

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 21-1301

CENTRO DE PERIODISMO INVESTIGATIVO, INC.
Plaintiff-Appellee

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD
FOR PUERTO RICO
Defendant-Appellant

**MOTION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF
PLAINTIFF- APPELLEE BY THE *PUERTO RICO ASSOCIATION OF
JOURNALISTS***

The Asociación de Periodistas de Puerto Rico (ASPPRO) is a nonprofit founded in 1971. Its members are journalists from national and international media, independent journalists, and other communication professionals united by the commitment to practice journalism guided by the highest ethical standards. The ASPPRO's brief clarifies the need to guarantee the international human right to access information and redress the violation of constitutional rights – particularly the right to information, free press, and speech- during debt restructuring processes.

Amicus has obtained consent to file this brief from both parties and therefore may file it pursuant to Federal Rule of Appellate Procedure 29(a)(2).

FED R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT

ASPPRO is a nonprofit corporation founded in 1971 pursuant to Puerto Rico corporate law framework. It has no parent corporations and does not issue stock. There is no publicly held corporation or other publicly held entity owns 10% or more of ASPPRO.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this motion for leave to file the accompanying brief be granted.

Respectfully submitted,

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Dated June 24, 2021

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2022 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system on June 24, 2022.

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**On Appeal from the United States District Court for the District of Puerto
Rico, San Juan, In Consolidates Cases
NOS. 3:17-CV-01743-JAG and 3:19-CV-01936-JAG**

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TABLE OF CONTENTS

I.	IDENTITY AND INTEREST OF AMICUS CURIAE	1
II.	INTRODUCTION AND SUMMARY OF ARGUMENT	1
III.	ARGUMENT.....	3
	A. ACCESS TO INFORMATION IS A RIGHT PROTECTED BY THE CONSTITUTION OF PUERTO RICO	5
	B. ACCESS TO INFORMATION IS AN ENFORCEABLE INTERNATIONAL HUMAN RIGHT	10
IV.	CONCLUSION	14

TABLE OF AUTHORITIES

Cases

Bhatia v. Governor,
 199 D.P.R. 59 (P.R. 2017).....8
Colón Cabrera vs. Caribbean Petroleum
 ...170 DPR 582, 590 (P.R. 2007).....15
Engineering Services International vs. Puerto Rico Power Authority
 ...2020 TSPR 103.....9
Igartua v. U.S.
 ...626 F.3d 592 (1st Cir. 2010).....12
Ortíz v. Court Administration Office,
 ...152 DPR 175 (P.R. 2000).....9
Santiago v. Bobb & El Mundo, Inc.
 ...17 P.R. Offic. Trans. 182, 190 (1986).....5, 8
Soto v. Giménez,
 ...12 P.R. Offic. Trans. 587 (1982).....5

Statutes

3 L.P.R.A. § 9911.....6
 3 L.P.R.A. § 9913.....6
 3 L.P.R.A. § 9891.....6
 48 U.S.C. § 2101.....passim
 48 U.S.C. 2121.....3
 48 U.S.C. § 2124.....6
 48 U.S.C. § 2148.....6
 48 U.S.C. §2144.....7

Constitutional Provisions

U.S. Const., art. IV § 3.....3
 P.R. Const. art. II, § 45

Treaties and Reports

International Covenant of Civil and Political
 Rights.....9
 U.S. Senate Executive Report 102-23, 102d Cong., 2d Sess.....11

Other authorities

Freedom of information: Need for its regulation in Puerto Rico,
 44 Rev. Jur. UPR 67, 69 (1975).....5

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Asociación de Periodistas de Puerto Rico (*ASPPRO*) is a nonprofit founded in 1971. Its members are journalists from national and international media, independent journalists, and other communication professionals united by the commitment to practice journalism guided by the highest ethical standards. The *ASPPRO*'s brief clarifies the need to guarantee the international human right to access information and redress the violation of constitutional rights – particularly the right to information, free press, and speech- during debt restructuring processes.

