

# Freedom of Information

ISSN 0817 3532

ISSUE No. 106

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Print Post approved PP:338685/00011

This issue may be cited as  
(2003) 106 *Fol Review*

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## Comment

The following observations were made about the debates surrounding Fol by Philip Doty after sitting through a two-day conference in Mexico in November 2000. He observed that there seemed to be four tensions or riddles that characterised freedom of information:

*what he loosely termed 'federalism'.* Namely the policy issue network and tensions thrown up by Fol including the need for a centralised policy instrument (usually a statute) requiring freedom of information — the necessity for local control over records, the role of the media, public interest groups, citizens and the need for effective remedies for those denied access.

*the nature of the relationship among the key actors.* Doty argued that these 'relationships demand mutual co-operation and mutual scepticism. These relationships are both adversarial and collegial.

*how we translate information into political action.* What is the relationship between the citizen and the state?

*how we manage the unrealistic expectations we have of freedom of information.* Doty argued that 'we must constantly strive for improvement, not perfection. The challenge of freedom of information in this regard is how to achieve two goals simultaneously: (1) aiming high for transparency of government without excuse while (2) understanding how to achieve and accept partial, limited victories that help build such transparency step-by-step rather than expecting it at one stroke.'

Doty's paper was entitled 'Freedom of Information in the United States: Historical Foundations and Current Trends' — his email address is: [pdoty@gslis.utexas.edu](mailto:pdoty@gslis.utexas.edu)

Throughout this year, with different groups, I have been contemplating these riddles or tensions. In January it was with a class of highly motivated Canadian, Hong Kong and French law students looking at Fol from a comparative basis. In February it was with a bunch of very dedicated and

*Continued on p.68*

The *Fol Review* gratefully acknowledges Justice Ted Matlow and Canada Law Book for granting permission to reprint 'Ontario's freedom of information access process: "a view from the inside"' by Christopher Berzins in April 2003 (104 *Fol Review* 18). The article was first published in *The Advocates' Quarterly* (2002, 26 *Adv.Q.* 1).

As editor I was eager to reprint Chris Berzins's excellent article in a journal that reached a more specialised Fol readership. A number of Fol officers have wanted articles that better reflect their day-to-day engagement with Fol in practice. As editor I felt that Chris's article was ideal. I have used it now to introduce three different classes of law students (in Canada and Australia) to a more balanced perspective on Fol issues.

I apologise to Chris Berzins and Justice Matlow for neglecting to include this acknowledgement when we reprinted the article. Chris had given his permission to reprint subject to the inclusion of the acknowledgement.

**Rick Snell**

## Government transparency: Japan's Information Disclosure Law of 2001

On 13 December 2001, a three-judge panel of Nagoya District Court rendered the first court decision applying Japan's new information disclosure law.<sup>1</sup> The plaintiffs were self-appointed citizen auditors seeking data related to an international exposition planned for 2005 at a site near Nagoya. The defendant was the Economics and Trade Bureau of the Chubu District office of the Ministry of Economics, Trade and Industry. The government lost. The court ordered disclosure of much of the information at issue, including a list of banks under consideration to finance the event and other plan details.

Over the past decade, Japan has adopted a number of laws and regulatory measures intended to make government administration more transparent and to provide greater opportunity for public participation in policy-making. These measures include an Administrative Procedure Law adopted in 1993,<sup>2</sup> regulations establishing a no-action letter system,<sup>3</sup> a government-wide policy review system<sup>4</sup> and a 'notice and comment' procedure to allow public comment on proposed regulations.<sup>5</sup> One of the most significant measures is the Information Disclosure Law (Law concerning the Disclosure of Information in the Possession of Administrative Agencies, Law No. 42 of 1999). Roughly patterned on the US *Freedom of Information Act*, this law for the first time provides a legally enforceable right to request information in the possession of Japan's national government.

Article 1 of the Information Disclosure Law describes its purpose in terms that call forth the core principles of democracy:

In accordance with the principle that sovereignty resides in the people ... the purpose of the law is to strive for greater disclosure of information held by administrative agencies thereby ensuring that government fulfills its duty to explain its various operations to the people and contributing to the promotion of a fair and democratic administration subject to the proper understanding and criticism of the people.<sup>6</sup>

It is too early to judge whether the law will truly fulfill this mission. The purpose of this article is to provide a brief overview of the operation of the statute and report some of the more noteworthy developments that have taken place in its first year of operation.

