

Sunlight Where It's Needed: The Case for Freedom of Media Information

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1. INTRODUCTION

On September 5, 2016, *Aftenposten*, Norway's most widely circulated newspaper,¹ ran a front-page story reporting how Facebook has suspended an account on the social network, after its owner uploaded to his feed a status that included the iconic "napalm girl" picture taken during the Vietnam War. The paper naturally linked to the report from its Facebook account that morning. Facebook consequently deleted that post from the newspaper's page, citing the girl's nudity as the reason. *Aftenposten* editor-in-chief replied with a front-page open letter to Facebook CEO Mark Zuckerberg, crowning him "the world's most powerful editor" but expressing fear of what he is "about to do to a mainstay of our democratic society."² At the time of writing, this letter remains unanswered. Facebook may or may not have had good reasons for banning the picture from its platform. We will never know what they were, which is key for my discussion here.

Twenty years earlier, in 1996, CBS's chief correspondent Roberta Baskin reported a story exposing how employees in the factories producing Nike shoes in Vietnam were systematically abused.³ The story caused much outrage despite denials from Nike management. As Baskin was working on

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1. According to data compiled at the Media Studies department of the University of Bergen. See *Circulation of Norwegian Newspapers*, MEDIANORWAY, <http://medienorge.uib.no/english/?cat=statistikk&medium=avis&queryID=190> (last visited Mar. 12, 2017).

2. Espen Egil Hansen, *Dear Mark. I am Writing this to Inform You that I Shall Not Comply with Your Requirement to Remove this Picture.*, AFTENPOSTEN: KOMMENTAR (Sept. 8, 2016), <http://www.aftenposten.no/meninger/kommentar/Dear-Mark-I-am-writing-this-to-inform-you-that-I-shall-not-comply-with-your-requirement-to-remove-this-picture-604156b.html>.

3. The information here is based on Baskin's description of the events, as presented in the movie *Shadows of Liberty* (Docfactory 2012). The film in full length is available for online viewing at <http://shadows.kcetlink.org>.

a follow-up report, she received notice it has been taken off schedule because “there was some sort of deal being made between Nike and CBS news regarding the upcoming Winter Olympics.”⁴ The deal, allegedly, included a commitment on behalf of CBS not to air Baskin’s follow-up story. Baskin wrote a memo criticizing this agreement. CBS subsequently demoted Baskin from her position and buried the story.⁵

In these two cases, as in numerous others, powerful media corporations, one a news outlet and the other a social network, made decisions with implications on issues undoubtedly at the heart of public discourse (war atrocities and the social responsibility of international corporations). Such decisions are part of their job. What is interesting for the sake of this article is that the public has no means to receive any information useful for evaluating these decisions. In this sense, they are dramatically different from decisions made by any public agency, even one with much less impact on matters of public interest, and also from those made by many commercial entities with even a remote touching on public matters.

This article argues that there exist a dramatic “accountability gap” between the constitutional dimension of the media’s role in democratic societies and its scrutiny-free operation. It calls for creating transparency requirements from news organizations, and technology firms who control news distribution, as a tool to hold them accountable. This is required to deter unduly censorship, misinformation, and disinformation, and mitigate what British philosopher Onora O’Neill, describes as “the poisoning of the public discourse and public life.”⁶

My battle here is an uphill one. There exists a widespread notion that any form of regulation is a violation of “freedom of the press.” Any attempt to regulate in any way what the press can do or refrain from doing is seen as an *ipso facto* violation of freedom of the press. This view has deep roots in US constitutionalism. Its flaw is that it focuses on the dangers of regulation, but overlooks the serious dangers to the public of non-regulation. My argument in this article is that transparency requirements are a form of *soft regulation*, which strikes the proper balance between the two fears.

It was said, “If there is ever to be an amelioration of the condition of mankind, philosophers, theologians, legislators, politicians and moralists will find that the regulation of the press is the most difficult, dangerous and important problem they have to resolve.”⁷ I attempt here to contribute a

4. *Id.*

5. *Id.*

6. Onora O’Neill, *Shoot the Messenger*, GUARDIAN (May 1, 2002), <https://www.theguardian.com/comment/story/0,3604,707820,00.html>.

7. Letter from John Adams to James Lloyd (Feb. 11, 1815), in THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 117 (1856).

modest suggestion towards the resolution of this problem. The discussion is theoretical and can be applied to any democracy, though my discussion is situated mostly in American constitutional law with a look at U.K. law.

Part II begins with an account of the power of the press. It is followed by a lengthier discussion of how the press has evaded accountability requirements often applied to private institutions of such power. Part III presents the justifications for Freedom of Information (FOI) legislation and will examine their applicability to the news media. Part IV details a few of the fields I believe transparency should be specifically applied to, but will also discuss the effect of a general disclosure regime which obliges the news media to release any information in its possession, in the absence of considerations that outweigh the public's right to know. It will also refer to information held by the major information agents of the day—online search engines and social networks, without which no discussion of the news media is nowadays complete. Part V will present the U.K. case of the BBC and the “Balen report” as a test case for the current, and in my view mistaken, balance prevailing in courts between freedom of the press and its accountability. Part VI concludes.

2. POWER WITHOUT ACCOUNTABILITY

2.1. Power

This Part need not be too lengthy. The crucial function of the press in any democratic society seems to be a settled matter. It has been expressed so eloquently by so many, that there is little for me to add. It is still worthwhile to remind ourselves of some of the basic maxims on the press and the power it.

It is a commonplace to say that the press holds enormous powers. This is intuitive, but also backed by numerous researches. It can end the careers of leading politicians,⁸ bring down multi-billion dollar corporations,⁹ push

8. For the coverage of the MPs' expenses scandal that brought about the resignation of the speaker of the U.K. parliament and six cabinet ministers, see, e.g., *MPs' Expenses*, GUARDIAN (Mar. 30, 2009), <https://www.theguardian.com/politics/mps-expenses/2009/mar/30/all>.

9. In the Enron scandal, see, e.g., George J. Benston & Al L. Hartgraves, *Enron: What Happened and What We Can Learn From It*, 21 J. ACCOUNTING & PUB. POL'Y 105 (2002); Paul M. Healy & Krishna G. Palepu, *The Fall of Enron*, 17 J. ECON. PERSPECTIVES 3 (2003); BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* (2003).

governments to take action,¹⁰ mobilize voters¹¹ and public opinion, and generate objection to war¹² or support for it.¹³

Any organization amassing such public powers is of political significance. Robert Dahl suggests that any large corporation should be seen as a political force, due *among other things* to its ability to “exercise influence, power, control and even coercion.”¹⁴ News organizations easily meet these criterion. They may not be the largest corporations, but they are definitely amongst the most capable of exercising influence, power, and control. Their foundational role and enormous power in a democratic society cannot be overstated.

What is of importance is not merely the scope of power the media possess, but its public nature. The press performs functions for the public “in which its own existence as a free society may be at stake.”¹⁵ To a large extent, it controls the public sphere, where public discourse takes place. So much so, that media scholar Ben Bagdikian described it as “a new Private Ministry of Information and Culture.”¹⁶ Take the press away from a democratic society, and you have taken away one of the strongest bonds creating a polity out of a mass of individuals. Inflict harm on the service provided by the press, compromise its standards, taint its content, and you have harmed social unity, compromised it and tainted its foundation. When it comes to public discourse, it is the media—not the legislature, nor the executive or judiciary—that is, in the words of Jürgen Habermas, “[P]ublic sphere’s preeminent institution.”¹⁷

When Habermas wrote these words in 1989, he could not have had in mind new institutions which will practice even more power over the exchange of news information in society—technology companies such as

10. For an interesting account on the impact of media on policy makers, see David Strömberg and James M. Snyder, *The Media's Influence on Public Policy Decisions*, in INFORMATION AND PUBLIC CHOICE 17 (Roumeen Islam ed., 2008) (showing, among other things, how the U.S. government is more likely to offer aid to countries handling a natural disaster situation if it was widely covered by the media).

11. Stefano DellaVigna & Ethan Kaplan, *The Political Impact of Media Bias*, in INFORMATION AND PUBLIC CHOICE, *supra* note 10, at 79.

12. The Pentagon Papers affair was documented in the movie *The Most Dangerous Man in America* (Kovno Communications, 2009).

13. Such criticism was voiced against the Israeli media's functioning during the second Palestinian uprising in 2000. See DANNY DOR, INTIFADA HITS THE HEADLINES HOW THE ISRAELI PRESS MISREPORTED THE OUTBREAK OF THE SECOND PALESTINIAN UPRISING (2004).

14. R.A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 11 (1967).

15. ROBERT M. HUTCHINS ET AL., THE COMMISSION ON FREEDOM OF THE PRESS (1947).

16. EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT 4 (Pantheon Books 2002).

17. JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE 181 (MIT Press 1989).

Google, Facebook, and the like. Such corporations have today a bigger role in determining what news items will receive public attention than do editors in the leading news organizations. They are the most powerful information agents, in general, and regarding news information in particular. A 2014 research report found Google responsible for forty percent of the traffic to pages in news websites, and Facebook responsible for an additional twenty-six percent.¹⁸ Leading American newspapers have agreed to share revenue with Facebook generated by news items that will be opened directly from the social networks without people visiting the news site. One news editor criticized this move, saying, “We are de-emphasizing our role as editors who influence what you should be spending your time on.” Indeed, technology companies nowadays determine what public affairs the public spends its time and attention on.

Thomas Jefferson famously wrote: “were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.”¹⁹ It was Jefferson’s belief that public opinion can play a greater role than the law in regulating people’s behavior and preventing government officials from becoming “wolves” looking at fellow citizens as “sheep.”²⁰ In addition to serving as a check on political and other powers in society, the media is also the main forum for members of any political community to exchange ideas and make their voice heard as participation in the democratic processes.

These public benefits ascribed to a free press are what historically drove the struggle to achieve the right to free press.²¹ It is too often taken for granted that this is a right of news organizations, rather than of the public at large. Since it is in the name of the public and its interests that the press received various constitutional entitlements, it flows naturally that the same public, in the name of which the press demands and receives various privileges, has a right to see to it that the press indeed serves these public goals.

