Article

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Freedom of Information Law and Its Application in Indonesia: A Preliminary Assessment

Abstract: In 2008, Indonesia introduced its first "freedom of information" statute – *Law 14 of 2008 on Disclosure of Public Information* (the "*FOI Law*" or the "*Law*") – which became fully operational in 2010. The *FOI Law* is an important component of the government transparency and accountability mechanisms established after Soeharto and his authoritarian "New Order" government fell in 1998. This article assesses the extent to which the *FOI Law* has been effective in requiring public bodies to disclose "public" information that they would rather keep within their ranks. More time is needed for these reforms to take hold. However, this article, which provides the first academic analysis of the freedom of information reforms "in practice", shows that Indonesia's central Information Commission and the courts have, with two important exceptions, applied the *FOI Law* in favour of information-seekers, thereby providing some reason for optimism for the future of this reform.

Keywords: law, Indonesia, freedom of information, transparency

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On 30 April 2008 Indonesia's National Parliament enacted Indonesia's first "freedom of information" statute – *Law 14 of 2008 on Disclosure of Public Information* (herein the "*FOI Law*").[1] The *FOI Law* gives rights to Indonesian

1 *Undang-Undang Nomor 14 Tahun 2008 Tentang Keterbukaan Informasi Publik* (literally, *Law 14 of 2008 on the Openness of Public Information*). An English translation of this statute can be found online at: <http://www.right2info.org/resources/publications/Indonesia-Public-Information-Disclosure-Act-2008.doc/view> (last accessed 30 October 2013). Although this article refers to this statute as the "*FOI Law*" for convenience, I note that "openness" rather than "freedom" is used in the title of the statute. The word "freedom" was dropped from earlier drafts by the government when the law was finally enacted: Andrew Thornley, "We Have a Right to Know. Is Our New Law Helping Us Find Out?" *The Jakarta Post* (26 December 2010).

citizens and legal entities to seek and obtain public information held by public bodies. The *FOI Law*'s starting point is that information held by public bodies is public and must, depending on the nature of the information, be: available for disclosure upon a procedurally-correct request from a citizen or legal entity, proactively disclosed periodically, or available at all times. A public body can refuse disclosure only if the requested information falls within one of the categories of excluded information listed in the *FOI Law* or another law. The *FOI Law* requires public bodies to nominate or employ information officers to service requests for information. It provides dispute resolution avenues for unsatisfied information-seekers – such as mediation, "non-litigation adjudication" and judicial appeals, including to Indonesia's Supreme Court – as well as criminal penalties for officials who fail to comply with information requests. The statute establishes a central Information Commission and regional information commissions to set public information policies and to help citizens and legal entities obtain information if public bodies refuse to disclose it.

The *FOI Law* is a legally significant advance. Prior to its enactment, most public bodies were not required to disclose information proactively or upon request. Disclosure, if it occurred at all, was either voluntary or obtained through media pressure. Members of the public had only a very narrow "right" under a 2007 Supreme Court Chief Justice Decree:[2] to access court-related information, including judicial decisions and case statistics. However, some lawyers complained that they were unable to obtain particular court decisions, despite their requests following procedures set out in the Decree. This reflected the view held by many judges that judicial decisions were confidential and should only be made available to the parties to a dispute.

In this article, I critically analyse the *FOI Law* and assess how it has been applied, particularly by the Information Commission – the primary institution established by the *Law* to resolve disputes between people seeking information and public bodies that are thought to hold that information. I also examine administrative court appeals against Commission decisions. I show that disputes which come before the Information Commission and the Indonesian courts were, at the time of writing, almost always being decided in favour of the person seeking the information. In other words, public bodies are usually compelled to disclose information that they would rather keep within their own ranks. Notably, these public bodies include Indonesia's National Intelligence Agency, the police force, many government departments and even some non-government organisations (NGOs). To be sure, significant legal and institutional impediments remain in the way of an effective freedom of information system. Also,

2 *No 144/KMA/SK VIII/2007 on Disclosure of Information in Court*.

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two administrative court decisions have upheld appeals by public bodies, using highly questionable grounds to conclude that information can remain secret. Although these reforms are new and a definitive assessment of them is likely premature, I argue that on the available evidence, however, Indonesia's reforms in this area have, on the whole, thus far been largely successful.

The origins of the *FOI Law* can be traced to the so-called *reformasi* (reformation) period that followed the fall of Suharto. Over 32 years, Suharto had built a system in which power was highly centralised within a small political elite. The system resembled a "franchise" as McLeod famously called it, within which loyalist government officials – including law enforcement officials and civil servants – were able to extract illegal rents from citizens with virtual impunity.[3] In return, they were required to give absolute loyalty and a share of the spoils to their franchisors. Within this system, transparency and accountability were almost non-existent, at least for the purpose of outside scrutiny, and challenges to the government were not tolerated.[4] Corruption flourished and many government misdeeds could not be uncovered, let alone punished.

After Suharto resigned in May 1998, his successor, Bacharuddin Jusuf Habibie, put in motion reforms that would shape Indonesia's trajectory towards democracy and the rule of law. These included constitutional reforms, the entrenchment of human rights protections, free and fair elections, removal of press restrictions, decentralisation, institutional independence of the judiciary from government, the establishment of a Constitutional Court, commitments to anticorruption reforms and improvements to government accountability and transparency.[5] The *FOI Law* was one such reform, although its enactment came well after the others.

The centrality of freedom of information to government accountability, transparency and public participation in governance is being increasingly acknowledged worldwide, with a "global explosion"[6] of freedom of information laws being enacted over the past decade or so. As of May 2012, approximately

3 Ross McLeod, "Soeharto's Indonesia: A Better Class of Corruption" (2000) 7(2) Agenda 99.

4 Daniel S. Lev, "Judicial Authority and the Struggle for an Indonesian Rechsstaat" (1978) 13 Law & Soc'y Rev. 37; Hans Thoolen, *Indonesia and the Rule of Law: Twenty Years of "New Order" Government: A Study* (London: F. Pinter, 1987).

5 Nadirsyah Hosen, *Human rights, Politics and Corruption in Indonesia: A Critical Reflection on the Post Soeharto Era* (Netherlands: Republic Of Letters, 2010).

6 John Ackerman & Irma Sandoval-Ballesteros, "The Global Explosion of Freedom of Information Laws" (2006) 58 Admin. L. Rev. 85.

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90 countries have national freedom of information legislation,[7] while 116 have provisions guaranteeing access to public information in their national constitutions.[8] In the Indonesian context, the statute was pushed by the Coalition for Freedom of Information – an initiative of the Indonesian Centre for Environmental Law (ICEL),[9] no doubt influenced and informed by this international trend. The Coalition, established in 2000 and comprising 24 NGOs and well known journalists, lobbied the national parliament to enact the statute. These efforts were successful, with a draft being produced by a parliamentary working group in 2002. However, it was not until 2005 that parliament began deliberating the Bill – a two-year process during which various NGOs made submissions to parliament about what the *FOI Law* should contain,[10] many of which were ultimately accepted.[11]

As we shall see, Indonesian legal experts have been quick to point out that large numbers of information requests have been ignored by public bodies and that many public bodies do not yet even have information officers to service requests for information. No doubt these are significant problems. However, I argue that the *FOI Law* has been at least a partially successful reform, particularly given that it became fully operational only in August 2011. If the current trajectory can be maintained, then higher levels of compliance are likely to be achieved in the future.

This article is divided into three parts. In Part I, I describe key features of the *FOI Law* and its constitutional underpinnings. Included in this description are mention of two of the *Law*'s implementing regulations – *Government Regulation 61 of 2010 on the Implementation of the Freedom of Information Law* (the "*Government Regulation*") and *Information Commission Regulation 1 of 2010 on Public Information Service Standards* (the "*2010 Information Commission Regulation*"). Various Ministers have also issued regulations on how the *FOI Law* and implementing regulations should be applied in their respective Ministries.

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7 Freedom Info, "FOI Laws: Counts Vary Depending On Definitions", online: <http://www.freedominfo.org/2011/10/foi-laws-counts-vary-slightly-depending-on-definitions/> (last accessed 1 May 2012).