### Overview of year one

The law came into effect on 1 April 2001 and attracted much attention during its first year of operation — and tens of thousands of information requests. According to the General Affairs Ministry, from 1 April 2001 through 31 March 2002, 48,650 document requests were filed and 45,071 decisions were made by national government agencies subject to the law. Of these decisions, 39,995 or nearly 89% resulted in either full or partial disclosure, and 5076 or about 11% resulted in complete denials.<sup>7</sup> The 'partial disclosure' category cannot be meaningfully evaluated because it covers a range from cases where only minor details were withheld to cases where virtually all information of interest was blacked out.

At the top of the list in number of requests received was the National Tax Agency. The cause of the NTA's popularity is undoubtedly its standard practice of publishing lists of people with highest reported incomes.<sup>8</sup> Many merchants are eager to obtain this information and the new law has provided a handy tool. Other agencies receiving more than 2000 requests included the Ministry of Land and Transportation, the Ministry of Health and Labor, the Financial Services Agency and the Ministry of Foreign Affairs.

During the first year of operation 1342 appeals were filed with administrative agencies subject to the law and 14 lawsuits were filed in court. The Nagoya decision mentioned above was the first to proceed to judgment. (Rather than accept the court judgment, the government appealed. The case is pending before the Nagoya High Court at the time of writing.)<sup>9</sup>

This article examines these and other significant developments later in the article. First, it will give a brief overview of the operation of the statute.

### Basic request procedures and documents subject to request

The statute establishes a simple procedure that enables anyone, Japanese or non-Japanese, to request to examine or copy documents in the possession of administrative agencies. The request must provide 'titles of administrative documents or other particulars sufficient to identify' the relevant documents.<sup>10</sup> Article 5 requires that, except for items that come within one or more of six categories of exempt information, 'the head of the administrative agency ... shall disclose the relevant administrative documents to the requester'.

All national administrative agencies, including 'organs within the Cabinet or established under the jurisdiction of the Cabinet' are subject to disclosure requests.<sup>11</sup> Requests are not limited to paper documents. The rules allow inspection and copying of 'documents, drawings, and electromagnetic records', as long as they were 'prepared or obtained by an employee of an administrative agency in the course of his or her duties' and 'held in the possession of the administrative agency for the use of its employees'.<sup>12</sup>

The Act creates six categories of exempt information and incorporates others by reference. Language creating each of these exemptions is broad and appears to grant officials much discretion in determining information exempt from disclosure. Provided that a government agency actually holds documents responsive to a request, the decision to disclose or not turns on interpretation of the scope of these exemptions.

The six categories of exempt information are 'individual information,' confidential business information, national security and foreign policy matters, criminal investigation and prosecution, policy deliberations internal to administrative agencies and a list of activities

conducted by administrative agencies including research, personnel management and other matters.<sup>13</sup>

### Customer service, time limits and fees

Requests can be made in person or by mail. All ministries and major agencies have established information windows with staff assigned to assist requesters in filling out request forms and identifying documents of interest. In addition, all national government agencies have established virtual windows on their websites. They explain the basic process and enable visitors to conduct key word searches of document titles online. A fixed fee of 300 yen must be paid with each request. There is an additional fee of 100 yen to view every 100 pages of a requested document and there can also be a charge of 20 yen per page for photocopying. There is a provision to waive some fees in some circumstances but this is not as broadly available as it is in the USA. Visitors can also download request forms and submit them by mail if they choose — provided they attach a 300 yen revenue stamp.

Article 10 of the Act requires that agencies respond within 30 days. This can be extended for an additional 30 days due to difficulty in handling the disposition or some other reason. Article 11 allows for further extensions where a 'very large volume' of documents is involved.

### Significant disclosures in the first year

Among information requesters active in the first year, reporters for national newspapers have attracted the most attention. They have used the new law to find newsworthy documents and many of their discoveries have found their way into print. Perhaps the most prominent example was the release of minutes of the proceedings of the Financial Rehabilitation Commission (FRC) held between December 1998 and January 2001.<sup>14</sup> The FRC was charged with overseeing the examination of Japan's commercial banks and making recommendations for remedial action. FRC decisions led to the nationalisation of two especially weak institutions and the injection of more than seven trillion yen of public money into 15 others in early 1999.<sup>15</sup> Major newspapers filed requests for minutes of FRC meetings immediately after launch of the disclosure system. Although numerous details were blacked out, the volume of documents released by the Financial Services Agency was large, leading to front-page stories. According to one newspaper account: '[i]n about 1000 pages of copies of FRC minutes, the names of companies and individuals involved in the public fund injection to the financial institutions were blacked out. FRC officials said publication of such names would unreasonably jeopardise the interests, rights and competitive status of those concerned.'<sup>16</sup> Agencies commonly cite the 'individual information' exemption in withholding the names of individuals and other identifying information. This has been a major source of complaint from requesters and will be discussed later under the heading 'Criticisms'.