2.2. Without Accountability

The press is mostly comprised of private commercial entities (with some notable exceptions such as PBS, BBC, and *The Guardian* and from more

18. *How Efficient is the News?*, AUTHORITY REPORT (Oct. 2013 - Jan. 2014), <https://www.parsely.com/resources/authority-report-4>.

19. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *Founders Online*, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-11-02-0047> (last visited Mar. 12, 2017).

20. *Id.*

21. BRIAN HENRY LEVESON, AN INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS, at B § 2.17 (2012) [hereinafter Leveson Report]. In 1947, the Hutchins committee in the U.S. similarly analyzed the different foundations of freedom of speech and freedom of the press. See HUTCHINS, *supra* note 15.

recent times *ProPublica*, *Mother Jones*, and *The Intercept*). As we have seen, if there is any private commercial entity that has been trusted with carrying out a public function, it is no other than the press. Nevertheless, two factors—its private commercial nature and “freedom of the press” based claims come together to free it from any notion of public duty, or, in the words of British Prime Minister Stanley Baldwin, to grant it “power without responsibility.”²²

When private commercial entities provide public services, they are often required to subject themselves to various regulatory requirements, including at least some level of transparency. The utilities and health sectors provide good examples.²³ Many U.S. states have laws requiring hospitals, private as public, to be transparent about medical errors.²⁴ Some states require hospitals to report statistical data on the outcomes of certain high-risk medical procedures.²⁵ A recent and growing legislative trend among states imposes price and cost disclosure on health services providers.²⁶ The coverage of the U.K. Freedom of Information Act extends to “any person” providing medical services as a contractor or under another arrangement according to the National Health Service Act 2006, in respect of information relating to the provision of the service.²⁷ Many other private and commercial organizations are brought under mandatory disclosure requirements, even when providing what is considered purely private products²⁸—first and foremost financial

22. Which, as the quote goes, is “the prerogative of the harlot throughout the ages.” The phrase was borrowed from Rudyard Kipling. See The Rt. Hon. The Earl Baldwin of Bewdley, *The Unfading Genius of Rudyard Kipling*, in THE KIPLING JOURNAL 4 (1971), <http://www.kiplingjournal.com/textfiles/KJ180.txt>.

23. For a conceptual overview of the challenges of regulating the health sector through disclosure, see William M. Sage, *Regulating through Information: Disclosure Laws and American Health Care*, 99 COLUMBIA L. REV. 1701 (1999).

24. JILL ROSENTHAL & MAUREEN BOOTH, MAXIMIZING THE USE OF STATE ADVERSE EVENT DATA TO IMPROVE PATIENT SAFETY 3 (2005), http://www.nashp.org/sites/default/files/use_of_adverse_data.pdf; Aharon D. Twerski & Neil B. Cohen, *Second Revolution in Informed Consent: Comparing Physicians to Each Other*, 94 NW. U. L. REV. 1, 2 (1999).

25. David Weil et al., *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POL'Y ANALYSIS MGMT. 155, 173 (2006) (discussing the effectiveness of patient safety disclosure acts in Pennsylvania and New York).

26. For a list of such laws in thirty-one states, see *Transparency and Disclosure of Health Costs and Provider Payments: State Actions*, NAT'L CONFERENCE OF STATE LEGISLATURES (March 2017), <http://www.ncsl.org/research/health/transparency-and-disclosure-health-costs.aspx>.

27. Freedom of Information Act, 2000 c. 36, Schedule I, Part III, §§ 43A, 44, 45, 45A.

28. For an in-depth discussion of existing disclosure requirements on private corporations, see ARCHON FUNG, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY (2007); Roy Peled, *Occupy Information: The Case for Freedom of Corporate Information* 9 HASTINGS BUS. L. J. 261 (2013).

products.²⁹ Disclosed information is used by the public at large, and very often by the press as it holds power to account. However, the press itself suffers no such duties.

The lack of public oversight over press conduct is no accident of history. When it was suggested to extend the U.K.'s FOI law to cover the (now defunct) Press Complaints Commission (PCC, a council of private commercial media),³⁰ the Commission based its opposition among other reasons, on "the inherent undesirability of direct regulation of the press".³¹ Interestingly, ITV-PLC and Channel 5 Ltd., two privately owned commercial broadcasting services, wrote to the Justice Ministry together that bringing commercial public service broadcasters under the scope of the act "could not be reasonably justified."³²

One could argue that in a free society the plethora of news organizations increases accountability in the press sector itself, as they hold each other to account. As a descriptive matter, this seems not to be the case. When media scandals in the U.K. were revealed in 2010, a public inquiry commission that was subsequently appointed to look into press ethics noted that "the press did nothing to investigate itself or to expose conduct which, if it had involved the Government, Parliament, any other national institution or indeed any other organization of significance, would have been subject to the most intense spotlight that journalists could bring to bear upon it."³³

Least accountable are the technological information agents. Not only are they private corporations, as are most news organizations, but they are also free from any journalistic ethos or commitment to the public discourse. In 2008, Google CEO Erich Schmidt described as "disturbing" the fact that people prefer reading about popstar Britney Spear than about more public

29. As imposed in several federal acts, most notably the Securities Act of 1933 (15 U.S.C. § 77), Securities Exchange Act of 1934 (15 U.S.C. § 78a), and The Sarbanes-Oxley Act of 2002 (Public Law 107-204, 116 Stat. 745-810). For a description of the legislations and their full text, see *Fast Answers, Laws that Govern the Securities Industry*, U.S. SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/about/laws.shtml>.

30. By the National Union of Journalists in a letter to the Ministry of Justice (Jan. 2008), The Campaign for Press and Broadcasting Freedom in a letter to the Ministry of Justice (Jan. 24, 2008), and the Campaign for Freedom of Information: Maurice Frankel and Katherine Gundersen, Response to the Ministry of Justice Consultation (Mar. 3, 2008) (on file with author).

31. Letter from PCC director to the Ministry of Justice Information Rights Division (Jan. 24, 2008) (on file with author).

32. Letter from Director of Regulatory Affairs, ITV and Director of Corporate Affairs, Five to the Ministry of Justice (Feb. 1, 2008) (on file with author).

33. Leveson Report, *supra* note 21, executive summary ¶¶ 21, 23. Joseph Stiglitz holds a more optimistic, and I would argue less valid, view of competition in the media, writing: "Multiple media can provide an important set of checks and balances. In other words, each reporter or newspaper has an incentive to uncover the mistakes or distortions of others." Joseph Stiglitz, *Fostering an Independent Media with a Diversity of Views*, in INFORMATION AND PUBLIC CHOICE 139, 145 (Roumeen Islam ed., 2008).

matters.³⁴ Yet he didn't as much as entertain the thought that perhaps Google has a role in shaping such preferences, saying "We love our consumers, even if I don't like what they're doing."³⁵ When it comes to the handling of specific cases, technology firms are much less candid. When in 2015 Facebook shut down the account of an Israeli social activist attacking the country's leading bankers, company spokespeople consistently refused to comment on the decision, referring only to "Facebook terms" and "community standards."³⁶ In 2016, when posts linking to stories critical of the company's Israel PR firm were taken off the air, the company would only say that it is "investigating the matter."³⁷

News organizations, joined nowadays by technological information agents, are of the most powerful and of the least accountable organizations in society. They enjoy this accountability gap largely because of the fear of violation of freedom of the press or the freedom of expression they and technology companies allegedly enjoy.³⁸ I will argue below that there is nothing in press freedom to justify preventing public scrutiny of the use, misuse, and abuse of the power the press holds.

3. FOIA AND THE PRESS

I have shown thus far that the media hold considerable power, that this is power exercised in the public sphere, but that they are unique among organizations of similar power in that they are free of any disclosure requirements.

Jurgen Habermas argued against this state of affairs, writing that:

[P]ublicity is also to be extended to institutions that until now have lived off the publicity of the other institutions rather than being themselves subject to the public's supervision . . . also to politically influential mass

34. Erich Schmidt, *Interview with Gary Hamal*, MANAGEMENT LAB SUMMIT (May 2, 2008), <https://goo.gl/TUpSWI>.

35. *Transcript of Google CEO Erich Schmidt O&A at NAA*, POYNTER (Apr. 7, 2009), <http://www.poynter.org/news/mediawire/95079/transcript-of-google-ceo-eric-schmidts-qa-at-na>.

36. Dori Ben-Israel, *Facebook Removed the Page "Coming to the Bankers" Referring to Bullying on Behalf of Barak Cohen and Eran Vered*, MIZBALA (Sept. 3, 2015), <http://mizbala.com/digital/social-media/103659> [in Hebrew]. In spite of the headline, Facebook did not actually cite a specific reason. Reference to bullying was made in the automatic message sent to page owners announcing the "unpublication" of the page and inviting owner to the company's "Bullying Prevention Hub."

37. Oded Yaron, *Is Facebook Censoring Posts Critical of the Social Media Giant?*, HAARETZ (Aug. 23, 2016), <http://www.haaretz.com/israel-news/.premium-1.738010>.

38. Such a claim a technology company was upheld by a New York federal court in *Zhang v. Baidu*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014).

media . . . [t]hese are all institutions of societal power centers . . . that exercise public functions within the political order.³⁹

I will now proceed to justify applying disclosure requirements to the media. I will argue that the underlying principles of Freedom of Information (FOI)⁴⁰ laws are comfortably applied to such organizations. This is not to say that there are no distinctions between news organizations and public agencies in the level and nature of transparency justified. I will in later parts of the article detail the topics which I argue require most transparency in news organizations (issues such as finance and ownership but also sources, decision-making processes and more), and the form of general disclosure I see justified.

FOI laws are now in action in more than 100 countries worldwide,⁴¹ including almost all liberal democracies. This is a rather modern development. More than ninety of these laws have been enacted in the past twenty-five years.⁴² In many countries, the right to receive information from public authorities is a constitutional right.⁴³ FOI laws have gained popularity, as they are believed to promote the fight against corruption⁴⁴ (although this nexus has been debated⁴⁵) and for good governance. They share another important function—limiting the power of government and empowering the press and the public as a whole. They reach this effect through the power gained by access to information.

In the following sections, I outline the major justifications for recognition of a right to obtain information from public authorities. For each, I will examine whether it can be applied to news organizations.

39. HABERMAS, *supra* note 17, at 209.

40. “Freedom of information” is the term accepted internationally to describe the right of the public to receive information from public 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 article with the same meaning.

