

NEWSLETTER

Media & Security Sector Reform

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The Openness of Public Information and Security

PREFACE

After some years, the Bill of the Freedom of Public Information (in Indonesian: *Rancangan Undang-undang Kebebasan Memperoleh Informasi Publik or RUU KMIP*) which has been discussed in the National Legislation Program since 2005, is finally passed by the Parliament on the 3 April 2008 with a new title of the Openness of Public Information Act (*Undang-Undang Keterbukaan Informasi Publik or UU KIP*). Despite its effective implementation that will only take place in two years to come, with this law Indonesia becomes the 5th country in Asia, and the 76th in the world that officially adopts the principles of public information openness in its legislation process.

The process itself took a long eight years since its first introduction to legislation agenda in 2000. It experienced the administration change in 2004; being re-introduced in the Legislation Program in 2005, and finally being passed in early March of 2008. In principle, a democratic government guarantees the six public rights: (1) rights to observe government officials in performing its public tasks; (2) rights to information; (3) rights to participate in the public policy making process; (4) rights to protection in the case of witnessing, informing, and reporting on facts and truth; (5) freedom of expression, among many is the freedom of press; and (6) rights to raise objections when the rights as mentioned previously are denied (Makaarim & Yunanto: 2008: 84)

Now Indonesia is equal with India, Japan, Thailand, and Nepal in terms of possessing legal framework that ensures public access the governance process. However, substantially the OPI Act still carries the issues that might damage the freedom its aims for. It means that OPI Act has moved away from the spirit the 1998 reform; which also marks the setback in our democratic transitions.

GENERAL OVERVIEW OF THE EXCLUSIONARY ARTICLES IN THE OPENNESS OF PUBLIC INFORMATION (OPI) ACT

The OPI Act recognizes two kinds of information eligible for public access. First, information with an open public access, and second, information with limited access to public. The latter is often referred to as the excluded public information.

The characters of the exclusionary public information are rigid, limited, and confidential. The legal-formal and ethical limit of this information covers the laws, public interest, and decency level on which any direct exposure could potentially trigger negative consequence.

There are five categories of exclusionary public information: (1) information that can pose dangers to the state; (2) information related to any business protection from unfair competitions; (3) information related to individual rights; (4) information related to one's institutional and structural position (*rahasia jabatan*); and (5) undocumented and disputed public information. The detailed explanations can be found in the Article 17 of the OPI Act.

From the perspective of information openness, constitutional and human rights assurance, the abovementioned categories have limited so much information, as well as being flexible and could easily be misused to punish the citizens for violations of this law. The principle of access limitation is often applied to protect individuals, state and private corporations, public and government institutions, and even the state itself. However, there is also a positive impression to this law, which is on the protection of victims, witness, individual privacy, and intellectual property rights of the public institutions.

However, the exaggerating points are viewed as inappropriate and against the basic considerations of the OPI Act that stipulate the following arguments: (1) Information is the basic need of all individuals for their

internal and social environment development, and is an essential part of the national resilience; (2) Rights to information is part of the human rights, and information openness is an important part of the democratic country; (3) The Openness of Public Information is a vehicle for a maximum public oversight in the state and public institutions administration-areas that are of concern to public interest; (4) Public information management is one of the efforts to develop an information society; (5)

Therefore, based on the previous arguments, an OPI Act is needed.

At the end, some exclusionary aspects in public information only signify the motivation and interests in enhancing the closure of public information. The impression is even more strengthened in the penal articles (article 51 to 57) that apply to those who violate the exclusions in the public information, even in the open public information. As stated in article 51 and 55, a person who is "perceived" in deliberate use of public information

so as to violate the law or is "perceived" to make incorrect public information that mislead and commit injustice to others, will be imprisoned for a maximum period of one year and or subject to penalty up to five millions Rupiah in total.

Without clear limitations and law enforcement procedure, the penal punishment and penalty clearly jeopardize those who make use and disseminate public information. Therefore, journalists, researchers, and writers become the potential targets of arrest due to the allegation of unlawful use of public information.

With such regulations, the work of press and civil society organization to access information for public interest, and the monitoring function on government performance will not be maximized, if not stalled at all.

There are nine categories in which any public institutions are entitled to keep the limited public information, as stated in the Article 6 of the OPI Act. These are:

first, access to public information that might disturb the law enforcement process.

Second, access to public information that might harm the intellectual property rights and fair business competition.

Third, access to public information that poses threats to the national security and defense.

Fourth, access to public information that reveals the value of our natural resources.

Fifth, access to public information which hampers the national economic resilience.

