In the Constitutional Court of Indonesia

PERMOHONAN PENGUJIAN UNDANG-UNDANG

Permohonan Pengujian Materiil Atas Pasal 29 Ayat (2), Ayat (3), Ayat (4) dan Ayat (5) Undang-Undang Nomor 14 Tahun 2008 tentang Keterbukaan Informasi Publik terhadap Pasal 24 Ayat (1) dan Pasal 28 F Undang-Undang Dasar 1945

APPLICATION FOR TESTING THE LAW

Application to Test Article 29, Paragraph (2), Paragraph (3), Paragraph (4) and Paragraph (5) of Law No. 14 of 2008 on Public Information Disclosure based on Article 24, Paragraph (1) and Article 28 F of the 1945 Constitution of Indonesia

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WRITTEN COMMENTS SUBMITTED BY THE CENTRE FOR LAW AND DEMOCRACY

INDEPENDENCE OF RIGHT TO INFORMATION OVERSIGHT BODIES

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1.0 Summary of Argument

[1] The right to information is a constitutionally protected in Indonesia, and given effect in practice through Law No. 14 of 2008 on Public Information Disclosure. It is also recognised under international law as a human right, protected, among other things, by the *International Covenant on Civil and Political Rights* (ICCPR), a legally binding treaty to which Indonesia is a party. Indonesian authorities, including the Constitutional Court, are thus under an obligation to interpret the Constitution of Indonesia and Indonesian laws, to the extent reasonably possible, in the manner which better gives effect to the international guarantees found in the ICCPR.

[2] As part of the system for protection of the right to information, and consistently with international standards and practice, Law No. 14 of 2008 creates an administrative oversight body, the Information Commission, to, among other things, resolve disputes regarding the right to information between members of the public and public agencies, including through non-litigation adjudication. The Law provides for robust guarantees for the independence of the Commissioners who run the Commission, but its Secretariat, and the staff of the Secretariat, are not independent inasmuch as they are appointed by government and remain government employees, effectively on short-term loan to the Commission.

[3] Pursuant to international human rights law, the determination of rights should be undertaken by an independent tribunal. International human rights standards also mandate that administrative oversight bodies for the right to information should be independent. This is apparent in numerous authoritative statements regarding these bodies. It also flows in a common sense fashion from the very function of these bodies, which is to be independent arbiters of disputes regarding the right to information. Finally, it may be derived by analogy from the requirements of independence which apply to bodies which undertake similar functions to information oversight bodies, in particular ombudsmen.

[4] Functional independence depends, importantly, on members of oversight bodies – Commissioners in the Indonesian context – being independent. But, as experience around the world has demonstrated, this is not enough. Oversight bodies must enjoy effective functional independence. For this, their administrative operations must be independence and this, in turn, implies that they must have full control over their staff, including through an independent appointments process. While the staff are not the same as Commissioners, their role within oversight bodies nevertheless accords them important powers to influence the outcome of the dispute resolution process.

[5] The above not only flows from international standards regarding the right to information, but it is reflected in better practices in countries around the world, including in Canada, Mexico, Serbia and Sierra Leone.

[6] As a result, the impugned articles of Law No. 14 of 2008, namely Articles 29(2)-(5), fail to pass constitutional muster and should be declared unconstitutional.

2.0 Statement of CLD Interest and Expertise

[7] The Centre for Law and Democracy (CLD) is a non-profit, human rights non-governmental organisation (NGO) that focuses on foundational rights for democracy. CLD believes in a world in which robust respect for human rights underpins strong participatory democracy at all levels of governance – local, national, regional and international – leading to social justice and equality. CLD works to promote, protect and develop those human rights which serve as the foundation for or underpin democracy, including the rights to freedom of expression, to vote and participate in governance, to access information and to freedom of assembly and association.

[8] To achieve this mission, CLD undertakes research and educational outreach to advance the understanding of civil society and the wider public globally about those human rights which serve as a foundation for or underpin democracy. Research and technical assistance are utilised to help governments and officials around the world to uphold international and constitutional standards regarding human rights which underpin democracy. CLD builds the understanding of inter-governmental organisations and non-governmental organisations regarding human rights which underpin democracy, so that they can better realise their goals. Extensive research and policy work are also part of CLD's mandate, with a view to contributing to ensuring continuous relevance and development of the key human rights which fall within its mandate.

[9] Based in Halifax, Canada, CLD is recognised as a global leader in international standard setting regarding freedom of expression and the right to information (RTI), as demonstrated for example by its annual role in drafting the Joint Statements of the four special international mandates on freedom of expression (referenced in the main body of this brief). CLD developed the RTI Rating,[1] which is the world's leading methodology for measuring the strength of the legal framework for the right to information. Work on the RTI Rating is particularly relevant inasmuch as it showcases CLD's expertise in distilling international standards and better national practice into a universal best practice set of standards.

[10] CLD has been working in Indonesia since it was founded and its Executive Director, Toby Mendel, has been working there since the fall of the Suharto regime in 1998. This work has included technical support to the government to prepare various laws, including Law No. 14 of 2008 on Public Information Disclosure, as well as Law No. 40 of 1999 on Press and Law No. 32 of 2002 on Broadcasting, as well as work with both public authorities and civil society to implement laws, again including the 2008 Public Information Disclosure Act.

