-growing power and public influence. I will then attempt to show how a “general disclosure duty” imposed on corporations can be framed to meet the shortcoming of these other models, without severely harming legitimate corporate concerns. I will begin by presenting this model.

6.1 What is proposed?

The “general disclosure” model I endeavor here to justify is a very simple one. It calls for the creation of a legal duty on corporations to disclose information in their possession upon request. It suggests an overturn of the existing presumption of secrecy of for-profit corporate information. Similarly to existing Freedom of Information Laws, it creates a presumption of openness, that can be overturned if, and only if, the request falls under certain procedural categories, or the information itself falls under certain substantial categories of exempt information. Unlike existing Freedom of Information Laws, however, additional substantial or procedural exceptions may need to be carved in order to protect legitimate corporate interests. I mention some of these towards the end of this chapter. However blanket secrecy will no longer cover corporate information in its entirety. Information under such a regime should be disclosed in the absence of justifications for secrecy.

While this may seem far-reaching, once certain reasonable limitations are set it shall seem much less so. FOIA as we know it includes a long list of exemptions. Such

exemptions will clearly apply to private corporations as well. For instance “trade secrets”¹⁸² will remain exempt from disclosure, meeting many of the legitimate fears that may arise from a general disclosure regime.¹⁸³

6.2 Why existing models fall short

6.1.1 Specified Disclosure Obligations

In Chapter 3 we discussed the disclosure obligations in certain fields such as finance, consumerism and the environment. Perhaps this is the proper approach - to identify the issues in which the public has a significant interest in disclosure, and to have the legislator or regulator impose specific disclosure obligations upon these? Experience demonstrates that legislators in democratic countries are attentive to the principle of promoting transparency, and there is a high likelihood that significant progress could be accomplished in this way. However this model suffers from some disadvantages that warrant consideration:

A biased list of disclosure – The three fields reviewed above are the classic examples to this model (finances, consumer affairs and the environment). One might argue that it is no coincidence that disclosure in two of these (finance and consumerism) aims at defending people with capital and their investments or purchases. It is true that the interests being protected are mostly those of middle class individuals against the large corporations, but by and large they relate to people with some fortune. More importantly, the basis of the disclosure requirements is the protection of financial interests. The environment issue is a field in which the supporting public campaign is associated with the upper middle class, and has the benefit of very powerful public relations while being carried on the shoulders of celebrities and environmental

¹⁸² FOIA *supra* fn 14 §§ (b)(4)

¹⁸³ 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., Id.*

activists in wealthy countries. Activists in these three fields possess significant assets in the democratic game, which enable them to contend with the power of the corporations defending their secrecy tradition. Yet it is not clear that discovery in these fields is more justified than in others, such as in the field of the protection of worker rights,¹⁸⁴ or the protection of minorities being prejudiced against by corporations.¹⁸⁵ The progress of imposing disclosure obligations from one field to another would necessarily focus on those with a strong disclosure lobby, an effective public relations campaign, or the involvement of influential individuals. 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 – The disclosure obligations in the field of labeling food products was imposed after the public had become more aware of manufacturers' manipulations of products.¹⁸⁶ Financial disclosure obligations were imposed following events such as the financial crisis of 1929, and the Enron and Worldcom affairs, and after hundreds of thousands of people had lost their jobs and pension savings. Release of information from US tobacco corporations was imposed only after millions of people had suffered the harmful effects of cigarettes. It was the death of

¹⁸⁴ 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 US who invested large sums of money in lobbying against it. See: LLOYD ULMAN, BARRY EICHENGREEN & WILLIAM T. DICKENS, *LABOR AND AN INTEGRATED EUROPE* 52–54 (1993).

¹⁸⁵ 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: Calland, above ftn 139, p. 232.

