Written Comments in the Case of *Francisco Javier Casas Chardon v. Ministerio de Transportes y Comunicaciones y Otro*

A Submission from the Open Society Justice Initiative to the Constitutional Tribunal of Peru

Of Counsel:

Thomas M. Susman
Jennifer Juste
Daniel A. Lev
Margaret S. Moore
Andrew T. Radsch
Ann D. Wiles

ROPES & GRAY LLP
One Metro Center
700 12th Street, NW, Suite 900
Washington, DC 20005, USA
Tel: +1 (202) 508-4600
Fax: +1 (202) 508-4650

Darian K. Pavli
Sandra Coliver

OPEN SOCIETY
JUSTICE INITIATIVE
400 W. 59th Street
New York, NY 10019, USA
Tel: +1 (212) 548-0606
Fax: +1 (212) 548-4662

OPEN SOCIETY
JUSTICE INITIATIVE

Case No. 04407-2007-HD

In the Matter of
Francisco Javier Casas Chardon v. Ministerio de Transportes y Comunicaciones y Otro

WRITTEN COMMENTS OF THE OPEN SOCIETY JUSTICE INITIATIVE

I. Introduction and statement of interest

The Open Society Justice Initiative (the "Justice Initiative") provides this submission to assist the Constitutional Tribunal of Peru in its understanding of the laws and practices of other nations with respect to access to information, particularly the financial disclosure of income, assets, and liabilities by government officials and employees, as well as their spouses, children, and financial dependants. This submission highlights the standards and procedures that best serve the goals and policies underlying access-to-information and anticorruption regimes, while accommodating the privacy interests of both government officials and their families. This submission draws on relevant international and comparative law and practice from the Americas and other leading jurisdictions in exploring the scope of the public's right of access to financial disclosure information and the principles that underlie its protection.

The Justice Initiative, the worldwide rule-of-law program of the Open Society Institute, pursues law reform activities grounded in the protection of human rights and contributes to the development of legal capacity for open societies. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in four priority areas: national criminal justice, international justice, freedom of information and expression, and equality and citizenship. It has offices in Budapest (Hungary), New York (United States), and Abuja (Nigeria).

In the areas of promoting access to information and combating official corruption, the Justice Initiative has extensive experience in promoting the adoption and implementation of freedom of information laws in Latin America, Eastern Europe and elsewhere, and also has contributed to international standard-setting and monitoring of government transparency around the world. The Justice Initiative files amicus curiae briefs with national and international courts and tribunals on significant questions of law where its thematically focused expertise may be of assistance. In the area of freedom of expression and information, the Justice Initiative has provided pro bono representation before, or filed amicus briefs with, all three regional human rights systems and the UN Human Rights Committee. In particular, the Justice Initiative filed amicus curiae briefs (jointly with four other groups) with both the Inter-American Commission (the "Inter-American Commission") and the Inter-American Court of Human Rights (the "Inter-American Court") in the landmark case of *Claude Reyes et al v. Chile* and also filed an amicus curiae submission before the Constitutional Tribunal of Chile in *In the Matter of Constitutionality of Article 13 of the Constitutional Organic Law on the General Bases of State Administration (No. 18.575)*.

II. Public access to government information is integral to government openness and accountability

A. Overview of policy

Access to information held by public authorities is fundamental to maintaining an informed public, which, in turn, is necessary for the proper functioning of a democratic and free society and a vital free marketplace. Around the world, at least sixty-five countries have enacted laws that provide mechanisms for individuals and other entities to request and obtain information from the government.[1] The present case raises issues of significance for the development of freedom of information law in Peru and the Americas, since it calls for resolution of the tension between access and privacy in an area where there is strong public interest in disclosure.

The ability of citizens to request and receive information about their government is vital to transparency and accountability, which are hallmarks of an open and democratic society. Enabling citizens to access and comment upon government-held information enhances respect for the government, encourages compliance with the law, and engenders public trust.

In free societies, access to information – especially financial disclosure information – is integral to combating corruption and abuse and guarding against arbitrary or wasteful acts. Access to information laws expose governments to public scrutiny, allowing citizens to inform themselves about the costs and efficacy of government actions and to hold government officials accountable for their decisions. In the words of a United States Supreme Court Justice, "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."[2]

For instance, the Mexican Federal Transparency and Access to Public Government Information Law (the "Mexican Access Law") sets forth general principles that illustrate the fundamental goals of freedom of information laws. These include making public administration transparent by disclosing the information generated by the government; encouraging accountability to citizens, so that they may evaluate the government's performance; and contributing to the democratization of society and the full operation of the rule of law.[3] Similarly, the basic purpose of the U.S. Freedom of Information Act, one of the oldest, most comprehensive statutory access systems, is, according to the U.S. Supreme Court, "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[4] These general principles, which touch upon the importance of freedom of information in a democratic government and free market, are common to many freedom of information regimes.

---

[1] Open Society Justice Initiative, *Transparency & Silence: A Survey of Access to Information Laws and Practices in 14 Countries* 22 (2006) [hereinafter *Transparency and Silence*]. *See also* www.freedominfo.org.

[2] *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

[3] Ley Federal De Transparencia y Acceso a La Información Pública Gubernamental, Art. 4 (2002).

[4] NLRB v. Robins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

B. The public's right to know under international law and state practice

Individuals have a basic human right to request and receive information under international law. In its first session in 1946, the United Nations General Assembly adopted Resolution 59(I), stating that "[f]reedom of information is a fundamental human right and the touchstone of all the freedoms to which the United Nations is consecrated."[5] The Council of Europe adopted its first recommendation on the right of access more than twenty years ago, providing that "[e]veryone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities."[6] The European Union's ("EU") Charter of Fundamental Rights grants a right of access to documents held by EU institutions to "[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State."[7]

The right of access to information held by public authorities has become widely accepted in the democratic world, including in the Americas, as a basic political right. The right of individuals and organizations to access government information has been recognized by both regional and international organizations.[8]

The Inter-American human rights system is perhaps the most advanced in guaranteeing, at a regional level, the right of the public to access information in the possession of the government. The Inter-American Court has acknowledged that the rights of listeners and receivers of information and ideas are on the same footing as the rights of the speaker: "For the average citizen it is at least as important to know the opinion of others or to have access to information generally as is the very right to impart his own opinion."[9] In 2000, the Inter-American Commission expressly recognized that "access to information held by the state is a fundamental right of every individual."[10]

---

[5] G.A. Res. 59(1), U.N. GAOR, 1st Sess., U.N. Doc. (Dec. 14, 1946); *see also* Toby Mendel, Freedom of Information: A Comparative Legal Survey (2003), http://www.article19.org/work/regions/latinamerica/FOI/pdf/TMendelComp.Survey.pdf

[6] Council of Europe, Recommendation No. R (81) 19 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities (Nov. 25, 1981), http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_&_documents/Conv_Rec_Res/Recommendation(81)19.asp

[7] *Charter of Fundamental Rights of the European Union*, art. 43 (Dec. 7, 2000), http://www.europarl.europa.eu/comparl/libe/elsj/charter/art43/default_en.htm

[8] *See*, *e.g.*, Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression, *available at http://www.article19.org/pdfs/igo-documents/four-mandates-dec-2006.pdf.*

[9] Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Nov. 13 1985, para. 32, http://hei.unige.ch/~clapham/hrdoc/docs/IACtHRAOJudicialgauantees.pdf

[10] Inter-American Declaration of Principles on Freedom of Expression, adopted at the Commission's 108th regular session, Oct. 19, 2000, para. 4, www.justiceinitiative.org/db/resource2/fs/?file_id=17590.

In September 2006, the Inter-American Court issued its landmark judgment in *Claude Reyes*, holding that the American Convention on Human Rights includes a right of access to public information:

> [T]he Court finds that, by expressly stipulating the right to 'seek' and 'receive' 'information,' Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information. . .[11]

The Court underscored the "indispensable" presumption in a democratic society that "all information is accessible," subject only to restrictions that can be imposed on a case-by-case basis.[12]

The general right of access to government information is constitutionally protected in at least 49 countries, 43 of which contain express constitutional protections. These include at least seven countries in the Americas (Antigua and Barbuda, Colombia, Ecuador, Guatemala, Mexico, Panama, Peru and Venezuela); at least 29 in Europe (Albania, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Czech Republic, Estonia, Finland, Georgia, Germany, Greece, Hungary, Latvia, Lithuania, Macedonia, Moldova, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey and Ukraine); at least four in Asia (Nepal, New Zealand, the Philippines, Thailand); and at least three in Africa (Malawi, South Africa, and Uganda). The courts of six additional countries – including three in Latin America – have interpreted their constitutions or other basic laws to protect the right implicitly (Chile, Costa Rica, France, India, Israel and Paraguay). Top courts of several of these countries have ruled that the constitutional right is actionable even without enactment of an implementing law (Chile, Costa Rica, India, the Philippines). [13]

---

[11] *Claude Reyes et al. v. Chile*, *11.L.R.41* (Sept. 19, 2006), http://www.elaw.org/resources/text.asp?ID=3455

[12] *Id.* at 92.

