Volume 11 | Issue 42 | Number 1 | Article ID 4011 | Oct 18, 2013

A New State Secrecy Law for Japan? 新たな秘密保護法?

Lawrence Repeta

A Japanese translation is available

A French translation by Philippe Looze is available

The Abe Proposal

The last major change to Japan's secrecy law was made in 2001 when the Diet revised the Self-Defense Forces Law (*jietai-ho*) to include a new provision protecting information designated as a "defense secret" (*boei himitsu*).[1] During the extraordinary Diet session that opens on October 15, the Abe administration plans to submit a "Designated Secrets Protection" bill (*tokutei himitsu hogo hoan*) to the Diet with the goal of strengthening Japan's secrecy regime.[2]

Compared to the 2001 law, the proposed rules would dramatically extend the range of state secrets in two ways. First, the categories of information subject to secrecy designation would be expanded. The 2001 Law empowers the Minister of Defense to designate information he determines to be "especially necessary to be made secret for Japan's defense." It covers no other information. The proposed bill would apply to four categories of information, including defense, diplomacy, "designated dangerous activities," and prevention of terrorism.[3]

Second, the list of government offices empowered to designate information secret would be expanded beyond the Defense Ministry to include every Cabinet Ministry and major agency of the government.[4] Moreover, in order to better enforce the new regime, the maximum penalty for violation of the law would be increased from five years imprisonment under the 2001 Law to ten years under the proposed law*.

In democratic societies, any law or regulation that would grant the government power to conceal information from the people must be carefully examined. Government claims of a need for secrecy must be balanced against the people's right to know about the actions of their government agents. Japan's bar associations and other advocates of constitutional democracy have expressed deep concern that the proposed law would disrupt this balance by foreclosing the people's right to know about a broad range of government actions.[5]

To assess their claim, we must consider several key questions. For example, does the proposed law provide any checks to protect against overclassification? When in doubt, the "safe choice" for any government official is to label a document secret rather than risk its release. Overclassification has long been identified as the most serious structural fault in the American system, as discussed below. What about the "life cycle" of designated information? What will happen to the information after the need for secrecy has passed? Will it be declassified and transferred to archives accessible by historians and other members of the public?

Questions like these are yet to be answered. After examining some of these issues below, we will consider "The Global Principles on National Security and the Right to Know" (commonly known as the "Tshwane Principles"), a new set of model rules intended to balance the people's

https://doi.org/10.1017/S1557466013034967 Published online by Cambridge University Press

right to know against government need to maintain the confidentiality of national security information. The Principles were created through the work of numerous experts around the globe and released in Tshwane, South Africa, on June 11, 2013.[6]

But first we should consider Japan's track record under the existing 2001 "defense secret" regime. This is surely the best evidence for what to expect under the proposed law.

The "Life or Death Cycle" of Defense Secrets under Japan's Self Defense Forces Law

The most heavily reported unauthorized release of Japan's defense information in recent years concerns a video recording of a Chinese fishing boat ramming a Japan Coast Guard vessel near the Senkaku (Chinese: Diaoyu) islands in September 2010.[7] But the video itself was not classified as a "defense secret," so its release cannot be considered a breach of the Self-Defense Forces Law ("SDF Law"). The leaker, who was identified as a member of the Japan Coast Guard, was not prosecuted for any crime.[8] However, the 2010 incident incited demands for stronger secrecy protection laws and led to the appointment of a new government committee to study the issue.

The rarity of high profile leaks of confidential Japanese government information is a sharp contrast to the United States, where federal prosecutors have brought as many as eight cases against accused leakers since President Obama took office in 2009.[9] Bradley Manning and Edward Snowden are known all over the world for releasing masses of secret data for publication in mainstream news media and online publishers like Wikileaks.

For open government advocates, one of the most fundamental questions concerns the life cycle of defense secrets. Secrecy designations are ordinarily limited to fixed periods of time. The proposed Designated Secrets Protection Law would set a maximum term of five years. At the expiration of this term, officials could either decide that information remains sensitive and therefore extend the secrecy term or that it is no longer sensitive and the information can be declassified and released to the public or transferred to a public archive for easy access.