41. The most comprehensive and up to date tally appears on the freedominfo.org website, a FOI portal managed by the National Security Archives at George Washington University. It counts 113 countries as of October 2016. See *Chronological and Alphabetical List of Countries with FOI Regimes*, FREEDOMINFO (June 30, 2016), <http://www.freedominfo.org/2016/06/chronological-and-alphabetical-lists-of-countries-with-foi-regimes>.

42. *Id.*

43. Roy Peled & Yoram Rabin, *The Constitutional Right to Know*, 42 COLUM. HUM. RTS. L. REV. 357 (2010).

44. 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 QOG WORKING PAPER SERIES (2005), http://www.pol.gu.se/digitalAssets/1350/1350633_2005_5-lindstedt_aurin.pdf.

45. For a few challenging the utility of FOI laws in fighting corruption, see Samia Tavares, *Do Freedom of Information Laws Decrease Corruption?*, MPRA Paper (2007), <http://mpa.ub.uni-muenchen.de/3560>.

3.1. Justifications

Four major justifications are often cited for recognizing the public's right to receive information from public authorities.⁴⁶ They are: (1) the proprietary justification (information is public property); (2) the instrumental justification (information is necessary to protect other rights); (3) the oversight justification (information is required for practicing public oversight), and (4) the civic-democratic justification (information is required for meaningful civic participation in the political process).

3.1.1. Proprietary

The proprietary justification states that information held by public authorities is, in fact, the property of the country's citizens. As such, citizens are meant to enjoy free access to it. The rationale behind this is either the status of citizens as the sovereign, or the fact that taxpayers' money was used to create and collect the information, or the status of civil servants controlling the information as trustees of the public.⁴⁷

Private news organizations are considered the property of their owners, not the public at large. If property is a person's "sole and despotic dominion,"⁴⁸ then the owners of news organizations have the right to exclude others from the information they hold. Modern theories of property offer a more varied approach to property and the rights it entails.⁴⁹ The "stakeholder theory" holds that owners have duties towards others, including consumers.⁵⁰ Stakeholders include neighbors of a polluting factors, employees whose livelihood is dependent on their workplace, as well as consumers and other individuals who have a "stake" in the operation of the business. The theory suggests that firms should consider the preferences of *all* interested parties and not just those of stockholders. Others, like Dahl, have argued that

46. For a more detailed discussion of this justifications and their theoretical background, see Peled & Rabin, *supra* note 43.

47. In the words of the Australian Parliament's Reform Commission:

The information holdings of the government are a national resource. Neither the particular Government of the day nor public officials collect or create information for their own benefit. They do so purely for public purposes. Government and officials are, in a sense, "trustees" of that information for the Australian people.

Australian Law Reform Commission, OPEN GOVERNMENT: A REVIEW OF THE FEDERAL FREEDOM OF INFORMATION ACT 1982, at 22 § 4.9, [http://www.arc.ag.gov.au/Documents/Report+40+-+word+version+\(ARC++ALRC\).doc](http://www.arc.ag.gov.au/Documents/Report+40+-+word+version+(ARC++ALRC).doc).

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

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

50. The theory was first presented in EDWARD R. FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984). However, the idea that managers owe fiduciary duties to constituencies other than stockholders is not new. This argument was made as early as 1932. See Merrick E. Dodd, *For Whom Are Corporate Managers Trustees*, 45 HARV. L. REV. 1145 (1931).

powerful corporations should be viewed as *political* institutions and treated as such.⁵¹ If such a notion were accepted, it would surely apply to major news organizations. There are also scholars who have attached social responsibility to the status of ownership, instilling into it commitments toward society, including an obligation to allow other individuals access to the owned property under certain circumstances.⁵²

In a way that would justify giving the public rights to access “their” information, one may admit that the proprietary justification is not easily applied to commercial media. However, such a claim is not entirely without merit. The news is one of those few products which are consumed by almost everyone. The public has at least those rights it is entitled to as consumers. Furthermore, the stakes for news consumers are much higher than many other types of consumers. If neighbors are stakeholders in polluting factories, and community residents are stakeholders in dominant companies that control the community’s economy, then members of the public at large are at the least a significant “stakeholder” in the news industry. Malfunctioning news organizations can pollute the public discourse and cause irreversible damage to any democratic community. The public may not enjoy property rights in these organizations, but a stakeholders approach to their management may serve to confer fiduciary duties on their managers, reporters, and editors, including opening a discussion on transparency duties.

3.1.2. Instrumental

Some interests should be elevated to the level of a legal right because they are prerequisites for the fulfillment of other recognized rights, a *sine qua non*. For example, the right of education is a precondition for substantially fulfilling one’s right to vote and other liberties. In the words of Isaiah Berlin, “If a man is too poor or too ignorant or too feeble to make use of his legal rights, the liberty that these rights confer upon him is nothing to him.”⁵³

The right to information is similarly a prerequisite to the fulfillment of many other rights. “It is perhaps an underpinning of democracy that freedom of information is most important . . . [u]nless there are good reasons for withholding such information, everyone should have access . . . [freedom of information] is a key component of a transparent and accountable

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

52. See Hanoch Dagan, *Exclusion and Inclusion in Property* (Tel Aviv Univ. Law Sch., Working Paper No. 109, 2009); Hanoch Dagan, *The Social Responsibility of Ownership*, 92 *CORNELL L. REV.* 1255 (2007).

53. Isaiah Berlin, *Introduction*, in *FOUR ESSAYS ON LIBERTY* iiiii (1969).

government.”⁵⁴ For instance, the ability to advocate for social rights hinges on the ability to access information.⁵⁵ If one wishes to protect his health, he is in need for information on the nutritional value of the food he is consuming. If town residents want to campaign for air quality, they first need to know the levels of pollutants released from the nearby factory. The right to personal autonomy entails a right for full disclosure of information regarding medical procedures one undergoes. The list goes on and on.

As far as the press is capable of violating rights of individuals and groups, the information it possesses might prove crucial to defending other human rights or remedying their violations. The most immediate examples relate to the harm to reputation and breach of privacy. Where those suffering harms from the press seek remedy in a court of law, they have discovery rules in place to assist them. These have been described as a “focused version of FOIA.”⁵⁶ But not all controversies are sorted out in a courtroom. If a person wishes to correct a story published in her regard, she might need to know what sources the reporter relied on. These may be confidential sources in need of protection, but may also be public record or spokespersons of organizations with competing interests. When a group which has been smeared in the press wants to protect its reputation, it may need access to information collected by a journalist to be able to reply. Alternatively, it may want access to correspondence leading to the story, minutes of editorial meetings, or information revealing a financial or other interest of the news organization in their story. Perhaps more importantly, the knowledge that under some circumstances such information might be disclosed could serve as a deterrent (some would say an overwhelmingly powerful one) to unnecessary violations of rights.

3.1.3. Oversight

We now reach the first of two primary justifications in our discussion. First is the oversight function of transparency. Indeed, Freedom of the Press itself is guaranteed in democracies because of the important role of the press as a monitoring mechanism, a watchdog to those in power. In the words of

54. Toby Mendel, *Freedom of Information as an Internationally Protected Human Right*, ARTICLE 19, <https://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf> (last visited Feb. 9, 2017).

55. The growing effectiveness of social pressure groups is often attributed to their improved access to (and use of) information. See JEFFREY M. BERRY, *THE RISING POWER OF CITIZEN GROUPS* (1999); BROOKINGS INST., *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* (Theda Skocpol & Morris P. Fiorina eds., 1999).

56. Jack M. Beermann, *Administrative-Law-like Obligations on Private[ized] Entities*, 49 *UCLA L. REV.* 1717, 1723 (2002) (“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 discourse of that information”).

Louis Brandeis, “the best of disinfectants.”⁵⁷ One of the major justifications to Freedom of Information laws, perhaps the most intuitive and widely accepted, is their role in the battle against corruption.⁵⁸ It is not just corruption that the public has the right to know about and receive information on. Civil servants are trustees of the public. The public thus has the right reserved to any beneficiary to monitor her trustee. Beneficiaries have no need to uncover or even suspect corruption to justify their oversight. In the public sphere, such a review may indicate that officials have invested innocently but unwisely, even while bearing the public good in mind.⁵⁹ As long as the trustees operated free of any conflicts of interest, or extraneous considerations—their conduct is not a matter for law enforcement. The same does not apply to the public trial. The public is entitled to demand an account of its trustees’ actions and the exercise of their judgment. It may demand that they act not only reasonably, but optimally. Such oversight requires the public’s access to information.

Taking this justification to the press finds that the public has a vested interest in the proper and professional functioning of the press. It has an interest in being able to assess the credibility of the news the media provides it with. “Reporting that we cannot assess is a disaster. . . How can we tell whether and when we are on the receiving end of hype and spin, of misinformation and disinformation? . . . What we need is reporting that we can assess and check.”⁶⁰

The importance of information to be able to evaluate the trustworthiness of news items can be exemplified with the following two stories.

The “Pentagon Military Analysts Program,” launched by the United States Department of Defense, consisted of a select group of retired generals who were frequent military analysts in the media. Many had business interests in the Pentagon. They were given access to confidential documents and then asked to reiterate DoD talking points in their “objective” analysis in the electronic media. Some information was not disclosed to analysts unwilling to subject themselves to such manipulation.⁶¹ Participants were expected to serve as “message force multipliers.” When the program was

57. LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1913).

58. See *supra* note 19.

59. A similar point is made in Joseph Stiglitz, *Fostering an Independent Media with a Diversity of Views*, in *INFORMATION AND PUBLIC CHOICE: FROM MEDIA MARKETS TO POLICY MAKING* 139, 141 (Roumeen Islam ed. 2008) (“Even without corruption, all individuals are fallible, and the consequence of human fallibility is that there has to be shared decision making.”).