Amicus has obtained consent to file this brief from both parties and therefore may file it pursuant to Federal Rule of Appellate Procedure 29(a)(2).

II. INTRODUCTION AND SUMMARY OF ARGUMENT

As it has been widely acknowledged, fiscal policy is public policy. Public debt negotiations and restructuring processes significantly impact the enjoyment and fulfillment of rights. Safeguarding access to public information is essential for democracy, especially when these processes occur within an austerity crisis of a jurisdiction besieged by multiple disasters and with limited space for civic participation. Journalists, particularly independent media organizations, undertake the responsibility to advance transparency and access to information to mitigate the

impact of lack of accountability on already harmed civic liberties. This Court is tasked with determining whether there is a right to access documents and communications related to debt negotiations under the control of the Financial Oversight and Management Board for Puerto Rico (FOMB or Board). The Board sustains to be exempt from statutory and constitutional provisions concerning the right to information. However, the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. § 2101, *et seq.*, does not preempt local, federal, or international laws that grant the press access to documents secured, prepared, and custodied by the Board. Moreover, because the Board is a government entity, it must abide by international human rights law ratified by the U.S. Congress, and the Puerto Rico Constitution. This brief, which supports the Centro de Periodismo Investigativo's (CPI) claims, provides a succinct overview of the constitutional and international law dimensions of the right to access and receive public information. For the foregoing reasons, the district's court judgment should be affirmed.

III. ARGUMENT

PROMESA was approved by the Congress of the United States on June 30, 2016. While PROMESA recommended establishing an oversight board for the territories of Guam, American Samoa, the Commonwealth of Northern Mariana

Islands, and the United States Virgin Islands, only Puerto Rico was obligated to accept this entity. 48 U.S.C §2121 (b). This legislation was an exercise of the Congressional plenary powers over the "needful rules and regulations for territories." U.S. Const., art. 4 § 3. PROMESA, a federal legislation adopted by a national forum where the people of Puerto Rico have no voting rights, imposed over Puerto Rico a Board of seven unelected members appointed without the participation or vote of Puerto Rico publicly elected officials. Although created by the federal government, PROMESA states that the Board is an entity within the government of Puerto Rico. 48 U.S.C §2121 (c).

The stated purpose of PROMESA is to provide mechanisms for a covered territory to achieve fiscal responsibility and access to the capital markets. 48 U.S.C. 2121(a). The activities related to these objectives naturally include negotiations with creditors regarding debt adjustments and restructuring. Because of the unsurmountable and unsustainable public debt that burdens Puerto Rico, and the scope of the powers granted by PROMESA, such negotiations will impact the wellbeing of the people in the archipelago of Puerto Rico. Disclosure of this documents inherently derives from the purposes and public policy interests enshrined in PROMESA.

The FOMB has reiterated its position against public information requests alleging that these requests are inconsistent with PROMESA, which establishes that in such cases its provisions shall prevail over State law. PROMESA, Section 4. The argument of preemption is presented on multiple grounds, including the enumeration of instances where access to information is mentioned by PROMESA, the sensitivity of information regarding debt negotiations, lack of staff, and their good faith. Overall, the FOMB insists on the immunity clause of PROMESA, to challenge the justiciability of this controversy. PROMESA, Section 105. None of these arguments are meritorious, particularly when such preemption would result in a displacement of the constitutional and human right of access to information. Even the most restrictive approach to the legislative text must conclude that nothing in PROMESA forbids public disclosure and that, therefore, the requests presented by the CPI are legitimate under both constitutional and international human rights law.