When NHK[10] reporters recently asked Defense Ministry officials to describe the life cycle of defense secrets under the 2001 Law, they received a detailed response. During the five-year period from 2006 through 2011, approximately 55,000 records were designated "defense secrets" under the SDF Law. What is the current status of these 55,000 records? According to Defense Ministry officials, 34,000 were destroyed once they reached the end of their fixed secrecy period. When asked how many of the records were de-classified for potential release to the public, the officials delivered a very precise response: one.[11]

This track record confirms the worst fears of open government advocates.

Thousands of records are designated secret for fixed periods. When these periods lapse, the secrecy designation is either extended or the information is destroyed. The Defense Ministry system is airtight. Under this practice, there will never be a reliable historical record of government actions documented in the destroyed files. Those files can never be used to hold government officers accountable for their actions or assure future generations of access to the historical record on critical issues. Hard evidence of the truth disappears into a black hole.

https://doi.org/10.1017/S1557466013034967 Published online by Cambridge University Press



Miki Yukiko has doggedly pursued the topic of government secrecy for many years. She has demanded that political leaders and government officials pursue open government policies, has filed numerous information requests to create a record of government policymaking regarding state secrets, and has repeatedly appeared in the news media to explain the issues to the Japanese public. In the photo above, she is shown in June 2013 receiving the first award for the promotion of free speech, the right to know and democracy created to honor the late attorney and journalist Hizumi Kazuo. For details see here.

Japan's Public Records Act

The issue of preserving the historic record of government action was supposed to have been solved by a statute that took effect in April 2011. The "Public Records and Archives Management Act" (the "Public Records Act") requires that officials create records of important actions and records with important historic value be stored in public archives.[12] The purposes clause includes the high-minded declaration that government records constitute "a shared intellectual resource of the people" and a "pillar of healthy democracy."[13] A central purpose of the Act is to ensure that the experience of Japan's "defense secrets" does *not* occur. In final bargaining over the terms of this statute, open government activists insisted that there be some check on the wholesale destruction of the people's legacy by anonymous government operatives. Their efforts led to insertion of Article 8(2) of the Law, which requires that government agencies obtain the consent of the Prime Minister before records are destroyed.

Alas, drafters of the Public Records Act also decided that the Act would *not* apply to defense secrets, so all decisions whether to preserve or destroy time-limited defense secrets are made by Defense Ministry officials. As noted above, during the period from 2006 through 2011, they reached the conclusion that information should be declassified and made available to the public in only one case. The in-box for "former secrets" at Japan's national archive is empty.

One obvious question for the sponsors of the proposed "Designated Secrets Protection Law" is whether secrets protected by this law will also be exempt from the Public Records Act and will therefore disappear into the same black hole as secrets under the 2001 SDF Law. When NHK reporters posed this question to officials of the Cabinet "Information Study Office" (*joho chosa shitsu*), the response was "we're thinking about it."[14]

Will "Designated Secrets" Ever Be Declassified and Released?

In the days leading up to the opening of the autumn 2013 Diet session, newspapers reported that the Abe administration was responding to widespread criticism and more particularly to demands by representatives of the Komeito, a member of the governing coalition, by acceding to demands that the new statute include language that would protect the people's right to know.[15]

As noted at the outset, the proposed bill would dramatically expand the range of information designated secret and placed beyond the reach of reporters, historians, and ordinary citizens.

https://doi.org/10.1017/S1557466013034967 Published online by Cambridge University Press

If government practice under this law follows the "defense secret" example under the SDF Law, an enormous body of secret records could be created and later destroyed, leaving little trace.

To address this problem, open government advocates have demanded that the Abe administration bill be amended to include provisions establishing an independent third party review board with the power to declassify information. Precedents for independent review boards have been established under Japan's information disclosure and individual information protection laws.