[13] Information compiled from *Freedom of Information Around the World: A Global Survey*, (2006), at http://www.freedominfo.org/documents/global_survey2006.doc, and case decisions, constitutions and other information on file with the Justice Initiative.

III. Access to financial disclosures by public officials fosters better government

Promoting honesty in government and combating conflicts of interest and corruption are important goals of democratic nations. Two types of information disclosure regimes commonly are used to achieve these goals. The first is a general freedom of information regime, opening to public scrutiny government information about policies, regulation, expenditures, and all types of government activities. The second is a system involving the filing and subsequent public disclosure of financial information, including income, assets and liabilities, by government officials.

The principal goal of financial information disclosure systems is to combat corruption. There is strong evidence that asset disclosure has a measurable anti-corruption impact. For example, Latvia, which has experienced a significant decline in corruption, now has one of the most comprehensive financial disclosure systems in Europe. As discussed in greater detail below, according to the Transparency International's Corruption Perception Index, which measures perceptions of public sector corruption in 180 countries and territories, Latvia's score has increased from 3.4 out of 10 in 1999 to 4.8 out of 10 in 2007. Among other benefits, asset disclosure programs enhance the legitimacy of government in the eyes of the public and stimulate foreign direct investment by investors who are more willing to invest money and resources in such countries.

While the tangible and immediate damage caused by corruption in government can be significant, other detrimental impacts are intangible, collective, and long-term in nature. Government corruption directly impacts the democratic and economic stability of a country. Empirical studies have confirmed that there is an inverse relationship between levels of corruption, foreign investment, and economic growth.[14] Corruption has a significant negative effect on investment flow as the level of uncertainty in the business environment negatively affects investment.[15] Corruption also affects private market confidence and increases the time, cost, and uncertainty of doing business, thereby deterring investment and limiting opportunities for economic growth.[16] Thus, investment tends to decrease when high levels of corruption are present and tends to increase when the level of corruption is low.[17] Political instability caused by government corruption also hampers economic growth.

---

[14] Giorleny D. Altamirano, *The Impact of the Inter-American Convention Against Corruption*, 38 U. Miami Inter-Am. L. Rev. 487, 489 (2006).

[15] *Id*.

[16] *See generally* The Role of the IMF in Governance Issues: Guidance Note, http://www.imf.org/external/pubs/ft/exrp/govern/govern.pdf.

[17] Paul Mauro, *Corruption: Causes, Consequences, and Agenda for Further Research*, 35 Fin. & Dev. 11 (Mar. 1998) (asserting that corruption is most prevalent where there is political instability, bureaucratic red tape, and weak legislative and judicial systems), http://www.worldbank.org/fandd/english/0398/articles/010398.htm.

There is now a growing trend toward requiring financial disclosure by government officials (and subsequent public disclosure) in order to combat corruption, foster public confidence in government, and encourage foreign investment.[18]

IV. The spread of access to financial disclosures around the globe

During the last several decades, nations around the world have begun to view bribery and corrupt practices as a "scourge" and an "impediment" to international business, economic and political development, and stability.[19] The increased recognition of corruption and its negative effects are evidenced by the proliferation of international initiatives against bribery and corruption.[20] One of the most significant efforts in this regard is the Organization for Economic Cooperation and Development ("OECD") Convention, adopted in November 1997 by the OECD.[21] As a result of international pressures, the majority of the OECD member states agreed to comply with a non-binding package of recommendations contained in the OECD Recommendations on Bribery in International Business Transactions,[22] including by enacting laws that criminalize bribery of foreign public officials.

The UN has been actively addressing corruption and bribery since 1996, [23] and developed two significant treaties which recently entered into force and have been widely ratified: the United Nations Convention Against Transnational Organized Crime, which entered into force 29 September 2003, and currently has 137 states parties,[24] and the UN Convention Against Corruption, which entered into force 14 December 2005, and already has been adhered to by 103 states, with an additional three dozen states having signed pending ratification.[25]

In 1996, the Organization of American States adopted the Inter-American Convention Against Corruption (the "IACAC"), seeking to eradicate bribery and corruption in member states.[26] Although bearing similarities to the OECD Convention, the IACAC goes even further

---

[18] *Anti-Corruption Policies in Asia and the Pacific, Progress in Legal and Institutional Reform in 25 Countries*, (2006), *available at* http://www.oecd.org/document/22/0,3343,en_34982156_34982460_36831894_1_1_1_1,00.html.

[19] Bonnie H. Weinstein, *International Legal Developments in Review: 2001 Business Regulation*, 36 Int'l Law. 355, 355 (2002).

[20] *See id.*

[21] John W. Brooks, *Fighting International Corruption*, 20 No. 6 GPSOLO 42, 42 (2003) (calling the adoption of the OECD Convention the most significant development in international law).

[22] *See* http://www.oas.org/juridico/english/Treaties/b-58.html.

[23] The UN General Assembly adopted two declarations on bribery and corruption in 1996: the Declaration Against Corruption and Bribery in International Commercial Transactions and the Declaration of the International Code for Public Officials, Weinstein, *supra* note 19, at 355.

[24] UN Convention Against Transnational Organized Crime, Doc A/55/383, see http://www.unodc.org/unodc/crime_cicp_signatures_convention.html.

[25] UN Convention Against Corruption, Doc. A/58/422, see http://www.unodc.org/unodc/crime_signatures_corruption.html.

[26] IACAC, http://www.oas.org/juridico/english/Treaties/b-58.html.

to combat bribery and corruption. As of 2006, the IACAC had been ratified by 33 of the 34 active states parties of the Organization of American States ("OAS").[27]

The European Union, the Council of Europe, the European Bank for Reconstruction and Development, the International Monetary Fund, the Inter-American Development Bank, and the Asian Development Bank all have instituted anticorruption measures and programs, as well.[28]

As a result of the proliferation of anticorruption regulations, more and more countries are screening public officials' assets and liabilities with the aim of detecting unjustified wealth as an indicator of corrupt behavior.[29] Additionally, governments increasingly are making these disclosures public based on a widespread recognition that public disclosure helps boost confidence in government, while at the same time giving journalists and civil society groups a role in policing the accuracy of disclosures.[30] A recent survey of 148 countries eligible to receive World Bank support found that 104 countries now require that top officials declare assets to an anticorruption body or other government entity, of which at least 33 require that the forms be published or made available to the public.[31]

As will be seen from the description of national laws below, many countries require that public officials and employees submit financial disclosure declarations under oath. In many of these countries, the public has a right of access to information about the assets, liabilities, net worth, and financial and business interests of public officials and employees, including those of their spouses and unmarried children under eighteen years of age who live with them. These laws allow citizens, the media, and civil society organizations to participate in each government's work against corruption and towards transparency.

A. Latin America and the Caribbean

The IACAC, mentioned in the preceding section, requires each member state to proscribe "illicit enrichment," defined as "a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions."[32] Under Article III, Paragraph 4, states parties agree to consider "[s]ystems for registering the income, assets and liabilities of persons who perform public functions in certain posts as specified by law and, where appropriate, for making such registration public." Article III, Paragraph 11 encourages access to the information in financial declarations by generally

---

[27] *See* http://www.oas.org/juridico/english/Sigs/b-58.html.

[28] Weinstein, *supra* note 19, at 357.

[29] ABD/OECD Anti-Corruption Initiative for Asia and the Pacific, Anti-Corruption Policies in Asia and the Pacific: Progress in Legal and Institutional Reform in 25 Countries (2006).

[30] Richard E. Messick, "Regulating Conflict of Interest: International Experience with Asset Declaration and Disclosure," in *Managing Conflict of Interest to Prevent Corruption: Frameworks, Tools, and Instruments to Detect, Avoid and Manage Conflict of Interest in Asia-Pacific*. ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (Manila, Philippines, 2007).