8 Right2Info, "Constitutional Provisions, Laws and Regulations", online: <http://www.right2info.org/laws> (last accessed 1 May 2012).

9 Indonesian Center for Environmental Law, *Anotasi Undang-undang Nomor 14 Tahun 2008 tentang Keterbukaan Informasi Publik* (Jakarta: Indonesian Centre for Environmental Law, 2009).

10 Many of these NGOs were supported by various international donors: Brad Simpson, "Indonesia's Freedom of Information Law" (2010), online: <www.freedom.org> (last accessed 30 October 2013).

11 Indonesian Center for Environmental Law, *Anotasi Undang-undang Nomor 14 Tahun 2008 tentang Keterbukaan Informasi Publik* (Jakarta: Indonesian Centre for Environmental Law, 2009).

In Part II, I set out criticisms that have been made of the *FOI Law* and its application. I focus on the *Law*'s alleged failure to impose significant penalties for non-compliance and the illegal use of information. I also discuss the lack of clarity of the exclusion grounds, including the vagueness of the so-called "harm test". As for the *Law*'s application, I examine complaints about the slowness with which public bodies have responded to the *Law*, the "test cases" where individuals and NGOs have requested information, and the perceived reluctance of public officials to comply with information requests.

In Part III, I attempt to counter some of these criticisms with an analysis of information commission and judicial decision-making in freedom of information cases. This analysis is based on a reading of all 40 central Information Commission decisions available on its website,[12] and the eight appeals against information commission decisions heard by administrative courts available on the Indonesian Supreme Court website.[13] After making some general observations about the Commission's decision-making, I discuss some of the grounds upon which the Commission has rejected arguments commonly put forward by applicants. I show that the Commission and the courts have ordered disclosure of requested information in the vast majority of reported cases.

I. The 2008 *FOI Law*

The most significant legal prelude to the *FOI Law* was the 2000 insertion of a Bill of Rights into Indonesia's 1945 *Constitution*. One of the new provisions, Article 28F, reads, in my translation:

> Every person has the right to communicate and to obtain information for the purpose of developing themselves and their social environment, and has the right to seek, obtain, possess, store, process and convey information through all available channels.

The Elucidation to the *FOI Law* describes this constitutional right as "an important aspect of national cohesion",[14] and "an important feature of a democratic state".[15] To this end, the *FOI Law* declares that providing increased access to information will "increase the quality of community involvement in public decision-making";

12 Downloaded from the central Information Commission's website: <http://www.komisiinformasi.go.id/> (last accessed 30 October 2013).

13 Available on the website of the Supreme Court of Indonesia: <http://putusan.mahkamahagung.go.id/> (last accessed 30 October 2013).

14 Consideration (a).

15 Consideration (b).

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expedite the creation of open government (which the law defines as a strategic effort to prevent corruption, collusion and nepotism, and to encourage good governance); and make public bodies responsive and provide "the best community service".[16] The statute declares that its aims include ensuring that citizens can find out about public policy plans and programs, the processes by which public decisions are made, and the reasons for making those decisions (Article 3(a)). Additional aims include encouraging public participation in policymaking processes (Articles 3(b) and (c)) and bringing about good governance – that is, a transparent, effective, efficient, accountable and responsible government (Article 3(d)).

The *FOI Law* requires that "all public information" be "open and accessible" to "users of public information" (Article 2(1)), which includes Indonesian citizens and legal entities. All citizens and entities have the right to request, view, understand, obtain a copy of and distribute public information.[17] All "public bodies" (*badan publik*) must comply with this statute – that is, they must provide accurate, correct and clear information to members of the public who have requested information, unless that information falls within one of the "excluded information" categories under the *Law* (discussed below in Part II). The *FOI Law* specifies types of information that public bodies cannot exclude, and therefore must disclose. These include judicial decisions; regulations; administrative decisions and policies; and orders to cease investigations or prosecutions (Article 18(1)). The public body must provide the information quickly, cheaply and in a simple manner (Article 2(3)), and in comprehensible language (Article 10(2)).

> "Information" is broadly defined in Article 1(1) to include: any information, statement, idea or sign that has value, meaning, or a message – including data, facts or explanations – that can be seen, heard, or read, whether in electronic or non-electronic form. "Public information" means information produced, stored, managed, sent or received by a public body which concerns the public interest, and either relates to the administration of the state or the administration of another public body. (Article 1(2))

Public bodies are defined broadly to include entities engaging in an aspect of state administration (*penyelenggaraan negara*) which receive government funding, and non-government organisations funded by either the community or foreign sources.[18] Specifically mentioned as public bodies are national and

16 General Elucidation.

17 The *FOI Law* also gives the right for "all persons" to "attend public meetings to obtain public information": Arts. 4(2) and (3).

18 Articles 1(3) and 16.

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regional executive governments and legislatures, the judiciary and political parties.[19]

The obligations that the *FOI Law* imposes upon public bodies are significant. They must develop information and documentation systems to efficiently manage public information (Article 7(3)); create request-processing systems; and appoint employees to respond to requests (Article 13(1)(b)). The *Law* requires public bodies to publish six-monthly reports on their activities, performance and finances (Article 9(2)) and to proactively disclose information that could (*dapat*) "threaten the necessities of life of the people and public order" (Article 10(1)). The *FOI Law* also requires that public bodies be ready to provide various types of public information "at any time". These types of information include: lists of the public information under their control; regulations and decisions they produce, along with the reasons for making them; policies and supporting documentation;[20] and contracts with third parties (Article 11(1)). Public bodies must also report the number of information requests they receive, grant and reject each year, and the time taken to fulfil these requests (Article 12). The *Law* also specifies particular information that must be disclosed by state-owned enterprises, political parties and NGOs.[21]

To meet these requirements, *Government Regulation 61 of 2010* stipulated that an information officer must be appointed in every public body by 23 August 2011 (Article 21(1)).[22] The main responsibilities of these officers are to receive and service requests for information; provide, store and protect information; conduct consequence assessments and classify information (discussed below, in "Exemptions and exclusions"); determine whether embargoes on information should be lifted; and provide written explanations for policies made by the public body.[23]

19 Articles 1(3) and 15; clarified in *Information Commission Regulation 1 of 2010 on Public Information Services Standards*, Art. 3.

20 This requires public bodies to provide reasons for their policies, including political, economic, social, cultural, security and/or defence reasons: Arts. 7(4) and (5).

21 Articles 14–16.

22 This deadline was one year from enactment of the *2010 Regulation*. In the interim, these tasks were permitted to be performed by an agency's public relations or communications unit: Art. 21.

23 In accordance with *Government Regulation 61 of 2010 on the Implementation of the Freedom of Information Law*, Art. 14(1)(h).

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A. Dispute Resolution

The *FOI Law* also establishes mechanisms which information-seekers can employ if public bodies ignore their requests, or do not provide all of the information requested. Perhaps the most important of these mechanisms are provided by the central Information Commission, an independent institution which operates alongside a number of provincial information commissions. The central Commission has seven members, with representatives from the government and community. They are chosen by the National Parliament from a list compiled by the President (Articles 31(1) and (2)). Provincial commissions have five members (Articles 25(2) and (3)). Commission members elect their own chairperson and deputy chairperson (Article 25(4)).

The *FOI Law*'s provisions on requesting information and resolving disputes are as follows: Applicants must submit a written or oral request with the public body thought to possess the information (Article 22(1)). The public body must then respond in writing within ten working days (Article 22(7)),[24] specifying whether the body possesses the requested information and, if so, whether the body is prepared to disclose it (Article 22(7)). The written response must include any proposed redactions (Article 22(7)(e)) and an estimation of costs to be borne by the applicant (Articles 22(7)(c) and (g)).

If the public body rejects the request, it must provide written reasons (Article 22(7)). The applicant has 30 days to lodge a formal objection with the information officer's superior if, under Articles 35(1) and (2):

- their application was refused,
- their request was ignored,
- the information provided was not the information requested,
- time limits for the provision of information were exceeded, or
- the estimated costs were excessive.

The superior then has 30 days to issue a written response (Article 35(5)).