[1] Available at: http://www.rti-rating.org.

[11] CLD is submitting this brief with a view to assisting the Constitutional Court in its task of interpreting the constitutional guarantees of freedom of expression and the right to information in Indonesia. The organisation has no direct interest in the outcome of this case, other than its human rights interest.

3.0 Statement of Facts and Law

[12] The facts of this constitutional appeal are fairly simple and consist mainly of legal provisions. Article 28F of the 1945 Constitution of Indonesia, as amended, provides as follows:

> Every person shall have the right to communicate and to obtain information for the purpose of the development of his/her self and social environment, and shall have the right to seek, obtain, possess, store, process and convey information by employing all available types of channels.

Article 28F is widely understood as providing a basis for the right to access information held by government (i.e. the right to information).

[13] Pursuant to the Constitution, international treaties, once ratified, become part of Indonesian law. As a result, legislation should, as far as possible, be interpreted in the manner that best reflects international guarantees of human rights. Furthermore, as a general consequence of Indonesia's obligations under international law, the Constitution of Indonesia should, as far as possible, also be interpreted in a manner which respects international guarantees of human rights.

[14] Inasmuch as it guarantees the right to information, Article 28F has been implemented by Law No. 14 of 2008 on Public Information Disclosure. This Law establishes a right to access information held by public bodies (Article 4), places an obligation on public bodies to publish information on a proactive basis (Articles 9-12 and 14-16), puts in place procedures for making requests for information (Articles 21-22), defines the exceptions to the right of access (Articles 17-20), provides for sanctions for those who obstruct access (Articles 53, 53 and 55) and puts in place various promotional measures to support the right of access (Articles 11-13, among others).

[15] Law No. 14 of 2008 also creates a mechanism, the central, provincial and district/municipal Information Commissions, to ensure oversight of the implementation of the Law (Article 23 and the following articles). Article 23 describes the Commission as an "independent body that functions to implement this Law and its implementing regulations, to provide the standard technical directives of public information services and to settle public information disputes by mediation and/or non-litigation adjudication."

[16] Article 25 of Law No. 14 of 2008 sets out the composition of the central and provincial Information Commissions, while Article 26 describes their main duties,

which are to settle disputes about access to information between members of the public and public bodies, first through mediation and then through a non-litigation form of adjudication, to set general policy regarding public information, to adopt implementing directives for the Law and to set procedures for dispute settlement. Article 27 sets out the powers of the Commission, which include reviewing information and compelling witnesses to testify under oath.

[17] It is clear from Law No. 14 of 2008 that the Commission is intended to be an independent body. This is stated explicitly in Article 23, which creates the Commission. It is also implicit in the way the members of the Commission are appointed. The members are supposed to reflect the government and society (Article 25), but, pursuant to Article 30(1)(f), members must resign from any public position if appointed. Article 30 provides that recruitment of members shall be conducted in a transparent, conscientious and objective manner, with a shortlist of candidates being published and the public being given an opportunity to make representations regarding those candidates. There are also strict conditions on who may be a member, including having an understanding of transparency as a human right. Pursuant to Article 31, both the President and the Parliament are involved in the actual nominations and appointments process, and this is conducted based on a due diligence test. The term of office is four years, renewable once (Article 33), and there are strict limitations on removal of members (Article 34). The Commission is accountable to both the President and the Parliament (Article 28).

[18] In stark contrast to these extensive efforts to ensure that members (i.e. leadership) of the Commission are independent, are the provisions in Article 29 regarding the Secretariat and Management of the Commission. Article 29(1) provides that the "administrative support, finance and management" of the Commission are conducted by the Secretariat. Articles 29(2)-(5), which are the subject of this constitutional challenge, set out the way the Secretariat is appointed and functions, and are reproduced in full below:

> (2) The Secretariat of the Information Commission is operated by the government.
> (3) The Secretariat of the Central Information Commission is directed by a secretary who is appointed by the Minister whose duties and authorities are in the field of communication and informatics, based on the proposal of the Information Commission.
> (4) The Secretariat of the provincial Information Commission is operated by an officer whose duties and authorities are in the field of communication and informatics at the provincial level concerned.
> (5) The Secretariat of the district/municipality Information Commission is operated by an officer whose duties and authorities are in the field of communication and informatics at the district/municipality level concerned.

[19] It is quite clear that the Secretariat is not independent. Article 29(2) states clearly and explicitly that the Secretariat is operated by the government. The secretary is appointed by the Minister, a political actor, although the Commission is supposed to play a role in this process. In practice, the staff of the Secretariat is composed of officials effectively working on a short-term loan from the public agencies where they are employed.

4.0 International Standards

4.1 The Right to Information as a Human Right

[20] The right to access information held by public agencies, or the right to information, is recognised as a human right, protected internationally via guarantees of respect for the right to freedom of expression. Although the right to information is founded primarily on freedom of expression, and in particular on the right to "seek" and "receive" information that are included in international guarantees of freedom of expression, it is broadly recognised as having a wider role as a foundation of democracy and as an essential tool for the defence of other rights. The special international mandates on freedom of expression – the (then) UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – recognised, in a Joint Declaration in 2004:

> [T]he fundamental importance of access to information to democratic participation, to holding governments accountable and to controlling corruption, as well as to personal dignity and business efficiency[2]

[21] Right to information laws have been recognised as important for many reasons, including safeguard against abuses of power by public officials, fostering public participation and promoting effective development. Law No. 14 of 2008 recognises these wider roles of the right to information, and these benefits – including informing the public about policy developments and decision-making, encouraging participation, and fostering good governance – are reflected in Article 3 of the Law which sets out its objectives.