A. ACCESS TO INFORMATION IS A RIGHT PROTECTED BY THE CONSTITUTION OF PUERTO RICO

The right to information is protected by the Constitution of Puerto Rico and is directly connected to the exercise of other liberties, such as the right to speech, free press, and free association set forth in Article II, § 4 of the Constitution of Puerto Rico. Soto v. Giménez, 12 P.R. Offic. Trans. 587 (1982). Although Article II, Section 4 is worded similarly to the First Amendment of the United States

Constitution, under the broader scope interpretation of Puerto Rico's *Magna Carta*, the right to receive public information has been acknowledged as a constitutional imperative, essential to guarantee a genuine democracy based on the free flow of ideas. Santiago v. Bobb & El Mundo, Inc., 17 P.R. Offic. Trans. 182, 190 (1986). The right of access to information is a corollary of democracy and is an essential component of the right to redress grievances. Given the limited spaces of civic participation in the public debt restructuring processes, it is one of the few mechanisms available to ensure accountability. As constitutionalist Efrén Rivera Ramos wrote, "to allow the government to manage public affairs under the cloak of secrecy is to invite arbitrariness, mismanagement, government indifference, public irresponsibility, and corruption" Freedom of information: Need for its regulation in Puerto Rico, 44 Rev. Jur. UPR 67, 69 (1975).

In recent years, the Legislature of Puerto Rico has attempted to consolidate the jurisprudential development of the right to access information through two statutes. The Transparency and Expedited Procedure for Access to Public Information Act (Transparency Act), 3 L.P.R.A. § 9911 et seq., and the Open Data Act of the Government of Puerto Rico, Law 122-2019, 3 L.P.R.A. sec. 9891 et seq., aim to clarify a public policy that highlights access to receive information as a

fundamental right. 3 L.P.R.A. § 9913.¹ *The Transparency Act* states that "any information or document originated, preserved or received in an office of the Government, even if it is in the custody of a third party." Id. The CPI has been consistently trying to use these mechanisms, and others such as those recognized under the Freedom of Information Act and the FOMB response has demonstrated a tendency to arbitrarily restrict access to information. Brief CPI, 16-17.

PROMESA itself requires the FOMB to publish and make available documents related to its work. The law lists instances that demand the disclosure of public documents, such as bylaws, rules, and procedures governing the Board's activities. Duties to disclose documents and communications include publishing information provided by creditors seeking to participate in debt negotiations, annual reports to federal and local governments, and findings of investigations referent to disclosure and selling practices in connection with the purchase of bonds. *See* 48 USC 2121(h)(1), 2124 (d)(1), 2124 (p) and 2148, respectively. Other guarantees of public information and participation within PROMESA include provisions

¹ Article 3. (1) Information and documentation produced by the Government are assumed to be public and equally accessible to all. 2) Information and documentation produced by the Government of Puerto Rico as part of its studies, transactions and exercise of public authority, either directly or by delegation, are part of the heritage and memory of the people of Puerto Rico. 3) The constitutional right of access to information requires government transparency. 4) Any information or document originated, preserved or received in an office of the Government, even if it is in the custody of a third party, is presumed to be public and must be accessible to the People and the press. 5) The right of access to public information is a constitutional pillar and a fundamental human right. 6) Access to public information and documentation must be speedy, inexpensive, and expedited. 7) Every person has the right to obtain public information and documentation, subject to applicable rules and exceptions.

regarding transparency in contracting. PROMESA, 48 USC 2144. The FOMB sustains that document beyond this enumeration remain confidential and that it is only through good faith that they are to be disclosed. FOMB Brief 15. Safeguarding access to information and the constitutional broader scope protections allow us to conclude that this is not a restrictive list. The constitutional and human right of access to information requires the Board to comply with a strict threshold to withhold the public documents and communications requested.

It is insufficient for the FOMB to argue that the requests are inconsistent with PROMESA, that disclosure attempts by the press threaten sensitive discussions or negotiations, or that they have a small staff. FOMB Br. 38–39. Similarly, the authorization to celebrate closed-door executive sessions enshrined on Section 101(h)(4) of PROMESA is an argument that fails to shield the Board against public disclosure requests. The FOMB has the burden to prove that the confidentiality threshold is reached and that the exclusion of a particular piece of documentation from the eyes of the public is meritorious. Alleging that information is sensible or that its disclosure could impact negotiations is not enough.