60. O’Neill, *supra* note 6.

61. The program became known to the public through a Pulitzer Prize winning New York Times coverage that began with David Barstow, *Behind TV Analysts, Pentagon’s Hidden Hand*, N.Y. TIMES (Apr. 20, 2008), <http://www.nytimes.com/2008/04/20/us/20generals.html>.

revealed by the *New York Times*,⁶² a series of internal investigations by the Department of Defense followed.⁶³

The story warrants questions regarding the conduct not only of government officials, but of the media as well. Were the networks aware of this manipulation? Did they consider the conflicts of interest of their analysts? Such questions were indeed asked, but no legal tools were available to make the networks answer. The coverage story itself, was met by the networks with what *Politico* described as “deafening silence.”⁶⁴ Questions sent out by a Congresswoman to the five major networks (ABC, CBS, NBC, FOX, and CNN) regarding their conflict-of-interests policies and their implementation in this case, were never replied to by three networks, and two others (CNN and ABC) offered very partial answers.⁶⁵ The DoD was held accountable, but questions to the media remain unanswered.

Another example comes from Israel. In July 2016, an administrative court rejected an appeal of a journalist to receive information from the office of Prime Minister Benjamin Netanyahu about his phone conversations with American casino mogul Sheldon Adelson and with the editor-in-chief of Israel’s most widely circulated newspaper owned by Adelson. The newspaper is considered by many to be strongly biased in favor of the Prime Minister. The court accepted that the Prime Minister could not argue for breach of his privacy, but also accepted that the editor and publisher have a right to privacy that justifies withholding the information.⁶⁶

In both cases, the lack of any accountability measures that would force more transparency on the media compromises the public’s ability to assess the information provided to it by the media. If one may paraphrase James Madison’s famous quote, a citizenry without information *on the information it is given*, “or the means of acquiring it, is but a prolog to a farce or a tragedy; or perhaps both.”⁶⁷

62. Clark Hoyt, *Information that Doesn't Come Freely*, N.Y. TIMES (May 11, 2008), <http://www.nytimes.com/2008/05/11/opinion/11pubed.html>.

63. A first report was prepared by the Department of Defense Inspector General, and later withdrawn to public criticism of its methodology. See also David Barstow, *Inspector at Pentagon Says Report Was Flawed*, N.Y. TIMES (May 5, 2009), <http://www.nytimes.com/2009/05/06/us/06generals.html>.

64. Avi Zenilman & Michael Calderone, “Deafening” Silence on Analyst Story, POLITICO (May 8, 2008), <http://www.politico.com/story/2008/05/deafening-silence-on-analyst-story-010204>.

65. Glenn Greenwald, *CNN, the Pentagon's "Military Analyst Program" and Gitmo*, SALON (May 9, 2008), http://www.salon.com/2008/05/09/cnn_abc.

66. AdminC (Jer) 28606-09-15 Drucker v. Comm’r for Freedom of Info. in the Prime Minister, (2015) (Isr.).

67. James Madison, *James Madison to W.T. Barry*, FOUNDERS’ CONSTITUTION (Aug. 4, 1822), <http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html>.

3.1.4. Civic-Democratic

“The democratic system of government is nourished by—and is dependent on—the open and free flow of information which focuses on the core issues that influence community and individual life . . . the free flow of information is the ‘key’ to the operation of the entire democratic system.”⁶⁸ Information is required to understand the political processes, and no less important, to voice a view on any current affairs. This notion is one foundation for inclusion of the right to request as well as obtain information in article 19 of the Universal Declaration of Human Rights of 1948,⁶⁹ which guarantees the right to “freedom of thought and expression.” The 1966 U.N. International Covenant on Civil and Political Rights also includes seeking information in the right to freedom of expression in its own article 19:

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.⁷⁰

Information provided by the media shapes people’s opinion on public affairs. The publication of the “Pentagon Papers” in 1971 caused public outrage because they showed how the American public had been misinformed about the war.⁷¹ The government fought the disclosure of the leaked documents up to the Supreme Court and failed. During the war in Iraq, several media campaigns played a role in turning many in the U.S. against the war. When the Bush Administration banned the publication of pictures of coffins of fallen soldiers arriving at Dover air base, citing privacy concerns, they were taken to court by a retired journalist, Ralph Begleiter, who successfully argued that the true reason was a desire to conceal from the public graphic evidence of the human cost of the war.⁷²

Numerous examples can be added to show how information disclosed to the public supported its ability to participate in public debate and voice its opinions on matters on the public agenda. It is not just government that controls such information. In today’s political world, private corporations

68. HCJ 1/81 Shiran v. Pub. Broad. Auth. PD 35(3) PD 365, 378 (1981) (Isr.).

69. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at 19 (Dec. 10, 1948).

70. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 19-2 (Dec. 16, 1966).

71. Support of the war has been declining for years and it is hard to assess the contribution made to this process by the publication of the papers. Yet there seems to be no question they contributed significantly to disillusionment among the American public about the war.

72. *Return on the Fallen: Pentagon Releases Hundreds More War Casualty Homecoming Images*, NAT’L SEC. ARCHIVE (Apr. 28, 2005), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB152>.

are amassing more and more power and influence on public affairs.⁷³ It comes without saying that of these, the private companies with impact on public opinion are news organizations. FOI legislation offers a tool to look behind government curtains and its use of information in shaping public opinion. No such tool exists when it comes to the press, although much of the information in its hands may be of utmost public interest. That is, if we believe the public should be aware of the way the forces that shape public opinion operate.

Consider the story of Roberta Baskin presented at the opening of this article. It is alleged that CBS removed from the public sphere information on the conduct of an American corporation overseas. There are two different types of information in this story, which are of much public importance. The first relates to the conduct of CBS itself. If CBS indeed agreed to hide such information from the public in return for Nike's business, this could be a grave violation of media ethics. The contract between the parties, as well as internal correspondence regarding its implementation, is necessary for being able to assess whether indeed CBS is guilty of such unethical journalism.

The second type of information is the hidden story itself. Somewhere in the CBS archives lies filmed information, which a mega-corporation was allegedly willing to spend a significant amount of money to keep hidden from the public. This information was removed from the public sphere not because it was of no interest, but precisely the opposite—because of the interest in it. Corporate misconduct was in the 1990s, and remains in the 2010s an issue of huge public interest. There are efforts on various levels, civic, legislative and others, to hold corporations accountable for human rights violations they engage in. CBS holds this information because it is its duty, for which it received a license from the Federal Communications Commission, to bring such information to the public sphere. It chose to withhold it from entering the public discourse. Questions of copyright law notwithstanding, the public should have a right to access such information. It is information useful for any citizen that wants to partake in the open debate on corporate vices.

However, pure business information of a news organization itself, not related to coverage of any news item, can also be of utmost importance for the public to voice their opinions. This is the case with *Yisrael HaYom* (Israel Today) Adelson's newspaper in Israel, mentioned above. It is a giveaway paper, distributed for free in numerous distribution stations but also delivered for free to the homes of subscribers. The newspaper, like other commercial media organizations, does not disclose any information on its internal affairs. But it has been alleged in court proceedings that the editor of the newspaper

73. I further developed this idea in respect to corporations in general in Roy Peled, *Occupy Information: The Case for Freedom of Corporate Information*, 9 HASTINGS BUS. L.J. 261 (2013) (discussing how corporations are amassing more power and influence).

was hired as a request of Bibi (Benjamin Netanyahu) and Mr. Adelson and that Adelson pours millions of U.S. dollars each month to cover the newspaper's operational losses.⁷⁴ This is a story that raised huge interest in Israel. At stake was whether a foreign billionaire was using his enormous wealth to influence local politics. The answer lies to a large extent in the audit reports of *Yisrael HaYom*.⁷⁵ This is information highly relevant to an ongoing public debate on a political affair of the first magnitude. The effective public discussion, one that extends beyond vague allegations, is in practice prevented by the concealment of the information required for the discussion. The public lacks information on the actual corporate structure of the newspaper and its political as well as personal bias.

The traditional media together with the more recent online platforms, in theory as in practice, holds the key to public discourse. It controls much, if not most, of the information required for such discourse.⁷⁶ With politicians, we are suspicious that they are insincere and care for their own political interests and thus cannot be trusted.⁷⁷ We then turn to the media for information we can rely on. The quality of public discourse, its meaningfulness, and effectiveness, hinge largely on the quality of information supplied by the press. In the words of Hannah Arendt, "Freedom of opinion is a farce unless factual information is guaranteed and the facts themselves are not in dispute."⁷⁸ In this sense, the media is one of the most important political institutions. The public has a right, perhaps a duty, to access information that will allow it to be involved in the discourse about the media itself, not just about its reportage. As of now this information is entirely out of citizen's reach.

3.2. *Objections*

I have explained above why I believe there is deep public interest in access to media information, and why this interest justifies the opening of

74. Oren Persico, *Smoking Gun*, 7 EYE (Aug. 26, 2011), <http://www.the7eye.org.il/12925>.

75. Needless to say, loss alone does not prove this point. Many print newspapers suffer ongoing losses in the past years. However, the size and stability of the losses with no reasonable business plan to alter this course would serve as strong indicators to the validity of the allegations against the newspaper and Adelson.

76. This statement has been debated by one of the commentators on this article, arguing that this has changed or at least is changing in the Internet era. This might be true as a matter of process, but for the current being, there are several indicators showing that while indeed the blogosphere and social media are playing a major and growing role in the dissemination of news, they still largely rely on the traditional media in bringing the information to the public sphere for them to spread.

77. For a discussion of the tension between politics and truth, see HANNAH ARENDT, *THE PORTABLE HANNAH ARENDT* 546 (Peter Baehr ed., 2000) (discussing the tension between politics and truth).

78. *Id.* at 554.

media information to the public in a way similar to how the opening of government agencies is warranted. Such a move is not problem-free. I will now address a few of the problems it raises.

3.2.1. Press's Freedom of Speech

One argument against bestowing transparency duties on the press is that such an act would violate the press' right to freedom of speech. This argument builds on two assumptions. First, that press corporations have a right to freedom of speech; and second, that forcing them to disclose information would violate it.

Discussing the first assumption draws us into the debate regarding corporate personhood and corporate rights. This is a major debate going on for decades, and this article cannot encompass even a portion of it. For the purpose of our discussion, it suffices to say that there are serious arguments, and in the author's view, convincing ones, made against the notion of corporate rights and corporate personhood.⁷⁹ The notion itself is based on shaky grounds in the legal history of the United States, from where it spread to the rest of the common law world.⁸⁰ It is, to say the least, not a given that corporations are entitled to constitutional rights.

