

# Submission for the Periodic Review of Japan

June 2014

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The Open Society Justice Initiative presents this submission to the Human Rights Committee in advance of its examination of Japan's sixth periodic report. This submission addresses the Act on Protection of Specially Designated Secrets, signed into law on 6 December 2013. It analyzes three sections of the Act that most clearly violate Article 19 of the Covenant: (1) the definition of what may properly be designated (or classified) as secret is vague, posing an unacceptable risk that information of high public interest may be kept secret; (2) public servants who disclose secrets, even of high public interest, face excessive penalties; the state is not required to prove harm to, or intent to harm, an important interest; and there is no requirement that the court, in assessing guilt or the appropriate penalty, consider the public interest in having access to the information; and (3) journalists and other members of the public may be prosecuted for publishing secrets even if the information is of high public interest.

## Executive Summary

The Open Society Justice Initiative<sup>1</sup> makes this submission to the Human Rights Committee prior to its review of Japan's 6th periodic report on compliance with the International Covenant on Civil and Political Rights (ICCPR).

This submission addresses the Act on Protection of Specially Designated Secrets (SDS) and related issues concerning the Act's implementation.<sup>2</sup> Because the Act was signed into law on 6 December 2013, just seven weeks after Prime Minister Abe's administration sent the bill to Japan's legislature, questions regarding this law were not included in the list of questions finalized by the Committee on 14 November 2014.

In the short period before the SDS Act was passed, numerous organizations and individuals issued statements expressing their concern that it deviated from international law and standards.<sup>3</sup> More than 60,000 Japanese took the streets in protest. On 22 November, Frank LaRue, UN Rapporteur on Freedom of Expression, and Anand Grover, Special Rapporteur on the Right to Health expressed concern that "the draft bill not only appears to establish very broad and vague grounds for secrecy but also includes serious threats to whistleblowers and even journalists reporting on secrets."<sup>4</sup> On 2 December, Navi Pillay stated that Japan's Government "should not rush through the law without first putting in proper safeguards for access of information and freedom of expression as guaranteed in Japan's constitution and international human rights law."<sup>5</sup>

Despite some amendments to the bill to respond to the protests, the law still includes several provisions that on their face violate Article 19 of the ICCPR. Moreover, the Government's recent proposals for independent oversight bodies to review decisions to designate, re-designate and destroy documents have not responded adequately to these concerns primarily because the bodies will have only advisory powers, and their decisions cannot be challenged before the courts.<sup>6</sup>

This submission focuses only on those provisions of the SDS Act that are quoted or otherwise referenced in the Japanese Cabinet Secretariat's "Overview of the SDS Act,"<sup>7</sup> as we do not have access to an official English-language translation of the Act.

## Recommendations

We encourage the Committee to ask the following questions during Japan's periodic review:

1. Is there an official translation of the SDS Act into any of the official UN languages? If yes, could this be made public?
2. Concerning the crime of unauthorized disclosure of secret information set forth in Article 23 of the SDS Act:
  - a. Why does the law not require proof of harm to an important governmental interest?
  - b. Why does the law not require the public interest in the information to be weighed against any harm caused in determining guilt and punishment?
  - c. What is the necessity for increasing the penalty for unauthorized, public disclosure of secrets from five years' imprisonment, as provided in prior law, to 10 years' imprisonment?
3. In designating information as secret, set forth in Article 3 of the SDS Act:
  - a. Why are heads of executive agencies not required to state in writing the specific harm that disclosure would cause, and the reasons why those harms outweigh the public's interest in having access to the information?
  - b. Why are decisions to designate secrets not subject to review by the courts?
4. Concerning the proposal to establish an authority to review secrecy designations –
  - a. Will the authority's decisions be advisory only?
  - b. If so, why is the Executive not required to comply with the authority's decisions or else seek review of the decisions before an independent court?
5. How does the SDS Act protect the public's right of access to information about information of high public interest, including information about environmental hazards, human rights abuses, and corruption?