[31] *Id*.

[32] *IACAC, supra, Article IX.* .

promoting participation of civil society and nongovernmental organizations in efforts to prevent corruption. Members of the OAS monitor implementation of the IACAC through the Committee of Experts ("the Committee") as part of the Mechanism for the Implementation of the Inter-American Convention (MESICIC). The Committee is composed of appointed experts from each country that has signed the IACAC and has joined the follow-up mechanism. The Committee issues country reports concerning progress toward implementing the IACAC. Twenty-eight countries have completed reviews by the Committee, and twelve of those countries have completed a second round of review.[33] These reports are a reliable indicator of the laws in each country regarding financial disclosures.[34]

It is clear from the information in the MESICIC reports that countries throughout Latin America have responded to the IACAC and are making progress towards strengthening government and defeating corruption, in large part through public access to financial disclosures. Many countries now require that financial disclosures be made public and that disclosures contain information regarding spouses and dependants. Of the thirty-two countries surveyed, financial declarations must include information for spouses, children, and other financial dependants in twelve countries: Belize, Brazil, Chile, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Trinidad and Tobago, and Venezuela. Full declarations by senior officials must be made public in eight countries: Argentina, Belize, Bolivia, Brazil, Chile, Jamaica, Nicaragua, and Paraguay.[35] Additionally, summaries of financial declarations are published in the Gazette in the Bahamas; declarations must be made public or authenticated by a notary in Ecuador; and over 100,000 public declarations are filed every year in Mexico.[36] Consequently, Belize, Brazil, Chile, Jamaica, and Nicaragua have granted some form of public access to financial declaration information regarding spouses, children, and financial dependants.

It is clear that Latin America is moving in the direction of more open and stronger government. Governments are continually becoming more, not less, open and accountable to their people. This progress has been encouraged by the IACAC, which Peru has ratified. In choosing to be a part of the IACAC, Peru chose to be a part of this important progress and strengthening of government.

The following is a summary of the laws regarding financial declarations in Latin American countries, reflecting the progress being made towards strengthening government integrity and combating corruption. While each of these countries separately recognize that there are important privacy concerns relating to personal information, many have determined that the extraordinary value of public financial disclosures outweigh the individual privacy interests in these circumstances.

---

[33] All country reports cited below are available in Spanish at http://www.oas.org/juridico/spanish/Lucha.html

[34] Nancy Z. Boswell, *The InterAmerican Convention against Corruption: Strengthening the Follow-Up Process to Secure Reform*, Transparency International (November 16, 2006), *available at* http://www.12iacc.org/archivos/WS.1.2_NANCY_BOSSWELL.pdf (last viewed October 23, 2007).

[35] *See* Messick, *supra* note 30.

[36] See individual country discussions below.

In Argentina, Law 25,188, Chapter III provides regulations for "the system of sworn declaration." The right of access to public information is expressly guaranteed in Article 75(22) of the Constitution, which also incorporates treaties.[37] Argentina's Anticorruption Office has developed software that enables computerized submission of the financial declarations.[38] It is estimated that between 15,000 and 50,000 public financial disclosures are filed every year by "certain bureaucratic employees; bureaucratic agency heads; elected bureaucrats; appointed bureaucrats; judges; certain judicial employees; legislators; and certain legislative employees." None of these reports are confidential.[39]

In Belize, certain government officials must file financial declarations with the Integrity Commission under Part III, Sections 6 to 12 of the Prevention of Corruption in Public Life Act. Under Section 6(1), this duty applies to "every person in public life," which includes members of the House of Representatives, the Senate, and local authorities. The statements must include information on the spouse and children of the declarant. After the declaration is made, the Commission publishes a certificate in the Gazette. Any person may file a complaint with the Commission regarding the information, and upon good cause, the Commission may grant access to the declaration.[40] Additionally, the declarations of certain senior officials must be published.[41]

In Bolivia, Article 45 of the Constitution requires that every public official submit a financial declaration before taking office. Law 2027 of 1999, the Statute on Public Officials, Article 54 requires that the declarations of elected officials, designated officials, freely-appointed officials, and specially determined career officers be made public. Additionally, under Supreme Resolution 222070, the Presidential Anticorruption Delegate has formed Citizen Anticorruption Networks charged with increasing transparency in public administration.[42]

In Brazil, elected administrators and legislators collectively file over 100,000 public financial declarations every year, and these reports can be accessed electronically.[43] Law No. 8730 of November 10, 1993, establishes the obligation to file a financial declaration in order to hold an office or post or to work in the Executive, Legislative, and Judicial Branches. The statements must also include the information for spouses, companions, children, and others economically dependent on the declarant.[44]

---

[37] Committee of Experts of MESICIC, Report on Implementation in the Republic of Argentina (February 13, 2003); and Second Report (December 15, 2006).

[38] Eric Raile, *Managing Conflicts of Interest in the Americas: A Comparative Review* (April 15, 2004), available at http://www.usoge.gov/pages/international/int_files/conflicts_americas_raile_0404.html#_edn3 (last viewed October 15, 2007).

[39] *Id.* at Appendix A.

[40] Committee of Experts of MESICIC, Report on Implementation in Belize (March 31, 2006).

[41] *See* Messick, *supra* note 30.

[42] Committee of Experts of MESICIC, Report on Implementation in the Republic of Bolivia (July 29, 2004); and Second Report (June 28, 2007).

[43] Raile, *supra* note 38, at Appendix A. (Confidential reports are filed by appointed administrators, judicial and legislative employees.)

[44] Committee of Experts of MESICIC, Report on Implementation in the Federative Republic of Brazil (March 31, 2006).

In Chile, civil servants and members of the legislative and judicial branches and other autonomous agencies must submit sworn declarations of assets and conflicts of interest.[45] All assets declarations must include assets held by the official's spouse and are public in their entirety.[46] The Chilean Constitutional Tribunal reviewed the constitutionality of Law No. 20.088 before its final promulgation by the Chilean Congress. The Tribunal held that unrestricted public access to assets declarations is consistent with the Constitution's privacy protections, provided that third party access to the declarations serves the legitimate goals pursued by the statute.[47] In a partly concurring and partly dissenting opinion, Justice Urbano Marin noted that full publicity of assets declarations is compatible with the constitutional values of transparency and good administration,[48] and does not affect the intimate core of individual or family privacy. Restricting access to the assets declarations would undermine the overall impact of the statute.[49] The ruling of the Constitutional Tribunal of Chile, a country with traditionally strong protections for privacy and patrimonial rights, highlights the importance new Latin American democracies place on the values of integrity and transparency in public administration.

In Ecuador, Article 122 of the Constitution establishes the obligation of civil servants to submit sworn financial declarations. In May, 2003, The Law Regulating Sworn Declarations of Net Worth was enacted to enforce Article 122. Under The Law on Administrative Careers and the Civil Service, these declarations must be made public or be authenticated by a notary.[50]

In Jamaica, Section 4 of the Parliament Integrity of Members Act requires financial declarations from Senators and Members of the House of Representatives. Section 4(2) of the Act requires that the information be provided for spouses and children as well. Section 4 of the Corruption Prevention Act requires public servants to file declarations with the Commission for the Prevention of Corruption. Declarations must include information regarding the spouse and children of the declarant. [51] The declarations for more senior officials must be made public.[52]

In Mexico, over 100,000 public reports of financial disclosures are filed every year and certain information from these reports is available electronically.[53] Article 43 of the Federal Law

---

[45] Law No. 20.088 Establishing An Obligation For Authorities Exercising Public Functions [To Provide] Sworn Declarations Of Assets (2005), art. 1 et seq.

[46] *Id.,* at art. 1.1.

[47] Judgment of December 6, 2005, Case No. 460.12-005, para. 31; available in Spanish original at: http://www.tribunalconstitucional.cl/archivos/sentencias/ROL00460.pdf.

[48] Article 8 of the Chilean Constitution provides that "[t]he exercise of public functions obliges those who perform such functions to comply with the principle of probity in all their activities."

[49] Judgment of December 6, 2005, Case No. 460.12-005 (Separate Opinion of Justice Urbano Marin).

[50] Committee of Experts of MESICIC, Report on Implementation in the Republic of Ecuador (February 6, 2004); and Second Report (December 15, 2006).

[51] Committee of Experts of MESICIC, Report on Implementation in Jamaica (September 30, 2005).

[52] *See* Messick, *supra* note 30.