Other noteworthy disclosures included the details of 'amakudari' placements of retiring central government officials in senior positions in government-controlled 'special corporations' (*tokushu hojin*) including

compensation levels;<sup>17</sup> total expenditures by the Ministry of Foreign Affairs related to the Okinawa Summit held in July 2000 (14.8 billion yen; this amount was additional to sums expended by other ministries);<sup>18</sup> administrative punishments applied to doctors employed at national hospitals who improperly received gifts from drug providers;<sup>19</sup> and others.

One case that received special attention was a disclosure by the Ministry of Justice that in January 2001, only three months prior to implementation of the new law, it destroyed all records of executions carried out between 1949 and 1989.<sup>20</sup> The action was taken pursuant to a newly adopted Ministry policy requiring that such records be maintained for only ten years. Apparently there is no longer any official record of executions carried out prior to the most recent ten-year period.

### Appeals

Dissatisfied requesters are provided two avenues of appeal. First, they can file a request for administrative review of non-disclosure decisions. Article 18 of the Information Disclosure Law requires agencies to refer such appeals to the Information Disclosure Review Board (*joho kokai shinsakai*) established by the law.<sup>21</sup> Alternatively, they can file suit for nullification of the non-disclosure decision directly with courts in eight districts. There is no requirement that requesters first appeal to the Review Board before filing suit in court.

Creation of the Information Disclosure Review Board is perhaps the most innovative and potentially influential aspect of the Information Disclosure Law. The Board ordinarily considers appeals in three member panels. These panels have the power to demand that the agency submit the document(s) in question and can consider written and oral presentations by requesters and their representatives. Hearings are closed to the public, thus allowing for *in camera* examination of confidential matters.

Once the Review Board panel has come to a conclusion, it issues a written opinion that is sent to the agency head and published on the Internet. The agency then must decide whether to follow the opinion of the Review Board or stand by its original disposition. All Board members are appointed by the Prime Minister for three-year terms and must be approved by both houses of the Diet. The original nine members included three law professors, three retired public officials, two attorneys and a former commentator on NHK.<sup>22</sup>

Of 1342 appeals filed with administrative agencies, 571 cases were referred to the Information Disclosure Review Board in the year ending 31 March 2002. The Board had formally received 384 cases for review and delivered formal recommendations in 178.<sup>23</sup>

The potential for the Board to play a leading role in policy development was illustrated in a series of recommendations issued on 9 January 2002.<sup>24</sup> Requesters had sought to examine official reports concerning accidents that occurred in public hospitals and health care facilities during 2000. The Ministry of Health and Labor made a 'partial disclosure' under Article 6 of the Information Disclosure Law, releasing a list of 83 incidents, but redacting

critical information, citing the exemption for individual information. The details released were so meager that, according to the Board, requesters could learn nothing more than the fact that reports were actually filed with the Ministry concerning these accidents.

The Ministry cited the exemption for 'Individual Information' to support its decision to withhold details. The Ministry reasoned that, by disclosing any details about the incidents, people with some relationship to the patient would be able to identify the patient. In its recommendation, the Board disagreed with this narrow approach, writing that the Individual Information exemption should apply only when information released would enable people with no special relationship to the patient (*ippanjin*) to make the identification.

Applying this logic, the Board went through a detailed list of types of information in the reports, deciding which information was properly withheld and which should be disclosed. Details the Board recommended for disclosure included the names of the chief and associate heads of the hospital, the chief physician in charge of departments involved in the incident, the date of the initial examination, dates and details of examinations and treatments, reports by hospital accident review panels and other details. Press accounts hailed the recommendations as 'the first specific standards for malpractice disclosure'.<sup>25</sup>

### Criticisms

Requesters have made numerous complaints about current implementation of the Information Disclosure Law. Causes of complaint include delays in receiving responses and costs for handling requests and making copies. Some observers point out that there are no mechanisms to ensure compliance by government officials. There are no penalties for recalcitrant officials and no awards of attorneys' fees for requesters who may incur heavy costs in pursuing a just claim. One perceptive observer, Ms Yukiko Miki, Executive Director of the Information Clearinghouse Japan, has said that government officials readily disclose documents in unambiguous cases where the law clearly mandates disclosure; on the other hand, in cases that require more sophisticated judgment, officials reject requests, leaving the requester the burden of filing an appeal with the national Information Disclosure Review Board.<sup>26</sup> Thus, the Board may play a critical role in setting policy. As an accumulation of Board Recommendations builds, officials will have precedents to rely on and may have an easier time disposing of challenging cases. In its first year of operation, one of the major complaints against the system was the backlog created by the great number of appeals filed. The statute itself does not set any time limit to govern appeals.<sup>27</sup>

An obvious and fundamental weakness in the system is embedded in the broad statutory language employed to create exempt categories of information. This issue has been confronted by courts which have considered cases filed under local information disclosure ordinances.