[22] Formal recognition of the right to information by international courts first came in 2006. The first such court to recognise this right was the Inter-American Court of Human Rights, in the 2006 case of *Claude Reyes and Others v. Chile*.[3] In the case, the Court explicitly held that the right to freedom of expression, as enshrined in Article 13 of the *American Convention on Human Rights* (ACHR),[4] included the right to information. In spelling out the scope and nature of the right, the Court stated:

> In respect of the facts of the present case, the Court considers that article 13 of the Convention, in guaranteeing expressly the rights to "seek" and "receive" "information", protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention. Consequently, the said article encompasses the right of individuals to receive the said information and the positive obligation of the State to provide it, in such form that the person can have access in

[2] Joint Declaration of 6 December 2004. Available at: http://www.osce.org/fom/66176.
[3] 19 September 2006, Series C, No. 151. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc.
[4] Adopted 22 November 1969, O.A.S. Treaty Series No. 36, entered into force 18 July 1978.

> order to know the information or receive a motivated answer when for a reason recognised by the Convention, the State may limit the access to it in the particular case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied.[5]

[23] It took a few more years but, in April 2009, the European Court of Human Rights followed suit,[6] recognising a right to information based solely on Article 10 of the *European Convention on Human Rights* (ECHR),[7] which guarantees the right to freedom of expression. Interestingly, the respondent State in the case, Hungary, did not even contest the claim that Article 10 protects the right to information, and instead limited itself to arguing that the information in question fell within the scope of the exceptions to this right (i.e. that the refusal to provide it was a legitimate restriction on freedom of expression).

[24] The UN Human Rights Committee, the body tasked with promoting the implementation of the rights set out in the *International Covenant on Civil and Political Rights* (ICCPR),[8] was relatively late to recognise clearly the right to information. However, a new General Comment on Article 19 of the ICCPR, adopted in September 2011, does just that, stating:

> Article 19, paragraph 2 embraces a right of access to information held by public bodies.[9]

4.2 The Need for Independent Oversight

4.2.a Independent oversight of rights in general

[25] It is well established under international human rights law that everyone is entitled to independent oversight in the context of the determination of their rights and obligations. Article 10 of the *Universal Declaration of Human Rights* (UDHR),[10] the flagship statement of international human rights,[11] states:

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[5] *Claude Reyes and Others v. Chile*, para. 77.
[6] See *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application No. 37374/05.
[7] E.T.S. No. 5, adopted 4 November 1950, entered into force 3 September 1953.
[8] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, entered into force 23 March 1976. Ratified by Indonesia on 23 February 2006.
[9] General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 18.
[10] United Nations General Assembly Resolution 217A (III), 10 December 1948.
[11] The UDHR is not formally a legally binding document, but it has attained enormous status and arguably reflects customary international law. Indonesia has indicated that it will be guided by the UDHR, for example in the preamble of the Indonesia Law on Human Rights, which states: "whereas as a member of the United Nations, the nation of Indonesia has a moral and legal responsibility to respect, execute, and uphold the Universal Declaration on Human Rights promulgated by the United Nations, and several

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

[26] Similar protections are found in international human rights conventions, including the ICCPR, the ACHR,[12] and the ECHR.[13] Article 14(1) of the ICCPR, for example, states, in part:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

[27] Rights in this context refers to all rights which are guaranteed by law, which *a fortiori* includes the protection of human rights. Indeed, the UDHR makes this explicit, stating, in Article 8:

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

[28] The rationale for this is fairly obvious. Absent independent oversight of rights, there can be no rule of law. Indeed, the very role and function of law in society would fall into question and, in essence, what are formally considered to be rights might, in practice, simply become words on paper. This is particularly important regarding independence from the government, given their particular power in many countries to pose a threat to the realisation of rights and especially human rights.

[29] Standards for judicial independence are outlined in a number of key international documents, such as the UN Basic Principles on the Independence of the Judiciary.[14] These principles set out clearly the importance of judicial independence, including freedom from "any inappropriate or unwarranted interference with the judicial process" and the duty of States to "provide adequate resources" to the judiciary.[15]

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other international instruments concerning human rights ratified by the Republic of Indonesia."

[12] Note 4.

[13] Note 7.

[14] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx.

[15] See principles 4 and 7, in particular.

These standards have been subject to authoritative elaboration in the 2008 Mount Scopus Approved Revised International Standards of Judicial Independence.[16]

4.2.b Independent protection of the right to information

[30] It is clear that judicial determination of right to information disputes, as matters which are provided for by law, should conform to these standards (i.e. general principles on judicial independence apply to the determination of right to information disputes as they do to all other types of disputes). However, many countries, including Indonesia, have opted to provide for other forms of dispute resolution, including internal dispute resolution (as provided for in Articles 35 and 36 of Law No. 14 of 2008) and dispute resolution by an external administrative oversight body (in the case of Indonesia, the Information Commission, as provided for by Articles 37 and following of Law No. 14 of 2008).[17]

[31] International standards arguably impose an obligation on States to provide for external administrative oversight of right to information disputes. For example, Principle 8 of the *Principles on the Right of Access to Information*, adopted by The Inter-American Juridical Committee, states:

> Individuals should have the right to appeal against any refusal or obstruction to provide access to information to an administrative jurisdiction. There should also be a right to bring an appeal to the courts on the full merits of the case against the decisions of this administrative body.[18]

External administrative oversight bodies encourage effective dispute resolution outside of the traditional court system, allowing for an expedited, more affordable, more accessible review mechanism to the benefit of the public for whom this right is guaranteed. A more accessible system increases the public's perception and confidence that this right is being protected. And it also increases actual protection for the right since it will be used more frequently.