[53] Raile, *supra* note 38, at Appendix A. Between 50,000 and 100,000 confidential reports are filed by judicial, legislative, and agency employees.

on the Administrative Responsibilities of Civil Servants require that information be disclosed relating to spouses, common-law partners, and economic dependants. The Civil Service Secretariat's 2001-2006 National Program to Combat Corruption and Promote Transparency and Administrative Development has repeatedly emphasized that increasing citizen participation and transparency of government is indispensable in combating corruption.[54]

In Nicaragua, Article 130, paragraph 2 of the Constitution requires that all state officials disclose their assets before assuming office and after leaving it. This constitutional requirement is reflected in the Civil Service Probity Law which requires all civil servants to submit sworn financial declarations.[55] The declarations of more senior officials must be made public.[56] Additionally, through Decree 67 of July 6, 2002, the executive branch formed the Public Ethics Office, which promotes government transparency and citizen participation.[57]

In Paraguay, Article 104 of the Constitution requires all public officials and employees to sign a sworn income and asset declaration "within 15 days of their installation and within 15 days after stepping down."[58] The declarations of senior officials must be made public,[59] and Article 28 of the constitution grants the public free access to public sources of information.[60]

While the laws of countries throughout Latin America are in various stages of development regarding applicability, scope, and accessibility of financial disclosures, it is clear that together they are heading towards increasing openness and accountability.[61] Peru has the

---

[54] Committee of Experts of MESICIC, Report on Implementation in Mexico (March 11, 2005); and Second Report (July 29, 2007).

[55] Committee of Experts of MESICIC, Report on Implementation in Nicaragua (July 18, 2003); and Second Report (December 15, 2006).

[56] *See* Messick, *supra* note 30.

[57] Committee of Experts of MESICIC, Reports on Implementation in Nicaragua (July 18, 2003); and Second Report (December 15, 2006).

[58] Committee of Experts of MESICIC, Report on Implementation in the Republic of Paraguay (July 18, 2003); and Second Report on Paraguay (December 15, 2006).

[59] *See* Messick, *supra* note 30.

[60] Committee of Experts of MESICIC, Report on Implementation in the Republic of Paraguay (July 18, 2003); and Second Report (December 15, 2006).

[61] In **Colombia**, Article 122(2) of the Constitution requires that public employees submit financial declarations. Law 190 of 1995, the Anti-Corruption Statute, implements this constitutional provision. Committee of Experts of MESICIC, Report on Implementation in Columbia (July 18, 2003). In **Costa Rica**, the Constitution of 1949 establishes the obligation of certain public officials to declare their assets, and this has been enforced through Law 1166 of June 14, 1950. The regulations cover a broad spectrum of public servants. Committee of Experts of MESICIC, Report on Implementation in Costa Rica (July 30, 2004); and Second Report (June 28, 2007). In **El Salvador**, Article 240 of the Constitution provides that public officials and employees designated by law are required to file a financial declaration with the Supreme Court when assuming their post and when stepping down. The information in the disclosure must also be provided regarding spouses and children. Committee of Experts of MESICIC, Report on Implementation in the Republic of El Salvador (March 12, 2005). In **Guatemala**, Article 20 of the Law on Probity and Responsibilities of Public Officials and Employees, Decree No. 89-2002, requires a wide variety of persons involved in government to submit financial declarations to the Office of the Comptroller General of Accounts. Information regarding spouses and dependent children must be included. Committee of Experts of MESICIC, Report on Implementation in the Republic of Guatemala (September 30, 2005). In **Honduras**, Article 56

opportunity to be one of the leaders in establishing more open, accountable, and democratic societies through effecting full public access to financial disclosure records for officials and their spouses.

B. United States

The United States adopted comprehensive financial disclosure legislation in 1978. In response to public scandals such as Watergate and a weakening of the public's trust in government, Congress enacted the Ethics in Government Act of 1978 ("Ethics Act"), which requires detailed financial disclosure from high-level government employees in all three branches of the federal government.[62] This federal legislation is complemented by a host of financial disclosure laws at both the state and local levels.

The Ethics Act requires annual disclosure of financial information by the president, vice president, members of Congress, federal judges, presidential appointees, and other officials and employees earning at or above a specified pay-scale or with policymaking responsibilities.[63] The breadth of required disclosures in the U.S. is illustrated by the appended Executive Branch Personnel Public Financial Disclosure Report of the Secretary of the U.S. Department of Transportation for the year 2006.[64] These required disclosures include the nature, source, and amount of income, gifts and reimbursements, assets and liabilities, and transactions in real property and securities.[65] Covered employees must make similar disclosures regarding the finances of their spouses and dependent children.[66] The Ethics Act also requires that the

---

of the Organic Law of the Superior Court of Accounts requires civil servants to submit financial declarations. Article 61 requires that the spouses and common-law spouses of declarants authorize the Court to investigate their accounts, assets, and businesses. Committee of Experts of MESICIC, Report on Implementation in the Republic of Honduras (March 12, 2005); Committee of Experts of MESICIC, Report on Implementation in the Republic of Honduras (December 15, 2006). In **Uruguay**, Law 17.060 and Decree 354/999 provide a comprehensive regulation system for sworn financial statements. Article 12 of Law 17.060 specifically requires sworn statements for spouses and dependants of declarants. Committee of Experts of MESICIC, Report on Implementation in the Oriental Republic of Uruguay (February 6, 2004); and Second Report (December 15, 2006).

[62] Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. §§ 101 *et seq*.).

[63] 5 U.S.C. app. 4 § 101.

[64] *See* Appendix A.

[65] 5 U.S.C. app. 4 § 102.

[66] *Id.*

disclosures be publicly accessible in full for six years, with limited exceptions.[67] Today, many of these financial disclosure reports can be found on the Internet.[68]

Many states and municipalities have adopted similarly comprehensive financial disclosure laws, starting in the early 1970s.[69] Today, forty-seven of fifty states require some sort of financial disclosure by high-ranking government employees, and many require disclosure by mid-level employees as well.[70] Thirty-three of those states require some disclosure of the spouse's financial information, and at least twenty-seven also require disclosure for any dependent children.[71] Forty-five states require annual updates, while two require updates to be filed every election year.[72] While the disclosure requirements vary among the states, many require that asset or income values be specified and that the full filings be made public.[73]

In enacting the Ethics Act, the U.S. Congress found that full public disclosure of personal financial information by governmental officials would serve to:

- Restore and increase public confidence in the integrity of the government;
- Demonstrate the integrity of the vast majority of government officials;
- Deter conflicts of interest;
- Deter some persons from entering public service who should not be doing so; and
- Better enable the public to judge the performance of government officials.[74]

---

[67] *Id.* § 105. The limited exceptions apply to (i) members of the intelligence community (if the President finds that disclosure by such persons would compromise national security), and (ii) members of the judiciary. *Id.* Under the Ethics Act, a member of the judiciary's report may be redacted "only (i) to the extent necessary to protect the individual who filed the report or a family member of that individual; and (ii) for as long as the danger to such individual exists." *Id*. Whether a danger exists to a reporting individual such that redaction is appropriate is determined by the Judicial Conference, in consultation with the United States Marshall Service. *Id.* Each year the Administrative Office of the U.S. Courts must submit a report to Congress detailing the requests for redaction, what type of information has been redacted, and what procedures are in place to ensure there is sufficient public disclosure. *Id.*

[68] The full financial disclosure reports for the U.S. President, Vice President, members of Congress, and many Cabinet members are available at, for example, www.opensecrets.org.

[69] *See*, *e.g.*, *Developments in the Law – Public Employment*, 97 Harv. L. Rev. 1619, 1660 n.72 (1984) (listing the states at that time with financial disclosure laws for public officials) [hereinafter *Developments in the Law*].

[70] *See* Center for Ethics in Government, National Conference of State Legislatures, *Personal Financial Disclosure for Legislators* (2007), http://www.nscl.org/programs/ethics/fd_home.htm.

[71] *See* Center for Ethics in Government, National Conference of State Legislatures, *Personal Financial Disclosure for Legislators: Household Member Requirements* (2007), http://www.ncsl.org/programs/ethics/fd_household.htm..

[72] *See* Center for Ethics in Government, National Conference of State Legislatures, *supra* note 70.

[73] *See*, *e.g.*, Alaska Stat. §§ 24.60.230, 39.50.010-.200 (values specified and public disclosure); Ariz. Stat. Ann. § 38-542 (same); Del. Code Ann. tit. 29, § 5814 (public disclosure); Haw. Stat. Ann. § 84-17 (values specified and public disclosure); Mass. Gen. Law. ch. 268B, §§ 3, 5 (same); N.Y. Public Officers Law § 73-a & N.Y. Executive Law § 94 (same).