If still dissatisfied, the applicant has 14 days to apply for dispute resolution (Article 36(2)). In most cases, the first stage is voluntary mediation before the Information Commission, which must be completed within 100 working days (Article 38(2)). If both parties agree to the mediated outcome, the Commission issues a declaration containing the agreement reached. Once issued, this declaration becomes final and binding on the parties (Article 39).

24 However, the response time may be extended by a further seven working days, provided written reasons are given: Art. 22(8).

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On the other hand, if one or both parties are dissatisfied with the mediation, then the Commission can commence "non-litigation adjudication" (*ajudikasi nonlitigasi*) (Article 42). Under this process, which appears to be very similar to arbitration, three Commissioners hear the dispute. These proceedings will usually be public unless they involve potentially excluded information (Article 43). The Commission has power to call applicants and officials to attend hearings, and to request notes or materials possessed by the public body that are relevant to the disputed rejection (Article 27(1)). After hearing from both sides, the Commission can either uphold the rejection, or order the public body to provide all or part of the requested information (Article 46(1)). Importantly, the public body bears the burden of showing that the information requested should not be disclosed, such as if the information is excluded by Article 17.

If either party is dissatisfied with the Information Commission's decision, then the *FOI Law* provides judicial avenues to resolve the dispute (Article 4(4)). Indonesia's administrative courts hear information disputes involving "state public bodies" (*badan publik negara*) (Articles 47(1) and (2)) and the general courts hear cases involving other types of public bodies. These courts can order the public body to disclose all or part of the information, or confirm the body's refusal to disclose (Articles 49(1) and (2)).

Supreme Court Regulation 2 of 2011 on Procedures for Resolving Public Information Disputes in Court stipulates that judicial reviews of Information Commission decisions are to employ "simple" (*sederhena*) procedures. The courts must examine the decision itself as well as the case file, written objections and responses to the objections submitted by the parties (Article 7). These cases can, therefore, proceed largely "on the papers" rather than by oral submissions from the parties.[25] Importantly, Article 12 of the *Regulation* authorises the courts to enforce Information Commission decisions. The decisions of the administrative and general courts can be appealed to the Indonesian Supreme Court (Article 50 of the *FOI Law*).[26]

25 Even though the *Regulation* requires that these cases must be open to the public (Art. 8(2)), it is difficult to see how this could occur, for two main reasons. First, as mentioned, appeals are on the papers only, with formal objections submitted in writing. Therefore, there is no formal "hearing" or "proceeding". Second, even if Art. 7 was interpreted to allow oral proceedings, it seems reasonable to presume that because of the sensitivity of some of the information sought, the court would often choose to hold proceedings in closed court, as is permissible under Art. 48 of the *FOI Law*.

26 Article 45A(2)(c) of *Law 5 of 2004 Amending Law 5 of 1986 on the Administrative Courts* states that the Supreme Court cannot hear appeals from decisions that have regional scope and are made by regional government officials. On this basis, it might be argued that while regional information commission decisions can be appealed to an administrative court, they cannot be

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B. Exemptions and Exclusions

The *FOI Law* declares that it seeks to limit the types of information that public bodies can or must keep secret (Article 2(2)). Most of the so-called "excluded" information is listed in Chapter 5 of the *Law*, comprising Articles 17–20. Excluded is information that will:

- impede law enforcement (Article 17(a)(1)),[27]
- threaten intellectual property rights (Article 17(a)(2)), national security,[28] national economic stability[29] or international relations,[30] or
- disclose Indonesia's natural resources, the contents of a private deed or will, or the personal information of an individual.[31]

The *FOI Law* also excludes documents circulated within a public body (or sent between public bodies), which are by their nature confidential, unless the Information Commission or a court determines otherwise (Articles 17(i) and 20(a)). To classify information as exempt under these provisions however, information officers in public bodies must first perform a careful and accurate "consequences assessment".[32] The exemption must be in writing, specify the

appealed all the way up to the Supreme Court. On the other hand, it might be argued that because Art. 50 of the *FOI Law* (which purports to allow the Supreme Court to hear appeal of administrative court decisions) was enacted after Art. 45A(2)(c) of *Law 5 of 2004*, Art. 50 implicitly overrides Art. 45A(2)(c). This appears to be the interpretation adopted by the Supreme Court in *Supreme Court Regulation 2 of 2011*, Art. 9(2) of which specifies a right of appeal to the Supreme Court.

27 Excluded is information about criminal investigations; the protection of witnesses, victims and law enforcement officials; and intelligence data related to preventing or handling transnational crime: Arts. 17(a)(1)–(5).

28 Excluded information includes strategies, intelligence, operational details, tactics and techniques related to the defence and security of the nation; and the composition and disposition of force and capacity in defence and security.

29 Such as plans for buying or selling national foreign currency, shares, property and vital state assets; planned foreign investment; and investigations into banking, insurance or other financial institutions: Art. 17(e).

30 Such as the position, bargaining power and strategies which will be (or have been) used by states in international negotiations; correspondence, communication and code systems used in international relations; and the protection and security of Indonesia's strategic infrastructure: Art. 17(f).

31 Including medical, financial or academic history; family details; and assessments of capability or competence: Art. 17(e).

32 *Government Regulation 61 of 2010*, Art. 3(1).

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category of excluded information into which the information falls and include the reason for the exemption.[33]

None of these exclusions are permanent (Article 20(1)) so if the reasons for exclusion no longer exist at a later date, the information can then be released. Thus, information classified as endangering national defence and security; disclosing Indonesia's natural resources or a person's confidential information; or damaging the national economy or international relations, can only be embargoed for as long as necessary to protect those interests.[34] Some types of otherwise excluded information can also be disclosed if, under Article 18:

- written authorisation is provided by the person to whom the confidential information relates; or
- disclosure "relates to someone's position in public office", or is for use in a criminal trial or civil proceedings involving state assets or finances (although the President's permission is required and can be withheld in the interests of defence, security and the public interest).

Government Regulation 61 of 2010 stipulates that information that could impede law enforcement processes can remain classified for up to 30 years, unless the information is disclosed in open court.[35] Once the time limit has expired, the information becomes public and disclosable.[36]

On paper, then, Indonesia's *FOI Law* appears to meet many of Article 19's "Principles on Freedom of Information Legislation" – widely considered to represent "best practice" based on international and regional standards.[37] These Principles include the following[38]:

- maximum disclosure (all information held by public bodies should be subject to disclosure and "information" and "public bodies" should be defined broadly);

33 *Ibid*., Art. 4(2).

34 *Ibid*., Arts. 7 and 8(2).

35 This information is defined as information that impedes the investigation of a crime; divulges the identity of informants, witnesses and victims; reveals criminal intelligence data or plans to prevent or handle transnational crime; endangers the safety or lives of law enforcers or their families, and the security of law enforcement equipment and infrastructure: Elucidation to Art. 5(1) of *Government Regulation 61 of 2010*.

36 *Government Regulation 61 of 2010*, Art. 11(1).

37 Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2nd ed. (Paris: UNESCO, 2008) at 30.

38 Article 19, *The public's right to know: Principles on freedom of information legislation* (1999), online: <http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf> (last accessed 30 October 2013).

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- proactive publication (particularly of information of documents of significant public interest);
- promotion of open government (the public should be informed of their rights and a culture of openness within government should be promoted);
- limited exceptions (to be excluded from disclosure, the disclosure of the requested information must threaten a legitimate aim listed in a law and the harm to the aim must be greater than the public interesting in disclosure);
- facilitated access (information requests should be serviced by the public body that holds the requested information, with an appeal to an independent administrative body and judicial recourse); and
- affordable costs.

The extent to which another of these Article 19 principles – that disclosure takes precedence (other legislation should be interpreted in line with disclosure requirements) – relates to the way that public bodies, information commissions, administrative tribunals and courts apply the disclosure requirements rather than the content of the law itself. In Part III, I discuss cases in which Indonesia's Information Commission and administrative courts have interpreted other laws that appear to contradict the *FOI Law*'s disclosure requirements.