[32] The standards relating to judicial independence arguably apply to external administrative oversight bodies for the right to information, especially where they exercise an adjudicative function. The definition of a tribunal generally includes any institution with the ability to reach resolutions through the performance of adjudicative tasks.[19] Adjudication is a court-like procedure whereby evidence is

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[16] Developed by the International Association for Judicial Independence and World Peace and approved on 19 March 2008. Available at: http://www.jiwp.org/#!mt-scopus-standards/c14de.

[17] For more information on these bodies see: http://www.right2info.org/information-commission-ers-and-other-oversight-bodies-and-mechanisms.

[18] Adopted 7 August 2008, CJI/RES.147 (LXXIII-O/08). Available at: http://www.oas.org/cji/eng/CJI-RES_147_LXXIII-O-08_eng.pdf.

[19] David M. Walker, *Oxford Companion to Law*, (Oxford: Oxford University Press, 1980), p. 1239.

brought before a decision maker and parties are given the opportunity to make representations in an contentious or contested hearing before a decision is issued. The decision maker, or adjudicator, needs to be a neutral party, independent from the parties being investigated, for such a process to function effectively or even arguably to make sense.[20] Fulfilment of an adjudicative role necessitates independence akin to that of the judiciary so as to ensure appropriate separation between the interests of the parties and the role of the decision-maker. The standards of judicial independence thus arguably extend to adjudicative oversight bodies due to the important similarities in their functions.[21]

[33] In any case, international standards make it clear that, when States do provide for external administrative oversight forms of right to information dispute resolution, this must be done by an independent body. As noted, the reasons for this are essentially analogous to the rationale for independence of the judiciary. Decisions of these oversight bodies, and especially those which, as in the Indonesian model, exercise quasi-judicial powers through binding non-litigation adjudication, have significant consequences. As the Commentary and Guide for Implementation for the Model Inter-American Law on Access to Information (see below) notes:

> Without an independent review procedure of decisions, the right to information will quickly become discretional and based on the whims and desires of the persons receiving the request. If the enforcement mechanisms are weak or ineffectual it can lead to arbitrary denials, or foment the "ostrich effect", whereby there is no explicit denial but rather the government agencies put their heads in the sand and pretend that the law does not exist. Thus, some independent external review mechanism is critical to the law's overall effectiveness.[22]

[34] Laura Neuman, an authority on oversight bodies, has written: "Perhaps most critical to the overall legitimacy of an external enforcement model is its independence (perceived and real)."[23] As Neuman indicates, there are two aspects to this, which may also be derived from the oft-quoted statement that justice must both be done and be seen to be done. If the oversight body is not independent, it will be unable to render proper decisions, thereby undermining respect for the right to information (and justice) in practice. Perhaps equally important, use of the Commission's services by

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[20] Laverne Jacobs. "Building on the Ombudsman Polyjuralism and the Impact of Dispute Resolution in the Canadian Access to Information Context" in Laverne Jacobs & Sasha Baglay, eds., *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Toronto: University of Toronto Press, 2012), pp.4-5.

[21] Gerald Heckman and Lorne Sossin "How Do Canadian Administrative Law Protections Measure up to International Human Rights Standards? The Case of Independence" (2005) 50 McGill LJ 193, p. 209. Available at: http://www.lawjournal.mcgill.ca/userfiles/other/5010430-1225241239_Heckman_Sossin.pdf.

[22] P. 13. Available at: http://www.oas.org/dil/AG-RES_2607-2010_eng.pdf.

[23] *Enforcement Models: Content and Context* (World Bank, 2009), p. 25. Available at: http://www.cdc.gob.cl/wp-content/uploads/documentos/world_bank_institute.pdf. See also http://www.right2info.org/information-commission-ers-and-other-oversight-bodies-and-mechanisms#section-5.

members of the public is contingent on the perception that the Commission is a fair and effective body which, in turn, will not be the case if it is not independent.

[35] The need for independent administrative oversight of the right to information is reflected in a number of international standards. For example, as far back as 1999, within the Commonwealth system, a set of principles on the right to information were adopted by the Commonwealth Law Ministers (Commonwealth Principles).[24] Principle 5 calls for decisions to refuse to disclose information to be "subject to independent review". The 2004 Joint Declaration of the special international mandates, noted above, calls for a right to appeal such refusals "to an independent body with full powers to investigate and resolve such complaints".[25]

[36] Within Europe, a 2002 Recommendation of the Committee of Ministers of the Council of Europe,[26] the leading official human rights body in Europe, refers to the right to appeal to a "court of law or another independent and impartial body established by law". The same language is reflected in Article 9 of the *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*.[27] On 27 November 2008, the Committee of Ministers of the Council of Europe adopted the *Council of Europe Convention on Access to Official Documents*,[28] the first international treaty specifically focusing on the right to information. Article 8(1) of the Convention states:

> An applicant whose request for an official document has been denied, expressly or implied, whether in part or in full, shall have access to a review procedure before a court or another independent and impartial body established by law.

