

MISSION PERMANENTE DU JAPON

AUPRÈS DES ORGANISATIONS INTERNATIONALES
GENÈVE-SUISSE

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The Permanent Mission of Japan to the United Nations and Other International Organizations in Geneva presents its compliments to the Office of the High Commissioner for Human Rights and, with reference to the latter's note verbale dated 19 November 2013, has the honour to transmit herewith the answer from the Government of Japan pursuant to the communication from Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and Mr. Anand Grover, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health dated 19 November 2013.

The Permanent Mission of Japan to the United Nations and Other International Organizations in Geneva avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.

Geneva, 31 January 2014

Enclosure mentioned.



Reply of the Government of Japan to the request for information through the communication of the Special Rapporteurs of the United Nations Human Rights Council

Regarding the request for information dated 19 November 2013 concerning Japan's Bill on the Protection of Specially Designated Secrets (at that time) sent to the Permanent Mission of Japan to the United Nations and Other International Organizations in Geneva, while it is not clear what information the communication was based on, the information which the Special Rapporteurs obtained is not accurate. The Act on the Protection of Specially Designated Secrets does not breach any international legal obligations of the Government of Japan including those under Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and is consistent with the Constitution of Japan which guarantees freedom of expression at substantially the same level as set out in the ICCPR. Please see below our answers to and clarifications of the questions in detail below.

Question 1. Are the facts alleged in the above summary accurate?

1. Designation of Specially Designated Secrets (SDS)

SDS consists of information pertaining to national security and shall fall under four categories pertaining to national security namely 1) Defense, 2) Foreign Affairs, 3) Prevention of Designated Harmful Activities (e.g. Counter-Intelligence), and 4) Prevention of Terrorism. The head of a ministry or another administrative organ designates SDS from information (1) which falls under the current category of "defense secrets" under the Self-Defense Forces Act or which is categorized as secret under existing laws such as the National Public Service Act, and (2) which is limited to the types of information specifically enumerated in the Appended Table of the Act, and (3) which requires an especially high level of secrecy in the light of national security. SDS is designated as such in accordance with criteria that reflect opinions from eminent non-government-affiliated experts.

As mentioned above, SDS does not enlarge the scope of secrets. SDS is information which is designated from information already considered secret under the relevant existing laws and as that which requires especially high-level secrecy for the purpose of national security. Only information that falls under the types of information specifically enumerated in the Appended Table of the Act can be designated SDS. The types

provided in the Act are more restrictive than those provided in systems for designation of secrets in other countries.

The Special Rapporteurs have pointed out that the act “enables authorities to hide legitimate information about environmental hazards, human rights violations and corruption”. These claims are absolutely incorrect and such information cannot be designated as SDS. In the communication, it was also insisted that information relating to the nuclear accident should be disclosed. Information relating to the nuclear accident does not fall under the scope of SDS.

2. Terms of Designation

The head of an administrative organ can set the term of designation of an SDS for up to five years. This term is renewable but there are the following restrictions:

- 1) The designation must be reviewed every 5 years by the head of an administrative organ to check that conditions are being met and its term shall not exceed 30 years in total.
- 2) Extension over 30 years requires approval by the Cabinet.
- 3) Extension over 60 years shall not be allowed for any information other than that which requires an especially high level of secrecy and is specifically enumerated in the Act such as cryptology and human intelligence sources.
- 4) Designation of SDS shall be lifted immediately, and at any point even during the term of designation, when a secret no longer requires protection as SDS.

As explained above, the Act has multi-layered provisions and mechanisms so as to prevent arbitrary and/or permanent designation of SDS. We understand that not all secrets are disclosed after a certain period of time under secret designation systems/procedures in other countries.