II. Criticisms of the *FOI Law* and its implementation

I now turn to discuss criticisms put forward by some commentators about the *FOI Law* and its implementation. While many of these criticisms have some merit, most are in my view, either overstated, or ignore the practical difficulties faced by public bodies in complying with the law. In particular, many of these criticisms fail to recognise, or underemphasise, much of the progress that has been achieved, particularly by the Information Commission (whose decisions are discussed in Part III).

A. Slowness in Establishing Institutions and Employing Information Officers

Though the *FOI Law* was enacted on 30 April 2008, it became operative in stages and only came completely into force in August 2011. The Information Commission was to be established within one year of enactment (Article 58)

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and regional commissions within two years (Article 59). The central Commission was not functional until May 2010–over one year later than required by the *Law*. By this date, only two provinces had established information commission offices as required by the *Law*.[39] By early 2013, only 20 out of Indonesia's 34 provinces had established provincial commissions.[40]

As mentioned, the *FOI Law* also required public bodies to appoint information officers, and to bring their practices into line with the *Law* (Article 13). However, many public bodies have been unable to meet these obligations. In the first year of the *FOI Law*'s enactment, only seven public bodies complied. These were the Supreme Court, Constitutional Court, Ministry of Health, Central Java Provincial Administration, Financial Transactions Reports and Analysis Centre, Development Finance Comptroller and National Police.[41] According to data from the Information Commission, by 30 April 2012 information officers were only appointed by:

- 25 of Indonesia's 34 Ministries (74%),
- 29 of 129 state institutions (22%),
- 14 of 33 provincial governments (42%),
- 53 of 399 county governments (13%), and
- 17 of 98 city governments (17%).[42]

Although these statistics provide stark evidence of slow compliance, they must be viewed in context. Article 13(1)(b) of the *FOI Law* requires that public bodies train staff to handle information requests. However, the central government has provided no funding, training or guidelines, leaving many agencies simply unable to afford to hire or train staff, and unsure about what the legislation requires of them.[43] The Information Commission itself does not appear to have provided guidelines or resources as apparently required under Article 26(1)(b) of the *FOI Law*. One result from this lack of funding and guidance is that many

39 Bagus B.T. Saragih, "Red Tape Hinders Access to Information" *The Jakarta Post* (1 May 2010).

40 See the list at <http://www.komisiinformasi.go.id/> (last accessed 30 October 2013).

41 Bagus B.T. Saragih & Hans David Tampubolon, "Access to Info Improved Despite Poor Preparations" *The Jakarta Post* (1 May 2010).

42 *"UU Keterbukaan Informasi Diabaikan", Hukumonline* (26 May 2012), online: <www.hukumonline.com> (last accessed 30 October 2013).

43 "Implementation of FOI Law Found Lacking in Indonesia", Freedom Info, online: <http://www.freedominfo.org/2011/02/implementation-of-foi-law-found-lacking-in-indonesia/> (last accessed 21 February 2011); "Indonesia: International Focus", UCL Constitution Unit, University College London, online: <http://www.ucl.ac.uk/constitution-unit/research/foi/countries/indonesia> (last accessed 30 October 2013).

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public bodies either have no employee responsible for assessing information requests, or have simply added information management to the existing responsibilities of a staff member.[44] For similar reasons, many public bodies still have no bureaucratic processes to systematically record and store data. Of course, if a public body is unable to discover what information is in its possession or locate that information, it will be unable to give that information to an information-seeker.[45]

B. Test "Requests" and Mindsets

Given this lack of central government support, it is perhaps unsurprising that many public agencies have appeared to respond inadequately, or not at all, to information requests. Soon after the *FOI Law* came into force, several NGOs attempted to test the extent to which various public bodies would comply with it. In 2010 for example, the Pattiro organisation[46] made 347 separate requests for information from 69 state agencies and 158 public organisations in 10 of Indonesia's 33 provinces. Less than one-third of requests were met, almost half were rejected and 75 were entirely ignored.[47]

In 2011, the Kontras organisation[48] lodged 115 requests for information from Indonesia's national police force across 7 provinces. The requested information was provided in almost one-quarter of requests, but 69% of requests were ignored.[49] In another test, apparently conducted in 2012, the Alliance of

44 *Ibid*.

45 Kristian Erdianto *et al*., *Implementasi Hak Atas Informasi Publik: Sebuah Kajian Dari Tiga Badan Publik Indonesia* (Jakarta: Centre of Law and Democracy & Yayasan 28, 2012), online: <http://www.law-democracy.org/wp-content/uploads/2010/07/Buku-UU-KIP.pdf> (last accessed 30 October 2013).

46 Center for Regional Studies and Information (*Pusat Telaah dan Informasi Regional*).

47 Warief Djajanto Basorie, "Indonesia's Freedom of Information Laws, One Year On", *The Jakarta Post* (28 April 2011). One hundred and six requests were met and 166 were rejected.

48 Commission for Missing Persons and Victims of Violence (*Komisi untuk Orang Hilang dan Korban Tindak Kekerasan*).

49 Kontras' choice to target the police force was strategic. The police, along with other law enforcement institutions such as the public prosecution and the judiciary, have for many years been notorious for lacking transparency and accountability, and for "guarding their own" in the face of credible allegations of corruption or misconduct. Yet senior police officers were amongst the earliest and most vocal supporters of the *FOI Law*, and the police force was one of the first public bodies to issue internal FOI regulations: Bagus B.T. Saragih & Hans David Tampubolon, "Access to Info Improved Despite Poor Preparations" *The Jakarta Post* (1 May 2010); see *Regulation of the Indonesian Chief of Police16 of 2010 on Procedures for Public Information*

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Independent Journalists and the Centre for Law and Democracy lodged 224 information requests with various government institutions. The requested information was provided in 104 or 46% of cases, but repeat visits to the public body were often required.[50] Public bodies had lost or simply ignored the remaining requests.[51]

Some NGOs have tested whether public bodies have complied with their proactive disclosure obligations, mentioned above. In 2010, "Article 19" published research indicating that most local public bodies in the regions had failed to meet these obligations.[52] The research found that, even though some national bodies made periodic publications readily available on their official websites, few of these publications included financial statements or regulations relating to the public interest, as required by the *FOI Law*. In some instances, the publicly available information even appeared to be unreliable. One study mentioned as an example *Indonesian Police Chief Regulation 16 of 2010 on the Procedures for Public Information Services in the Indonesian National Police*. Only part of the *Regulation* could be accessed on the national police website, with multiple inconsistent versions also uploaded.[53]

A report produced by the Indonesian Centre for Environmental Law and the Centre for Law and Democracy concluded that the *FOI Law* had not changed the mindset or behaviour of many officials, who remain reluctant or simply refuse to disclose public information, often without justifying the refusal by reference to the *FOI Law*, if at all.[54] For example, some officials were said to reject

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Services in the Indonesian National Police. According to one study, poor compliance with the *FOI Law* amongst police departments could be attributed to this *Regulation* not complying with the *FOI Law*, and failure to conduct training and education programs for staff: Dessy Eko Prayitno *et al.*, *Assessment of the Right to Freedom of Information: An Assessment of Three Indonesian Public Authorities* (Jakarta: Centre for Law and Democracy and Indonesian Centre for Environmental Law, 2012), at 12.

50 "Problems Found in Handling of RTI Requests in Indonesia", *freedominfo.org* (4 May 2012), online: <www.freedom.org> (last accessed 30 October 2013).

51 *Ibid*.

52 Article 19, *Fulfilling the Right to Information: Baseline Access to Information in East Nusa Tenggara, Indonesia* (2010), at 12.

53 Kristian Erdianto *et al.*, *Implementasi Hak Atas Informasi Publik: Sebuah Kajian Dari Tiga Badan Publik Indonesia* (Jakarta: Centre of Law and Democracy & Yayasan 28, 2012), online: <http://www.law-democracy.org/wp-content/uploads/2010/07/Buku-UU-KIP.pdf> (last accessed 30 October 2013).

54 Dessy Eko Prayitno *et al.*, *Interpretation of Exceptions to the Right to Information: Experiences in Indonesia and Elsewhere* (Jakarta: Centre for Law and Democracy and Indonesian Centre for Environmental Law, 2012); *ibid*.