While the right to access to information is subject to specific limitations, the confidentiality of documents prepared, created, or in control of a government entity

is the exception and never the rule. Santiago v. Bobb y El Mundo, Inc., 17 P.R. Offic. Trans. 182, 190-91(1986). The Supreme Court of Puerto Rico has reiterated that the exclusions are limited to instances where a) a law so declares; (2) the communication is protected by one of the evidentiary privileges that the citizens may invoke; (3) revealing the information may injure the fundamental rights of third parties; (4) it deals with the identity of a confidante and (5) it is "official information" pursuant to Puerto Rico Rules of Evidence. See Bhatia v. Governor, 199 DPR 59 (2017). In any case, restrictions to access to public information must be justified, and denials cannot be made on arbitrary or capricious grounds. Restrictions must comply with the judicial standard of strict scrutiny. Engineering Services International vs. Puerto Rico Power Authority, 2020 TSPR 103, p. 5.

The right to access to information guarantees that every person will be able to examine the contents of records, reports, and documents gathered by the government in its official business. See Ortíz v. Court Administration Office, 152 DPR 175 (2000). Documents under the control of the Board and gathered during debt negotiation processes, particularly those received from other public institutions such as those obtained from the Treasury and the White House, should be made immediately available to the press. The enjoyment of constitutional rights should not be made arbitrarily burdensome. Because agencies and courts must be guardians of

procedural economy, a duty that encompasses the Board as an entity financed with funds from the government of Puerto Rico, there is no reasonable ground to deny public information provided by another public entity and in custody of the Board.

It is also essential to address that governmental and semi-governmental entities such as the Board have a non-delegable duty to comply with public information requests. As has been sustained in this brief, access to information is a constitutional right and not a matter of public relationships. Contracting private firms bestowed with media relations to manage access to information requests and, hence, authorize public disclosure requests to be serviced as any other public outreach, is a concerning practice.

B. ACCESS TO INFORMATION IS AN ENFORCEABLE INTERNATIONAL HUMAN RIGHT

The right to information is an enforceable international human right and is part of the International Covenant of Civil and Political Rights (ICCPR) ratified by the United States Congress in 1992. Article 19, 999 U.N.T.S. 171. Article 19(2) of the ICCPR states that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art,

or through any other media of his choice." Art. 19.2 ICCPR. The right to access public information derives from this right to seek and receive documents.² The entities compelled to ensure the enjoyment of this right is broadly defined to encompass the government and public efforts carried out by semi-governmental or third parties.

"All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party. Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities. General Comment 34, CCPR/C/GC/34 (2011)³.

Efforts within international human rights law to reach consensus regarding access to information standard and the public's right to know are guided by maximum disclosure. This is a two-part principle: (1) a presumption that all information held by public bodies should be subject to disclosure and (2) it is the government duty to bear the onus to justify a refusal to disclose, grounded on very limited exceptions.⁴

Restrictions must be clearly delimited and comply with strict tests and no entity can

² Report of the United Nations Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, E/CN.4/20.05/64 (2005), para 39.

³ United Nations Human Rights Committee, General Comment No. 34: Freedoms of opinions and expressions (Art. 19), September 12, 2011. CCPR/C/GC/34

⁴ See the Public Right's to Know: Principles on Freedom of Information Legislation, quoted with endorsement on the Report by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, E/CN.4/2000/63 (2000). Also, see the Joint Declaration by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expressio, the Organization for Security and Cooperation in Europe, Representative on Freedom of the Media and the Organization of American States Special Rapporteur on Freedom of Expression, December 6, 2004.

preempt the application of public examination of documents. International and regional forums have resolved controversies reiterating the State's responsibility disclose requested information or to justify the restriction based on the limited exceptions.⁵