3. Review of designation by third parties

First, as we detail in paragraph 5, SDS falls under the scope of the Access to Government Information Act in the same manner as all other administrative documents, and the procedure is in place and guaranteed. In accordance with the law, anyone can appeal a decision by relevant ministries to decline the disclosure of such information. Such decisions are to be examined by an independent body composed of experts outside the government called the Information Disclosure and Personal Information Protection

Review Board, and they can check the contents of any official documents in question, including SDS, through an in-camera procedure.

In addition, in order to ensure appropriate implementation of the SDS Act including the designation of secrets, various mechanisms/procedures are in place, as follows:

- 1) Only the information that falls under the types of information specifically enumerated in the Appended Table of the Act can be designated SDS by the head of an administrative organ such as a minister and in accordance with the criteria that reflect opinions from eminent non-government-affiliated experts.
- 2) In order to ensure that designation of SDS is in conformity with the criteria, the Prime Minister may instruct the head of an administrative organ to take necessary measures to ensure the appropriateness of designation.
- 3) Furthermore, mechanisms are set in place to regularly check the application and implementation of the SDS Act, including SDS designation, through annual reporting to the Council composed of experts outside the government as well as to the National Diet.
- 4) In addition to these mechanisms, the government will establish an organ, before entry into force of this law, which will be tasked to review and monitor the designation of respective SDSs by administrative organs and to call for corrections on inappropriate cases.
- 5) The Act stipulates that the SDSs shall be submitted to closed meetings of the National Diet under safeguard measures that will be decided by the Diet. Therefore, the claim that SDSs are not to be provided to the Diet is incorrect.

4. Relation with whistle-blowers and journalists

In relation to the freedom of the press, the Act clearly states that:

- due consideration be given to the freedom of the press and news gathering that contributes to guaranteeing the people's right to know.
- regular news gathering shall be considered as legitimate professional activities that do not fall under the scope of penalty stipulated in the Act.

These principles serve as the basis for interpreting and applying this bill in the work of investigative authorities and courts in Japan. All competent authorities are required to thoroughly examine whether there is no undue infringement on fundamental human rights and freedom of press is sufficiently protected.

In addition, the act clearly stipulates that acquisition of SDS through unlawful acts, etc. shall be punished only when the purpose of such acquisition is to serve interests of foreign countries or unjust self-interest of perpetrators or when the information is used in a manner that jeopardizes the national security or lives and security of persons. Therefore, freedom of the press and news gathering cannot be infringed.

As explained, secrets that are designated as SDS under the Act are strictly restricted to those of which disclosure would cause severe damage to the national security of Japan. Therefore, facts relating to criminal acts and violations of national laws that are subject to whistle-blowing in the public interest would not be considered as SDS in the first place. In the event that it were to be discovered that such facts were designated as SDS with the aim of covering them up, such designation would be invalid. It then naturally follows that whistle-blowing of such facts would not constitute disclosure of SDS and therefore such whistle-blowers would not be penalized and will be protected under the Whistle-Blower Protection Act.

5. In Relation to the right to know

The Act stipulates that “due consideration must be given to freedom of the press and news gathering that contributes to guaranteeing the people’s right to know” and, in order to prevent information that should be publicly reported from being kept secret and not to restrict legitimate activities of the press, relevant authorities are required to interpret and implement the Act with due care. Therefore, due consideration is given to the people’s right to know.

In addition, all administrative documents that include SDS are subject to the Access to Government Information Act. Upon requests for disclosure from individuals, a decision on whether or not to disclose such documents will be taken in accordance with the Act. In the case that an appeal is filed with a relevant ministry against a decision that it has made to decline the disclosure, the Information Disclosure and Personal Information Protection Review Board, an independent body composed of external experts, shall investigate and review such a decision in response to the request for consultation from the head of an administrative organ. In the event that the Board decides to hold a so-called in-camera investigation, there are provisions in the SDS Act that allow members of the Board access to SDS.

In addition to the mechanisms mentioned above, if such official documents are found to

constitute “Historical Public Records and Archives”, they shall be transferred to such places as the National Archives of Japan, in accordance with Public Records and Archives Management Act, where the public has access to such information once the term of the validity of designation expires.