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information requests merely because they did not bear official stamps, were not printed on official letterhead, or did not have a formal letter of introduction accompanying them, even though none of these are grounds for refusal under the *FOI Law*.[55]

The report also concluded that various public bodies, and even officials within the same agency, have interpreted the *Law*'s exclusions in different ways, leading to inconsistencies and uncertainty about whether particular information should be disclosed.[56] In particular, some agencies have been criticised for their inability to apply the public interest harm test (mentioned above) consistently or even at all.[57]

While these "test requests" make for dramatic media headlines, they are imperfect indicators of the public bodies' progress towards compliance with the *FOI Law*. No doubt many public officials are struggling to accept the increased transparency the *Law* requires of them. However, drawing conclusions from the number of rejected information requests is highly problematic. The *FOI Law* lists many legitimate reasons for rejecting requests for information, some of which were mentioned above. For example, the request might not have been formally made in accordance with the *FOI Law*, or the type of information might be formally excluded under the *Law*. Yet many of these studies simplistically classify them as "rejections". The potentially useful statistic is the "ignore rate", because the *FOI Law* requires information officers to respond to all requests. However, even these might provide a skewed perspective, for example if applications were ignored for failure to meet the procedural requirements for requests under the *Law*.

C. Weak Penalties

The *FOI Law* imposes criminal penalties upon public bodies and officials who, under Article 9(3):

- reject a legitimate request for information,

55 Andrew Thornley, "We Have a Right to Know. Is Our New Law Helping Us Find Out?" *The Jakarta Post* (26 December 2010).

56 Dessy Eko Prayitno *et al.*, *Interpretation of Exceptions to the Right to Information: Experiences in Indonesia and Elsewhere* (Jakarta: Centre for Law and Democracy and Indonesian Centre for Environmental Law, 2012); Kristian Erdianto *et al.*, *Implementasi Hak Atas Informasi Publik: Sebuah Kajian Dari Tiga Badan Publik Indonesia* (Jakarta: Centre of Law and Democracy & Yayasan 28, 2012), online: <http://www.law-democracy.org/wp-content/uploads/2010/07/Buku-UU-KIP.pdf> (last accessed 30 October 2013).

57 *Ibid.*

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- falsify, remove or destroy public information, or
- fail to either provide the types of information that must be available at all times, or publish six-monthly information as required.

The *FOI Law* also prohibits the unlawful use of public information, acquisition or provision of excluded information, disclosure or use of national security or economic information, and even "making up" public information that is confusing and results in loss to another (Article 55). These breaches can result in the official responsible being fined up to Rp 5 million, imprisoned for one year, or both (Articles 52 and 53). Destroying or removing public information that the State must protect or that concerns the public interest attracts higher penalties: a maximum fine of Rp 10 million, two years' imprisonment, or both (Article 53).

Government Regulation 61 of 2010 specifies that criminal penalties are paid by the public body (Article 17(1)), unless the information officer acted beyond his or her official capacity, in which case the officer becomes individually liable (Article 19). The *Regulation* also allows information-seekers to claim up to Rp 5 million in compensation for material losses suffered if a public body breaches the *FOI Law*, which includes refusing to disclose public information (Article 16(1)). The Information Commission cannot itself impose punishments or award compensation. Criminal allegations are heard by general courts, and compensation claims by administrative courts.

Critics condemn these penalties as insufficient to deter or punish non-compliance.[58] To my knowledge, no information officer or public body has yet been subject to administrative claims or criminal proceedings for breach of the *FOI Law* or its implementing regulations. The financial disincentives, whether imposed by administrative or criminal action, are unlikely to exceed Rp 10 million (around US$1000). For most public bodies, this is a trifling amount to keep sensitive information from the public.

In my view, however, criminal penalties may ultimately have a deterrent effect where they apply to individual information officers. As mentioned, while the public bodies are responsible for paying any compensation, criminal punishments can potentially be imposed on errant information officials themselves. "Any person" who damages or destroys public information; accesses or provides excluded information; or who falsifies information, appears to be personally liable under Articles 53–55 of the *FOI Law*. Also, the use of "any person" appears to capture information officers. As for refusal to disclose public information, Article 17 of *Government Regulation 61 of 2010*, as mentioned, exposes individual

58 University College London, online: <http://www.ucl.ac.uk/constitution-unit/research/foi/countries/indonesia> (last accessed 30 October 2013).

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officials to criminal liability if they act beyond their official capacity. On one interpretation, failure to meet one's legal obligations could be construed as exceeding one's official capacity. If an Indonesian court were to accept this interpretation, then individual officers could be criminal culpable for failure to disclose public information. (If an information officer's superior was to order the officer to refuse disclosure, it is unclear whether the officer or their superior would be held criminally responsible by an Indonesian court. To my knowledge, there have been no cases in which this issue has arisen.)

For individual officers, the *FOI Law*'s criminal penalties cannot, in my view, be categorised as insubstantial. Most public servants earn between Rp 2 million and 14 million per month, including allowances, while mid-range officials earn between Rp 6 and 9 million.[59] In this context, Rp 5 million is significant. Furthermore, the threat of a term of imprisonment, no matter how short, must present a significant disincentive for officials to illegally refuse to disclose public information.

D. Excluded Information and the Harm Test: Executive Override and Bureaucratic Discretion?

The *FOI Law* contains a number of significant uncertainties that could, depending on how they are resolved, result in large amounts of information being closed off. Problematic provisions include Articles 6 and 2(4).

Article 6 is entitled "The Rights of Public Bodies" and declares, in paragraphs (1) and (2), that public bodies have the right to refuse to provide information that is "excluded by" or "does not accord" with "written laws" (*peraturan perundang-undangan*).[60] "Written laws" are any form of government law, from statutes enacted by the National Parliament, through to government regulations, presidential instructions, ministerial decrees and circulars, and even by-laws issued by local parliaments and regional heads – such as governors, regents and mayors.[61] On a plain reading of Article 6(3), any such legal instrument could exclude almost any type of information. This interpretation would likely leave the *FOI Law* a dead letter. Many of these laws, such as

59 *Government Regulation 11 of 2011 on Public Servant Wages*.

60 Article 6(3) then sets out types of information that public bodies must not disclose. These are categories also mentioned in Article 17: official secrets; and information that could endanger the state, individual rights, or that protects industry from unfair competition (Articles 6(3)).

61 "*Perbedaan antara undang undang dengan peraturan perundang-undangan*", *Hukumonline Klinik* (5 November 2012), online: <www.hukumonline.com> (last accessed 30 October 2013).

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instruments issued by ministers and regional heads, only require the signature of a senior official to come into force. Public bodies seeking to avoid disclosure could, therefore, quite easily regulate to exclude particular information from disclosure requirements.

Against this interpretation is Indonesia's so-called "hierarchy of laws", which sets out types of laws and their relative authority within the Indonesian legal system.[62] Formally, the hierarchy stipulates that national statutes, such as the *FOI Law*, trump all lower-level regulations and decisions issued by national and regional executive institutions and officials – at least to the extent of any inconsistency. The Information Commission or a court could enforce the hierarchy by ignoring lower-level regulatory attempts at excluding information classified as "public" in the *FOI Law*. I discuss how the Information Commission has treated attempts by public bodies to exclude information under Articles 6(1) and (3) in Part III, below.

Article 2(4) establishes what some commentators have called the "harm test".[63] The provision states that excluded information is information that is:

> [C]onfidential by reason of statute, appropriateness and the public interest, based on an assessment of the consequences that will arise if the information is disclosed to the community and after considering whether denying access to that information could protect a greater interest than the interest in opening access, or vice versa.

The Elucidation to this provision states that:

> "[C]onsequence that will arise" means a consequence that endangers the interests protected by this statute if information is disclosed. The categorisation of information as open or closed must be based on the public interest. If the greater public interest can be protected by keeping information secret, that information must be kept secret or closed, and vice versa.

Subsequent implementing regulations have not explained how the test should be applied.[64] However, it seems that, depending on its interpretation, Article 2(4) might give information officers discretion to exclude otherwise disclosable information in two ways.