However, even if car manufacturers, software companies, and cereal producers do not enjoy first amendment protection, perhaps media organizations are unique, and should enjoy such protection because of their special role in society? Opposing opinions on this question have enjoyed support among U.S. Supreme Court justices.⁸¹ The answer, I argue, lies in the dominant motive of the news organization. If it is one of profit, where the news serves a wider effort to make a profit and editorial decision are subject to profit-making considerations, then granting first amendment protections to the organizations will primarily serve profit making and not

79. The most elaborate, detailed and convincing account of such arguments I am aware of appears in Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583 (2008). For a history of the commercial speech doctrine in the United States and a very different approach to commercial free speech, see Nicole B. Casarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. 929 (1998). I offered my own rebuttal to some of the arguments in favor of recognition of constitutional corporate rights in Peled, *supra* note 73, at 278.

80. For a critical historical account of the development of "corporate personhood" see Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985). For traces of the theory of corporations as persons in continental Europe, in somewhat different forms, see Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 566-69 (1987).

81. David S. Allen, *The First Amendment and the Doctrine of Corporate Personhood*, 2 JOURNALISM 255, 263 (2001), <http://journals.sagepub.com/doi/pdf/10.1177/146488490100200303>.

public discourse.⁸² This is a difficult line to draw, but given my following point, regarding the second assumption, it is not necessary that we conclude the exact position of the line at this point.

Do disclosure obligations violate freedom of speech? The argument here is that this is a form of “compelled speech” and a violation of the right not to speak or “negative speech.”⁸³ But one of the main justifications of free speech, to begin with, is the vitality of free flow of information to any open society and the individual’s search for truth. This is particularly the case with *factual* information.⁸⁴ Raising the free speech flag to protect an alleged right to prevent factual information from entering the public sphere is an abuse of the idea of free speech. This is not to say that transparency requirements from the media do not raise other concerns, as discussed below.

3.2.2. Compromising Freedom of the Press

The third objection, and the one that carries the most weight is that applying disclosure requirements to the press may compromise its freedom. Hannah Arendt contended that “if the press should ever really become ‘the fourth branch of government,’ it would have to be protected against government power and social pressure even more carefully than the judiciary is. For this crucial political function of supplying information is exercised from outside the political realm.”⁸⁵ In her view, any social pressure from basically anyone with an opinion or ideology to serve is antithetical to the press’s commitment to truth telling. Requests for information, and more so operation in conditions of transparency, may indeed inflict such pressures as Arendt feared, on the press. This can be the case, for instance, when information is sought by competitors, business or ideological, to expose faults in the newspapers conduct and perhaps misrepresent them, take them out of context or proportion. This can be the case where internal information is used to turn the public against a media organization because of the way it

82. For different views on the role of profit-making in the determination of First Amendment protection, see *Fed. Election Com. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

83. For the development of Supreme Court jurisprudence on the matter, see Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL’Y & L. 205 (2011).

84. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he 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 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies . . . the remedy to be applied is more speech, not enforced silence.”), *overruled by Brandenburg v. Ohio*, 395 U.S. 444 (1969).

85. ARENDT, *supra* note 77, at 572.

reached one or other decisions. In short, as in every information battle, information can be turned against its original owner when out in the light.⁸⁶

Were the press comprised of a group of distantly secluded journalists, dedicated to meticulously searching for nothing but facts and publishing them in the most neutral gazette-like fashion, Arendt would have had it right. Any intrusion into their bubble might have been harmful. But the press never operated this way and it is not likely it ever will. In reality, journalists, editors, and publishers inevitably have to take numerous decisions based on several subjective factors: their professional judgment on matters such as what is of public interest; their opinions regarding questions like what is important and what is not, what is reasonable framing of a fact; and their business and other organizational interests. This being the case, the press is indeed another political actor, with opinions and interests.

The press being a political actor does not negate the notion that it should be free of external pressure—governmental or social. But it does present this concept with some serious problems. On the one hand, the sought freedom is justified by the need to be able to tell any truth free of any pressure or fear of any consequences. On the other hand, the press is inherently susceptible to the pressures described above of judgment, opinions, business, and organizational interests. Transparency requirements which open the media to social pressure might serve *to balance* these other pressures. Politicians, business partners, advertisers, sponsors, lobbyists, PR professionals—all apply pressure on the press in many various ways. The added pressure that may result out of transparency requirements will come from groups that are otherwise the least empowered, least capable of reaching the information that serves their own interests. It is not clear that democracy is better served when these are the only groups prevented from applying pressure to this highly valuable machine laying the grounds to the public discourse (while business interests and organizational interests are free to do so).

In this dilemma, I believe the proposition promoted here strikes a delicate balance. Requiring news organizations to be more transparent is a soft form of pressure. Disclosure requirements are the least intrusive of pressures.⁸⁷ In themselves, they do not present any demand that interferes

86. Lawrence Lessig, *Against Transparency*, NEW REPUBLIC (Oct. 8, 2009), <https://newrepublic.com/article/70097/against-transparency>.

87. In a rating of twelve levels of interventions of “interest holders” in the life of a corporation, informing was rated as third least intrusive. ANDREW L. FRIEDMAN & SAMANTHA MILES, *STAKEHOLDERS: THEORY AND PRACTICE*, 167-68 (2006). *See also* Cass R. Sunstein, *Private Broadcasters and the Public Interest: Notes Toward a “Third Way”* 4 (Chi. Law & Econ., Working Paper No. 65, 1999) (presenting “[m]andatory public disclosure of information about public interest broadcasting, unaccompanied by content regulation” as one of three “less intrusive and more flexible instruments” to promote public interest goals in the broadcast media). For the regulatory

with the media's professional work. They may help substantiate certain public demands from news organizations, but do not give the government or the public any direct control power.⁸⁸ If such requirements compromise any freedom of the press, it is the freedom conceal, which to begin with seems antithetical to the goals of the press (except, of course, where concealment serves other disclosure, as is sometimes the case with confidential sources).

One question is: Can freedom of the press be defined to include the right to conceal information, other than when concealment is necessary for the carrying out of journalistic work? If freedom of the press includes a right to conceal information from the public, it works against the same public it aims to serve. The balance is intrinsic. It is not between competing forces. Where concealment serves the public interest, it should prevail; where it diserves it, it should not. It is the interest of the public in disclosure or concealment, not that of the journalist, editor or publisher, that is paramount.

3.2.3. Press's Property Rights (NOYB)

Another possible argument that against media disclosure duties is that enforcing such obligations on privately held news organizations would breach their property rights, their right to run their business as they see fit without external intervention. This accepts the concept of property as a "sole and despotic dominion." However, as illustrated above, there are nowadays alternative approaches to the narrow traditional approach to property rights. 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.⁸⁹ 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 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.⁹⁰ Where the use of information by others does not harm the owners reasonable enjoyment of it (as is often the case with information), Dagan argues that allowing access to

force of transparency, see Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339 (2011).

88. Amitai Etzioni in his discussion of the limits of privacy suggests this distinction between "accountability (matters the government is or is not entitled to "watch") and control (the "decisional" realm, choices the government is or is not entitled to make). This is a helpful thought method here if we replace the government with the public that may watch, but not control, the news media. See AMITAI ETZIONI, *THE LIMITS OF PRIVACY* (2000).

89. For a comprehensive description of this concept and its supporters, and criticisms, see Dagan, *Exclusion and Inclusion in Property*, *supra* note 52.

90. See also Dagan, *The Social Responsibility of Ownership*, *supra* note 52.

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.

This is much more so when the relevant property is a news organization. Such organizations ask for recognition of their rights to collect information and publish it to allow for public scrutiny of affairs of public interest, whether involving public or private bodies. It would seem awkward to them, of all, to argue that one and only piece of property, happening to be their own, should be left out of the information-harvesting realm. Indeed, they do not have a legally recognized right to access information in much of the non-public bodies they cover, but they nevertheless make efforts to extract information from such institutions. Assumably, they believe the public interest in the information they shed light on justifies allowing them access to it, however, such access is gained.⁹¹

4. TRANSPARENCY OF WHAT?

I have tried to show that there is justification for increased transparency of the press, and that the required transparency may be well advanced by applying the concept of FOI to the press, and furthermore that the advantages of such a move outweigh the problems it raises. I now turn to discuss what such transparency might look like.

This is a complicated, sensitive and arduous task. Here, I can only offer a rough outline of categories of information that may contribute to the public's understanding of the way the media, this major political force, operates. I first identify four categories of information which can and should be proactively disclosed to the public. I then go on to consider the adapted FOI regime that forces organizations to reply to queries from the public.

Different people may identify different goals for transparency in the media. Such different goals may all be valid, as transparency, truth has many virtues. I suggest thinking of one major goal of transparency in the media as the dismantling of what Edward Herman and Noam Chomsky describe as a "propaganda model" that the media is.⁹² This in order to allow people to be aware and critically think of the power they are subjected to when on the receiving side of the news. In presenting the different fields of suggested transparency, I will also mention how they relate to some of the news "filters" which together comprise Chomsky's "system of propaganda."

91. For insights on the relationship between the right to property and freedom of the press, see SLAVKO SPLICHAL, *PRINCIPLES OF PUBLICITY AND PRESS FREEDOM* 171-76 (2002).

92. HERMAN & CHOMSKY, *supra* note 16, at 1.

4.1. Ownership

Media is big business. Huge business. No news here. Even though revenue fell, the newspaper industry is still a \$34 billion-a-year industry.⁹³ These owners own the media. It is not surprising that Herman and Chomsky identify ownership as “the first powerful filter that will affect news choices.”⁹⁴ They identify the profit-making purposes of these businesses as the major motive behind such filters. As they rightly point out, were it profits alone, populace demand for program content might have outweighed owners’ preferences. However, if power and influence are dominant factors alongside profit-making, owners might be willing in some instances to sacrifice popular demand for the benefit of other interests, ideological, political, personal or those of their other businesses.