We encourage the Committee to recommend to Japan:

1. Amend the SDS Act to:
  - a) Make precise the categories of information subject to classification, and subject to extended classification beyond an initial five-year period.
  - b) Permit challenges of classification decisions to a body that is independent of the Executive and that has the authority to order disclosure.

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- c) Make clear that prosecution for unauthorized disclosures requires proof both of the harm of the disclosure and that the harm outweighed the public interest in having access to the information.
  - d) Require that any penalty for unauthorized disclosure should be proportionate to the harm caused; and reduce the maximum penalty for public servants who publicly disclose secrets from 10 years to no more than 5 years, or such other term as is deemed necessary after full consultation with the Japanese public.
  - e) Repeal the crimes of conspiracy and incitement; and make clear that journalists and other members of the public may not be criminally prosecuted for disclosing secrets unless they committed a crime in obtaining the information, and that journalists may protect their confidential sources.
  - f) Repeal Article 22 which, far from safeguarding human rights and press freedom, instead undermines the Constitution's guarantee of freedom of the press and Article 19's protection of freedom of expression.
2. Allow sufficient time to consult with the general public as well as non-governmental experts, as the Prime Minister has committed to do, in drafting guidelines that will narrow the designation of secrets consistent with the requirements of Article 19.
  3. Pursuant to such a consultation process, issue guidelines that make clear that:
    - a) Information should not be classified even if its disclosure might harm national security if the public interest in public access to the information outweighs the likelihood and seriousness of the harm.
    - b) Administrators must state in writing their reasons to designate and re-designate information as secret.
    - c) Designation of information as secret cannot be justified simply to protect the government or public officials from embarrassment or exposure of wrongdoing; or to conceal information about the function of its public institutions.
    - d) No information may be classified indefinitely.
  4.
    - a) Establish an oversight body that is fully independent of the Executive to receive and act upon (i) requests to declassify information, and (ii) requests from government agencies to authorize the destruction of records; and
    - b) Allow judicial review of decisions of the oversight body.

## I. INTRODUCTION

Two of the main purposes of the SDS Act are to prevent unauthorized disclosures of designated secrets and to increase the amount of information that may be designated as secret. However, laws already in force are sufficient to protect secrets.<sup>8</sup> In particular, the Self-Defence Forces Law empowers the Minister of Defence to designate information that is determined to be “especially necessary to be made secret for Japan’s defence,” and provides a maximum penalty of five years’ imprisonment for any unauthorized release of designated information.<sup>9</sup>

The Justice Initiative has made numerous submissions to international bodies to advance protections of the right to freedom of expression, including the right of access to information. During this Committee’s drafting of General Comment 34 on Article 19, we organized a panel discussion at the UN in New York on 23 March 2010 to which all Committee members were invited and in which five participated, to discuss some of the complicated issues involved, and we submitted written comments. We have worked with civil society groups that submitted applications to the Committee pursuant to the Optional Protocol challenging decisions of public bodies of member states to refuse access to public information. We facilitated the work of 22 civil society organizations and academic centres, and hosted 14 meetings around the world, including with the relevant UN rapporteurs, to draft Global Principles on National Security and the Right to Information (called the “Tshwane Principles” after the municipality in South Africa where they were finalized), which set forth current international law norms and detailed guidelines, based on international and national law, standards and good practices. The Principles have been endorsed by the UN Rapporteurs on Freedom of Expression and on Human Rights and Counterterrorism; the three regional mandates on freedom of expression and/or media (of the African Commission on Human and Peoples Rights, the OAS, and the OSCE); and the Parliamentary Assembly of the Council of Europe. The principles on whistleblower protections have been endorsed by the European Parliament of the European Union.<sup>10</sup>

The Justice Initiative now is working to promote alignment of national laws, regulations and practices with the Tshwane Principles, especially in states that are in the process of debating or implementing legislation or regulations that fall significantly below the standards set forth in the Principles. We currently are working, or have worked, on these issues, together with local actors, in Colombia, Guatemala, Peru, South Africa and the United States, as well as in Japan. We also are working in sub-Saharan Africa and Latin America to promote increased awareness of the Principles.