First, Article 2(4) seems to establish a proportionality test, where the public interest in disclosure is weighed against the potential harm that disclosure might bring. From a plain reading of the provision, it seems that if an

62 Contained in Article 7(1) of *Law 12 of 2011 on Law-Making*.

63 Andrew Thornley, "We Have a Right to Know. Is Our New Law Helping Us Find Out?" *The Jakarta Post* (26 December 2010).

64 *Ibid*.

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information officer believes the disclosure of particular information will be more detrimental to the public interest than any advantage or benefit of disclosure, then disclosure can be refused. "Appropriateness" and the "public interest" are not defined in the *FOI Law*, and are inherently vague and subjective. Their scope is broad and could potentially apply to almost any category of information.

Article 2(4) therefore appears to allow information officers to decide whether information should be disclosed, based on their own determination of whether prospective harm outweighs the public interest in disclosure.[65] Also when weighing up benefit and harm, information officers can consider the purpose for which the information will be used. Article 4(3) of the *FOI Law* requires that applicants must specify the reasons for seeking information. Some commentators have been critical of this requirement, noting that most countries do not impose it, and that it is likely to simply arm public bodies with another basis upon which to reject the request.[66] However, there seems to be nothing to stop an information officer or public body desiring to prevent disclosure of sensitive information from simply asserting that disclosure, for the purposes provided by the applicant, is not in the public interest. The statute and implementing regulations do not specifically permit the Commission or a court to review the merits of an information officer's decision to refuse disclosure.

Second, Article 2(4) might be taken to expand "excluded information" beyond the categories of information contained in Article 17 of the *Law* and, by virtue of Article 6(3), information deemed confidential by other written laws. Article 2(4) does not specifically exclude information that must be disclosed under Article 18–including judicial decisions, regulations, administrative decisions and policies, and orders to cease investigations or prosecutions. It is therefore possible that *any* information – including information that is defined as "public information" under the *FOI Law* – could be subjectively categorised as more harmful if released, offensive or against the public interest.

Further sources of potentially wide exclusions are found in Articles 17(i) and 20(a). These provisions state that documents circulated within a public body or sent between public bodies, and which by their nature are confidential, are also excluded from the *FOI Law* unless the Commission or a court determines otherwise. Public bodies might be able to take advantage of these provisions to exclude swathes of information by framing their documents as inter-departmental correspondence and labelling them as confidential.

65 In accordance with *Government Regulation 61 of 2010*, Article 21.

66 As Thornley puts it, "public information ought to be public regardless of what the intended use is": Andrew Thornley, "We Have a Right to Know. Is Our New Law Helping Us Find Out?" *The Jakarta Post* (26 December 2010).

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As we shall see in Part III, however, the Information Commission has, for the most part, not interpreted these provisions restrictively to preclude disclosure. For example, the Commission has treated the Article 17 exceptions as "limited and restricted". The Commission has also consistently ordered information to be disclosed if the public body cannot prove that it has conducted a consequences assessment, or that the information is excluded under Article 17. It is to these decisions of the central Information Commission and administrative courts to which I now turn.

III. Analysis of information commission and judicial decision-making in freedom of information cases

In its first two years, the performance of the Information Commission was frequently criticised by NGOs and the media. In particular, it was able to resolve only a small portion of the disputes brought before it by information-seekers. According to 2011 reports published in *The Jakarta Post*,[67] the central Information Commission received 225 dispute resolution requests between July 2010 and March 2011. However, only seven cases had been adjudicated by the end of 2011, and of these, only three cases were complied with by the losing party. The first two of the remaining four cases were appealed to an administrative court. In the final two cases, the parties did not appeal within 14 days of the Information Commission's ruling being issued. (As mentioned, under Article 50 of the *FOI Law*, the ruling therefore became binding.) The losing party simply refused to comply in the remaining two cases, but no criminal charges or compensation claims were made against them. (As mentioned, the Information Commission itself lacks power to issue criminal penalties or compensation.)

In 2012, however, the Commission markedly improved its performance, at least from a dispute resolution perspective. According to the Commission's Annual Report for 2012,[68] the Commission had resolved more than two thirds of the 818 cases received by 26 December 2012.[69]

67 Warief Djajanto Basorie, "Indonesia's Freedom of Information Laws, One Year On", *The Jakarta Post* (28 April 2011).

68 *Annual Report 2012*, Central Information Commission of Republic of Indonesia, available at <www.komisiinformasi.go.id> (last accessed 30 October 2013).

69 The Commission received 76 complaints in 2010, 419 in 2011 and 323 in 2012. Two hundred and fifty-one of those lodged in 2012 were by NGOs, with 72 lodged by individuals: *Ibid*. Of the resolved cases, 162 were through mediation and 65 by adjudication. Two hundred and seventy-two requests were rejected, though the annual report does not specify the grounds for rejection.

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A. General Observations

The following section provides a description and analysis of both the central Information Commission's decision-making in "adjudications" and administrative court appeals against adjudications of the central Commission and regional commissions. This section is not intended to be an accurate predictor of future decisions by the courts or the Commission. The Information Commission is not a judicial body and the *FOI Law* does not require the Information Commission to follow its previous decisions. As for administrative court decisions, Indonesia does not have a formal system of precedent, so judicial decisions (even of the Supreme Court) are not formally binding on lower courts (although they will usually be highly influential). Nevertheless, from these Commission and court decisions, it is possible to discern general decision-making trends.

This section also does not purport to take into account all the cases decided by the Commission. As mentioned at the outset, the following discussion is based on a reading of all 40 central Information Commission adjudications available on its website, and the eight appeals against these adjudications available on the Supreme Court's website.[70] I have not covered mediations because the Commission only posts declarations of the agreement reached on its website, making it impossible to discern arguments raised by the parties. Somewhat ironically perhaps, regional commission adjudications were not available online for review.

In the reported cases, the central Information Commission assessed requests that public bodies had denied for a variety of types of information, including the following:

- lists of public information held by Ministries, regional governments and government committees, including budgets, work plans and financial reports,[71]

70 Officials from the Information Commission indicated during interviews conducted in Jakarta in October 2012 that the website contains all of the Commission's adjudications that were binding – that is, they were not appealed within the 14-day deadline mentioned earlier. At first glance, this figure of 40 cases might appear inconsistent with the annual report which, as mentioned, states that by the end of 2012, 65 cases had been adjudicated. However, it is possible that all 25 of these were on appeal at the time of writing, and therefore had not been posted on the Commission's website. Indeed, during an interview, one Information Commissioner mentioned many cases that were on appeal.

71 *Muhammad HS v. Social Affairs Ministry* (Information Commission Decision 51/XII/KIP-PS-M-A/2010); *Muhammad HS v. Coordinating Ministry for People's Welfare* (Information Commission Decision 65/XII/KIP-PS-M-A/2010); *Muhammad HS v. Trade Ministry* (Information Commission

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- regulations issued, planned and performed activities, and procurements,[72]
- government and departmental budget spending reports,[73]
- contracts between local governments and the private sector for provision of goods or services, or relating to the exploitation of natural resources,[74]
- land certificates and information about amendments to the land register (requested from land affairs offices),[75]
- programs of activities and financial reports of political parties,[76]

Decision 71/XII/KIP-PS-M-A/2010); *Muhammad HS v. Jakarta Regional Government* (Information Commission Decision 63/II/KIP-PS-M-A/2010); *Muhammad HS v. National Transport Safety Committee* (Information Commission Decision 61/XII/KIP-PS-M-A/2010); *Muhammad HS v. Culture and Tourism Ministry* (Information Commission Decision 70/XII/KIP-PS-M-A/2011); *Muhammad HS v. National Education Ministry* (Information Commission Decision 025/XII/KIP-PS-M-A/2010); *National Fitra Secretariat v. Regional Autonomy Advisory Council* (Information Commission Decision 112/IV/KIP-PS-M-A/2011); *Sarvodya v. Ministry for Development of Underdeveloped Regions* (Information Commission Decision 133/IV/KIP-M-A/2012); *Sarvodya v. Drug Dependence Hospital* (Information Commission Decision 001/I/KIP-M-A-2012); *Muhammad HS v. Bank of Indonesia* (Information Commission Decision 54/XII/KIP-PS-M-A/2010); *Muhammad HS v. Social Affairs Ministry* (Information Commission Decision 51/XII/KIP-PS-M-A/2010); *Muhammad HS v. Coordinating Welfare Ministry* (Information Commission Decision 65/XII/KIP-PS-M-A/2010); *Gebrak v. Sumenep County Transportation Office* (Information Commission Decision 003/VI/KIP-PS-M-A/2010).