One way or the other, it is undeniable that ownership has a stark influence on what news consumers receive. Therefore, news consumers have keen interest in understanding the complex web of ownership standing behind each news organization. For publicly traded companies this is often publicly available information. General corporate regulation laws determine disclosure requirements from these companies, including disclosure of ownership and identification of chief officers.⁹⁵ This however may not be enough, neither in scope of businesses included or the depth of information provided. The Council of Europe recognized this in a recommendation it published in 1994, regarding means to promote transparency in the media. Most of the measures suggested there focused on making available to the public information regarding persons and bodies that are part of media organizations’ structure and their interest in other economic sectors and specifically other media enterprises.⁹⁶

4.2. Finance / Advertising / Special Interests

Until a new model for financing the media is found, advertising is the lifeline of commercial news organizations. One needs no “inside information” to realize that advertisers have great impact on what news organizations choose to communicate, how they choose to present news touching on their advertisers, and what they choose not to communicate at

93. Pew Research Center, *The State of the News Media 2012*, PEW RESEARCH CTR’S PROJECT FOR EXCELLENCE IN JOURNALISM 1 (2012).

94. HERMAN & CHOMSKY, *supra* note 16, at 14.

95. JENS CAVALLIN, EUROPEAN POLICIES AND REGULATIONS ON MEDIA CONCENTRATION (1998), <http://essaydocs.org/european-policies-and-regulations-on-media-concentration-by-pr.html>.

96. EUR. CONSULT. ASS., *Recommendation No. R (94)13* (Nov. 22, 1994), <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=534799&SecMode=1&DocId=515710&Usage=2>.

all. The story of Nike and CBS (part 0 above) is just one of many examples. A 2000 Pew Center poll found that more than a third of 300 editors polled practice self-censorship avoiding stories that might damage their organization or its parent company, and a little less than a third go as far as restraining themselves in publications that might damage advertisers.⁹⁷ Advertisers and their advertisements determine the fate of news organizations, which in turn determine what voices will be heard in society⁹⁸ and who will be addressed by the press.⁹⁹ Advertisers are the subsidizers and patrons of the newspaper pages and the broadcast programs. For Chomsky, appealing to them is the second filter through which potential news items are screened.¹⁰⁰

Transparency in the advertising and funding of news organizations is crucial to the understanding of their operations. How much income was generated from each advertiser? When? Such information will allow those interested to trace correlations between changes in advertising and coverage of particular stories. Were there promises made in return for advertising?¹⁰¹ One may doubt whether a news organization will admit to such agreements, but one may also assume it will be harder to reach such agreements if the parties know their contract might become public.

4.3. Sources

Sources for news reports come in all sorts and shapes and sizes. Sometimes, but not very often, they are the “deep throat” type, whistleblowing behind a veil of secrecy. Much more often they are in the form of a text message sent by a spokesperson for a group of journalists. Sometimes it is an interview or a tip from a politician in a corridor discussion. Other times the source may be a poll or a report issued by a research group or a think tank. The important thing about sources is that they are rarely passive bystanders. More often they are participants in the unfolding of events with an agenda of their own. Thus, receiving the maximum information possible on the sources to a news story is key to understanding

97. *Self Censorship: How Often and Why*, PEW RESEARCH CTR. PEOPLE PRESS 2 (2000), <http://www.people-press.org/2000/04/30/self-censorship-how-often-and-why>.

98. The process in which advertising changes the target audience of a newspaper and draws certain publications out of business is well described in JAMES CURRAN, *POWER WITHOUT RESPONSIBILITY* 28-33 (2003).

99. Offering advertisers more upscale viewers “with money to buy.” See HERMAN & CHOMSKY, *supra* note 16, at 16.

100. *Id.* at 18.

101. In one case that surfaced during legal procedures in Israel, it was revealed that a daily newspaper that was distributed in railway stations and onboard trains had committed itself to arbitration where news items might damage interests of the railway company, “including its public image.” See Barstow, *supra* note 61.

what forces are at play through it. “Deep throat” sources are, as mentioned, the rarity and deserve protection. They are not in the focus of this part.

According to Herman and Chomsky, sources are the third filter of news.¹⁰² They explain why government officials and official government information are preferred as sources by the press, and how they enjoy credibility that often prevents journalists from investigating themselves.¹⁰³ Corporate public relations department are the next primary sources of news items, issuing press releases that are often copied verbatim by journalists and presented as their own writings. Media researchers Robert McChesney and John Nichols reveal, “The dirty secret of journalism is that a significant percentage of our news stories, in the 40-50 percent range, even at the most prestigious newspapers in the glory days of the 1970s, were based upon press releases . . . only loosely investigated and edited before publication.”¹⁰⁴ A 2008 study in the United Kingdom looked at 2,207 news items printed in the country’s most prestigious newspapers and found that “[n]early one in five newspaper stories . . . were verifiably derived *mainly or wholly* from PR material or activity.”¹⁰⁵ A 2010 study conducted in Israel found that “PR practitioners contributed varying amounts of material for 73 percent of news items, but succeeded in supplying 100 percent of the information for only 22 percent.”¹⁰⁶

There is a shared interest for journalists and PR professionals to keep such information away from the public.¹⁰⁷ “PR practitioners want their messages to gain the aura of ordinary journalistic content serving the public interest.”¹⁰⁸ “Journalists, in turn, try to avoid being perceived as lazy people who outsource their public duties to a third, biased party.”¹⁰⁹ At the same time, it is clear that there is public interest in knowing the source for a news item. Hiding such information from the public, while being an industry standard, is akin to intentionally misleading news consumers. The information is not kept from the public to prevent any harm to the source (i.e., the PR practitioner). Indeed, these often enjoy telling tales of their

102. HERMAN & CHOMSKY, *supra* note 16, at 18.

103. *Id.* at 19.

104. ROBERT WATERMAN MCCHESENEY & JOHN NICHOLS, *THE DEATH AND LIFE OF AMERICAN JOURNALISM* 47 (2010).

105. Justin Lewis et al., *A Compromised Fourth Estate?*, 9 *JOURNAL. STUD.* 1, 7 (2008).

106. Zvi Reich, *Measuring the Impact of PR on Published News in Increasingly Fragmented News Environments*, 11 *JOURNALISM STUDIES* 799, 806 (2010).

107. Although at least in one country, Germany, the journalistic code of ethics specifically addresses this issue stating in article 1.3, “Press releases must be identified as such if they are published by the editorial team without any further editing.” See German Press Code, ETHNICNET, http://ethicnet.uta.fi/germany/german_press_code (last visited Mar. 12, 2017).

108. Reich, *supra* note 106.

109. *Id.* at 804.

impact on the news. It is kept from the public so it thinks it received balanced, weighed, edited information that passed the critical scrutiny of a journalist, while the truth is often that it receives a sophisticated form of disguised advertisement.¹¹⁰

The U.K. Leveson report deals with this issue, suggesting that a regulatory body “should consider encouraging the press to be as transparent as possible about sources and source material for its stories . . . to be as clear as is consistent with the protection of sources about where a story comes from.”¹¹¹ The report goes on to encourage politicians to publish their contacts and relationships with the press and details of communications with press representative “which might be thought to be relevant to their responsibilities.”¹¹² This is a suggested mode of oversight over politicians’ conduct. However, if we accept that proprietors of news organizations and their editors are political figures as well, similar disclosure might be warranted for their meetings not only with politicians but with representatives of the corporate world and other pressure groups.

A more modern non-transparent phenomenon is simply scraping of information by one news organization to the website of another. There is no quantitative data to describe how widespread a phenomenon this is, but qualitative research documents this trend and the motivations behind it.¹¹³ When this happens, the news consumer is led to believe that the authority behind a news item is the journalist named in the by-line, while he/she cannot sincerely offer any such authority. New technologies create some of these problems, but they can also provide some of the solutions. In print, it is hard to attribute every item to many different sources, and one assumes the journalist is responsible for the news item in its entirety (though this is often no more than fiction¹¹⁴). However, online, there can be metadata added to news items, which can easily include a list of sources, links to press releases used, and other material sources.¹¹⁵

Forcing the fullest possible disclosure of sources and source materials is tantamount to stripping a news item naked. It denies the journalist some of

110. For more on the problematic relationship between journalists and PR professionals, see John Sullivan, *True Enough*, COLUMBIA JOURNALISM REV. (2011), http://archives.cjr.org/feature/true_enough.php.

111. Leveson Report, *supra* note 21, ¶ 63.

112. *Id.* ¶ 86.

113. Angela Phillips, *Transparency and the New Ethics of Journalism*, 4 JOURNALISM PR. 373, 375 (2010).

114. Angela Phillips et al., *An Ethical Deficit? Accountability, Norms and Material Conditions of Contemporary Journalism*, in NEW MEDIA OLD NEWS 51, 61-62 (Sage 2010).

115. A project to offer such metadata structures was launched in 2008 by the Media Standards Trust and is applied by several news websites. See Transparency Initiative, MEDIA STANDARDS TRUST, <http://mediastandardstrust.org/projects/transparency-initiative/background>.

the power he/she enjoys while putting together a news item. It opens to public scrutiny the diversity of sources used, their reliability, and the impact of sources on the final product. In short, it helps the citizen who are consuming the news to better assess the weight to be attached to the information he/she receives, and thus sets apart good journalism from lesser journalism.

4.4. *Decision-Making and Algorithms*

Decisions made in newsrooms on an hourly basis shape our public discourse. They determine what items will appear on the top of the homepage, open tonight's broadcast, and appear in tomorrow's paper or be aggressively pushed the social networks. They decide whether to pursue or drop a lead for an investigation, and how to frame the latest story. The decisions are taken in editorial boards' meetings, through correspondence between publishers, editors, journalists and others. To a growing extent they are also made by algorithms, or more accurately by the people who design them and seniors in technology companies.

Research has shown that the public and news people share similar views on what is news-worthy. We also know that what the actual preferences practiced by editors and publishers through their policies and by the public through its media consumption habits, have little to do with those shared views. All agree that "hard news" about political affairs and the economy deserve prominence in the news media, yet editors will often put celebrity gossip and other lifestyle affairs ahead of these, and the public will reward them with higher ratings.¹¹⁶

We have no tools to look into how this becomes to be the situation. We have no tools to decide whether a report that turned to be misleading or inaccurate, was the result negligent decision making during the investigation. We have no tools to assess whether reporting is designed by a calculated position the news organization decided to take or on the merits of the covered item alone. Looking into such decisions, either through publications of minutes of meetings, leaked correspondences or simply interviewing decision makers in the media about their work (a surprising rarity) is of immense public value.