¹⁸⁶ Ilyse D. Barkan, *Industry invites regulation: The passage of the Pure Food and Drug Act of 1906*, 75 *AMERICAN JOURNAL OF PUBLIC HEALTH* 18–26, 20 (1985).

thousands in Bhopal, India, a result of the release into the air of methyl isocyanate from a nearby factory, that led to the imposition of disclosure requirements regarding pollutant emissions.¹⁸⁷ In all of these cases disclosure came only after it was beyond dispute that significant harm has been caused. A duty to allow access to corporate information might have led to the exposure of priceless information at a much earlier stage. In the current situation, we praise any leak made to an investigating reporter in these matters, while we allow the officials in the corporations to deny the reporter such information that is necessary for his work. In a system of free corporate information, the suspicion or even curiosity of a single individual would be sufficient to reach the information possessed by the corporation which documents the damage caused by the cigarettes/ corruption / pollutant emissions or different food products.

Limited Disclosure - Specific disclosure requirements have led to the exposure of vast amounts of information from the hands of private corporations. It may not be a drop in the ocean, but it is not much more than an inlet in it. The amount of information of public importance that is held in the hands of corporations is difficult to comprehend. No legislator or regulator can view the information picture in its entirety, to decide what should be exposed, nor can they realize what could be of interest in the future. “Much important data simply cannot be expressed in a form suitable for standardized disclosure”.¹⁸⁸ 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, and to expose their existence to the world.

¹⁸⁷ Christ Overdevest & 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.** 1493–1837, 1508 (2008)

¹⁸⁸ Stevenson, *supra* fn 1 p.13.

Disclosing in Conflict of Interest – In the current model of specific disclosure obligations, the responsibility for actual publication of information is placed upon the corporations, largely against their will. The discloser of the information is therefore placed in an inherent conflict of interests. Even if attempts are made to define the obligation of disclosure in an objective and measurable way, one cannot avoid the "social being that determines the consciousness" of the disclosing corporation, even one that attempts to act in good faith. This can become an acute problem when there is need to exercise judgment that could relate to decisions such as the amount of money that should be invested in examining the reliability of the released information, or the way in which the corporation should edit the disclosed information, and the way in which the corporation should treat results that seem suspiciously optimistic (self satisfaction? skepticism? additional examinations?). Even the interpretation of the scope of required disclosure is left to the corporation. Should we be surprised if corporate officials in charge of disclosure would consider some figure as not meeting the legal criteria for disclosure requirements, despite the fact that members of the public might disagree?

A general disclosure system would allow access to the raw information held by the corporation, without its mediation (beyond the technical function of delivering the document), thus allowing less room for discretion than in the disclosure of the information by a corporation employee.

6.2.2 Disclosure by Regulators

A regulator is the public's trustee, and it is presumed that her actions are directed by the public's best interests. She can collect information from the corporations, while properly balancing the public's right to be informed and the rights that are argued by the corporations, as seems to be the case with *AT&T v. FCC*. But such a model for

disclosure too suffers the problem of a biased list of disclosure obligations, as regulation exists only in fields where sufficient political power has driven the legislator to impose regulation. Furthermore, the resources at the disposal of the regulator are ever limited. Thus, her ability to examine all of the information collected is similarly limited. A general obligation of disclosure utilizing the full extent of the power of the public could make better and more efficient use of the information held by the regulator.¹⁸⁹

Another major problem with this model is the lack of supervision of the regulator. 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 is acting properly on the basis of the information reaching her. Even the most talented and decent regulator will sometimes make professional mistakes. There should be a very good reason to deny other members of the public, who may possess an expertise in the relevant fields, their right to examine the information possessed by the regulator. A report prepared for the US Congress in 1990 showed that of 198 drugs that were approved by the FDA in 1976-1985, there were no less than 102 that were later found to be significantly dangerous, to the extent that their distributors were required to change the labels on the drugs, or remove the drugs from the shelves altogether.¹⁹⁰ Is

¹⁸⁹ An interesting example for such utilization of public power in the public sphere, is the “MPs expenses scandal” in the UK. 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: BBC News, MPs Expenses, http://news.bbc.co.uk/2/hi/in_depth/uk_politics/2009/mps_expenses/default.stm; for the cloudsourcing operation launched by “the Guardian” newspaper, see: The Guardian, Investigate Your MPs Expenses, at: <http://mps-expenses.guardian.co.uk/>.