### Problems with government handling of information about requesters

Application of the disclosure law took an unexpected turn on 28 May 2002 when the Mainichi Shinbun newspaper revealed that officers of the Self-Defense Agency compiled a list of people who had submitted information requests, had conducted background investigations of those people and then distributed this information to officers in the Agency.<sup>28</sup> Subsequent revelations showed that similar lists had been compiled by each of the three branches of the Self-Defence Forces and that these databases were made available throughout the Agency and the branches by posting them on local area networks. Representatives of the Agency themselves admitted that certain of these actions violated a 1988 Privacy Protection Law.<sup>29</sup> This law, however, provides no penalties for violation. The ensuing uproar was so loud that the Koizumi Administration abandoned similarly toothless privacy-related bills it had already proposed to the Diet along with other defense-related legislation.<sup>30</sup> Diet members from all opposition political parties boycotted all Diet sessions for several days pending clarifications and apologies from government representatives.<sup>31</sup>

This incident raised serious questions about the absence of protection for individual privacy in Japan, the failure of the government to train personnel regarding the purpose of the new disclosure law and the ambiguous position of the Koizumi Administration concerning such issues.

### Local government document disclosure

Local governments adopted disclosure ordinances long before the national government took action. By 1985 major population centers, including Tokyo, Osaka, Kanagawa and Saitama, had all adopted information disclosure ordinances and attorneys, citizen activists and local residents had begun to file requests.<sup>32</sup> The information disclosure movement received a major boost when a loose network of activists who called themselves 'Citizen Ombudsmen' began a national campaign to uncover misuse of public funds. When they discovered that local government officials across the country were spending many millions of dollars to entertain national public officials and on related abuses, the story made front pages of Japan's national newspapers. Due to these efforts and the embarrassing disclosures, such entertainment was curtailed and numerous officials were disciplined for improper behaviour. Perhaps of greatest significance, public revulsion at the details of misbehavior amongst old style officials has led to the election of progressive governors and city mayors around the country who are committed to transparency in government.<sup>33</sup>

The first lawsuit was filed under the Saitama ordinance in 1983.<sup>34</sup> By the time the national Information Disclosure Law was enacted in 1999, a significant body of administrative experience and judicial precedent had developed. Although the wording of local ordinances differs in many respects from the national law and the range of documents available is quite different, nonetheless knowledge gained under the local rules by attorneys, judges, information requesters and others is applicable to the operation and interpretation of the national law.

In the 1983 Saitama suit, a court confronted for the first time the opaque language typically employed to describe categories of exempt information in these ordinances. In this case, as in subsequent cases where courts have reversed government decisions to withhold, advocates persuaded the court that the ordinance creates a general rule of disclosure and, as exceptions to this general rule, exemptions should be interpreted narrowly. In its decision in 1984, the Saitama court imposed a heavy burden of proof to justify non-disclosure, requiring that the government present 'clear and objective' evidence to support its claim of exemption. When the government failed to meet this burden, court-mandated disclosure was the result.

In other cases, courts have been more willing to accept government assertions of exempt status at face value. The split is well illustrated by a set of decisions issued by different panels of the Supreme Court in 1994. On January 27, 1994 the First Petty Bench issued two judgments upholding decisions by the governors of Osaka and Tochigi to deny requests for documents detailing their entertainment expenditures.<sup>35</sup> Less than three weeks later, the Third Petty Bench of the Supreme Court ordered disclosure of similar information related to entertainment by the Osaka Water Department.<sup>36</sup> The First Petty Bench accepted government arguments that disclosure would disrupt relations with official guests. The Third Petty Bench, on the other hand, declared that the government bears a burden of proof to uphold information denials and in order to successfully carry this burden, must 'assert and prove concrete facts' justifying application of the exemption. Needless to say, advocates for information requesters routinely cite the latter case in court pleadings while government representatives cite the contrary judgments of the First Petty Bench.<sup>37</sup>

Dissatisfied requesters are provided two avenues of appeal. They can file a request for review of the non-disclosure decision by the 'Information Disclosure Review Board' (Review Board) established by the law (described below), or they can file a suit for nullification of the non-disclosure decision directly with one of eight district courts. There is no requirement that requesters first appeal to the Review Board before filing suit in court.