Many such decisions are today taken by technology. Facebook, Google and similar companies decide which news item will receive what prominence online, which is where most people consume their news.¹¹⁷ These major technology companies can make a news item disappear altogether, for all

116. Pamela Shoemaker & Akiba A. Cohen, *News Around the World: Content, Practitioners and the Public* (2006).

117. *See How Efficient is the News?*, *supra* note 18.

practical matters, as was attempted with the *Aftenposten* photo mentioned in the opening of this article. Computers make some of these decisions by extremely sophisticated algorithms developed by humans.¹¹⁸ Most technology companies like Google and Facebook treat their algorithms as a trade secret and will not allow any inspection of them. What values do they represent? What categories of professionals were involved in their development? Lawyers, psychiatrists, sociologists, business administrators? One can trust that Google works to bring users “the most helpful and useful information” and that that alone fulfills ethical expectations, as is argued by Eugene Volokh and Donald M. Falk in a Google-commissioned paper.¹¹⁹ However, others may doubt whether this suffices to protect the public interest in the free flow of information in society.

Volokh and Falk argue that “Google, Microsoft’s Bing, Yahoo! Search and other search engine companies are rightly seen as media enterprises, much as the New York Times Company or CNN are media enterprises”.¹²⁰ This is not how Google wants to be perceived in all circumstances. For instance, when a public inquiry commission in Israel looked into regulation in the new media environment, Google’s submission to the committee that a search platform is not like a newspaper and a hosting platform like Google’s YouTube is not an editor who selects between news items.¹²¹ Google seems to be holding the stick at both ends of the legal discussion on press freedom protections and their implications on search engines. Whether Google, Facebook, Twitter, Reddit, and other information agents are media enterprises or “merely” technology providers is immaterial. What is important is that their decisions have an enormous bearing on the public sphere. The public has thus legitimate interest in looking behind their veil of secrecy to understand their decision-making processes.

4.5. Replies, Mistakes, Criticism

News items most often cover controversies. One part of the controversy is often happy with the report, and the other much less so. Those feeling they

118. Some researchers believe the Facebook algorithm that determines what members will see in their “news feeds” contains as many as 100,000 variants. See generally Motahhare Eslami et al., *I Always Assumed That I Wasn’t Really That Close To [Her]: Reasoning About Invisible Algorithms In News Feeds* (2015), http://www-personal.umich.edu/~csandvig/research/Eslami_Algorithms_CHI15.pdf.

119. Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J. L. ECON. POL’Y 883, 884 (2011).

120. *Id.* at 888.

121. “Google’s position on the possibility of regulation of audio-visual content on the internet in Israel.” White paper submitted by Google to the Inquiry Commission to Address the Regulation of Commercial Broadcasting in Israel (Shechter committee) (Apr. 24, 2014), http://www.moc.gov.il/sip_storage/FILES/0/4140.pdf.

were wronged by a report expectedly want to correct the record to project their views. They might offer a different narrative to the same chain of events presented to the public. Sometimes they will make factual claims, which may be false and may be true. Sometimes they will go after the motive of the reporter or his sources.

In 1974, the U.S. Supreme Court in a controversial ruling decided that a state law granting subject of press coverage a legal right of reply is an unconstitutional violation of freedom of the press.¹²² Nevertheless, it is considered good practice to publish replies for news items and guidelines in this respect appear in several journalistic codes of ethics.¹²³ Yet replies are often edited. In print media, where inches are counted, and in broadcast media where seconds are expensive, this is unavoidable. Editing constraints may at time be abused to present a reply in an unfashionable manner and protect the journalist and his story. But since lengthy replies have to be edited, it's hard to enforce more transparency in delivering them. However, this is not the case with digital media. There is no reason why replies by subjects of news coverage cannot appear in the digital media in their entirety and be clearly linked to from the news item they address.

Many codes of ethics¹²⁴ require editors to publish corrections they receive or report mistakes they otherwise find included in their publications. Victims of the U.K. phone-hacking scandal have argued against an industry habit of "burying apologies in the back of a newspaper, having defamed an innocent person on the front page."¹²⁵ The manner in which apologies and corrections are posted is also an issue of transparency. There is no reason for why nowadays reasonably worded requests for correction or criticism of published news items, will not appear in their entirety online. They might there not be more noticeable there than in a newspaper's back page, but their aggregate can be telling. It can document a trajectory of reporting in need of corrections and offer an insight into. It will also force the journalist to reply to the more serious allegations or better-made arguments brought against a certain news item.

122. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

123. *See, e.g.*, National Code of Conduct § 4 (Denmark); Guideline for Journalists § 21 (Finland); Charter of Duties of Journalists (Italy); Guidelines from the Netherlands Press Council § 6.1 (Netherlands); Code of Ethics of the Norwegian Press § 4.15 (Norway); Deontological Code for the Journalistic Profession § 13(C) (Spain); Code of Ethics for the Press, Radio and Television § 5 (Sweden); Editor's Code of Practice § 2 (United Kingdom). English versions of all codes are available at Collection of Codes of Journalism Ethics in Europe, EthnicNet, http://ethicnet.uta.fi/codes_by_country.

124. Including literally all those mentioned *supra* note 123.

125. Patrick Wintour, *Phone-hacking Victims Reject Newspapers' Charter Proposal*, *GUARDIAN* (May 23, 2013, 7:01 PM), <http://www.guardian.co.uk/media/2013/may/24/phone-hacking-reject-charter-proposal>.

Transparency of criticism and responses may also have a blessed effect on the critics themselves. It may serve as an “anti-flak” measure. Herman and Chomsky describe “flak” as the “negative responses to a media statement or program . . . [that] can be both uncomfortable and costly to the media.”¹²⁶ They argue that the ability to produce effective flak lies with the powerful and that if “certain kinds of fact, position or program are thought likely to elicit flak, this prospect can be a deterrent.”¹²⁷ But if pressures applied to news organizations would become public knowledge, this would have at least three different effects on three different constituencies. The “flak appliers” would have to take into account that they might be called to justify their pressure publicly. A cut in advertising contracts with a corporation will not be seen as pure business if it becomes public knowledge that it followed angered letters to an editor. For the news organizations themselves, this may provide a shield. They will be able to explain to those pressuring them that any yielding to such pressure is likely to become public knowledge and harm both parties. Both those applying flak and those on the receiving end will have to be more careful when striking deals with each other on what information will be supplied to the public if they know such deals might be brought under sunlight. The public at large can benefit in at least two ways. In addition to the deterrence of “flakers” and “flakees,” its own flak efforts may be given greater weight. If a news organization is obliged to reveal the volume and nature of appeals from the public regarding a certain controversy, numbers might be in a better position to outweigh money and power.

4.6. General Disclosure in Response to Other Information Requests

While there is much to be gained from proactive disclosure in the fields described above and others, it would be naïve to expect the agencies we are out to critique, to themselves provide all information of public interest on their most troubling conducts when they occur. The conflict of interests is inherent and clear. This applies to most corporate disclosure, and I have argued elsewhere for general disclosure requirements from corporate entities.¹²⁸ If we are to rid the news media of its illnesses, we cannot rely on it alone to do so.

My goal here is to show that a statutory general disclosure requirement from news organizations, similar (though not identical) to that imposed by FOIA on public authorities, is in place. The model calls for a presumption of openness in the operation of the news media. This does not mean absolute transparency or transparency in all fields of the organization’s operation. The

126. HERMAN & CHOMSKY, *supra* note 16, at 26.

127. *Id.*

128. Peled, *supra* note 28, at 261.

basic idea is that when a member of the public requests information from a news organization, it is entitled to receive that information, given certain circumstances and subject to certain limitations described below. Additional substantial or procedural exceptions may need to be carved in order to protect legitimate corporate interests. Yet blanket secrecy should no longer be taken for granted as the default *modus operandi* of the media.

The South African Promotion of Access to Information Act (2000) (PAIA)¹²⁹ is one of the very few freedom of information acts to recognize the right to receive information from private entities, regardless of any relationship with a public authority or public function.¹³⁰ Regarding private entities, the right to access information is recognized as long as the information is needed “for the exercising or defending of a right.”¹³¹ The advantages and disadvantages of applying FOI legislation to private entities, in general, is beyond the scope of this article.¹³² For our purposes, it is worth noting that at least *de jure* a right to access information held by the media exists in South Africa (beyond of course the publicly-owned media which is covered in many countries). It is also important to note the limitations on such access.

These limitations can be divided into positive and negative ones. Positive limitations relate to the reason for access. Unlike with FOIA in general, a requestor needs to present his interest in the information he wishes to obtain from a private body. This can be understood by looking back to the justifications to FOI. Since in this category the information is not the property of citizens as sovereigns or as taxpayers, they do not enjoy free access to just any piece of information. The valid justifications are the instrumental, oversight and civic-democratic justifications, and they need to be substantiated for the right to be invoked. In the case of the South African law, the requisite is a need to defend a right. That is a reasonable basis for requesting information from the media as well but does not cover much of the information related to the public function of the press. In the case of the

129. 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 S. AFR. J. HUMAN RIGHTS 2 (1999). See also Doug Tilton & Richard Calland, *In Pursuit of Open Democracy and Freedom of Information – A South African Campaign Study* 8.2. CHRI NEWS (2001), http://www.humanrightsinitiative.org/publications/nl/articles/south_africa/in_pursuit_of_open_democracy_foi.pdf.

130. Similar provision appear in the Liberian Freedom of Information Act of 2010 § 1.6(b), <http://freedominfo.org/documents/liberian%20law%202010%20text.doc>, and in the Model Law on Access to Information for Africa § 2(b), prepared by the African Commission on Human and Peoples' Rights, http://www.achpr.org/files/news/2013/04/d84/model_law.pdf

131. PAIA, *supra* note 129, article 50(1)(a).

132. See Peled, *supra* note 73, at 9.

press, it seems more adequate to grant the right to access information in those cases where the information requested is of public interest. Indeed, such a definition leaves much space for interpretation. However, guidance for interpretation can be found in referring again to the justifications. Where information may shed light on the way the media operates it serves the oversight justification, where it is needed to protect a right, it serves the instrumental justification, and most importantly, where it serves to assess information in the public sphere, which is ground for public discourse, it serves the civic-democratic justification.