¹⁹⁰ The report is discussed in the minority opinion in Int'l Dairy Foods, above fn **Error! Bookmark not defined.** p. 104.

it possible that some of the damage done by these drugs could have been prevented if more skeptical or critical people than the FDA investigators had been allowed to inspect the information?

Another problem relates to the connection between the regulator and the corporations. Regulators engage in daily working relationships with the inspected corporations. Some of them played roles in these corporation in the past or think of doing so in the future. Even without this problematic nexus, the regulator is in need of the corporations cooperation, especially that of the larger and more powerful ones operating in her field of inspection. In the context of their proper business relationships, regulators are likely to internalize attitudes that are reiterated by heads of corporations with whom they are in continuous contact, rather than those of the public they represent.¹⁹¹

6.2.3 Disclosure through Discovery of Documents in Legal Proceedings

A great deal of the information that could be sought in the context of a general rule of disclosure applied to corporations would, by their very nature, relate to disputes existing between individuals and corporations. In light of the wide obligations of disclosure existing in legal proceedings, efforts could be suggested to focus in that direction, turning to the court to receive information in the hands of private corporations. However, relying on such a model is neither just nor efficient.

The inefficiency of this system is rather clear. The assumption that the way to receive information from a corporation *must* go through a court of law, even when the request for information is easily justified, is a call for a large number of unnecessary hearings and the lengthy deposition currently suffered by parties to litigation proves the point.

¹⁹¹ Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, (1954).

It is probably true that the imposition of a general obligation of disclosure on corporations may initially cause additional cases of litigation. However, after an "adjustment period", in which the courts would clarify the proper interpretation of the legal general disclosure requirement, it is hoped that the lion's share of the petitions for information would be settled outside of court.

The injustice of this system is equally clear. Often the individual needs information from the corporation before he can decide if he should turn to court, which is costly and time consuming. In the current situation a person who is unable to afford the financial risk of managing a failed legal proceeding, is forced to abandon the case. If an individual could manage to get the information without needing a court order, he could more reliably assess his chances in court, and would not be forced to abandon the pursuit of the truth before a judge. This would serve to promote the general interest of the public to discover the truth, together with the private interests of individual plaintiffs.

6.3 Possible Models for Recognition of Freedom of Corporate Information

We will now examine several legal possibilities for applying FOI laws as we know them to commercial corporations.

6.3.1 Applying the Act to Corporations Enjoying Taxpayer Funding

According to this model corporations that have an income that is based on a minimal percent of taxpayer money (regardless of its formal mode of transaction - by way of grants, contracts, or other) would be considered as "public authorities" for the purposes of the act. This is the case in many of the more recent FOI laws.

The model significantly widens the application of the act to private organizations, but the basis for this expansion which makes a distinction between corporations enjoying

government funding and those which do not, is problematic. It presupposes the existence of some property right being attached to the information which results from the public's participation in the funding of the organization. So it addresses only one of the justifications for applying the disclosure obligation, and not necessarily the most compelling of them. Individuals who do not pay taxes still have rights and duties in our community, and the same should go for corporations which do not enjoy taxpayer money. Furthermore, this model would create a measure of uncertainty. It would raise questions relating, for example, to the basis of the calculation of the corporations' income (are government grants the same as government payments for services?).

6.3.2 Applying the Act to Organizations Fulfilling a Public Service

According to this model the Freedom of Information Act would be applied to any organization "fulfilling a public service", and this term may be defined to include, not exclusively, activity in fields such as education, health, communications, environment and infrastructure. Again, some of the more modern laws cover this aspect, but still a minority of the world's 90 FOI laws.

The prominent advantage of this model over its predecessor is that it significantly expands the application of the act, and could catch in its net a large portion of the corporations with operations in which the public might have an interest. However, it only provides an answer to the need to have access to information of corporations involved in privatization (in its wider sense), but not to the public interest in supervising the actions of corporations due to their growing power and influence on the exercising of human rights and other public interests. Thus, for example, the public interest in ensuring equality to employees and consumers is identical when it relates to an energy and infrastructure corporation which under this model would be

subject to an obligation of disclosure, and when relating to a chain of coffee shops which apparently would not be subject to the provisions of the act.