Articles 21-26 establish the Review Board, a nine-member panel attached directly to the Office of the Prime Minister, with panel members appointed by the Prime Minister subject to Diet approval. Appeals to the Review Board are governed by the Administrative Complaint Inquiries Law. Under this law, the Review Board does not actually have the power to force an agency to disclose documents; the ARC commentary indicates that the council is intended to act as a 'third party,' providing guidance to the administrative agency that must make the disclosure decision. Thus, an appeal to the Review Board is actually made to the agency that made the original disposition, and the agency head then refers the appeal to the Review Board for examination.

### The future

In the final days of Diet negotiations over the proposed information disclosure law in early 1999, Opposition party

members were able to gain some significant amendments to the Government Bill. One requires that four years after its launch the statute should be subject to a complete review and modified to remedy defects. Pro-disclosure activists are already making their wish lists of proposals for reform, including shorter time limits on appeals, tighter wording for exemptions, reduced fees and other items.

The Defense Agency incident suddenly threw a spotlight on the threat of government invasion of individual privacy and its relationship to a disclosure system. Proponents of information disclosure also support protection of individuals against improper surveillance by government and against the dissemination of private information among officials without an appropriate need to know. The incident clearly revealed that there is little protection against such abuses in Japan today.

As suggested at the outset of this article, a freedom of information law is only one element in a system that successfully promotes citizen understanding and participation in government policymaking. Another critical element is the existence of active and sophisticated citizen organisations able to identify important information, obtain relevant items from government agencies and then utilise them in the course of developing proposals for public policies. Even the most progressive disclosure system will have little impact if there are few organisations with the capability to effectively represent public interest by developing policy proposals, lobbying for their adoption and monitoring government performance. Many observers point out that there has been much interest in the role of non-governmental organisations in Japan since the occurrence of the Kobe earthquake in 1995. However, this has yet to result in the development of an influential community of civil society organisations anywhere near the scale of what we see in the United States. The lack of any real tax incentives for financial contributions, the absence of a tradition of civic participation in policymaking, and other factors have inhibited the growth of such organisations.

Nonetheless, implementation of the Information Disclosure Law itself is a major accomplishment in the effort to develop a more democratic society in Japan. Its future growth will depend on the energy of the Japanese people in putting it to work and the posture of future governments in responding to citizen requests and in adopting further improvements.

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## Rethinking commercial confidentiality in the decade of competition policy

### Introduction

The always fuzzy line between 'public' and 'private' has been reconstructed since freedom of information (Fol) legislation first appeared in Australia in the early 1980s. Both the wave of privatisation and outsourcing since that time and the mid-1990s commitment to the values of national competition policy have radically altered the landscape across which the Fol Acts operate. In particular, the commercial relations between government, business and the broader community have been fundamentally reshaped. It follows that business affairs exemptions, trading on notions of 'commercial confidentiality', must also be reconstructed. This article offers some opening thoughts and provocations.

### Markets, competition and information: three propositions

We can begin with three propositions:

both competitive markets and political democracies require free information flows in order to function effectively;

the individual interest in competitive success is not identical to, and may in fact operate against the public interest in fostering vigorous competition;

unilateral control of information may create a situation of market power, or even monopoly, with anti-competitive consequences.

The first proposition suggests some broad similarities between democracies and markets. The centrality of access to information to a flourishing democracy is well recognised by public lawyers. It is the key rationale

underpinning the Fol Acts. It is the same rationale which lies at the heart of the 'freedom of political speech' cases. As Brennan J remarked in *Nationwide News*:

... it would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgment.<sup>1</sup>

Economists make a parallel observation in relation to markets. These are also informational systems, which depend on information exchange as their key decision-making mechanism. In the context of competition law, the point was well made in an early and much approved decision of the Trade Practices Tribunal:

We think of competition as a mechanism for the discovery of market information and for enforcement of business decisions in the light of this information. It is a mechanism, first, for firms discovering the kinds of goods and services the community wants and the manner in which these may be supplied in the cheapest possible way. Prices and profits are the signals which register the play of these forces of demand and supply.<sup>2</sup>

The 'ideal type' of a market, wherein perfect competition takes place, is therefore a marketplace characterised amongst other things by perfect information. In that ideal market every player knows everything there is to know about every other player, and all their transactional potentials, and thus makes the informed production and consumption decisions from which the allocative efficiency of the market, Adam Smith's 'invisible hand', is said to flow. Access to information is one of the pre-conditions for effective competition, which leads in turn to economic efficiency and hence to the broader public interest.