This submission addresses three main violations of Article 19:

- Vagueness: The definition, set forth in Article 3 of the SDS Act, of what may properly be designated (or classified) as secret is vague. Information may be designated as secret if it

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“pertains to national security” (nowhere defined) and to “defence, foreign affairs, prevention of designated harmful activities (e.g., counterintelligence) or “prevention of terrorism.” (Overview, p. 1) Categories of information that may be designated as secret are illustrative only and do not suffice to cure the vagueness. The law could allow the authorities to hide information about environmental hazards, human rights abuses, corruption and other categories of information whose disclosure is protected by international law.

- Overbroad offences and excessive penalties for disclosures by public servants: Public servants who disclose specially designated secrets face up to ten years’ imprisonment, pursuant to Article 23 of the SDS Act. The State is not required to prove harm, or even likelihood of harm; and it is no defence that the information that was disclosed was improperly classified or that its disclosure benefited the public interest. (Overview, p. 5, “Penalty,” pt. 1)
- Overbroad offences and excessive penalties for disclosures by the media and other members of the public: Journalists and other members of the public may be prosecuted for publishing secrets even if the information is of public interest.<sup>11</sup>

Provisions that seem intended to protect human rights and media freedom are poorly worded and could very well be interpreted to authorize violations.<sup>12</sup>

## A History of Secrecy

The law raises particular concerns in light of the Japanese government’s history of having repeatedly suppressed information of vital public interest. Its notorious and deadly failure in 2011 to release full and timely information about the Fukushima nuclear reactor disaster is but the most recent, serious instance. The government’s withholding of information provoked statements by UN Special Rapporteurs on Freedom of Expression and Health,<sup>13</sup> and led Reporters without Borders to drop Japan 31 places (from 22<sup>nd</sup> to 53<sup>rd</sup>) in its press freedom index for 2012.

Other instances illustrate the pattern of concealment. In 2009, a reporter published an article based on interviews with retired senior Foreign Ministry officials concerning secret agreements allowing the entry of U.S. naval vessels carrying nuclear weapons into Japanese ports. His research confirmed that the government had lied to the Japanese people for decades. Although not eventually prosecuted, he was warned by a senior public official that he had committed the crime of soliciting unauthorized disclosures by public employees.<sup>14</sup> A request to the National Police Agency for figures on civil rights complaints filed against police officers yielded a single newspaper article (normally available throughout Japan at newsstands), with numerous sections blacked out. An appeals committee concurred with the decision.<sup>15</sup>

Moreover, of the 55,000 records designated “defence secrets” from 2006 through 2011 under the prior, more limited Self-Defence Forces Law, 34,000 were destroyed once they reached the end of their fixed secrecy period. Only one record was declassified for potential release to the public.<sup>16</sup>

Those examples demonstrate that Japan’s government, before passage of the SDS Act, already had significant powers to keep information secret and punish public servants and journalists for disclosures, and used those powers to keep secret even information of high public interest. The passage of the SDS Act adds additional powers that constitute significant and unnecessary restrictions on the right to freedom of expression and the public’s right to know guaranteed by Article 19.

## II. LEGAL OBLIGATIONS UNDER THE COVENANT

### A. Limited Restrictions on Freedom of Expression

Article 19 of the ICCPR guarantees a right of access to information held by public bodies. As stated in General Comment 34 on Article 19, any restrictions must be “provided by law”; they may only be imposed for one of the grounds, including national security, set out in paragraph 3; and “they must conform to the strict tests of necessity and proportionality.” (General Comment No. 34, para 22, hereinafter “GC No. 34”.)

*Precision:* To satisfy the requirement that a restriction must be “provided by law,” the norm “must be formulated with sufficient precision to enable an individual to regulate his or her conduct.” (GC No. 34, para 25.)

*Proportionality:* To satisfy the requirements of proportionality, restrictions must be “appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; and they must be proportionate to the interest to be protected.” (GC No. 34, para 34, quoting General Comment No. 27, para. 14.)