6.2.3. Applying the act to information of public nature

In this model the application of the act is determined by the content of the information, and not the identity of its possessor. Similarly to South Africa's PAIA, such legislation may cover any information required for the defense of human rights or their practice, regardless of the nature of the possessor.

Does this model reverse the concept that with corporations, secrecy is the rule, and disclosure the exception? On the one hand, if defined or interpreted broadly enough, it covers almost any piece of information that in practice may be of interest. On the other hand, it still presupposes that in the absence of a positive justification, the default position is that of secrecy, which means that secrecy has a primary justification that requires overcoming. Admittedly the difference between this model and that of the general disclosure is quite thin. Under certain interpretive conditions it could provide the same answer to that of the model of general disclosure. In most cases, people request information to promote some interest, and this nearly always relates to some right of the petitioner, or at the least, *could be interpreted* in this way.

This model has *substantive problems* that relate to the possibility of narrow judicial interpretations regarding the threshold condition. As we have seen, the South African courts have chosen to state that the "exercise or protection of any rights" (the condition for imposing a disclosure obligation on a private entity) relates only to the rights that are enumerated in the South African Constitution,¹⁹² despite the fact that this interpretation is not required by the language of the act. The use of such

¹⁹² IDASA case, above fn. 143.

“flexible” terms could significantly undermine the desire to impose a general rule of disclosure on corporations.

It also has *procedural problems*: **First**, often the requestor does not know if the information relates to his rights. Imagine a member of a minority group, or a non-profit organization working to promote minority rights, requesting to see a company's guidelines regarding the hiring of employees. The company could reply to a disclosure petition that this information does not relate to rights, as the guidelines do not refer to the ethnicity of candidates. However, the company could be misleading the requestor as the guidelines set a requirement of the majority's language as mother tongue. When the primary condition for disclosure relates to its content, which is often known to the corporation alone, the requestor suffers inherent inferiority in his struggle. **Second**, this model imposes the burden of proof on the petitioner together with the risks stemming from legal proceedings. Situations could exist where the chances of the information having a bearing on the petitioner's rights is low, but existent. The parties may also disagree as to whether a certain public interest is a right, but if in these cases there is no strong opposing argument, there would still be no justification for denying the disclosure of the information. **Third**, the process of proving eligibility is designed to create a bureaucratic complication. The need to prove the existence of the threshold condition calls for an almost unavoidable debate between the requestor and the corporation, and may have a “chilling effect” on potential information requestors, causing them to abandon the idea at an early stage.

6.4. Justifying a General Disclosure Obligation

One of the main features of the US FOIA and other Freedom of Information laws, is that a public authority is required to respond to “any request”,¹⁹³ not putting in to question a requestor’s motive.¹⁹⁴

Unlike FOIA as applied to classic public authorities, a general disclosure model for corporations accepts the need for some sort of “legitimate interest” in the information requested and not merely its being held by a public authority. However, in this model a corporation refusing an information request will have to show why it serves an “illegitimate interest” (or serves no interest at all). Mainly, such an interest would be a mere financial or commercial interest of another person or corporation. While this may be a legitimate interest for the requestor, burdening the corporation, when the request serves such an interest *alone* and no other public interest, is unreasonable and unfair. Without a some sort of cause to tip the scale in favor of disclosure, the procedural burden should be bore by the corporation. Yet, this should be termed in legislation in a manner that makes it clear that the threshold is a very low, to leave outside the protection of the law only the most frivolous requestors.

This model could be applied by adding a section to FOIA, which would state that the provisions of this act also apply to commercial corporations, under the exceptions stated in the act and additional exceptions in a separate clause. These will be tailored to meet specific corporate needs. This model possesses some advantages, which we will now review, along with several disadvantages which will also be addressed.