[74] S. Rep. No. 95-170, 1978 U.S.C.C.A.N. 4216, 4237-38.

The role of financial disclosure in promoting the government's integrity and in preventing corruption also has been acknowledged in countless judicial proceedings. Typical of these is the recognition by one court that "[t]he underlying purpose for such [public financial] disclosure is laudable as a means of maintaining integrity in the democratic process and guarding against conflicts of interest and potentially corrupt practices on the part of public officials."[75]

The fulfillment of these public objectives requires that financial disclosures be publicly available in full and include information from spouses and dependent children. Disclosure only to the government does little to enhance the public image of government, nor does it ensure compliance by public officials. According to one commentary, "Disclosure must be made public if it is to facilitate public appraisal of government employees' performance in light of their personal financial interests. . . . Moreover, any financial disclosure law that makes the government its own watchdog seems a halfhearted means to restore public trust."[76]

Though such broad financial disclosure laws as those adopted by the U.S. federal government may appear intrusive, it is only because they are intrusive that they are able to deter corruption and conflicts of interest, as well as enhance the public's confidence in its government. Or, as one court stated: "Were the regulation any less burdensome, it would be that much less effective in achieving the legislature's objectives."[77]

Despite the many benefits of financial disclosure by government officials, individual privacy concerns must be considered. In the United States, the right to privacy is guaranteed by the Constitution and protected by statue. The United States Constitution has been read as conferring a right to privacy on all individuals, a right that is now "firmly established."[78] This right to privacy, however, is not absolute, and may, in certain circumstances, give way to competing rights or interests.[79] Public officials, for example, have chosen to accept public office and "assume public responsibility," a fact which "puts some limits on the privacy that they may reasonably expect."[80]

The right to privacy relating to government records is also protected by statute: the federal Privacy Act of 1974 generally prohibits government agencies from disclosing information about an individual to any person or any other agency, except under limited circumstances.[81] Yet, shortly after enacting legislation to protect individual privacy, Congress

---

[75] *Lehrhaupt v. Flynn*, 356 A.2d 35, 41 (N.J. Super. App. Div. 1976). *See also Igneri v. Moore*, 898 F.2d 870, 877 (2d Cir. 1990).

[76] *Developments in the Law*, *supra* note 69, at 1668 (examining the financial disclosure provisions of the Ethics Act).

[77] *Igneri v. Moore*, 898 F.2d 870, 877 (2d Cir. 1990).

[78] *Id.* at 873.

[79] *See*, *e.g.*, *Doe v. Gen. Servs. Admin.*, 544 F. Supp. 530, 540 (D. Md. 1982) ("[T]he right of privacy is neither absolute nor all encompassing, and often must give way to competing societal interests.") (citing U.S. Supreme Court decisions).

[80] *Duplantier v. United States*, 606 F.2d 654, 670 (5th Cir. 1979) (internal quotation marks and citation omitted) (upholding financial disclosure requirements of Ethics Act against a challenge by members of the federal judiciary).

[81] 5 U.S.C. § 552b.

approved the Ethics Act, presumably reflecting its conclusion that the public interest in financial disclosure is paramount to privacy rights, at least where public officials are involved. Thus, in the limited arena of public employees' financial information, privacy concerns have been made secondary to the overriding public interest in disclosure and to the objectives that full, public financial disclosure serve.

The United States' federal and state courts have overwhelmingly found that public financial disclosure laws for government officials do not offend the constitutional right to privacy, or any other constitutional right. Although the Supreme Court has never squarely addressed this issue, it has dismissed three appeals from state court decisions upholding state statutes requiring public financial disclosure, two of which required disclosure from spouses.[82] Those dismissals are binding on the merits,[83] meaning that laws requiring public disclosure of government officials' and their spouses' financial information are not unconstitutional on their face. Such dispositions by the United States' highest court undoubtedly have influenced the countless other U.S. courts that have upheld similar laws.

A leading case is *Duplantier v. United States*, in which the United States Court of Appeals for the Fifth Circuit held that the financial disclosure provisions of the Ethics Act are constitutional.[84] The plaintiffs – members of the federal judiciary – challenged the financial disclosure requirements on several grounds, alleging, among other things, that it violated their privacy rights. They argued that "their personal privacy and that of their spouses and dependents is unconstitutionally invaded by the reporting requirements of the Act"; that personal financial disclosure would create a security risk and cause "the irritation of solicitations or the embarrassment of poverty"; and that "disclosure could be destructive of close family relationships."[85]

The court, however, found that "the Act does not unconstitutionally hamper plaintiffs' privacy interests."[86] In dismissing the notion that financial disclosure unconstitutionally interferes with an individual's autonomy, the court noted that while such disclosure may affect intimate decisions, "the same can be said of any government action."[87] The court also found that financial disclosure does not unconstitutionally impair the right to confidentiality. In reaching that conclusion, the court "weigh[ed] the injuries imposed by [the Act] against the governmental purposes furthered by the Act" and found that the governmental purposes substantially outweighed any individual injury.[88] The court noted with approval the "extensive list of values"

---

[82] *See Walsh v. Montgomery County*, 424 U.S. 901 (1976), *dismissing appeal from* 274 Md. 489, 336 A.2d 97 (1975); *Fritz v. Gorton*, 471 U.S. 902, *dismissing appeal from* 83 Wash. 2d 275, 517 P.2d 911 (1974); *Stein v. Howlett*, 412 U.S. 925 (1973), *dismissing appeal from* 52 Ill. 2d 570, 289 N.E.2d 409 (1972).

[83] *Barry v. City on New York*, 712 F.2d 1554, 1558 (2d Cir. 1983). *See also Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) .

[84] 606 F.2d 654 (5th Cir. 1979).

[85] *Id.* at 669.

[86] *Id.* at 671 n.36.

[87] *Id.* at 670.

[88] *Id.*

set forth by Congress when passing the Act, referring to them as "important governmental interests which are substantially furthered by financial disclosure."[89] By accepting public employment, government officials have accepted public responsibility, which in itself "puts some limits on the privacy that they may reasonably expect."[90] The Court also held that the Act (a) did not violate the Equal Protection Clause because requiring disclosure by public officials and not by ordinary citizens is rationally related to the purposes of the disclosure, and (b) did not violate the Due Process clause because the Act was neither arbitrary nor irrational: it substantially furthered important government interests.[91] Implicit in the court's reasoning is the acknowledgment that the right to privacy – like every other right – has its limits and often competes with other rights. And, like many other courts, the *Duplantier* court found that the "'paramount public interests are enough to subordinate the assumed right of a public official to be free from compulsory economic disclosure.'"[92]

The U.S. Court of Appeals for the Second Circuit has also upheld the constitutionality of public financial disclosure requirements for government employees on three separate occasions. For example, in *Barry v. City of New York* the court reversed a lower court's ruling that the public inspection provision of New York City's financial disclosure law was unconstitutional.[93] Like the *Duplantier* court, the court in *Barry* concluded that "the City's interest in public disclosure outweighs the possible infringement of plaintiffs' privacy interests."[94] The court expressly rejected the plaintiffs' contention that disclosure to the City only – and not to the public – would equally serve the City's efforts to deter corruption and conflicts of interest.[95] The legislature had determined that public disclosure was necessary to meet the objectives of the disclosure requirements, and the court found that the legislature's determination was not unreasonable.[96] In upholding the financial disclosure law at issue, the court also noted that

---

[89] *Id.*

[90] *Id.*

[91] *Id.* at 671-72.

[92] *Id.* at 671 (quoting *In re Kading*, 235 N.W.2d 409, 417-18 (Wis. 1975)). The Court did not directly address the plaintiffs' argument that disclosure posed a security risk, though it did state that the plaintiffs failed to produce evidence that the financial disclosure provisions "will prevent the judiciary from accomplishing its constitutionally assigned functions." *Id.* at 667. In other words, there was no real evidence that the disclosure provisions created such a security risk as to justify rendering them unconstitutional.