The Act aims to protect the security of the state and nationals by preventing unauthorized disclosure of information which requires special secrecy for national security and is not an act to restrict freedom of expression and the people’s right to know.

Question 2. Please provide the full details of the aforementioned Bill and explain how its provisions are in accordance with Japan’s obligations under international human rights law and standards, particularly with regard to the rights to freedom of opinion and expression.

We are attaching a brief summary of the Act on the Protection of Specially Designated Secrets, as well as the original Japanese text. We will provide translation of the text into English, now in progress, upon its completion.

As detailed in our answer for Question 1 above (especially in paragraphs 4 and 5), in relation to the Act, the Government of Japan has given various due considerations to freedom of expression including the right to know so as not to unduly restrict it and has made every effort to ensure freedom of expression. Accordingly, the Act is consistent with the obligations of Japan under human rights treaties (specifically Article 19 of the ICCPR).

Article 19 of the ICCPR is guaranteed by Articles 19, 21, and 23 of the Constitution of Japan. In particular, the right to hold opinions and freedom of expression are respected and guaranteed to the fullest extent possible by the Constitution as they are considered essential for the maintenance of democracy. Since the Constitution can be interpreted as covering the same range of human rights including the right to have opinions and freedom of expression as that of the ICCPR, as just described, there can be no conflict between the Constitution and the ICCPR. Furthermore, Article 98 of the Constitution stipulates that “this Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.”

QUESTION 3. Please indicate the main legal and institutional instruments in place to ensure the realization of the right to access information in Japan.

Legislation to ensure the right to access to information held by an administrative organs in Japan is as follows:

(i) Act on Access to Information Held by Administrative Organs

This act provides that any person may request the disclosure of administrative documents held by administrative organs, in line with the principle of sovereignty of the people, with a view to fulfilling accountability of the Government to the citizens for its activities.

(ii) Public Records and Archives Management Act

This act aims to ensure accountability of the State for its activities to its current and future nationals on the understanding that public records and archives of various activities of the State shall be considered intellectual resources to be shared by the people as a basis for sound democracy and therefore shall be made available to the people endowed with sovereignty, in line with the principle of sovereignty of the people.

The Act (i) ensures that all the people can request the disclosure of any administrative documents including SDS and the Act (ii) enables people to have access to public records and archives that are important as historical materials and have been transferred to the National Archives of Japan, etc.

Question 4. Please indicate any consultation undertaken, including with civil society in the drafting of this Bill.

With regard to the legal system for protection of secrets in Japan, the government established a study team in 2008 and has since been considering relevant aspects of the issues for years.

In its deliberation, the government has convened expert panels for two terms for consideration by non-government-affiliated legal and other experts. In addition, the government has revealed the progress of study as much as possible and has been attempting to hear opinions from citizens, including on its necessity.

For instance, in August 2011 the government published a report prepared by the expert panel on the legal system for the protection of secrets and collected public comments. Furthermore, the government published “Summary of the Bill on the Protection of Specially Designated Secrets” in September 2013, and once again collected public comments about the bill.

Moreover, the minister in charge of the bill has been conducting hearings from relevant stakeholders, while explaining the necessity of the act, and received various feedback. The relevant departments within the government also approached the parties concerned such as the media and other relevant stakeholders and explained the bill to and held dialogues with them.

In addition to measures mentioned above, discussions were held with Diet members as representatives of the civil society in the project team of the Liberal Democratic Party and the Komeito (New Frontier Party) and necessary amendments were made to the bill before it was submitted to the Diet. During the Diet deliberations and as a result of consultations between the ruling and opposition parties, revisions proposed by Diet members were also made to the bill including the establishment of a mechanism that reviews and monitors the designation of respective SDS by administrative organs and makes recommendations to correct situations which it finds inappropriate.

(End)