Advantages of a General Disclosure Model

¹⁹³ §§ 552(a)(3)(A)

¹⁹⁴ As is clearly stated in several FOI laws, including: Australia’s Freedom of Information Act (Commonwealth) ,1982 s.11(2); Ireland’s FOI Act (1997) s.8(4); South Africa’s Promotion of Access to Information Act (2000) s.11(3); Israel’s Freedom of Information Law (5758-1998) s.7(a).

The central advantage of the model is in its generality over three plains – the bodies covered, the petitioners, and the information (Some of these advantages also exist in some of the other models, but only partially).

The bodies covered – The obligation to disclose information applies to all profit oriented organizations, with exceptions that would be listed in regulations (the regulations may, for instance, exempt small organizations such as those employing less than a certain number of employees workers, or with annual income that is lower than a set threshold). There would be no need to examine the nature of the organization and its activities or the sources of its funding. This would encourage the practice of the right, as the petitioner would not need to perform an investigation regarding the organization, and would not require legal counseling to ascertain whether he has a right to request information.

The Petitioners - This model does not require the petitioner to demonstrate that the information is required to promote her rights. She does not need to show any legal relationship or concrete disputes with corporation from which she seeks the information. This would serve to considerably encourage the use of this right by social change organizations and reporters, who are usually not in direct personal conflict with corporations, but are the two most important target groups for making efficient use of the information that is in their hands.

The Information – In the absence of conditions regarding the content of the information there is no need to hold court hearings in regard to every single document asked for. When this is the case, often background material and other documents that may put the information provided in context, might not be accessible. The wealth of information that is thus exposed to the public is greater than in other proposed models.

Additional important advantages are:

Educational Advantage - Any model which leaves room for legal debates, signals to the parties that frequent litigation is expected. When this is the case, corporations will rely on their legal services to often avoid disclosure, often by means of exhausting requestors, instead of taking the measures to adapt to a new era of corporate transparency, and accordingly adjust the work and culture of the organization.

The reversal of the burden of proof - If the corporation desires to deny a request for information it will need to prove that the request fulfills one of the exceptions stated in the legislation (or in the additional exception that will be later suggested). It is the corporation that will need legal consultation as to whether it can deny a request, and to hire litigators capable of justifying this denial at the outset of legal proceeding, should they occur. The petitioner is in a much less complicated situation and does not require professional services at the stage of a simple information request.

Disadvantages of the Model

The central disadvantage of the model is also one of its main advantages – namely, its being general in relation to the applicable organizations and petitioners. One cannot say that there would be a justification to impose a disclosure obligation on the grocery store across the street to the same extent that it should be imposed on a retail chain. The grocery store is not a powerful corporation, and its relation to matters of the public domain is questionable. It is true the neighbors may have an interest in matters such as waste being dumped by it, but the balance of power between the public and small businesses doubtfully justifies legal intervention; Small businesses lack the resources to contend with requests for information; Small businesses' identification with the people behind the veil of incorporation is not

a legal fiction. For these reasons it is recommended that certain categories of corporations be exempted from a general disclosure obligation. This might bring back into play a bit of the element of uncertainty which we have sought to avoid, but this would only exist on the margins, and regarding the type of corporations that are not at the heart of our discussion, and which are not expected to be a source of many requests for information.

Regarding the petitioners, the danger is that with the availability of the right to everyone, an opening would be created for petitioners seeking inappropriate goals, and people desirous of harming the corporations, commercial espionage, and "obsessive" petitioners. Addressing this problem could be accomplished by setting an identification requirement for information seekers, which would enable the private corporations to weigh more carefully to whom the information is disclosed, without harming the general principle that any petitioner in good faith is entitled to receive any information. Beyond this, and to the extent that a concern exists which involves security issues, or industrial espionage, this problem could be resolved on the basis of exceptions that are already embedded in most FOI laws.