Sixth, access to public information which can harm our interests in international affairs.

Seventh, access to public information which can disclose individual confidentiality.

Eighth, memorandum or internal correspondence among public institutions.

Ninth, information which are subject to protection as stipulated by the law.

THE CRUCIAL ARTICLES OF HIGH CONCERNS IN THE OPI ACT

There is a peculiarity in the OPI Act which was passed only recently in early March 2008; that is the strict punishment to those who violate the law. In comparison to other 75 states with Freedom of Information Law, Indonesia is the only country that impose strict punishment for public as the user and the partaker of public information.

The crucial articles which require high attention from the OPI Act are as follows:

Article 17

It is mandatory to all public institutions to grant access for public information to anyone who requested it, unless:

1. the access to it might hamper the law enforcement process
2. the access to it might disturb the protection on intellectual property rights and protection against unfair business competition
3. the access to it might pose threats to national security and defense
4. the access to it might reveal the value of national natural resources
5. the access to it might hamper the national economic resilience
6. the access to it can harm our interests in international affairs
7. the access to it can reveal the content of authentic documents as in will or testament
8. the access to it can disclose individual confidentiality
9. the informations is a memorandum or internal correspondence among public institutions deemed confidential, unless certified otherwise by the Information Commission or Court
10. it is the disclosed information as stipulated by Law

Article 51

Everyone who deliberately uses public information so as to violate the law will be sanctioned for maximum of one year of imprisonment and/or charged with penalty up to five millions Rupiah.

Article 52

Public institution that deliberately not providing, not granting access, and/or not publishing public information in the form of periodicals, information that requires

immediate announcement, information that should be available at all time, and/or information on which access should be granted as stipulated by this law, and cause consequences at the expense of others will be sanctioned for maximum of one year of imprisonment and/or charged with penalty up to five millions Rupiah.

Article 53

Everyone who is intentionally against the law to destroy, damage, and/or misplace the documents of public information in any forms that are protected by the state and/or of high public interest will be sanctioned for maximum of 2 years of imprisonment and/or charged with penalty up to 10 millions Rupiah.

Article 54

1. Everyone who intentionally and without any rights access and/or acquire and/or pass on the exclusionary information as stipulated in the article 17 point a, d, f, g, h, i, and j will be sanctioned for maximum of 2 years of imprisonment and/or charged with penalty up to 10 millions Rupiah.
2. Everyone who intentionally and without any rights access and/or acquire and/or pass on the exclusionary information as stipulated in the article 17 point c and e will be sanctioned for maximum of 3 years of imprisonment and/or charged with penalty up to 20 millions Rupiah.

Article 55

Everyone who intentionally creates any false and deceptive public information and cause consequences at the expense of others will be sanctioned for maximum of one year of imprisonment and/or charged with penalty up to five millions Rupiah.

Article 56

Every violation which is subject to criminal punishment in this law and is subject to other law that regulates particular topics will be settled according to the corresponding law.

Article 57

The criminal charges based on this law are subject to complainable crime and submitted to the criminal court.

STATEMENT FROM THE COALITION FOR THE FREEDOM OF INFORMATION ON THE ENACTMENT OF THE OPENNESS OF PUBLIC INFORMATION ACT

On 3 April 2008, the Indonesian Parliament passed the the Openness of Public Information Act (OPI Act). With this act Indonesia becomes the 5th country in Asia, and the 76th in the world that officially adopts the principles of the openness of public information. The process itself took a long eight years since its first introduction to legislation agenda in 2000. It experienced the administration change in 2004; being re-introduced in the Legislation Program in 2005, and finally being passed in early March of 2008.

Now Indonesia is equal with India, Japan, Thailand, and Nepal in terms of possessing legal framework that ensures public access the governance process. It brings hope and expectations to improve Indonesia's image that is undermined by the problems of corruption and government's transparency.

POSITIVE ACHIEVEMENT OF THE OPI ACT:

The Coalition for Freedom of Information, who has been advocating the enactment of the OPI Act, has marked some positive achievements of this law. First, OPI Act is the first law that comprehensively ensures the public rights for information. Some of the previous laws have also recognized public rights for information, but without further implementation mechanism. These laws also do not oblige public institutions to grant access for information, as well as related punishments.