[93] 712 F.2d 1554 (2d Cir. 1983). New York City's disclosure law requires a variety of City officials, candidates for office, and all City employees earning above a certain pay-grade to disclose their own and their spouse's financial information. The law includes a privacy provision that allows a discloser to request that certain information be withheld from public inspection if it "would constitute an unwarranted invasion of his or her privacy." *Id.* at 1557. Clearly, in passing the law, the City did not deem disclosure of most financial information to be an unwarranted invasion of privacy. The City's Board of Ethics decides whether to grant such a request based upon whether the information is of a highly personal nature, relates in any way to the duties of the position held by the person, and involves an actual or potential conflict of interest. *Id.*

[94] *Id.* at 1562-63.

[95] *Id.* at 1563.

[96] *Id.*

disclosure by spouses was "necessary to make [the financial disclosure law] effective"[97] and that the law's application to a wide array of government employees was appropriate.[98]

The U.S. Court of Appeals for the Second Circuit has on numerous occasions also upheld the financial disclosure provisions of the State of New York's Ethics in Government Act, which requires comprehensive financial disclosure for a broad array of government employees, their spouses and children.[99] In *Igneri v. Moore*, for example, the court weighed the competing interests of, on the one hand, individual privacy rights, and, on the other, the public interests advanced by financial disclosure. It found that the "balance tips in the statute's favor."[100] In reaching that conclusion, the court noted that the public employee foregoes to a limited degree his or her right to privacy by entering public service.[101] Though public employees retain their privacy rights, the overriding interests that public financial disclosure serve compelled the conclusion that the privacy intrusion does not reach constitutional significance.

In upholding financial disclosure laws, U.S. courts have recognized that full, comprehensive disclosure is necessary to combat corruption and foster public confidence in government. For example, in approving a state's executive order that required high level state employees to publicly disclose their financial information, one court noted the connection between "the full disclosure requirements" and the intent of the order to "not only . . . ferret out actual or apparent conflicts of interest but also to disclose to public view all financial data which may be relevant in guarding against corruption and dishonesty in government." [102] The court went on to conclude that it "cannot conceive of a means of tailoring the order which would narrow the scope of disclosure and still preserve the integrity of its purpose."[103] The court recognized that summary or partial disclosure of financial information would not allow members of the public to evaluate the financial information – and thus to determine where possible conflicts exist and to become reassured in the integrity of their government – which means that the very objectives of disclosure would be defeated.

In summary, cases in both the United States' federal and state courts have determined that public disclosure of financial information by government employees and their spouses and dependents does not violate the individual's right to privacy or any other right under the U.S. Constitution. These cases recognize and support the important role full financial disclosure plays in uncovering and preventing corruption, as well as in promoting the public's confidence in government. While the disclosure to the public of that financial information plainly implicates

---

[97] *Id.* at 1560.

[98] *Id.* at 1563 ("[T]he fact that many of the plaintiffs are not public figures or policymaking officials does not immunize them from all possibilities of corruption or conflict of interest.").

[99] *See*, *e.g.*, *Bertoldi v. Wachtler*, 952 F.2d 656 (2d Cir. 1991); *Igneri v. Moore*, 898 F.2d 870 (2d Cir. 1990).

[100] 898 F.2d at 878.

[101] *Id.*

[102] *Kenny v. Byrne*, 365 A.2d 211, 217 (N.J. Super. Ct. App. Div. 1976) (noting that "plaintiffs have not offered any alternative means, more limited than the order's full public disclosure, to achieve the legitimate aim of restoring the public's trust in government.").

[103] *Id.*

an individual's privacy interest, any infringement is minimal when compared to the importance of the public objectives sought by disclosure.

C. Canada

The Canadian financial disclosure law requires that public officials, from Ministers of Parliament to officers of the Royal Canadian Mounted Police, disclose financial assets.[104] In adopting the Conflict of Interest Code (the "Canadian Code"), the Canadian Parliament recognized the paramount importance of transparency:[105]

> The object of this Code is to enhance public confidence in the integrity of public office holders and the decision-making process in government
>
> (a) while encouraging experienced and competent persons to seek and accept public office;
> (b) while facilitating interchange between the private and the public sector;
> (c) by establishing clear rules of conduct respecting conflict of interest for, and post-employment practices applicable to, all public office holders; and
> (d) by minimizing the possibility of conflicts arising between the private interests and public duties of public office holders and providing for the resolution of such conflicts in the public interest should they arise.[106]

In the interest of advancing these principles, the Canadian Code requires disclosure in a public registry of the financial interests of public officials and their spouses and dependent children.[107]

The Canadian Code distinguishes between financial interests that must be publicly disclosed and those that remain confidential.[108] For example, declarable assets include interests in privately held businesses that do not contract with the government, farms, and real property.[109] Assets exempt from the publication requirement are mostly personal assets, such as residences used by the official's family, certain retirement savings plan assets, automobiles, and works of

---

[104] Conflict of Interest and Post-Employment Code for Public Office Holders (June 1994) § 4.

[105] The Canadian Federal Courts of Appeal have clarified that the conflict of interest provisions prohibit any apparent conflict of interest. *See Threader v. Canada* (Treasury Board), [1987] 1 F.C. 41, 43 (Can.).

[106] Conflict of Interest Code, *supra* note 104, § 2.

[107] *Id.* § 9 ("Information on spouses and dependent children is only for use by the Ethics Counsellor in advising the public office holder on his or her own compliance arrangements.").

[108] *Id.* ("Assets that are not exempt assets are either 'declarable assets' or 'controlled assets' unless, after a Confidential Report, the Ethics Counsellor determines that they are of such a value that they do not constitute any risk of conflict of interest in relation to the public office holder's duties and responsibilities.").

[109] *Id.* § 11.

art.[110] In addition, Canadian public officials must divest their controlled assets, which include publicly traded securities, futures, and self-administered retirement plans.[111] Liabilities must also be disclosed and the Ethics Counsellor is granted the power to require "that particular arrangements be made to prevent any conflict of interest situation from arising."[112] Canada's comprehensive conflict of interest prevention procedures further require confidential disclosure of all outside affiliations, including those of the official's spouse and dependent children, and public disclosure of all outside affiliations for "Ministers, Secretaries of State and Parliamentary Secretaries."[113] Generally, the information submitted to the Ethics Counsellor under Canada's Conflict of Interest Code is subject to being withheld under Canada's Privacy Act unless disclosure is mandatory by statute.[114]

D. Europe

Despite the history of misuse of personal information in Europe, particularly during the height of Fascism in the mid-twentieth century, freedom of information remains a hallmark of democratic systems in the region. The Council of Europe and the EU have issued pronouncements on the importance of disclosure.[115] Many new European democracies have included the right to information in their constitutions. For example, Article 61 of the Polish Constitution guarantees every citizen "the right to obtain information on the activities of organs of public authority as well as persons discharging public functions."[116] The widespread inclusion of such broad rights of free access to information in nascent democracies, some of which are emerging from the veil of the most secretive and abusive governments in the world, reinforces

---

[110] *Id.* § 10.

[111] *Id.* § 12. Divestment of these assets are subject to three limited exceptions as determined by the Ethics Counsellor: (1) the asset does not present a risk of conflict of interest; (2) the asset is "pledged to a lending institution as collateral;" and (3) the asset is not marketable. *See id.* §§ 9(2), 13(5).

[112] *Id.* § 14.

[113] *Id.* § 16. As in the case of asset declarations, certain activities must be disclosed, certain activities are exempt from disclosure, and certain activities are prohibited. *See id.* §§ 17-19.

[114] Privacy Act, 1985 S.C., ch. P-21 (Can.).

[115] Council of Europe, Recommendation R (2002)2 of the Committee of Ministers to Member States on Access to Official Documents (Feb. 21, 2002) ("Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including national origin."); Commission Regulation 1049/2001, Regarding Public Access to European Parliament, Council and Commission Documents, 2001 O.J. (L 145) 44 ("Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions.").

[116] Constitution of the Republic of Poland art. 61. *See also* Constitution of the Republic of Bulgaria art. 41 ("Citizens shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of others."); Constitution of the Republic of Estonia art. 44 ("Everyone has the right to freely obtain information disseminated for public use."); Constitution of the Republic of Hungary art. 61 ("[E]veryone has . . . the right of access to information of public interest, and also the freedom to disseminate such information."), Constitution of the Republic of Lithuania art. 25 ("The citizen shall have the right to receive, according to the procedure established by law, any information concerning him that is held by State institutions."); Constitution of the Republic of Moldova art. 34 ("Having access to any information of public interest is everybody's right, that may not be curtailed."); Constitution of Romania art. 31 ("A person's right of access to any information of public interest cannot be restricted.").

the above-quoted pronouncement of Justice Brandeis that "[s]unlight is said to be the best of disinfectants."