Occurrences of abuse of the right to receive information might also take place in petitions to receive information from the public service,¹⁹⁵ but a private corporation should anyhow not be expected to provide service to a citizen on the same level and it should also not be required to act with the same measure of tolerance toward information seekers. Therefore, it is also suggested that in regard to frivolous or vexatious requests, the corporation will have the right to dismiss the petitions without

¹⁹⁵ Indeed some FOI laws try to deal with this problem. Section 14(1) to the UK FOIA (above fn. 144) 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: www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/vexatious_requests_a_short_guide.pdf.

examining them. Naturally, such a provision might be abused by the corporations, but it would seem that a wording that would clarify that this provision only applies to unusual situations, along with supporting interpretation by the courts, could alleviate this concern.

The Burden of Costs – Handling information requests can be a timely and costly task as any FOI official in a public agency will tell you.¹⁹⁶ Private corporations are not to be expected to incur such costs as a public agency is and average corporations should not be expected to allocate special manpower for the purpose of caring for information requests, although this scenario is less alarming in regard to large corporations. As a general rule costs of requests of information from corporations should be covered by requestors and only readily available information should be covered (unlike public authorities where a more extensive search and retrieval operation may be expected).¹⁹⁷

7. CONCLUSION

The tremendous enterprise of human rights discourse that goes back to the restrictions on the monarchy of the Magna Carta through the limitations placed on the legislature by the US Constitution's Bill of Rights, to the restrictions that countries took upon themselves in their constitutions and by ratifying the important Human Rights Conventions, is required nowadays to shift its focus. The social unrest that covered the world map with pins of “occupy X” movements promoted this shift, asking us to now limit the power of private commercial corporations. The right to freedom of

¹⁹⁶ 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? Constitution Unit Blog, April 11, 2010, available at: <http://constitution-unit.com/2011/04/11/the-best-things-in-life-are-free-how-much-does-foi-cost/>.

¹⁹⁷ §§ 552(a)(3)(C)

information served in the past to redistribute the power between government and the citizenry. It should now serve to redistribute the power between the corporations and the individuals in society, and to protect the strong public interest in the proper conduct of corporate activity and in the understanding of corporate ways of operation.

Those who believe that the existence of corporations bears an inherently positive might be alarmed by what they may see as a breach of corporate rights and freedoms. However, those who are mindful of the fact that the corporation is a tool created by law, which is only entitled to rights conferred upon it by law, should be open to the possibility of giving preference to the right of the public to be informed over the alleged right of the corporation to do as it pleases with the information in its possession. There is nothing axiomatic in the premise that corporations are entitled to keep their information to themselves just because they “own” it and with no other grounds for denying it from others.

The adoption of a general disclosure model in relation to corporations requires a revolution of thought. Corporate officials and employees must become accustomed to the idea that any information created by them could under certain circumstances be exposed. They would need to act while remaining forever conscious that they could be asked to explain their actions to the public. They will need to be more upfront and honest. The public, and especially journalists and civil society organizations will need to learn to make an educated use of the new possibility that has opened before them, and to learn to ask for meaningful information that possesses real potential of improving society, and advancing the defense of civil liberties. This process will require a significant period of adjustment which will not be simple. The legislator may need to establish proper mechanisms that will ensure the application of the corporation's obligation while preventing the placing of an exaggerated burden upon

them. Courts will need to be active in clarifying the legal situation. But at the end of the day, the result will be a significant contribution to society at large, to the protection of public interests and of human rights and little if any damage to the regular operations of profit-making corporations. When this is how the scale is tipped, the old notion that what happens within a private corporation is “none of our business” cannot stand. One needs just imagine what enormous forces will be applied against a proposal like that suggested here if it were to ever gain political support. But the truth of the matter is that corporations are much the business of many, and the many are entitled to supervise their conduct. In the words of Theodore Roosevelt: “We are not attacking the corporations, but endeavoring to do away with any evil in them. We are not hostile to them; we are merely determined that they shall be so handled as to subserve the public good.”¹⁹⁸

¹⁹⁸ Theodore Roosevelt, Second Annual Message, December 2, 1902, *available at*: <http://www.presidency.ucsb.edu/ws/index.php?pid=29543>