*Harm and Public Interest:* For a restriction on freedom of information to be proportionate, the public authority must demonstrate that the release of the information would result in harm to a legitimate interest that is greater than the public interest in having access to the information. “Extreme care” must be taken by States parties to ensure that secrecy laws are “crafted and applied in a manner that conforms to the strict requirements of paragraph 3.” Such a standard is

not met where laws allow the state to keep secret information of public interest “that does not harm national security.” (GC No. 34, para. 30.)

## **B. Protection of Public Servants for Disclosure of Information in the Public Interest**

International law offers protection for public servants who release information showing wrongdoing, and recognizes the public interest in the exposure of such information, despite general or specific employee duties of loyalty and confidentiality of a public servant to the government employer.<sup>17</sup> The UN Rapporteur on Freedom of Opinion and Expression has stressed that government officials who, in good faith, release confidential information on violations of the law, or wrongdoing by public bodies, should be protected against legal sanctions.<sup>18</sup>

In two recent cases, the European Court of Human Rights held that penalties for disclosure of classified or otherwise sensitive information violated the right to impart information where the information disclosed wrongdoing by public officials and efforts to seek remedies for the wrongdoing through official channels would have been ineffective.<sup>19</sup> In *Guja v. Moldova*, the Grand Chamber, noted:

[A] civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgence or publication corresponds to a strong public interest...[T]he signaling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection.<sup>20</sup>

The Court, recognizing “little scope ... for restrictions on debate on questions of public interest,” reasoned that “the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion.”<sup>21</sup> Accordingly, the Court concluded that “the interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence.”<sup>22</sup>

In *Bucur v. Romania* the European Court ruled that divulging “top secret” military intelligence information concerning “irregular” surveillance directly to the public had been justifiable, and that the criminal prosecution and two-year prison sentence imposed violated the public servant’s right to communicate information.<sup>23</sup>

The Court, in both cases, considered several factors: the availability of any effective, alternative remedies; the public interest in the information; the actual harm caused by the disclosure weighed against the public interest in the information’s release; the reasonableness of the public



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official's belief in the accuracy and importance of the information; and the severity of the penalty.<sup>24</sup>

Several states include in their law a public interest defence similar to that elaborated by the European Court in *Guja* and *Bucur*. The Canadian Security of Information Act, for instance, makes it an offence to improperly communicate special operational information,<sup>25</sup> but provides a public interest defence where a public servant discloses illegal activity, considering virtually the same factors as does the European Court.<sup>26</sup> Danish criminal law provides a public interest defence for publication of state secrets where the person is acting in “the legitimate exercise of obvious public interest,”<sup>27</sup> which has been interpreted to require that this interest shall exceed the interest in keeping the information secret.<sup>28</sup> A Danish court, applying the public interest defence in 2006, considered as factors the national security interest, the degree of actual harm to the interest, and the significance of the public interest in knowing the information and facilitating debate on the issues raised.<sup>29</sup>

The laws of several countries include provisions prohibiting the classification of information concerning corruption, crimes or human rights violations.<sup>30</sup> In various countries – including Chile, Colombia, the Czech Republic, Germany, Mexico, Moldova, the Netherlands, Norway, Paraguay, Romania, Spain, and Sweden – the burden is on the prosecution to show that “damage” or “harm” to national security has occurred.<sup>31</sup>

## **C. Protections of Journalists and Other Members of the Public for Disclosure of Information in the Public Interest**

The General Comment on Article 19 states unambiguously that the prosecution of “journalists, researchers, environmental activists, human rights defenders, or others for having disseminated ... information of legitimate public interest that does not harm national security” violates Article 19(3) of the ICCPR.<sup>32</sup> The journalist's role includes informing the public on matters of public interest necessary for effective democratic governance. Civil society organizations and leaders and others who monitor government performance have a similar role to play in effectuating the free flow of information and ideas, and are thus entitled to the same protections.<sup>33</sup>

In considering the UK Official Secrets Act, this Committee expressed specific concern that the law “frustrate[d] former employees of the Crown from bringing into the public domain issues of genuine public concern, and prevent[ed] journalists from publishing such matters.”<sup>34</sup>

Three international rapporteurs on Freedom of Expression (for the UN, the OSCE and the OAS) in their 2004 Joint Declaration on Access to Information and Security Legislation,<sup>35</sup> explained the reasoning behind the protection of journalists and other social watchdogs from penalties for disclosure of information of public interest:

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Public authorities and their staff bear sole responsibility for protecting the confidentiality of legitimately secret information under their control. Other individuals, including journalists and civil society representatives, should never be subject to liability for publishing or further disseminating this information, regardless of whether or not it has been leaked to them, unless they committed fraud or another crime to obtain the information. Criminal law provisions that don't restrict liability for the dissemination of State secrets to those who are officially entitled to handle those secrets should be repealed or amended.