Second, the OPI Act has comprehensively regulated the obligations of public institutions and public officials to grant access to open and efficient information for public. Through OPI Act, the responsibility to provide information, document, and data are integrated as inherent part of the bureaucratic governmental function with strict sanctions for violations against it. Third, OPI Act regulates the classification of information in order to provide legal assurance regarding certain information of which openness is mandatory, and certain information which could be excluded for a certain period. Theoretically, OPI Act offers solutions for journalists, researchers, and ordinary citizens that constantly have been experiencing claim of state secrecy, institutional confidentiality, or occupational information when accessing documents in public institutions. Fourth, OPI Act has institutionalized the Commission of Information as a national

independent institution with the mandate of dispute settlement on information and regulatory bodies under the law. Fifth, judging from the condition, OPI Act is considered as well-equipped and strategic to complement the existing instruments for corruption eradication, i.e the Anti-Corruption Act, the Corruption Eradication Commission (KPK) Act, the Victims and Witness Protection Act, and the Anti-Money Laundering Act.

POINTS OF CRITICISM OF THE OPI ACT

Despite its important advantages, the OPI Act is not flawless. The following are some weaknesses of the OPI Act. First, there is a criminalization for public as the user of such information. The article 51 of the OPI Act states, "Every person who deliberately uses public information so as to violate the law will be imprisoned for a maximum period of one year and/or charged with penalty up to five millions Rupiah." By referring to similar legislation in other states, the OPI Act should only regulate the access to public information, instead of the use of it. Hence, the criminalization towards the use of public information is not common. Such status could only be applied to cases of closing up or damaging access to public information and illegal disclosure of exclusionary information.

Without clear norms, such articles would provide blank "bank cheque" for the authority holder to put charge on illegal use of public information. It is understandable when these articles draw rejection from the civil society and media. However, the parliament's failure to obliterate these articles is also understandable on the other hand. The government demands, should the article 51 be taken out, the penal sanctions for public institutions or government officials that commit to information access violation should also be obliterated. It is an irrational demand and will only undermine the legal authority of the OPI Act.

Second is the equalization of formula and sanctions for public and public institution/officials. In OPI Act the public institution and public are not in the same position. The first accepts the mandate of the executive, while the latter is mandate holder. The first holds the obligations, while the latter holds the right. Therefore, the insistence of the government

to equalize the weight of sanction for public and public institutions as accommodated in the Chapter of Sanction in the passed OPI Act is incomprehensible. Consequently, there is the total ignorance that OPI Act serves as a legal framework aimed for reforming the bureaucracy in order to bring good and clean governance, instead of limiting public rights to control the accountability of the government.

Third, the OPI Act has successfully institutionalized the Commission of Information as the regulator and dispute settlement body for public information access matters. In the early draft of the bill as proposed by the Indonesian Parliament, the Commission of Information was envisioned as an independent state body and representing the public in terms of check and balance to power. However, most concern lies in the independency of the Commission of Information. One can only imagine the degree of its independency when the article 25 of the OPI Act stipulates that, "the seven member of the Commission of Information should reflect the aspect of government and society". Article 30 also enhances that "the recruitment of the candidates for the members of the Commission of Information should be held by the government in an open, fair, and objective manner". The situation reflects more on the compromise deriving from the reluctance of the government on the Commission of Information since the beginning of the OPI Bill discussion.

Fourth, in the early draft of the parliament-submitted bill, the scope of public institutions also covers the private corporations that are engaged in production contracts with the government. This definition refers to the mining companies that are mandated by the government as in the article 33 of the Constitution to handle the available natural resources to the utmost of people's welfare; companies for administering the departure of the Indonesian Haj delegations; companies that administer the Indonesian migrant workers abroad; companies that run public service such as Indosat, and many others. However, in the OPI Act as passed by the Parliament, these corporations are not included in the category of public

institutions. The General Rules on Public Institutions explicitly did not include the state-owned-corporations and political parties, as previously covered in the Parliament's initiative. Hence, the additional explanations on their transparency are stipulated in the body.

EVALUATION TO THE LEGISLATION PROCESS

The long and complicated legislation process of the OPI Act showed that the highest interest in implementing the regime of openness is yet to come. Not only the government conservatism reflected this situation; in discussing each articles in the bill and the compromising decision taken by the Parliament on the government's requests; one example is the modification of title, from "Freedom of Public Information" into "Openness of Public Information"; but also in the lack of considerations on the presence of civil society element: non-governmental organizations, academia, occupational associations, and even the press during the discussion.

The enactment of the OPI Act is only one momentum in the fulfillment of the transparency and openness of information; it is indeed still a long way to go. Having a law on the Openness of Public Information is one thing, whereby its implementation is another complex thing. By being critical and alert, we need to welcome the OPI Act. The Coalition for the Freedom of Information will monitor and evaluate the implementation of OPI Act so as to comply with and embrace the fundamental principle of the freedom of information; and not otherwise: to hinder the access to public information and create new problems in terms of the freedom of press.