72 *Muhammad HS v. Jakarta Provincial Government* (Information Commission Decision 63/II/KIP-PS-M-A/2010); *Muhammad HS v. Bekasi People's Regional Representative Council* (Information Commission Decision 63/XII/KIP-PS-M-A/2011).

73 *Sarvodya v. Energy and Mineral Resource Ministry* (Information Commission Decision 183/V/KIP-PS-M-A/2012); *Galaksi v. Banten Provincial Directorate General of Tax* (Information Commission Decision 253/VII/KIP-PS-M-A/2011); *Public Policy Monitor v. Pasar Minggu District Head* (Information Commission Decision 161/V/KIP-PS-M-A/2012).

74 Such as train services operators in *Indonesia Corruption Watch Medan Branch v. Indonesia's State-owned Railway Company PT KAI Persero* (Information Commission Decision 298/VII/KIP-PS-M-A/2011); drinking water in *People's Coalition for the Right to Water v. Jakarta State-owned Water Company* (Information Commission Decision 391/XII/KIP-PS-M-A/2011); religious court building in *Indonesia Corruption Watch v. National Police Headquarters* (Information Commission Decision 002/X/KIP-PS-A/2010); *Moh Sidiq v. Sumenep Religious Court* (Information Commission Decision 358/IX/KIP-PS-M-A/2011).

75 *Agoes Soeseno v. East Java Regional Land Office* (Information Commission Decision 374/XI/KIP-PS-M-A/2011); *Padang Self-Help Consumer Protection Community v. Padang Regional Land Office* (Information Commission Decision 385/XII/KIP-PS-M-A/2012); *Heniy Astianto S.H. v. Yogyakarta Regional Land Office* (Information Commission Decision 175/V/KIP-PS-A/2012).

76 *Indonesia Corruption Watch v. Democrat Party Central Executive* (Information Commission Decision 207/VI/KIP-PS-M-A/2012); *Indonesia Corruption Watch v. United Development Party Central Executive* (Information Commission Decision 209/VI/KIP-PS-M-A/2012); *Seknas Fitra v. National Mandate Party Central Executive* (Information Commission Decision 113/IV/KIP-PS-M-A/2011).

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- a report on an investigation into the management of a state-owned pharmaceutical company pension fund,[77]
- asset reports submitted by judges,[78]
- correspondence between the National Intelligence Agency and Garuda, in connection with the murder of human rights activist Munir,[79]
- Trade Ministry data on import agreements and restrictions,[80]
- Documents indicating how the social assistance allocation from the National Budget was spent, including types of assistance and recipients' addresses,[81]
- Information from schools including how particular "operational funds" were spent,[82] scholarships awarded to poor students,[83] various school processes and policies,[84] and fees for new students, overtime payments made to teachers, failure to evaluate teachers, and loans taken out on behalf of the school.[85]

Before turning to discuss the Commission's approaches to decision-making, I make four observations about the procedures employed by the Commission in the cases studied. First, the Information Commission has not, in the cases reported on its website, refused to hear a case on procedural grounds, such as lack of jurisdiction or standing. (This is consistent with the position in many countries – that is, that applicants are not generally required to demonstrate a

77 *Busra Hasjim v. Kimia Farma Pension Fund* (Information Commission Decision 335/IX/KIP-PS-A/2011).

78 *Indonesia Corruption Watch v. National Police Headquarters* (Information Commission Decision 002/X/KIP-PS-A/2010); *Moh. Sidiq v. Sumenep Religious Court* (Information Commission Decision 358/IX/KIP-PS-M-A/2011).

79 *Solidarity Action Committee for Munir v. State Intelligence Agency* (Information Commission Decision 120/IV/KIP-PS-M-A/2011).

80 *Gada Rahmatullah v. Trade Ministry* (Information Commission Decision 150/V/KIP-PS-M-A/2011).

81 *Sarvodya v. Nutrition Directorate, Health Ministry* (Information Commission Decision 124/IV/KIP-PS-M-A/2012); *Sarvodya v. Undeveloped Regions Ministry* (Information Commission Decision 134/IV/KIP/PS-M-A/2012).

82 *Sarvodya v. Anna Ceger High School* (Information Commission Decision 017/I/KIP/PS-M-A/2012); *LSM Sarvodya v. PGRI Junior High School 9* (Information Commission Decision 390/XII/KIP-M-A/2011).

83 *North Sumatra Indonesia Bible Institute v. Sunggal Senior High School 1 and Sunggal Junior High School 1* (Information Commission Decision 015/VIII/KIP-PS-M-A/2010).

84 *Milang Tauhida v. Jakarta Junior High School 1* (Information Commission Decision 202/VI/KIP-PS-M-A/2011); *Herunarsono v. East Jakarta Regional Education Office* (Information Commission Decision 001/II/KIP/PS-M-A/2011).

85 *Herunarsono v. Jakarta Provincial Education Office* (Information Commission Decision 201/VI/KIP-PS-M-A/2012).

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legal interest or standing to request information.[86]) Second, a representative of the institution from which information was sought (the "respondent") occasionally fails to attend to defend the institution. In these circumstances, the Commission has often proceeded to hear the arguments of the information-seeker (the "applicant") regardless, and then decided the case in the respondent's absence.[87] Third, the Commission can and does regularly call witnesses, usually to help it understand a relevant law or something about the agency from which information is sought.[88] Fourth, the Commission has, in several cases, visited the offices of the public body from which information was requested – to determine whether the body possesses the requested information, and to assess its information management practices.[89]

The Commission's approach in most cases is to categorise the information sought, and then determine if it is excluded under Article 17 of the *FOI Law*.[90] Many decisions emphasise that information held by public bodies is presumed to be "public" and that it falls upon public bodies to convince the Commission otherwise. As mentioned, the Commission described the Article 17 exceptions as "tight and limited" (*ketat dan terbatas*).[91] If relevant, the Commission will also determine whether the information falls within any of the categories of information that public bodies must disclose.[92]

86 John Ackerman & Irma Sandoval-Ballesteros, "The Global Explosion of Freedom of Information Laws" (2006) 58 Admin. L. Rev. 85, at 93.

87 Pursuant to Art. 49 of *Information Commission Regulation 2 of 2010*. For example, the Commission did this in *Herunarsono v. East Jakarta Regional Education Office* (Information Commission Decision 001/II/KIP/PS-M-A/2011).

88 See, *e.g.*, *Community Legal Aid Institute v. National Narcotics Board* (Information Commission Decision 163/V/KIP-PS-A/2012).

89 *E.g.*, the Information Commission did this in *Gde Bhaskara v. Jakarta Workers and Transmigration Office* (Information Commission Decision 254/VII/KIP-PS-M-A/2011).

90 See, *e.g.*, *Research and Application Discourse Institute v. PT Blora Patragas Hulu* (Information Commission Decision 001/VII/KIP-PS-A/2010), in which the Commission noted that even though the information sought – a copy of a co-operation contract relating to natural resource exploitation – was not specifically mentioned as a type of information that must be disclosed, it could still be disclosed provided that the information was not excluded under Art. 17.

91 *Ibid.*; *Antoni Fernando v. Public Works Ministry* (Information Commission Decision 361/XI/KIP/PS-M-A/2011).

92 See, *e.g.*, *Seknas Fitra v. National Mandate Party Central Executive* (Information Commission Decision 113/IV/KIP-PS-M-A/2011) in which the Commission upheld a request for copy of a financial report because, apart from not being excluded under Art. 17, it was required to be disclosed under Art. 15(d); *Muhammad HS v. Jakarta Provincial Government* (Information Commission Decision 63/II/KIP-PS-M-A/2010). See also *Sarvodya v. PGRI Junior High School 9* (Information Commission Decision 390/XII/KIP-M-A/2011), in which the Commission considered *National Education Minister Regulation 37 of 2010 on Government Support Fund Use in 2011*.