The Special Rapporteurs on Freedom of Expression of the UN and the OAS affirmed this norm in 2010.<sup>36</sup>

Numerous authorities have concluded that, in particular, “under no circumstances, should journalists, members of the media, or civil society organizations be punished for publication of information about human rights violations.”<sup>37</sup>

The General Comment on Article 19 also calls on states parties to “recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources.” (GC No. 34, para 45.)

## III. PROBLEMS WITH JAPAN'S SECRECY ACT

### A. The definition of protected information is overly vague and imposes unnecessary restrictions on information of public interest.

According to the official Overview of the SDS Act, Article 3 reads:

The head of an administrative agency shall designate as Specially Designated Secrets information of the types listed in the table, which is kept undisclosed, and which requires special secrecy because unauthorized disclosure thereof would cause severe damage to the national security of Japan.

The four categories listed in the referenced “table” are “defence, foreign relations, prevention of designated harmful activities, and prevention of terrorism.” The table provides an illustrative list of information that falls into these categories. Several of these listed sub-categories of information are narrow and directly relate to protecting legitimate national security interests. However, others are far too broad, such as “[o]peration of the Self-Defence Forces or thereto relevant assessments, plans or research;” “[m]easures to prevent Designated Harmful Activities

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or thereto relevant plans or research;” and “[m]easures to prevent terrorism or thereto relevant plans or research.” (Overview, p. 1, table.) Moreover, “designated harmful activities,” “terrorism” and “national security” are not defined in the law.

## **B. Public servants who disclose secrets face excessive penalties, without a requirement of a showing of harm or an analysis of the public interest value of the disclosure.**

Article 23(1) of the SDS Act increases the maximum penalty for an intentional, unauthorized disclosure by a person handling designated secrets as part of his or her duties from five years’ imprisonment, under the Self Defence Forces Law of 2001, to ten years imprisonment and a fine of up to 10 million yen (US \$ 97,500), per violation. (Overview of SDS Act, p. 5, “Penalty,” pt. 1(1).)

Additionally, Article 23(4) criminalizes negligent acts by a person handling designated secrets that result in the disclosure of classified information. Persons convicted of negligently violating Article 23(1) face up to two years’ imprisonment and a fine of up to 500,000 yen per violation. (Overview, p. 5, pt. 1(1).)

Disclosure by a public servant who received secret information for the sake of the public interest may be punished by up to five years’ imprisonment. (Overview, p. 5, pt. 1(2).)

The SDS Act does not require the state to prove that a disclosure could or did cause harm to national security in order to obtain a conviction for unauthorized disclosure. Article 3 does provide that information may be designated as secret only if its “disclosure could cause severe damage to the national security,” but the Act does not require that information be *legitimately* classified in order for its disclosure to trigger criminal penalties, and certainly the Act does not require the state to prove actual or even likelihood of harm in any criminal proceeding.

Nor does the SDS Act include a public interest defence.

Information whose disclosure would be protected under international law but could result in a significant prison term under the SDS Act includes information showing corruption, misuse of resources, or maladministration; information about human rights violations committed by Japan’s defence or intelligence services; information about environmental hazards; any secret court orders, laws or regulations; and information showing that a government official had mischaracterized facts.

Further, while the penalties set forth in Article 23 might be proportionate for the sale or transfer of secret information to enemies with the intent to cause, and likelihood of causing, serious harm, they are excessive for disclosures to the public, especially in the absence of any showing of harm

or intent, and absent the availability of a defence or mitigation for disclosures that advance the public interest.