Jakarta, 8 April 2008

*On behalf of the Coalition for the Freedom of Information:
MPPI, the SET Foundation, ICW, Yappika, AJI Indonesia, The Habibie Center, LSPP, VAB, KRHN, ICEL, LBH Pers, Imparsial, ilrc, KP3, Kontras, ISAI*



THE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS THAT PROTECT THE OPENNESS OF PUBLIC INFORMATION

The Resolution of the General Assembly of the United Nations

Resolution 59 Article 1

Freedom of information is fundamental human rights and is the touchstone of all the freedoms to which the United Nations is consecrated;

Universal Declaration of Human Rights

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

International Covenant on Civil and Political Rights

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone 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.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- a. For respect of the rights or reputations of others;
- b. For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Universal Declaration of Human Rights: Individual Rights

Article 12.

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Other Policies on State Security-Related Information

Next to OPI Act, other regulations that deal with information related to state security and defense matters are the Penal Code (*Kitab Undang-undang Hukum Pidana* or *KUHP*) and the Act No. 40/1999 on Press. Additionally, the government is in the process of formulizing the bills on National Intelligence and on State Secrecy. The security of the state is regulated in the Chapter 2 of the Penal Code on the Crime against State Security. Matters with concern of the state secrecy breach, for example, are found in the articles 112, 113, and 114 of the Penal Code.

Article 112 in the Penal Code states, "Every person who deliberately announces the correspondence or news or information that are known to be confidential and of interest of the state or deliberately informs and gives it to foreign state, are punished with imprisonment for maximum of seven years".

In addition to the Penal Code, the state secrecy matter is also regulated in the Archives Act No. 7/1971, the Banking Act No.10/1998, the Telecommunication Act Law No.36/1999, and the Trade Secrets Act No. 30/2000.

On this legal norm, there are some problems arising from the unclear parameter in determining the degree of classification for

each type of information. For example, in mid-2001 Surtipto, the Chairman of LESPERSI Board was arrested under the accusation of breaching the state secret to foreign party. The case however never went to court. According to Beni Sukadis, the security analyst of LESPERSI, the documents confiscated by the police contained analysis and facts which were gathered from open sources and accessible for public.

The case above is different with the information classification in the OPI Act with regard to the security and defense issues which are considered to provide solution to journalists, researchers, and the ordinary audience.

As there is no harmonization within various legal regulations, it causes the overlapping in implementation, for example the Law No. 40/1999 on the clauses in the Penal Code, whereby the Police is still referring to the Penal Code for press violation until present time.

The present Penal Code that regulates the state security, according to Andi Hamzah, a professor in criminal law, the Trisakti University, originates from the *Wetboek Van Strafrecht Voor Ned. Indie*, completed in 1915 and started its effectively applied from 1 January 1918.

Most practitioners view that the Penal Code tends to keep the substantialization and sacredness of the state; whereby the state holds the ultimate supremacy in public life. Consequently, the state has the sole right to regulate the private and public domain. []

THE LIMITATION OF PROTECTED INFORMATION IN VARIOUS COUNTRIES

The 56 member states of OSCE (The Organization for Security and Co-operation in Europe) have adopted the law that regulates the details of protected information classification that of high relevance to national security. Such classification covers the categories of information that are attainable, sensitivity, the duration of such information to be publicized.

The Categories of Protected Information

The information on state secrecy is well-protected but remains accessible after a certain period of time with regard to its strategic impact on the state's security or territorial integrity. Despite some limitations, the OSCE member states apply clear criteria and rules, so as not to restrict the entire activities on state affairs and governance. In Lithuania, state secrecy only refers to information that can "harm the sovereignty of the Republic of Lithuania, the national defense or economic power, measures that can harm the constitution system and the political interests of the Republic of Lithuania, as well as events that may harm the lives, well-being, and the constitutional rights of an individual". In Macedonia, the protected information has high relevance to "the national security and defense, sovereignty and territorial integrity, constitutional law, public interest, and the civil rights and independence".

An ideal law should be able to clearly regulate the categories of information which are protected by the state, so as not to provide the illegitimate use of such law to restrict information on behalf of the national security. The government of United States of America has classified eight areas of protected information:

- Military plan, weaponry system or operational system;
- Information from foreign countries;
- Intelligence activities (including special operations), intelligence methods or sources, or encryption
- International affairs and activities of the USA, including confidential sources;
- Issues in economics, technology, and science that are related to national security, including the national defense against transnational terrorism;
- The US government programs to safeguard the facility or nuclear materials;
- The limitation in the system ability; for installation, infrastructure, projects, or strategies of national security and defense, including the defense system against transnational terrorism;
- Weapons of mass-destruction.