The authors of the Tshwane Principles present the establishment of such an independent review panel as a sine qua non of a reasonable secrecy protection system.[16] U.S. President Jimmy Carter established such a board, the Information Security Oversight Office (ISOO), in 1978.[17]

So far the Abe administration has shown no inclination to create such an independent panel. Unless the new law's drafters include such provisions or some other concrete procedure for declassifying information that need not be kept secret, however abstract references to respect a "right to know" will not be credible.[18]

Notes from the U.S. Experience

"Overclassification"

When Bradley Manning disclosed an estimated 700,000 classified documents in 2010, he was only 22 years old and held the second lowest rank in the U.S. Army. When Edward Snowden escaped from the United States in June of 2013 with a mass of secret material, he was not even an employee of the US government; he worked for a consulting firm. The 29-year old Snowden did not graduate from college, but like Manning, he held a "Top Secret" clearance and was in a position that gave him wide access to information the US government labels secret.[19] Why were these two young men selected to serve as guardians of the American "government of secrets?" The answer is that the body of information classified by the U.S. government is so vast that a huge army of operatives must access this "secret" information in order to do their jobs every day. According to the annual report of the U.S. Director of National Intelligence, more than four million people hold a security clearance that enables them to view classified information.[20] Among them, an astounding 1.4 million hold the "Top Secret" clearance, just like Manning and Snowden did.



National Security Agency Headquarters, Fort Meade, Md

Many experts think that, rather than making the U.S. safer against external threats, the US secrecy system actually makes the country more vulnerable. As explained by national security expert Morton Halperin, "Every study that has been done on this question has concluded that one essential step is to drastically reduce the amount of information that is classified."[21] Halperin says that because so much ordinary information is classified, "it is hard to protect real secrets." Moreover, this

https://doi.org/10.1017/S1557466013034967 Published online by Cambridge University Press

creates a related problem: "it is difficult to persuade government officials that they are doing harm by providing information which is classified to the press and the public."

Tens of millions of U.S. government records are classified every year.[22] Such a massive secrecy operation inflicts severe damage on any public "right to know" about the actions of government. Without the actions of individuals like Manning, Snowden and others, the American people would have no way to learn about the boundless electronic surveillance operations of the National Security Agency or countless other questionable activities carried out in their name.

The idea that such a massive system involving so many people can effectively manage the nation's secrets is absurd. The giant Mississippi of US government secrets is continually overflowing its banks or spilling through leaks in dikes.

Aggressive Prosecution

Confronted with the impossible task of maintaining the secrecy of such a vast amount of information, the US government has demanded extreme punishments for the leakers it can identify and capture. In its prosecution of Private Manning, the government demanded a prison term of 60 years. In a judgment rendered in August, a court ordered Manning to prison for 35 years. (With parole, the actual time served could possibly be reduced to 10 years.)

Manning was not a spy employed by a foreign government. The information he disclosed was not delivered to a foreign intelligence agency; it was published by Wikileaks and in establishment newspapers such as the New York Times and the Guardian to be read by Americans and people around the world. In comparable cases, the penalties in most countries are far less than in the United States.

In Britain, the United States' closest military and intelligence ally, the maximum penalty for public disclosure of intelligence or security information is two years. The maximum in Spain and Sweden is four years; in Belgium, Germany, Poland and Slovenia, the maximum is five years. In France, it is seven.

Since Britain's Official Secrets Act (OSA) of 1989 entered into force, 10 public servants with authorized access to confidential information have been prosecuted under the Act. Of those, the longest sentence—one year in prison—was served by a Navy petty officer who pled guilty to the selling to a newspaper of security and intelligence information concerning a plot by Saddam Hussein to launch anthrax attacks in the UK.[23] In the United States, that offense would be prosecuted under the same law used to prosecute Bradley Manning.