[37] Within Africa, the African Commission on Human and Peoples' Rights, which is responsible for implementation of the *African Charter on Human and Peoples' Rights,*[29] adopted the *Declaration of Principles on Freedom of Expression in Africa* in 2002.[30] Principle IV(2) of the Declaration refers to two levels of appeal, "to an independent body and/or the courts".

[38] *The Global Principles on National Security and the Right to Information* (Tshwane Principles) were drafted by 22 organisations and academic centres (see the

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[24] *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).
[25] Note 2.
[26] Recommendation R(2002)2 the Committee of Ministers to Member States on access to official documents, 21 February 2002.
[27] UN Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the "Environment for Europe" process, 25 June 1998, entered into force 30 October 2001.
[28] CETS No. 205, not yet entered into force.
[29] Adopted 26 June 1981, 21 I.L.M. 58 (1982), entered into force 21 October 1986.
[30] 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, The Gambia. Available at: http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html.

Annex) in consultation with more than 500 experts from more than 70 countries at 14 meetings held around the world, in order to provide guidance on the appropriate balance between the right to information and protection of national security.[31] The preamble of the Tshwane Principles calls for "oversight of the right by independent courts, parliamentary oversight bodies, and other independent institutions". Principle 3 states that no legal restriction on the right to information is legitimate unless, among other things, the law provides for "adequate safeguards against abuse, including prompt, full, accessible, and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts." This is supported by Principle 26, which states:

> A requester has the right to a speedy and low-cost review by an independent authority of a refusal to disclose information, or of matters related to the request.[32]

[39] A number of intergovernmental organisations have developed model right to information laws which reflect the requirement for independence of right to information oversight mechanisms. For example, the Model Law on Access to Information for Africa, prepared by the African Commission on Human and Peoples' Rights,[33] provides for exactly such a mechanism. Section 45 of the Model Law states:

> This Part establishes an independent and impartial oversight mechanism comprised of information commissioners for the purposes of the promotion, monitoring and protection of the right of access to information.

A whole section of the Model Law is devoted to the issue of how to secure independence in practice.

[40] The Model Inter-American Law on Access to Information[34] was prepared by the Department of International Law of the Organization of American States at the request of the member States.[35] Although this Model Law does not explicitly state that the oversight body, the Information Commission, is independent, this is abundantly clear from its structure and appointments process (see Articles 55-61), as well as from the Commentary to the Model Law.[36]

4.3 Analogous Bodies

[31] Adopted 12 June 2013, available at: http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles.
[32] See also Principles 31, 33 and 34.
[33] Available at: http://www.achpr.org/files/news/2013/04/d84/model_law.pdf.
[34] Available at: http://www.oas.org/dil/AG-RES_2607-2010_eng.pdf.
[35] See OAS General Assembly Resolution AG/RES. 2514 (XXXIX-O/09).
[36] As is clear from the quotation above. See note 22.

[41] International law imposes obligations of independence in relation to a number of other bodies which fulfil a role which is similar or analogous to that of an information oversight body. These international standards of independence can be extrapolated and applied to information oversight bodies like the Indonesian Information Commission.

[42] Ombudsmen are one such analogous entity. The role of the information commissions and ombudsmen are so similar that in countries such as New Zealand, Norway and Pakistan, the office of the ombudsman is the entity which acts as the independent oversight mechanism for information matters. Like information oversight bodies, ombudsmen are supposed to act independently of public agencies to resolve disputes between citizens and those agencies, and they normally have the power to investigate complaints and make recommendations or orders for reform.[37] The underlying rationale for independence in relation to ombudsman offices is thus very similar to that of information oversight bodies.

[43] A requirement of independence is embodied in nearly all ombudsman standards including the International Ombudsman Association (IOA) Standards of Practice[38] and the United States Ombudsman Association (USOA) Model Ombudsman Act for State Governments.[39] For example, the IOA Standards of Practice state, generally, in the very first clause, Standard 1.1: "The Ombudsman Office and the Ombudsman are independent from other organizational entities." The need for institutional independence is also widely reflected in national laws governing ombudsmen worldwide.

4.4 The Attributes of Independence

[44] It is clear that a key indicator of independence is the independence of the members of the oversight body, or the commissioners. All of the international standards which address the issue of independence stress this aspect and it is also an important focus of the statements on judicial independence. If the leadership of the body is not independent, it follows that the body itself cannot be independent.

[45] As noted above, Law No. 14 of 2008 goes to some lengths to ensure that commissioners are independent, including through the appointments process and protection of their tenure. This clearly demonstrates the intention of the government

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[37] Dean Gottehrer "Fundamental Elements of an Effective Ombudsman Institution" (2009), p. 3. Available at: http://www.theioi.org/publications/stockholm-2009-conference-papers.

[38] Available at: http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf.

[39] February 1997. See ss. 1, 5 and 7. Available at: http://www.usombudsman.org/about/model-legislation/.

and Parliament of Indonesia, in adopting this Law, to respect international standards in this area.