Nearly every country in continental Europe has some form of financial disclosure requirement for public officials. The Group of States Against Corruption (GRECO) of the Council of Europe adopted a Model Code of Conduct for Public Officials that includes a requirement for declaration of private interests[117] and a broad definition of conflict of interest, including apparent and potential conflicts of interest.[118] The OECD also asserts that public officials' disclosures should be targeted at all apparent and potential conflicts of interest, rather than limited to direct, current conflicts.[119]

Among the new European democracies, Latvia has one of the most comprehensive financial disclosure systems in Europe, which has arguably led to the reduction of once-rampant corruption in this post-Soviet democracy.[120] The basis for Latvia's strong conflict of interest protections is its constitutional right of access to information and the Law on Prevention of Conflict of Interest in Activities of Public Officials. Public officials, ranging from the president to notaries, soldiers, and city council members, must disclose their financial and personal interests as well as those of their relatives.[121] The declarations must include information about the public officials' and their relatives' income, property, stock and other securities, savings, transactions performed, debts, and loans given.[122] The only categories of information in this comprehensive disclosure that are not publicly accessible are the official's place of residence and personal identification number.[123] All of the financial interests are disclosed, and declarations of high-ranking officials are published in the government Official Gazette.[124]

Romania has a similarly robust system of publishing public officials' asset disclosures, grounded in a constitutional right of access to information. All "[p]ersons holding high and official positions," – which generally includes all civil servants, elected officials, and political appointees, and their spouses and dependent children – must disclose their financial and other positions.[125] The latter includes the positions they hold in associations and businesses, paid

---

[117] Council of Europe, Recommendation R (2000)10 of the Committee of Ministers to Member States on Codes of Conduct for Public Officials art. 14 (May 11, 2001).

[118] *Id.* at art. 13.

[119] OECD, Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service 4 (June 2003).

[120] According to Transparency International's Corruption Perception Index, which measures perceptions of public sector corruption in 180 countries and territories, Latvia's score has increased from 3.4 out of 10 (ranked 58th least corrupt country) in 1999 to 4.8 out of 10 (ranked 51st) in 2007.

[121] Law on Prevention of Conflict of Interest in Activities of Public Officials § 21 (May 10, 2002), *available at* http://www.knab.gov.lv/uploads/en_htm/EN_officials.htm.

[122] *Id.* § 24. Disclosure of the latter four items is required only if each "exceeds twenty minimum monthly wages."

[123] *Id.* § 26.

[124] *Id.*

[125] Law on Statement and Auditing of Property of Dignitaries, Magistrates, Civil Servants and Persons with Leading Positions (1996), *as amended by* Law on Certain Steps for Assuring Transparency in Performing High Official Positions, Public and Business Positions, for Prevention and Sanctioning the Corruption (2002).

professional activities, and interests as a shareholder.[126] In addition to personal property and income, financial positions include deposits, claims, bonds, and other income of more than €10,000 (about 43,300 PEN), and gifts of more than €300 (about 1,300 PEN) resulting from protocol activities.[127] All such disclosures are published on the website of the relevant government agency.[128]

Countries coming out of a transition from authoritarian regimes, like Peru's, have led the way in establishing comprehensive conflict of interest regimes on the continent. Besides Romania and Latvia, countries that require public access to financial interest statements of at least the top government officials include Albania, Bulgaria, Croatia, Georgia, Lithuania, Moldova, Russia, and the Ukraine.[129] The benefits reaped as a result of such democratizing efforts have included increased foreign direct investment, relative political and economic stability, and, for some, EU accession.[130]

E. Australia and New Zealand

Among British Commonwealth countries, a number of important declarations set forth the principle of unrestricted access to information, including that freedom of information should be a legally enforceable right, and that any statutory restrictions of the right should be narrowly drawn.[131] Australia and New Zealand passed freedom of information laws in 1982, making them among the first countries to do so after the landmark FOIA legislation was adopted in the United States.[132] In these countries, a presumption of access to information has become the norm.

In New Zealand, members of Parliament "must make returns of pecuniary interests," including those of their spouses and dependent children.[133] The interest is broadly defined as "a direct financial benefit that might accrue to a member personally, or to any trust, company or other business entity in which the member holds an appreciable interest."[134] A Standing Order of New Zealand's House of Representatives only requires disclosure of the interest and not its actual value.[135] All such returns are published in the Register of Pecuniary Interest of Members of Parliament within 90 days after a general election.[136] Since 1983, Australia's conflict of

---

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] Rick Messick, *Income & Asset Disclosure Requirements for Heads of State & Governments* (June 15, 2006).

[130] *See* IMF Data Mapper, http://www.imf.org/external/datamapper/index.php.

[131] *Communiqué*, Meeting of Commonwealth Law Ministers, Port of Spain, Trinidad and Tobago (May 10, 1999).

[132] MENDEL, *supra* note 4, at 19, *citing* Freedom of Information Act, 1982, § 13 (Austl.); Access to Information Act, 1982 S.C., ch. A-1 (Can.); and Official Information Act 1982, 1982 S.N.Z. No. 156 (N.Z.).

[133] Standing Orders of the House of Representatives, 2005, §§ 164-67.

[134] *Id.* § 165.

[135] *Id.* at app. B, § 8.

[136] *Id.* §§ 11, 15.

interest laws and regulations have required similar disclosures.[137] The Australian House of Representatives and Senate have published these disclosures in a registry since 1984[138] and 1994,[139] respectively.

F. Africa and Asia

In the Rabat Declaration, the Ministers of Civil Service of 34 African countries proclaimed their belief in "[a] well-performing and transparent public service" and recognized this principle as an "essential prerequisite for private sector growth and Africa's economic recovery."[140] South Africa has implemented a comprehensive conflict of interest policy,[141] and its Constitution provides an expansive right of access to information: "Everyone has the right of access to (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights."[142] In addition to this Constitutional right to information and the Promotion of Access to Information Act, South Africa has enacted a number of conflict of interest codes requiring disclosure of financial interests by public officials. Elected officials and senior managers in the civil service, as well as their spouses and dependent children, must publicly disclose nearly all financial interests, including shares and interests in companies, land and property owned, paid outside employment, directorships and partnerships, consultancies, and gifts received from sources other than friends and family.[143] Although limited portions of this information, such as the value of interests in companies and pensions, amounts of remuneration, and details of private residences and family financial interests, are kept confidential,[144] the presumption in South Africa favors disclosure of assets.

East Asian democracies have a long-standing tradition of confidentiality that has been criticized as promoting corrupt bureaucracies. While many countries have implemented freedom of information laws,[145] comprehensive conflict of interest regimes have been less forthcoming.

---

[137] Public Service Commission, Guidelines on Official Conduct of Commonwealth Public Servants 64 (Canberra 1995), *citing* Public Service Regulation 8B.

[138] Australian House of Representatives, Declaration and Registration of Members' Interests (Oct. 8, 1984), *available at* http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=159102&table=hansardr.

[139] Australian Senate, Senators: Registration of Interests (Mar. 17, 1994), *available at* http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=307726&table=hansards.

[140] Rabat Declaration, 3d Pan-African Conference of Ministers of Civil Service, Rabat, Morocco (Dec. 15, 1998).

[141] Recently, additional countries, such as Kenya and Malawi, have passed conflict of interest legislation, but such efforts have not been as comprehensive or as successfully implemented as South Africa's.

[142] Constitution of the Republic of South Africa of 1996 art. 32. Malawi's Constitution, art. 37, also has a right of access to information in its chapter on Human Rights.

[143] Code of Conduct for Assembly and Permanent Council Members § 7, *available at* http://www.pmg.org.za/parlinfo/codeofconduct.htm; Public Service Regulations of 2001 ch. 3, *available at* http://www.info.gov.za/gazette/regulation/2001/21951.pdf.

[144] *Id.* § 9.