Comparative law and practice provides guidance on proportionate penalties. In many countries, the penalties allowed for the unauthorized public disclosure of national security information are limited to five or fewer years' imprisonment where there is no espionage, treason or disclosure to a foreign state.<sup>38</sup> Moreover, prosecutions are rare, even in countries with penalties of more than five years, suggesting that higher penalties are unnecessary to discourage damaging disclosures, and also evidencing increasingly consistent state practice contributing to the emergence of a customary law norm disfavouring penalties of more than five years.<sup>39</sup>

### **C. Journalists and other members of the public may be prosecuted for publishing secrets even if the information is of public interest.**

Article 25 of the SDS Act provides that conspiracy and incitement to commit an unauthorized disclosure under Article 23.1 are punishable by up to five years in prison. (Overview, p. 5, "Penalty," pt. 3.) That provision could be invoked to punish journalists or others who take steps to receive designated secrets, for instance, by making it known that they are willing to receive such secrets while protecting the source.

Journalists and other similarly protected persons with a special responsibility to act as public watchdogs may only be sanctioned in connection with the disclosure of government information in extraordinary circumstances, such as when they intentionally caused harm to an individual.<sup>40</sup>

Article 25 interferes with the ability of the media and civil society to perform their crucial functions of acting as public watchdogs and facilitating the public's right to freedom of expression and access to information.

Moreover, the SDS Act violates Article 19 in that it does not recognize the journalist's privilege to protect confidential sources. Without adequate safeguards, prosecution or the threat of prosecution for unauthorized disclosure, conspiracy, or other crimes may be abused in order to compel journalists and other similarly protected persons to reveal their sources or in other ways to chill investigative reporting.

### **D. Provisions that aim to protect human rights and media freedom are in fact pernicious and should be deleted.**

Article 22(1) of the SDS Act states that "stretching the interpretation of the act to unduly infringe on the fundamental human rights of citizens shall be prohibited," and that "due consideration" shall be given "to freedom of the press and news gathering that

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contributes to guaranteeing the people's right to know.” (Overview, p. 5, “Other Issues,” pt. 1.)

Japan's Constitution already guarantees freedom of the press, so requiring authorities to show only “due consideration” could be read to constitute a reduction of this protection. Moreover, prohibiting only “undue” infringements of fundamental human rights is at best a clumsy formulation, and at worst, an invitation to government over-reaching, given that human rights may *never* be violated.

Article 22(2) of the SDS Act states: “News gathering by those engaged in publishing and the press shall be deemed lawful as long as it is intended exclusively to serve the public interest, and is not judged to be done through violations of law or grossly unreasonable means.” (Overview, p. 5, “Other Issues,” pt. 2.)

This provision is highly problematic. It provides an exceedingly narrow definition of journalists - only those “engaged in publishing and the press.” This excludes, without justification, radio, television, online or other media. Moreover, it does not provide any protection to other public watchdogs, such as civil society organizations, which also are critical for democratic oversight. While the provision may have been intended to protect “lawful” journalism, its exclusivity leaves out many who are recognized as entitled to journalistic and related protections.

This Committee has stated that protections afforded to the press must be extended “to bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere” and that secrecy laws should not be used to “prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated ... information of public interest.” (GC No. 34, paras. 30, 44.)

Moreover, the language of the provision may serve to harm journalists and other similarly situated persons by limiting those whose actions are deemed lawful with vague and imprecise terms including “exclusively to serve the public interest” and “grossly unreasonable means”—without any greater clarity about what would constitute “grossly unreasonable means.”

Further, these terms together could well be interpreted to deem *illegal* any news gathering by journalists or others that falls outside the article's explicit protection—including those whose journalism serves both public and private interests (e.g., business media). This provision clearly falls afoul of international requirements.

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<sup>1</sup> The Justice Initiative, an operational arm of the Open Society Foundations, has programs in 70 countries. The Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. The Justice Initiative expands freedom of information and expression, addresses abuses related to national security and counterterrorism, fosters accountability for international crimes, combats racial discrimination and statelessness, supports criminal justice reform, and stems corruption linked to the exploitation of natural resources.