The negative limitations to access are those exemptions which outweigh a request for access, even when it serves one of the justifications mentioned above. Naturally, wherever an FOI law would be expanded to include the media, those exemptions listed in the law will apply as well. One exemption that appears in many FOI legislation and is relevant here is that of “commercial secrets.” The United Kingdom’s FOIA allows the withholding of information which “would, or would be likely to, prejudice the commercial interests of any person.”¹³³ The United States FOIA does not apply to matters that are “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”¹³⁴

Clearly, the proposal does not come without a price. Part of the price is monetary. The handling of requests for information, even if not according to the statutory FOIA procedures, is burdensome and requires human resources. More importantly, learning to operate under conditions of transparency requires a profound cultural change that in turn requires both time and efforts. I do not think the press is entitled to a “right to conceal” and is therefore not surrendering such a right if subjected to transparency. But one cannot overlook hardships that come inherent in operating under transparency, as well as possible dangers from abuse of transparency by competitors and others with ill intentions. This requires further discussion to focus on the safeguards that can be added to a FOIA regime applied to the press, in the same manner, that safeguards were added to FOIA legislation to protect interests of police units and national security agencies.

5. THE CASE OF THE BBC

The case of *Sugar v. British Broadcasting Corporation*¹³⁵ offers a glimpse into the U.K.’s Supreme Court’s view on transparency in the media. This opportunity is quite rare because FOIA, of course, does not normally

133. Freedom of Information Act, (2000) ¶ 36, 43 (Eng.), http://www.legislation.gov.uk/ukpga/2000/36/pdfs/ukpga_20000036_en.pdf.

134. 5 U.S.C. § 552(b)(4) (1996).

135. *Sugar v. British Broad. Corp.* [2012] UKSC 4.

apply to media outlets. The BBC is different, being a public authority funded with public money. However, the law is applied to the BBC only “in respect of information held for purposes *other* than those of journalism, art or literature.”¹³⁶

Steven Sugar, a British citizen and supporter of the State of Israel, approached the BBC in 2005 with a FOIA request, asking for a copy of the “Balen Report.” This was a report prepared by an external consultant upon request of the BBC’s Director of News, Mr. Richard Sambrook to “analyze the BBC’s domestic Middle-Eastern coverage . . . and to suggest whether, and if so how, it might be improved.”¹³⁷ The BBC denied his request on the basis that the report was not covered by law, as it was not prepared “for purposes other than those of journalism.”¹³⁸ Mr. Sugar appealed the BBC’s decision, and the case’s trajectory brought it all the way up to the Supreme Court.¹³⁹

The Supreme Court unanimously dismissed the appeal. To reach its decision it struggled with different interpretive approaches to the designation in the law (i.e., the term “other than those of journalism, art or literature”).¹⁴⁰

For the purpose of our discussion a few observations on the Court’s ruling are in place.

The Court was concerned with the possible “chilling effect” of the disclosure of the report. It feared that if disclosed “the necessary frankness of such internal analysis would be damaged.”¹⁴¹ The argument that disclosure has a “chilling effect” deterring people from speaking freely where they have reason to believe that their words will become public, is not a new one, nor limited to disclosure of information in general or media

136. *Id.* (emphasis added).

137. *Id.* at [6].

138. *Id.*

139. This trajectory included an appeal to the information commission which upheld the BBC’s refusal (*id.* at [14]); a subsequent appeal by Mr. Sugar to the Information Tribunal which reversed the commissioner’s decision (*id.* at [16]); an appeal by the BBC to the High Court, which again reversed and held the Information Commissioners initial decision lawful; an appeal by Mr. Sugar to the Court of Appeal, which was dismissed (*id.* at [19]); an appeal by Mr. Sugar to the House of Lords which was granted and where the case was remanded to the High Court. (*id.* at [20]); a second allowing of the BBC appeal by the High Court (*id.* at [22]); another appeal by Mr. Sugar to the Court of Appeal which was dismissed (*id.* at [23]); and finally the appeal to the Supreme Court discussed here.

140. This was the main issue in dispute between the justices. While all agreed that the report in discussion should be seen as not covered by the law, they disagreed whether it is so because it was held *predominantly* for purposes of journalism, or it suffices that it was held for purposes substantially related to journalism, regardless of their dominance. *See, e.g.,* Sugar v. British Broad. Corp. [2012] UKSC 4 at [57], [65], [75], [83], [110].

141. *Id.* at [40], [102].

information.¹⁴² Freedom of Information acts worldwide pay notice to this phenomenon and provide for tests balancing between the public interest in disclosure and that in avoiding the implications of the chilling effect.¹⁴³ To conclude that the chilling effect in the case of the BBC is so alarming that it avoids a balancing test altogether, the court must have assumed that there is something more worrisome about chilling BBC personnel than any other bureaucrat in any other public authority.

Evidence of this effect is found in the court's reference to the rationale behind the designation in the law: "A measure of protection might have been available under some of the qualified exemptions in Part II of FOIA . . . But Parliament evidently decided that the BBC's important right to freedom of expression warranted a more general and unqualified protection . . ." ¹⁴⁴ The designation, the court concluded,

is necessary in a democratic society for the protection of the freedom to impart information enjoyed by the BBC . . . [with] particular regard to the importance of freedom of expression and, in particular, to the extent to which it would be in the public interest for "journalistic, literary or artistic material . . . to be published."¹⁴⁵

There is more than a grain of irony in this comment. The court allowed the BBC to conceal information to protect its right to impart information. There is, of course, a reasonable logic behind such a view, that fears the BBC will not feel free to impart information in the future in the way it sees (professionally) fit, in light of public criticism based on the disclosed report (or the fear of future criticism that will follow disclosure of future reports). But what is striking about the opinions of the five justices, is that none of them thought there was reason to discuss whether concealment in this case indeed serves the BBC's right to freedom of expression, and what the public interest in disclosure may be.

A discussion of the BBC's right to freedom of expression might have raised the question "who is to be served by it?" Is it a freedom granted to the BBC like to any individual to speak as she wishes? Or is it rather a legal right and obligation granted to it in order to bring information to the public.

142. For history and a discussion of the chilling effect in the U.S. context, see Frederick Schauer, *Fear, Risk and the First Amendment*, 58 BOSTON UNIV. L. REV. 685 (1978). For evidence on the role of press regulation in the creation of a chilling effect, see T.W. Hazlett & D.W. Sosa, *Was The Fairness Doctrine a "Chilling Effect"?* *Evidence from the Postderegulation Radio Market*, 26 J. LEG. STUD. 279 (1997); T. MCCORMACK, *STUDIES IN COMMUNICATIONS: CENSORSHIP AND LIBEL: THE CHILLING EFFECT* (Jai Pr 1990). For a short discussion of the chilling effect and freedom of information in the U.K. context, see the Information Commissioner's website at <http://www.ico.org.uk/foikb/FOIPolicyChillingeffectarguments.htm>.

143. Freedom of Information Act, *supra* note 133, at c. 36, 2(2)(b).

144. *Sugar v. British Broad. Corp.* [2012] UKSC 4, at [78].

145. *Id.* at [59].

If the latter is the case, could it not be argued that where there are findings of a disservice to the public, freedom of expression cannot be the basis for hiding that very information from the public it is to serve?

The court notes that the words of the designation are derived from the U.K. Data Protection Act of 1998.¹⁴⁶ That act states that journalism and artistic and literary purposes are “special purposes.”¹⁴⁷ It exempts publications of private data made for such purposes from the limitations in the law where “having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest”¹⁴⁸ The court fails to notice the contrast between this stipulation and its findings in the Balen report case. The DPA empowers journalists where it may have otherwise limited them from bringing information of public interests to the light of day. This serves the fundamental justifications of the right to freedom of expressions, to promote the pursuit of truth and democratic discourse. The court’s interpretation of FOIA does exactly the reverse. It empowers journalists where they make an effort to conceal information from the public. Indeed, this might be to protect future endeavors. However, in this sense, the BBC journalists are no different from any other person preferring to conceal findings of his professional misconduct.

More alarmingly, the court failed to discuss even very shortly, the public interest in disclosure of the specific piece of information here in discussion. The BBC is a powerful actor to a large extent shaping public discourse in the U.K. It is, at least in this sense, a political actor. It is interested in protecting and maintaining its power. It has its organizational interests, and it has much power to promote them. There may or may not be some truth in the allegations that the way in which it impacted public opinion on Middle-East affairs was tainted. If the former is the case, this was in breach of its duty to impartiality. If so, there is immense public interest not only in accessing the Balen report but indeed in the corporation knowing that future review of its coverage in other fields of interest will also be subject to public scrutiny.

6. CONCLUSION – THE EFFECTS OF TRANSPARENCY

Transparency is much about trust and distrust. Where we have blind faith in someone, we have little interest in looking into her specific actions. Where we trust ourselves to reach our own conclusion in the judgement of others, we require information on their actions. Skepticism and critical thought are a hallmark of democracy. It is not reasonable nor morally

146. *Id.* at [34].

147. *Id.*

148. *Id.* at [35].

acceptable to expect the public of a free society to award any institution of such immense political impact as the news media with blind trust.

This understanding is meaningless unless some effective measures are taken to promote media transparency. Subjecting the media to an FOI-like regime has its cost. People do not enjoy working with other lurking over their shoulders. Nevertheless, the global wave of transparency laws has taken much more than the governmental bureaucracies and purely public authorities. In most countries, if you sell a car, you must provide information on its safety and pollution level. Food manufacturers are obliged to provide information on nutrients in their produce. In many countries, schools have to publish their performance levels. In the United States as in the United Kingdom, hospitals are required to publish information on various performance indicators. Publicly traded companies have to publish every information item that bears impact on their financial situation. It is hard to think of another private sector remotely as powerful as the media which has totally evaded this wave of transparency and remains as free to conceal information regarding its product.

Transparency will let news consumers make wiser decisions as to which news providers they choose to trust and how they should react to specific news items. It will let NGOs, corporations, and individuals more effectively fight against alleged unfairness in reporting. But most importantly, it will impact how journalists carry out their job. Knowing they and their work is open to public scrutiny will force journalists to think twice before signing on to news reports that suffer any of the numerous illnesses plaguing the media. This is not a move aimed at inflicting more hardship on the press. Sunlight as a powerful disinfectant is too important a tool to forgo if we are to cure the press of its infections. 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."¹⁴⁹

149. Theodore Roosevelt, *Second Annual Message*, (Dec. 2, 1902), <http://www.presidency.ucsb.edu/ws/index.php?pid=29543>.