The inaccuracy in defining information related to state secrecy may lead to misclassification in categorizing information of high relevance to public access as state secret. In Tajikistan,

the information on economic growth was once classified as confidential in 2003. In Tajikistan and Uzbekistan, the information on death penalty is also considered confidential. In Turkmenistan, information on communicable diseases is also categorized as state secret that cannot be publicized.

The Classification Level

Most of the laws that regulate the classification of information and state secrecy have set up various degree of security in its retention into "Top Secret", "Secret", Confidential", "Restricted" or "For Official Use".

Each category allows different access in acquiring the protected information. In Poland, information with the category of "top secret" are limited on the condition that "if the unauthorized disclosure of such information takes place and is made public, it will harm the freedom of the Republic of Poland; will undermine the territorial and international relations; and will endanger the citizens and the interest of national security and defense."

In the US, the US Executive Order on Classified National Security Information, EO 12958 regulates the secrecy level; only when "the state secrets are opened without authorization, its disclosure could endanger national security". Most of the laws of the OSCE member states are based on similar approach.

The Duration of Retention

Classified state information has certain duration of classification period, after which such information can be accessible for public. The longer the retention period, the lesser the risk it holds for endangering public interest when it is made public.

The average retention period for keeping information confidential ranges from 30 to 50 years. Some states even have shorter duration for retention, between 10 to 20 years. The Macedonian Law on Classified Information divided certain information into several categories: "secret" that is up to 10 years; "highly confidential information" is up to 5 years; "confidential" is up to 3 years; and "Internal Information" that is for 2 years.

In Albania, the state secret is limited up to 10 years. The US also determined that 10 years is maximum retention duration, unless an extension is required with strong verification and ground. Some states apply an extensive duration of retention, even without limit. In Hungary, state secret may be kept for as long as 90 years. Most of the Central Asian states do not specify certain limit of time on this matter. It indicates that the classified information is well safeguarded without any clear limitation of time.

PROFILE

FES

Friedrich Ebert Stiftung (FES) Indonesia Office was established in 1968, and particularly since 1998 FES has been working in various activities to support the democratization and socio-economic development in Indonesia. The area of work of FES covers political education, good governance, legal reform, human rights, conflict prevention and resolutions, security sector reform, free and fair media, strengthening trade union, and gender mainstreaming.

These objectives are sought through cooperation with Indonesian institutions, namely the civil society organizations and other corresponding organizations. The activities of FES and its partner organizations cover seminar, workshop, discussion, training, as well as producing publications. FES Indonesia also works for strengthening the international dialogue by facilitating exchanges of delegations, experts, academicians, and senior journalists in various regional and international forums. Periodically FES also invites the experts from Germany to other countries to share their expertise to Indonesian audience.

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AJI

Aliansi Jurnalis Independen or the Alliance of Independent Journalists is committed to uphold the public rights for public and free press. For the first goal AJI views itself as part of public who fights for public access to public information.

On its role as the press and journalists organization, AJI is also committed to the establishment of free press. The goal of this commitment is to fulfill public needs on objective and balanced information. To maintain the freedom of press, AJI strives to create a beneficial press culture: as achieved by professional journalism, strong work ethic, and on the same time, the journalists' welfare. These three factors are intertwined. Strong professionalism and compliance to work ethics cannot be achieved without proper fulfillment of living needs. AJI argues that decency of living has impact on journalists commitment to work professionally, complying the work ethics, and be independent.

The programs carried out by AJI to achieve such objectives are socialization of the ideal values of journalism and the economic rights of the journalists. These are achieved by journalism trainings, discussions, and seminar on issues related to press. AJI also conduct advocacy for journalists through legal consultation and individual assistance

for those who experiences repression from the media companies, state institutions, or community groups.

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IDSPS

Institute for Defense, Security and Peace Studies (IDSPS) was established in the mid-2006 by activists and academicians who share strong concerns for the advocacy of the security sector reform in strengthening democratic transitions in post-1998 Indonesia. IDSPS works together with civil groups and society dedicated to a democratic and accountable governance, as well as strong involvement of the civil society in the security sector policy making.

IDSPS carries out policy research in the fields of defense and security, conflict resolutions and human rights; establishes dialogue with various stakeholders: civil society, the security sector, parliamentarians, and other corresponding institutions. These activities aim to push for policy acceleration in the security sector, strengthen the involvement of civil society organizations, and encourage peaceful resolutions for violent conflict and human rights violations.

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