<sup>2</sup> As of 10 June 2014, there is no official translation of the Act into English or any other of the UN's official languages. Excerpts of the law in this submission are drawn from materials published in English by the Cabinet Secretariat at: [http://www.cas.go.jp/jp/tokuteihimitsu/gaiyou\\_en.pdf](http://www.cas.go.jp/jp/tokuteihimitsu/gaiyou_en.pdf) (Overview of SDS Act, 5 pages) and [http://www.cas.go.jp/jp/tokuteihimitsu/point\\_en.pdf](http://www.cas.go.jp/jp/tokuteihimitsu/point_en.pdf) (Main Points of SDS Act, 1 page).

<sup>3</sup> These included Human Rights Watch, Article 19, International PEN, the Japanese Civil Liberties Union, Federation of Bar Associations, Access-Info Clearinghouse Japan, constitutional law scholars, criminal law experts, and numerous others.

<sup>4</sup> See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14017&LangID=E>.

<sup>5</sup> Justin McCurry, "Japan whistleblowers face crackdown under proposed state secrets law," *The Guardian*, 5 Dec 2013, penultimate paragraph.

<sup>6</sup> Editorial, "Toothless Secrecy Oversight Body," *Japan Times*, 3 June 2014, at <http://www.japantimes.co.jp/opinion/2014/06/03/editorials/toothless-secrecy-oversight-body/>.

<sup>7</sup> Overview, note 2, above.

<sup>8</sup> Lawrence Repeta, "A New State Secrecy Law for Japan?" *The Asia-Pacific Journal*, Vol. 11, Issue 42, No. 1, October 21, 2013, available at <http://www.japanfocus.org/-Lawrence-Repeta/4011>.

<sup>9</sup> *Id.*

<sup>10</sup> Global Principles on National Security and Right to Information ("Tshwane Principles"), available at <http://www.right2info.org/exceptions-to-access/national-security/global-principles>. For endorsements, see <http://www.right2info.org/exceptions-to-access/national-security/global-principles#section-1>.

<sup>11</sup> Overview of SDS Act, p. 5, "Penalty," pt. 3, referring to Art. 25 of the SDS Act.

<sup>12</sup> See Overview, p. 5, "Other Issues," pts 1 & 2, and Part V.D, below.

<sup>13</sup> See Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/23/41/Add.3 (2013).

<sup>14</sup> Lawrence Repeta, *Japan's 2013 State Secrecy Act – The Abe Administration's Threat to News Reporting 2013*, THE ASIA-PACIFIC JOURNAL, Vol.12, Issue 10, No. 1, 10 March 2014.

<sup>15</sup> Erik Slavin, "Legal experts worry Japan's secrecy law may silence journalists," *Stars and Stripes*, 17 Dec 2013.

<sup>16</sup> Lawrence Repeta, *A New State Secrecy Law for Japan?* note 8, above.

<sup>17</sup> See, e.g., UN Convention Against Corruption, adopted 31 October 2003, entry into force 14 December 2005 (167 State parties), Arts. 32-33. See also Tshwane Principles, note 10 above, Principles 41-43 and 46.

<sup>18</sup> UN Special Rapporteur on Freedom of Opinion and Expression, Annual Report, UN Doc. A/68/362, 4 Sept 2013, at para. 68.

<sup>19</sup> *Guja v. Moldova*, ECtHR (Grand Chamber), 12 February 2008. *Bucur v. Romania*, ECtHR, 8 January 2013.

<sup>20</sup> *Guja v. Moldova*, ECtHR, at para. 72.

<sup>21</sup> *Id.*, para. 74.

<sup>22</sup> *Id.*

<sup>23</sup> *Bucur*, para. 120.

<sup>24</sup> *Guja*, paras. 73-77; *Bucur*, paras. 95-119.

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<sup>25</sup> Security of Information Act (Canada) (R.S.C., 1985, ch. O-5), Arts. 13 & 14.

<sup>26</sup> *Id.*, Art. 15.