US prosecutions are based on the Espionage Act of 1917, a statute adopted just after the US entered World War I, written at a time when our understanding of the powers of government were very different from today. The phrase "Right to Know" would not appear until the 1950s and the US Freedom of information Act would not be adopted until 1967. The 1917 US Espionage Act is a poorly written law that has been criticized as vague and overbroad, even by the judges who must enforce it. But it remains in effect and provides the US government with frightening power to punish anyone accused of a violation. Moreover, the government need not show that any harm was caused by the disclosures in order to obtain a conviction.[24]

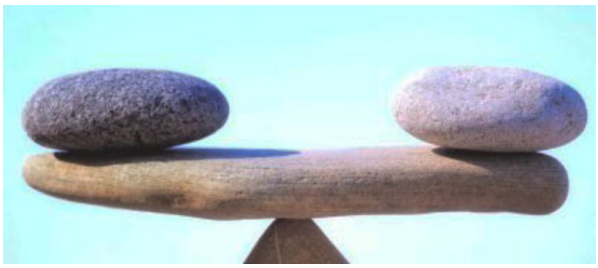
The prosecutions of individuals like Manning and Snowden make big headlines and severely punish selected individuals, but they do not solve the important issue of protecting national security information. This is not a model for Japan to follow.

There is a better way.

https://doi.org/10.1017/S1557466013034967 Published online by Cambridge University Press

A New Model to Balance the Need for Information Security with the Public's Right to Know

A new model appeared this year that deserves careful study. The "Global Principles on National Security and the Right to Information" (also known as the "Tshwane Principles" because they were finalized and issued at meetings held in the city of Tshwane, South Africa) provide detailed guidelines for drafting, revising or implementing laws or provisions relating to the state's authority to withhold information on national security grounds or to punish the disclosure of such information.[25] Japan's lawmakers and others concerned with these issues should study the Tshwane Principles carefully.



Work on the Tshwane Principles was carried out over two years and involved hundreds of experts from around the world, including government and former government officials and military officers. The Principles address such issues as the public's right to know, the scope of national security information that governments may legitimately keep confidential, protection for journalists, independent oversight bodies, and others that must be considered by Japan's legislators and the Japanese people as they evaluate state secrecy proposals.

The Principles are based on international and national law, standards, good practices, and the writings of experts. There is broad consensus that the Principles provide a practical plan for balancing information security and the public right to know.

On October 2, the Principles were endorsed by the Parliamentary Assembly of the Council of Europe (PACE).[26] The report could provide the source for information policies of countries across Europe.

(A summary of the key points of the Tshwane Principles appears here.)

Excessive Secrecy and Government Wrongdoing

The most serious problem is that excessive secrecy creates the ideal environment for government wrongdoing. This is the most disturbing lesson learned from the Manning and Snowden affairs.

The materials that Private Manning gave to WikiLeaks lifted the veil on American military and diplomatic activities around the world. They included a video taken during an American helicopter attack in Baghdad in 2007 in which civilians were killed, including two journalists. Manning also gave WikiLeaks some 250,000 diplomatic cables, dossiers of detainees being imprisoned without trial at Guantánamo Bay, Cuba, and hundreds of thousands of incident reports from the wars in Iraq and Afghanistan.

Among other things, the files exposed the abuse of detainees by Iraqi officers under the watch of American forces and showed that civilian deaths during the Iraq war were most likely significantly higher than official estimates.

Based on information that Edward Snowden leaked to The Guardian newspaper of London in May 2013, it published a series of exposés that revealed hitherto secret surveillance programs conducted by the National Security Agency (NSA), the giant American electronic spying agency. Due to Snowden's revelations, we have learned of the existence of the PRISM

https://doi.org/10.1017/S1557466013034967 Published online by Cambridge University Press

and other Internet surveillance programs and that the NSA utilizes such programs and secret agreements with telephone and Internet providers to monitor the communications of ordinary American citizens and to intercept the communications of political leaders around the world, including the leaders of Japan and other U.S. "allies." Snowden's release of NSA material was called the most significant leak in US history by Pentagon Papers leaker Daniel Ellsberg.

Without the actions of Manning, Snowden and other leakers and whistleblowers, we might never know about many wrongful actions by the US government. And while Manning sits in prison and Snowden is in hiding abroad, there is no punishment for the government leaders who launched distant wars based on lies about "weapons of mass destruction" and created systems that secretly monitor communications around the world.

Disclosure of government information does more than protect the people's right to know. It also serves to stop wrongdoing. Government officials and others who know their actions will be subject to public scrutiny may refrain from wrongdoing. Those who act in secret can act with impunity.