[145] *See*, *e.g.*, Gyoseikikan no Hoyu Suru Joho no Kokai ni Kansuru Horitsu [Law Concerning the Disclosure of Information Held by Administrative Organs], Law No. 42 of 1999 (Japan), *available at* http://www.soumu.go.jp/gyoukan/kanri/translation4.htm; Act on Information Disclosure by Public Agencies, Act

South Korea and the Philippines are noteworthy in their approaches to combating corruption. In 1989, the Constitutional Court of South Korea held that South Koreans have a constitutional right of free access to information.[146] South Korea began requiring public disclosure of the financial interests of public officials in 1993.[147] All high-ranking public officials, their spouses, and many of their lineal ascendants and descendants must disclose their ownership of real property, intangible property, and shares in nonpublic business entities.[148] In addition to examination by a Public Ethics Committee,[149] the property declarations of most of these public officials and their families are published in a public bulletin within one month of their submission.[150]

Despite the lack of a specific freedom of information law, the Philippines is "one of the most open countries in the world."[151] Reaching as far back as 1948[152] and fundamentally grounded in the Constitution,[153] Filipinos have long enjoyed relatively unrestricted access to their government's records. This includes access to the financial disclosures of all public officials and employees, including their spouses and minor children living in their household.[154] These financial disclosures, which must be "made available for inspection at reasonable hours,"[155] contain information about all real property, personal property, investments, liabilities, and business interests.[156]

No. 5242, Dec. 31, 1996 (S. Korea), *available at* http://www.freedominfo.org/documents/korea%20980258118_korea.doc; Code on Access to Information, (1996) (H.K.), *available at* http://www.access.gov.hk; Official Information Act, B.E. 2540 (1997) (Thail.), *available at* http://www.oic.thaigov.go.th/content_eng/act.htm.

[146] *See* DAVID BANISAR, FREEDOM OF INFORMATION AROUND THE WORLD 2006: A GLOBAL SURVEY OF ACCESS TO GOVERNMENT RECORDS LAWS 70 (July 2006) (citing Right to Information (1 KCCR 176, 88HunMa22 (Sept. 4, 1989)), *available at* http://www.freedominfo.org).

[147] Public Service Ethics Act, Act No. 4566, Jun 11, 1993 (S. Korea), *available at* http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN019099.pdf.

[148] Intangible property disclosure is limited to (1) cash, deposits, securities, debts, and claims worth more than ten million won (about $10,900); (2) intangible property right that yield more than ten million won per year; (3) gold, platinum, precious stones, curios, and memberships worth more than five million won (about $5,450); and (4) transportation vehicles. *Id.* at Art. 4(2).

[149] *See id.* at Art. 9.

[150] *Id.* at Art. 10. Persons running for certain national and local elected offices must publish their property disclosures immediately upon declaring their candidacy. *Id.* at Art. 10-2.

[151] BANISAR, *supra* note 146, at 96.

[152] *Id.* (citing Subido v. Ozeta, G.R. No. L-1631, (S.C. Feb. 27 1948), *available at* http://www.aer.ph/images/stories/projects/id/cases/subido.pdf.).

[153] CONST. (1987), Art. III, Sec. 7 (Phil.).

[154] Code of Conduct and Ethical Standards for Public Officials and Employees, Rep. Act. No. 6713, § 8 (1987) (Phil.).

[155] *Id.* at § 8(C)(1). The Philippine Center for Investigative Journalism has posted the asset declarations of Congress and the Cabinet in an online database at http://i-site.ph.

[156] *Id.* at § 8(A).

Building upon the noteworthy conflict of interest regime in South Korea and the Philippines, many Asian countries have implemented varying degrees of financial disclosure laws and regulations. In Japan, senior public officials must file reports on gifts received in excess of ¥5,000 (about 130 PEN), securities transactions, and income in excess of ¥1,000,000 (about 26,000 PEN),[157] parts of which are available for review by the public.[158] Thailand requires full disclosures of all assets and liabilities of political office-holders and high-ranking public officials, including their spouses and minor children.[159] The National Counter Corruption Commission is responsible for publishing the financial disclosures of a number of the highest ranking public officials in the Government Gazette.[160] In India, the Election Commission requires all electoral candidates to submit affidavits containing their financial and criminal history, and these reports are made available on the Commission's website.[161]

V. Public interests in disclosure outweigh privacy interests

The value of open government co-exists with the value of individual privacy. Both are important values in democracies. However, while the right to privacy is generally accepted (although its contours may vary), it is not an absolute right. At times, privacy must give way to overriding societal interests such as the ability of law enforcement agencies to fulfill their duties to the public. Another of these overriding societal interests is guarding against unethical or corrupt conflicts of interest among government officials. Not only is this a significant societal interest, persons serving in government understand that their privacy interests will often need to yield to other significant public needs. When a person assumes public office or government employment, he or she takes on a special responsibility to the public and holds the public's trust. This requires, among other things, the relinquishment of certain privacy rights that must give way to the important public interests underlying a financial disclosure law. Unlike more sensitive aspects of personal life, disclosure of an official's financial interests generally does not infringe upon the central core of the official's right to privacy.

Confidence in government is another important societal interest that outweighs the value of privacy. A country's stability often depends on the confidence of the people in their government, and reliable public financial disclosures greatly increase citizen confidence in elected officials and government servants. Without assurance that the government is acting in the public's interest, a citizenry can easily become distrustful and the democracy unstable. A country's stability obviously outweighs the privacy interests of those who choose to serve in government positions.

While privacy rights are important, transparency is a defining characteristic of democratic government. Today it differentiates which countries have confidence in their government, and

---

[157] National Public Service Ethics Law, Law No. 129 of 1999, arts. 6-8 (Japan).

[158] *Id.* at art. 9 ("only that part which contains the report on the receipt of gifts or compensation worth more than ¥20,000").

[159] Organic Act on Counter Corruption, B.E. 2542, § 32 (1999) (Thail.), *available at* http://www.nccc.thaigov.net/nccc/document/doc_info/doc_info10.doc.

[160] *Id.* at § 40.

[161] *See* http://archive.eci.gov.in/Affidavits/Affidavits_fs.htm.

which are able to prevent corruption more efficiently than others. In fact, a country's capacity to prevent and sanction corruption has a direct correlation to the quality of its democratic posture. By increasing the strength of the financial disclosure system, this court has the opportunity and responsibility to strengthen the government of Peru and the citizens' confidence in and respect for that government.

VI. Successfully implementing a financial disclosure system

For a financial disclosure system to contribute to the creation of a stronger and more accountable government, the system must be *open* and provide public access to *meaningful* information. Openness requires that disclosures be made available to the public. Without this element, a system loses its ability to increase public confidence in government and decrease corruption. The second element of meaningful disclosure requires that information regarding spouses and financial dependants also be made available. Without this information, public disclosures lose significant strength because of the ease in which the goals of openness and accountability can be circumvented. It is almost impossible for a financial disclosure system to fulfill its responsibility of improving government without these two elements.

Peru's financial disclosure system will maximize its contribution to achieving these goals if financial disclosure filings are required to be made public in their entirety – with the possible exception of limited, security-sensitive information – and if they contain meaningful content. Enforcing these requirements will place Peru among the leading countries in Latin America and the world, measured in terms of efforts to strengthen democratic government and to decrease embarrassing and devastating corruption.

CONCLUSION

The Open Society Justice Initiative has shown in this submission that the right of access to government information – including access to the financial disclosures of high-level government officials – is well-established in international and comparative law and practice. Courts and lawmakers throughout the democratic world have determined that the right to receive government information is a basic political right, and, like the right to impart information and ideas, an actual prerequisite for the meaningful exercise of other fundamental rights in a modern democracy. Furthermore, there is a clear trend in the democratic world to consider free access to financial disclosure records as essential to ensuring the integrity and credibility of the government. Public access to financial disclosure filings by public officials is a justifiable and responsible intrusion into the rights of those officials to maintain the privacy of their financial information. Assuming public office and shouldering public trust require this privacy interest to give way to public accountability.

In this submission the Justice Initiative has also illustrated how, in established democracies and increasingly in Latin America and elsewhere, public disclosure is seen as an essential element in effecting accountability of government officials and enforcement of government ethics laws. While all nations do not presently require filing of financial information by officials, or make such filings fully available to the general public, the best

practice and clear trend is toward public disclosure of financial information for both the official and immediate family.

We respectfully urge this Tribunal to take cognizance of the important principles and procedures that accompany the administration of access to information and are embodied in anticorruption laws: disclosure by the official to the government, and disclosure by the government to the public. The result will help construct a fair and efficient framework governing access to financial disclosure information in Peru. Finally, it will highlight this Tribunal's recognition of the importance of access to this information as a foundation for an honest and open democratic government.

Dated: New York, New York, U.S.A.
November 19, 2007

Respectfully submitted,

For Open Society Justice Initiative

_____
Darian Pavli
Legal Officer

For Ropes & Gray LLP

_____
Thomas M. Susman
Partner

_____
Robert O. Varenik
Acting Executive Director