<sup>27</sup> Criminal Code (Denmark), Section 152(e) (2010).

<sup>28</sup> Amanda Jacobsen, *National Security and the Right to Information in Europe*, 2013, at [http://www.right2info.org/resources/publications/national-security-page/national-security-expert-papers/jacobsen\\_nat-sec-and-rti-in-europe](http://www.right2info.org/resources/publications/national-security-page/national-security-expert-papers/jacobsen_nat-sec-and-rti-in-europe) (University of Copenhagen, in collaboration with the Open Society Justice Initiative) (*hereinafter* “Jacobsen, *National Security and the Right to Information in Europe*”), pp. 48-49.

<sup>29</sup> *Denmark v. Larsen*, Copenhagen City Court, Case No. SS 24.13764/2006, 4 December 2006.

<sup>30</sup> See Maeve McDonagh, Public Interest Test in Freedom of Information Legislation, Univ. College Cork (2013), at pp. 4-5, available at <http://www.transparencyconference.nl/wp-content/uploads/2012/05/McDonagh.doc>.

<sup>31</sup> See also Jacobsen, *National Security and the Right to Information in Europe*”), note 28 above, p. 49.

<sup>32</sup> GC, para. 30. See also UN Human Rights Committee, Concluding observations on the Russian Federation (CCPR/CO/79/RUS), 1 December 2003, para. 22.

<sup>33</sup> See, e.g., *Vides Aizsardzības Klubs v. Latvia*, ECtHR, Judgment of 27 May 2004, para. 42.

<sup>34</sup> UN Human Rights Committee, Concluding Observations on United Kingdom (CCPR/CO/73/UK), 6 December 2001, at para. 21.

<sup>35</sup> See Joint Declaration, p. 2 (on Secrecy Legislation), available at [http://www.right2info.org/resources/publications/instruments-and-standards/joint-declaration\\_2004](http://www.right2info.org/resources/publications/instruments-and-standards/joint-declaration_2004).

<sup>36</sup> Joint Statement on Wikileaks, UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and the Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression, 21 December 2010, para. 3.

<sup>37</sup> See, e.g., Joint Statement by UN Special Rapporteurs on Freedom of Expression and on Human Rights and Counterterrorism, issued by OHCHR, 4 September 2013, at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13678&>.

<sup>38</sup> A survey by the Open Society Justice Initiative of the laws of 26 countries found that in 13 countries, in the absence of espionage, treason, disclosure to a foreign state, or intent to cause harm, the law provides for a maximum penalty of five years or less, as follows: Brazil (one year); Australia, Sweden and United Kingdom (two years); Slovenia (three years); Panama and Spain (four years); Colombia and Norway (four and a half years); and Belgium, Mexico, Paraguay and Poland (five years). Another six countries have maximum penalties of less than 10 years: Netherlands (6 years); France and Russia (7 years); Bolivia and Guatemala (8 years); and Ecuador (9 years). Four countries have penalties of up to 10 years: Argentina, Germany, Serbia, US. Denmark allows penalties of up to 12 years, but highest penalty ordered in past 20 years was 4 months. Two countries - Chile and Italy - have indeterminate penalties. See Penalties for Unauthorized Disclosure of National Security Related Secrets, at <http://www.right2info.org/resources/publications/national-security-page/national-security-expert-papers/penalties-for-unauthorized-disclosure-of-national-security-secrets-2013>.

<sup>39</sup> For instance, in 17 of 20 European countries surveyed, there were either no convictions for unauthorized disclosure of information in the past decade, or less than a handful. *Id.* Jacobsen, *National Security and the Right to Information in Europe*, note 28 above, at pp. 43-44. Russia is the only European country surveyed in which significant numbers of prosecutions have resulted in custodial sentences, with ten public servants sentenced to substantial prison terms over the past decade.

<sup>40</sup> See, e.g., UN Special Rapporteur on Freedom of Expression, Annual Report, note 18 above, at para. 69.

**E-mail: [info@justiceinitiative.org](mailto:info@justiceinitiative.org)**  
**[www.justiceinitiative.org](http://www.justiceinitiative.org)**



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