Congressional ratification of the ICCPR was accompanied by a statement providing that articles 2 to 27 are not self-executing. U.S. Senate Report on Ratification of The International Covenant on Civil and Political Rights, U.S. Senate Executive Report 102-23, 102d Cong., 2d Sess, (Senate Commission Report). Expressions by former members of this Court, such as esteemed Judge Torruella, signal to an understanding of these Congressional statements as non-binding for judicial interpretation of the self-execution nature of treaties. Igartua v. U.S., 626 F.3d 592 (2010), 612-633. Torruella defended the power of the courts to address this issue by arguing that "what determines whether a treaty is self-executing, or not, is the language of the treaty as interpreted by the courts, not the nature of the rights established therein as opined by the Senate that ratified the treaty." *Supra*, 623.

⁵ See Toktakunov v. Kyrgyzstan, solved by the Human Rights Committee in 2011 and Claude Reyes v. Chile, solved by the InterAmerican Court of Human Rights on 2006. It is important to remember that the United States is a signatory of the American Convention of Human Rights. Although this covenant has not been ratified by Congress, its signature represents alignment with the overall principles including access to information, included within Article 13 of the Convention.

Further, while the Senate made reservations to specific ICCPR provisions such as Articles 7, 15, and 20, it did not reservations in relation to Article 19. Senate Commission Report (Senate Report). Senate commentaries about Article 19 (and 20) were "rooted in concern about certain limitations that the Covenant allows on freedom of speech and freedom of expression." Senate Report. It was the limitation to free speech proposed by restrictions on propaganda or hate speech, among others, that motivated the Senate's declarations regarding this Article. Statutory provisions that are not more restrictive than those enshrined on the First Amendment of the United States Constitution are enforceable human right legal obligations. The Board's insistence on the secrecy of public documents regarding unsustainable public debt should and must be analyzed in light of this protection.

Regarding public debt and negotiations, the United Nation special procedures have explicitly addressed the importance of access to information. The Guiding Principles on Debt and Human Rights (Guidelines) are the result of a broad consultation process that included international and regional meetings with States and other stakeholders concerned about the relationship between public debt and the wellbeing of the people in jurisdictions besieged by unsustainability⁶. Within these

⁶ Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephass Lumina.

guidelines, transparency, participation, and accountability are core values and apply to the vastness of the debt restructuring and negotiation processes:

“lending and borrowing decisions by States, international financial institutions and other actors as appropriate, the negotiation and execution of loan agreements or other debt instruments, the utilization of loan funds, making of debt repayments, the renegotiation and restructuring of external debts, and implementation debt relief when appropriate” Guidelines, para. 28.

The principle of transparency refers to “full disclosure of all relevant information regarding loan agreements, debt repayments, debt management, outcomes of public debt audit and other matters”.⁷ Public input and accountability depend on this right to exercise transparency.

IV. CONCLUSION

As has been repeatedly stated by scholars, journalists, and advocates, this unelected Board wields plenary fiscal powers over Puerto Rico and mandates over public policy decisions with minimal oversight or accountability. Granting the Board the power to evade access to information claims would aggravate the democratic crisis that Puerto Rico currently faces. The importance of the right of access to public information lies in the notion that knowledge of public management

⁷ Id.

facilitates the free discussion of government affairs and the full exercise of the constitutional rights involved. Colón Cabrera vs. Caribbean Petroleum, 170 DPR 582, 590 (2007). The future of the archipelago of Puerto Rico depends on the just and accountable resolution of the unsustainable debt crisis. Constitutional and human rights protections, such as freedom of information and press, aim to level an inequitable playfield to give people eyes and a voice in processes that are mostly unintelligible. The role of the CPI and journalists is to safeguard equity and accountability in these processes. The Constitution and international right law recognize the centrality of this task.

For the aforementioned reasons, amicus respectfully urge this Court to affirm the decision of the district court.

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