[46] However, independence must be more than formal in nature, it must be substantive and effective in nature. For this to be the case, in addition to members being independent, the administrative functions of the oversight body must also be independent.

[47] In this regard, international standards address the need for oversight bodies to be funded in a manner which is both adequate and protected against interference. In the context of judicial bodies, the 2008 Mount Scopus Approved Revised International Standards of Judicial Independence states:

> 2.17. It is the duty of the state to provide adequate financial resources to allow for the due administration of justice.

[48] The definition of independence in the *Tshwane Principles* notes that this includes being "financially … free from the influence, guidance, or control of the executive…".

[49] The same idea is reflected in the various model laws referred to above. Section 53(2) of the African Model Law states: "Parliament must appropriate the budget presented by the oversight mechanism annually upon its presentation." While this does not explicitly refer to the need for budgetary independence, the approach of having Parliament approve the budget is clearly designed to this end(i.e. so as to insulate the budget of the oversight mechanism from control by the executive). Similarly, Article 55(4) of the Inter-American Model Law states: "The legislature shall approve the budget of the Information Commission, which shall be sufficient to enable the Commission to perform its duties adequately."

[50] International standards also address the need for broad administrative independence of oversight bodies. In the context of judicial bodies, the 2008 Mount Scopus Approved Revised International Standards of Judicial Independence include a number of statements which support the conclusion that administrative functions must be protected against executive influence (i.e. must be independent). The more relevant of these are as follows:

> 2.9. The Executive shall not have control over judicial functions.
> 2.12. Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.
> 10.3 The court shall be free to determine the conditions for its international administration, including staff recruitment policy, information systems and allocation of budgetary expenditure.
> 15.1 States, parties and international organisations shall provide adequate resources, including facilities and levels of staffing, to enable courts and the judges to perform their functions effectively.

[51] The definition of independence in the *Tshwane Principles* notes that this notion implies that oversight bodies must be "institutionally, financially and operationally free from the influence, guidance, or control of the executive…."

[52] The African Model Law addresses the issue of staff directly, stating, in section 55(1): "The information commissioners must appoint such staff as are necessary to fulfil the functions of the oversight mechanism." It also states, in section 53(6), that "The oversight mechanism is accountable to Parliament for the execution of its mandate, *operations* and performance." [emphasis added] For its part, the Inter-American Model Law states, in section 55(3): "The Information Commission shall have *operative*, budgetary and decision-making autonomy and shall report to the legislature". [emphasis added]

[53] Standards relating to ombudsmen often specify explicitly the need for these bodies to appoint their own staff as an aspect of their institutional independence. The IOA Standards of Practice, for example, state:

> Standard 1.5 The Ombudsman has authority to select Ombudsman Office staff and manage Ombudsman Office budget and operations.

[54] Similarly, section 10(a) of the USOA Model Ombudsman Act for State Governments stipulates:

> The Ombudsman shall select, appoint and fix the compensation of a person as Deputy Ombudsman and may select, appoint and fix the compensation of such other officers and employees as the Ombudsman may deem necessary to discharge the Ombudsman's responsibilities under this Act. Compensation shall be fixed within the amount available by appropriation. All officers and employees shall serve at the Ombudsman's pleasure.[40]

[55] The rationale for oversight bodies appointing their own staff, rather than having staff allocated to them from within the public service, is fairly clear. If the staff come from the very public agencies which the oversight body is tasked with adjudicating in the context of information disputes, it is clear that they cannot be expected to be fully independent in this role. While the members – in the case of Indonesia, the Commissioners – obviously have the final say in terms of dispute resolution, it is equally obvious that staff play an important role in this process. This may range from more administrative matters – such as managing case files – which may nevertheless have an important bearing on the resolution of those cases – to more substantive

[40] See also Australia New Zealand Ombudsman Association (ANZOA), *Essential Criteria for Describing a Body as an Ombudsman: Policy statement endorsed by the Members of the Australian and New Zealand Ombudsman Association* (2010), available at: http://www.ombudsman.gov.au/docs/anzoa/anzoa_essential_criteria_for_describing_a_body_as_an_ombudsman.pdf, and the American Bar Association Standards for the Establishment and Operations of Ombudsman Offices, 2004, p. 13, available at: http://www.americanbar.org/content/dam/aba/migrated/leadership/2004/dj/115.authcheckdam.pdf.

matters – such as preparing cases and even recommendations for consideration by Commissioners.

4.5 Implications of these Standards for the Information Commission

4.5.a The Commission should appoint its own staff

[56] For the Commission to be effectively independent, it should appoint its own staff rather than having them appointed by and from public agencies. Indonesia has taken commendable steps to ensure the independence of Commissioners themselves, but this has not been extended to Commission staff. The Indonesian Commission is supported by a Secretariat for all of its "administrative support, finance and management" tasks (Article 29(1) of Law 14 of 2008). The "Secretariat of the Information Commission is operated by the government" (Article 29(2)) and the day-to-day activities of the Commission are "directed by a secretary who is appointed by the Minister", albeit based on a proposal by the Commission (Article 29(3)).

[57] As a result, the government has considerable potential to influence or otherwise exert control over the day-to-day work of the Commission. It may be noted that this influence may be direct or indirect. In terms of the latter, Secretariat staff are essentially on a short-term loan to the Commission and most will return to a government position when they finish their term at the Commission. This may be contrasted with models where oversight bodies hire their own, permanent, staff. As a result, in Indonesia, the longer-term loyalties of Secretariat staff, as well as their longer-term career prospects, rest with government.