Conclusion

Japanese readers can take some comfort from the knowledge that their countrymen are not involved in wars in Afghanistan, Iraq, and elsewhere around the world and that Japan has no equivalent of the American NSA. But who knows what the future may bring?

LDP proposals to amend Japan's Constitution would eliminate the key restrictions of Article 9, transform the Self-Defense Forces into a national defense military (*kokubogun*) and make the Prime Minister its supreme commander (*saiko shikikan*).[27]

Constant pressure from senior officers of the U.S. government is an important factor driving Japan to tighten its secrecy laws.[28] Prime Minister Abe has repeatedly declared that the need for a tougher secrecy law is indispensable to his plan to create a National Security Council based on the American model. Because Japan's national security is so heavily dependent on the United States, Japan NSC officials would surely need to access much U.S. classified information to do their jobs. To gain this access, Japanese officials must satisfy their American counterparts that Japan's secrecy protection is sufficiently robust. Their frame of reference is the American model: a vast information bureaucracy, periodic front-page leaks of highly embarrassing and sometimes damaging information, and severe criminal punishment for the leakers who get caught. Is this the path Japan will follow?

Lawrence Repeta is a professor on the law faculty of Meiji University in Tokyo. He has served as a lawyer, business executive, and law professor in Japan and the United States. He is best known in Japan as the plaintiff in a landmark suit decided by the Supreme Court of Japan in 1989 that opened Japan`s courts to note-taking by courtroom spectators. He serves on the board of directors of Information Clearinghouse Japan (情報公開クリアリングハウス）（www.clearing-house.org), an NGO devoted to promoting open government in Japan and is affiliated with other organizations that promote individual rights. He has been awarded an Abe Fellowship by the Center for Global Partnership to conduct research at the National Security Archive, a non-profit research institute located at George Washington University (www.gwu.edu/~nsarchiv). His guide to Japan's information disclosure movement is available at www.freedominfo.org/regions/east-asia/japan. His article "Reserved Seats on Japan's Supreme Court" was published in the Washington University Law Journal and is available at (http://lawreview.wustl.edu/in-print/vol-886/). He is author of "Limiting Fundamental Rights

https://doi.org/10.1017/S1557466013034967 Published online by Cambridge University Press

Protection in Japan – the Role of the Supreme Court," in Critical Issues in Contemporary Japan, edited by Jeff Kingston (Routledge, forthcoming).

Recommended citation: Lawrence Repeta, "A New State Secrecy Law for Japan?," The Asia-Pacific Journal, Vol. 11, Issue 42, No. 1, October 21, 2013.

Related articles

• Lawrence Repeta, Japan's Democracy at Risk – The LDP's Ten Most Dangerous Proposals for Constitutional Change

• Lawrence Repeta, Mr. Hashimoto Attacks Japan's Constitution

• Klaus Schlichtmann, Article Nine in Context – Limitations of National Sovereignty and the Abolition of War in Constitutional Law

• Koseki Shoichi, The Case for Japanese Constitutional Revision Assessed

• John Junkerman, Gavan McCormack, and David McNeill, Japan's Political and Constitutional Crossroads

Notes

[1] The text of the Self-Defense Forces Act is available here (in Japanese). There is no English translation available on the Japanese government website. Article 96(2) of the Law, adopted in the aftermath of the 9/11 Incident in 2001, empowers the Minister of Defense to designate information he determines to be "especially necessary to be made secret for Japan's defense." The unauthorized release of information so designated is subject to prosecution with a maximum penalty of five years imprisonment.

[2] The Asahi Shimbun published a detailed summary of the bill on September 27, available here (in Japanese). The author's comments on the proposed bill are primarily based on this document. Note that, unless otherwise indicated, all translations from Japanese that appear in this article were made by the author.

[3] The Addendum to the draft bill published by the Asahi provides lists of the types of information that may qualify for secrecy designation under the four categories. The list makes reference to weapons, plans, communications, secret codes, information required to be kept confidential under international agreements and many other items.