[58] This is not simply a theoretical matter. At a very practical level, the Commission makes decisions virtually on a daily basis that may be seen as counter to the interests of the government and of various public agencies. Indeed, many of its decisions effectively reverse decisions that have been made by public agencies, forcing them to take actions that they have specifically indicated that they do not believe they should have to. If staff play a robust role in support of transparency while working at the Commission Secretariat, as they implicitly should do, this is fairly likely to have implications for them when they return to work for government. As a result, the current arrangement is likely to lead to Secretariat staff being unduly supportive of the interests of public agencies, as opposed to the wider public interest.

[59] Beyond this, where Secretariat staff come exclusively from the civil service, as is the case in Indonesia, they are likely to bring an inherently pro-civil service perspective to their work. Law No. 14 of 2008 explicitly recognises this threat in relation to the Commissioners, providing, at Article 25(1), that they should represent both the government and elements of society. The same need applies to Secretariat staff; even if they are less influential than Commissioners, they are certainly not without influence.

4.5.b The Commission should exercise full control over its budget

[60] The Commission lacks full control over its budget in two respects. First, although the budget is charged to the State or regional budget (Article 29(6)), in practice it is controlled by the Secretariat. Inasmuch as Secretariat staff owe their primary loyalties to government, as opposed to the Commission, this means that the Commission lacks full control over its budget.

[61] Second, while Commissioners receive their salary from the State, Secretariat staff are remunerated directly from public agencies due to the fact that technically they remain employees of those public agencies and do not actually fall under the Commission umbrella in the same way that Commissioners do. This effectively exacerbates the problem of loyalties to the government rather than the Commission, noted above.

5.0 Comparative Practice

[62] A large number of the over 100 countries in the world which have adopted right to information laws have put in place administrative oversight bodies to ensure respect for this right which reflect a strong measure of institutional independence. From among these countries, four are described briefly here – namely Canada, Mexico, Serbia and Sierra Leone – chosen for their geographic diversity and the different models of independence that they reflect.

5.1 Canada

[63] Under Canadian law, standards of judicial independence apply fully to courts and tribunals and, as far as possible, to bodies with adjudicative powers.[41] The Canadian Office of the Information Commissioner (OIC), which has adjudicative powers, is formally an independent body under Canadian law. Section 2(1) of the Access to Information Act[42] sets out, as one of the purposes of the Act, that "decisions on the disclosure of government information should be reviewed independently of government". The manner of appointment of the Commissioner also protects the independence of that office (see sections 54-55 of the Act) and, in practice, successive Commissioners have been robustly independent.

[64] As part of the system of structural guarantees of institutional independence, the OIC is considered to be an office of Parliament, with a special procedure in place to

[41] Gerald Heckman and Lorne Sossin "How Do Canadian Administrative Law Protections Measure Up to International Human Rights Standards? The Case of Independence" (2005) 50 McGill LJ 193, p. 212. Available at: http://www.lawjournal.mcgill.ca/userfiles/other/5010430-1225241239_Heckman_Sossin.pdf.

[42] RSC 1985, c A-1.

ensure that the budget allocated to it is not subject to political interference. The OIC has plenary powers in relation to its budget, in accordance with the budget headings which the budget contains (i.e. funds for staff must be spent on staff and so on).

[65] The OIC also has full, direct powers to appoint its own staff pursuant to section 58 of the Act. Furthermore, the hiring of OIC staff must be in accordance with the Public Service Employment Act (PSEA).[43] The PSEA preamble refers to the idea of a public service which is, as a general matter, based on merit and non-partisanship, and is free from political influence[44] and these values must be taken into account for any appointment. If any appointment or proposed appointment is believed to be in contravention of the PSEA, including because it is not free from political influence, there are remedial provisions in the PSEA to address this.[45]

5.2 Mexico

[66] Mexico is frequently hailed by international right to information experts as having one of the strongest right to information regimes in the world, and an important part of this is the very powerful and robustly independent oversight body, the Federal Institute for Access to Information (IFAI).

[67] An important protection for the Mexican right to information system is the detailed constitutional guarantees which apply to it. These state, among other things:

> Mechanisms for granting access to information and speedy correction procedures shall be established. Those procedures shall be conducted before specialized and impartial organs and bodies enjoying autonomy in terms of operation, management and decision-making.[46]

This represents formal constitutional protection for the independence of IFAI, along with the oversight bodies that exist in each province in Mexico.

[68] Article 33 of the Federal Transparency and Access to Public Government Information Law,[47] which creates IFAI, states explicitly that the body shall be "independent in its operations, budget and decision-making". The members are nominated by the executive branch of government, but may be rejected by a majority vote of the Senate, and the Law provides for various protections for their independence (Articles 34-35). Article 34 also stipulates that the "Institute will not be subject to any authority, will make its decisions with full independence, and will be

[43] SC 2003, c 22.
[44] Section 30(1).
[45] Section 68.
[46] Constitution of Mexico, Articles 6(IV). Available at: https://www.constituteproject.org/constitution/Mexico_2007.pdf?lang=en.
[47] Enacted June 2002. Available at: http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/laweng.pdf.

provided with the necessary human and material resources for carrying out its functions."

[69] IFAI is formally a body of the federal public administration and, as such, must designate civil servants as its staff. However, IFAI has plenary powers to choose those staff and to set their functions within IFAI, a key difference from the Indonesian system. The ability of the IFAI to designate its own staff operates in tandem with its power to develop its own internal regulations and norms of operation (Article 37(XVI) of the Law).[48] As a result, IFAI appointed staff are accountable exclusively to protect the right to information and operate under the exclusive direction of the IFAI Commissioners.

5.3 Serbia

[70] The independence of the Serbian oversight body, the Commissioner for Information of Public Importance, is provided for explicitly in Serbia's Law on Free Access to Information of Public Importance.[49] Article 1 states:

> In order to implement the right to access information of public importance, held by public authority bodies, a Commissioner for Information of Public Importance shall be established (hereinafter: Commissioner) by this Law, as an autonomous state body, independent in fulfilling its authority.

This is supported by Article 32, which states, in part:

> The Commissioner shall be autonomous and independent in the exercise of his/her powers.
>
> In the exercise of his/her powers the Commissioner shall neither seek nor accept orders or instructions from state bodies or other persons.

[71] The Law includes robust practical safeguards for the independence of the Commissioner through the manner in which he or she is appointed, as well as protections against dismissal, protections for salary and requirements of expertise (Articles 30-32).

[72] A significant provision in the Serbian law is Article 34, titled Staff of the Commission, which reads in full as follows:

> The Commissioner shall have staff that will help him/her exercise his/her powers.
>
> The Commissioner shall pass a book of regulations on the work of his/her staff, with approval from the National Assembly. The Commissioner shall independently decide on the employment of expert staff and other employees, in accordance with law, guided by the need to professionally and efficiently exercise his/her powers.

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[48] Federal Transparency and Access to Public Government Information Law, enacted June 2002, Article 37.XVI.

[49] Available at: http://www.rti-rating.org/files/pdf/Serbia.pdf.

> The regulations on working conditions in state bodies shall accordingly apply to staff working for the Commissioner.
>
> The funds required for the work of the Commissioner and his/her staff shall be secured in the budget of the Republic of Serbia.

The Commissioner thus has full powers to appoint and direct staff, as well as an adequate budget to discharge his or her duties.

5.4 Sierra Leone

[73] Sierra Leone enacted comprehensive right to information legislation in 2013.[50] Article 37 of the Act provides for the independence of the oversight body, the Information Commission, as follows:

> The Commission and its authorised agents shall not in the performance of their functions under this Act be subject to the directions or control of any person or authority.

Article 31 provides for an independent appointments process for Commissioners, along with prohibitions on individuals with strong political connections being appointed and protection for the tenure of Commissioners.

[74] Article 34(1) of the Act provides for the Commission to be assisted in its administrative, financial and other tasks by a Secretariat. Article 34(2), however, gives the Commission full powers over the appointment of the staff of the Commission, as follows:

> The Executive Secretary, Finance Officer, Administrative Officer and such other technical and administrative staff, shall be appointed by the Commission, on such terms and conditions as the Commission shall determine.

[75] Furthermore, the Sierra Leonean Commission is not dependent on budgets or finances connected to any public agency but, instead, is funded by "moneys appropriated by Parliament for the purposes of the Commission" (Article 38(a)). This is a robust model for independent budgeting for administrative bodies.

6.0 Conclusion

[76] International standards are clear insofar as they mandate that administrative oversight bodies for the right to information should be independent of the public agencies which they regulate. This flows from numerous explicit statements to this effect, from extrapolation by analogy from bodies which conduct similar tasks to

[50] The Right To Access Information Act, 2013. Available at: http://www.sierra-leone.org/Laws/2013-02.pdf

information oversight bodies, such as courts and ombudsmen, and from a common sense assessment of the role that these bodies play.

[77] Independence in this context clearly means formal independence, in the sense of protecting the members or leadership of these bodies from political interference and putting in place an appointments process which avoids individuals who do not have a genuine commitment to openness from being appointed and protecting the tenure of those who have been appointed. But it goes beyond this to include both budgetary independence, without which formal independence is largely meaningless, and administrative independence. The latter, in turn, implies, among other things, that the staff of the body should also be protected against political interference, as well as against undue bias towards the entities they are supposed to regulate, namely public agencies.

[78] The Public Information Disclosure Act demonstrates Indonesia's admirable intention to implement a strong and effective regime for the defence of the right to information. It is also clear that the intention of the Act is for the oversight body, the Information Commission, to be independent, as reflected in various provisions which effectively secure the independence of Commissioners. Furthermore, these provisions have so far been respected in practice, with independent Commissioners in fact being appointed. At the same time, the Act fails to extend these important guarantees of independence and impartiality to the staff of the Commission, who are appointed by government and who, for various structural reasons, normally have a primary loyalty to government.

[79] The Indonesian Public Information Disclosure Act is generally a strong piece of legislation which has already delivered important benefits to the people of Indonesia. However, full realisation of its potential is being hampered by certain weaknesses in the legislation, including the structure of the Information Commission. Recognising that this structure fails to conform to the standards which flow from the human right to information, as guaranteed under both international law and the Constitution of Indonesia, will strengthen respect for this right in Indonesia.

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