[4] Article 100 of the National Public Employees Law imposes a duty on all national government employees to protect government secrets. Article 109 of that law mandates punishment of up to one year imprisonment for violations. In 1978, the Supreme Court of Japan overturned the not guilty verdict of a lower court and found Mainichi News reporter Nishiyama Takichi guilty of violating Article 109 by using improper means to entice a government employee to disclose confidential information.. An English translation of the statute is available here. For background on this case, see "Disgraced Mainichi Journalist Reopens 30-year-old Scandal Over Okinawa Reversion - David Jacobson

[5] A statement in opposition to the secrecy bill was published on the website of the Japan Federation of Bar Associations on October 4, 2013. Statement In Opposition to the Secrecy Bill.. See also the statement released by the Japan Civil Liberties Union. (The author of this article is a director of the JCLU.) The best source for ongoing commentary on these issues is the collection of news reports, columns and blog and twitter commentary by Miki Yukiko, chairperson of the NGO *Joho Kokai Clearinghouse,* available here: Joho Kokai Clearinghouse Website (Japanese only).

* This article does not address issues related to criminal prosecutions that may be brought

https://doi.org/10.1017/S1557466013034967 Published online by Cambridge University Press

under the proposed law or under the 2001 revision to the Self-Defense Forces Law.

[6] The Global Principles on National Security and the Right to Information at OpenSociety Foundations

[7] For details, see JapanTimes - Senkaku Collisions Video Leak Riles China

[8] An interview of the leaker, Isshiki Masaharu, appeared in the Asahi Shimbun on October 5, 2013. 「政府の隠匿にも罰則必要」 "Punishments are also needed for government concealments" The interview was accompanied by Mr. Isshiki's color photo.

[9] See, e.g., "Obama's efforts to control leaks 'most aggressive since Nixon', report finds," The Guardian - Obama Leaks Aggressive Nixon Report Prosecution and "U.S. accused of unpreced ented assault on press freedom," at Truth-Out - US Accused of Unprecedented Assault on Press Freedom

[10] NHK is Japan's national public television broadcaster.

[11] "Most 'defense secrets' are destroyed" 「「防衛秘密」の多くが廃棄」, NHK news report broadcast at 7:16 PM on October 3, 2013 (accessed on October 10, 2013).

[12] An English translation together with the original Japanese text are available here: Japanese Law Translation

[13] Public Records Act, article 1.

[14] NHK, "Most 'defense secrets' are destroyed."

[15] Asahi Shimbun, October 13, 2013, "Right to Know Guarantee Inadequate" 「知る権利担保不十分」.

[16] Principles 31 – 36 set forth provisions that should govern independent oversight bodies. OpenSociety : Principles 31-36

[17] The National Archive Information Security Oversight Office

[18] Anyone can file a request to examine any government record under Japan's national information disclosure law, any information designated secret under the proposed law would almost certainly be deemed exempt from disclosure. An English translation of the law is available here. See especially Articles 5(iii) and 5(iv).

[19] U.S. state secrets are designated according to three levels established by presidential executive order: Top Secret, Secret and Classified. See Executive Order 13526

[20] US Intelligence 2012 Report on Security Clearance Determinations

[21] Morton H. Halperin, "Criminal Penalties for Disclosing Classified Information to the Press in the United States."

[22] National Archives - Information Security Oversight Office Releases 33rd Annual

[23] See Sandra Coliver, "National Security Whistleblowers: The U.S. Response to Manning and Snowden Examined."

[24] See Halperin, "Criminal Penalties," n. 21 for a description of the Espionage Act and its various interpretations.

[25] The full text of The Principles.

[26] See Sandra Coliver, "A question of public interest,"

[27] See Lawrence Repeta, "Japan's Democracy at Risk – the LDP's Ten Most Dangerous Proposals for Constitutional Change,"

[28] Among other examples, the Asahi reports that U.S. Cabinet officers take advantage of the regular "2x2" meetings to demand tighter Japan secrecy protections. "Japan's laws

https://doi.org/10.1017/S1557466013034967 Published online by Cambridge University Press

protecting secrets are weak – U.S.” 「米「日本　は秘密守る法律弱い」」, Asahi Shimbun, October 6, 2013, p. 1.

https://doi.org/10.1017/S1557466013034967 Published online by Cambridge University Press