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In the vast majority of cases, the Commission has decided that the requested information is not excluded and has ordered the respondent to disclose all or some of it within 14 days, as required by Article 48(1) the *FOI Law*. Broadly speaking, the Commission has rejected applications in only three circumstances.

The first is if the applicant does not attend the adjudication, in which case the Commission might drop the case.[93] However, this failure to attend will not necessarily result in automatic defeat. In one case, the applicant twice failed to attend adjudication, but the Commission decided to proceed and ultimately ordered the relevant Ministry to disclose the information.[94]

The second circumstance is when the Commission accepts that the respondent does not possess the information requested, either because the Commission is satisfied that the information does not exist, or that another section, department or Ministry holds it. This argument is based on Article 6(3) of the *FOI Law*, which requires public bodies to disclose only the information in their possession.

Respondents commonly make this argument, but the Commission accepted it in only three of the cases studied.[95] In other cases, the Commission has dismissed this argument as irrelevant (*tidak relevan*).[96] If the information has at some time been in the possession of the body from which the information is sought, then the Commission has usually ordered the respondent to disclose that information to the applicant. The Commission has ordered disclosure, even when it accepts that the public body no longer possesses the information, in two circumstances: first, when the body has sent the information to another state institution as required by law, such as the National Audit Agency or the Anti-Corruption Commission;[97] and second, when the agency, in the Commission's opinion, should have held the requested information.[98]

93 *Muhammad HS v. Administrative and Bureaucratic Reform Ministry* (Information Commission Decision 49/XII/KIP-PS-M-A/2011; *Muhammad HS v. Bank of Indonesia* (Information Commission Decision 54/XII/KIP-PS-M-A/2010).

94 *Muhammad HS v. Culture and Tourism Ministry* (Information Commission Decision 70/XII/KIP-PS-M-A/2011).

95 *Solidarity Action Committee for Munir v. Indonesia's State Intelligence Agency* (Information Commission Decision 120/IV/KIP-PS-M-A/2011); *Muhammad HS v. Law and Human Rights Ministry* (Information Commission Decision 52/II/KIP-PS-M-A/2011).

96 *Sarvodya v. Electricity Directorate, Energy and Mineral Resource Ministry* (Information Commission Decision 181/V/KIP-PS-M-A/2012).

97 *Muhammad HS v. Coordinating Ministry of Welfare* (Information Commission Decision 65/XII/KIP-PS-M-A/2010); *Muhammad HS v. Trade Ministry* (Information Commission Decision 71/XII/KIP-PS-M-A/2010).

98 Such as in *Arifin Nurdin v. Polewali Mandar Land Office* (Information Commission Decision 174/V/KIP-PS-A/2012), where the Commission ordered the Polewali Mandar Land Office to provide the applicant with the requested land certificate, on the presumption that the Land Office should have held it.

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In some cases, the respondent has already provided some of the requested information, but the applicant complains that the information provided was not the information requested, or was otherwise insufficient. In some of these cases, the Commission has found that the information was provided and thus refused to order further disclosure.[99] For example, in *Komid v. National Ombudsman*,[100] the applicant sought the Ombudsman's investigation report into the closing of a school, and the legal basis for the Ombudsman closing that investigation. The legal basis was a policy decision that Article 11(1)(c) of the *FOI Law* required the Ombudsman to disclose. The Ombudsman had provided this information to the applicant. As for the investigation, the Ombudsman had written to the applicant several times, indicating that the case was criminal and therefore the Ombudsman lacked jurisdiction to pursue it. The Commission accepted that the Ombudsman did not possess the requested report because the Ombudsman had never compiled one.

The third category is information that, if disclosed, would affect intellectual property rights. The Commission has refused to order the disclosure of information on this ground in only one case,[101] discussed below.

B. Arguments Commonly Rejected by the Commission

The Commission has rejected many of the arguments made by respondents in defence of their refusal to disclose requested information. Commonly-made arguments for exclusion include that the information was personal, would prejudice national security or law enforcement if disclosed, or was confidential by reason of a contract with a third party. Another commonly-made argument is that the respondent was not a "public body", and that the *FOI Law* did not therefore apply to it. Before turning to discuss these arguments and the Commission's responses to them in some detail, I briefly consider four arguments that the Commission has consistently rejected.

First, in several cases, public bodies have complained that they had an insufficient budget to find and provide the requested information. The Commission's response has been to point to provisions in the *FOI Law* requiring the applicant to pay reasonable costs for the information. For their part, public

99 *Muhammad HS v. National Education Ministry* (Information Commission Decision 025/XII/KIP-PS-M-A/2010).

100 *Komid v. National Ombudsman* (Information Commission Decision 011/I/KIP-PS-M-A/2012).

101 *People's Coalition for the Right to Water v. Jakarta State-owned Water Company* (Information Commission Decision 391/XII/KIP-PS-M-A/2011).

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bodies need only estimate the cost of obtaining and reproducing the information.[102]

Second, public bodies have complained that they were unaware of their obligations under the *FOI Law*, and that they had no information officer, making it impossible to fulfil the applicant's request for information. The Commission has consistently decided that ignorance of the *Law* is no excuse, holding that the *FOI Law* has been published in the State Gazette, and therefore all entities and citizens are deemed to know about it.[103] As for the lack of an information officer, the Commission has found this argument to be "irrelevant", noting that the *FOI Law*'s deadline for public bodies to appoint an information officer has passed.[104]

Third, the Information Commission has held that a public body cannot simply reject a request because of flaws in the application for information. The *2010 Information Commission Regulation* gives public bodies three days to query any apparent mistakes in the application. If a public body does not act within those three days, it cannot later rely on mistakes to justify rejecting a request.[105]

Finally, in several cases the Information Commission has not heard the dispute within the 100-day deadline that Article 38(2) of the *FOI Law* appears to impose. Respondents have argued that this breach renders the Information Commission's decision invalid. The Commission has rejected this argument, however, deciding that exceeding this time limit will not affect the validity of

102 *Muhammad HS v. Jakarta Provincial Government* (Information Commission Decision 63/II/KIP-PS-M-A/2010); *Muhammad HS v. Social Affairs Ministry* (Information Commission Decision 51/XII/KIP-PS-M-A/2010). The Commission has not, to my knowledge, considered resource implications for public bodies. If the applicant does not request documents, but rather seeks answers to specific questions, to what lengths must the public body go to provide the information? Will providing the documents containing the information be sufficient, or does the information officer need to distil the information from a document and provide a summary of that information? The Commission's approach in one case has been to require that the respondent answer eight specific questions directly, rather than merely provide the documents containing the information: *Milang Tauhida v. Jakarta Public Junior High School 1* (Information Commission Decision 202/VI/KIP-PS-M-A/2011).

103 *North Sumatra Indonesia Bible Institute v. Sunggal Senior High School 1 and Sunggal Junior High School 1* (Information Commission Decision 015/VIII/KIP-PS-M-A/2010). In this case, the Commission found that schools could not use ignorance of their obligations as an excuse for failing to provide the requested information.

104 *Sarvodya v. General Directorate for Minerals and Coal, Energy and Natural Resources Ministry* (Information Commission Decision 178/V/KIP-PS-M-A/2012); see also *Seknas Fitra v. Regional Autonomy Representative Council* (Information Commission Decision 112/IV/KIP-PS-M-A/2011).

105 *North Sumatra Indonesia Bible Institute v. Sunggal Senior High School 1 and Sunggal Junior High School 1* (Information Commission Decision 015/VIII/KIP-PS-M-A/2010).

its decisions.[106] To my knowledge, the Commission has not yet justified ignoring this deadline.

C. What Is a Public Body?

In many cases, respondents have claimed that they are not public bodies for the purposes of the *FOI Law*. They argue then that because the *FOI Law* does not apply to them, they need not disclose any information requested under the *Law*. In one case for example,[107] the applicant sought from the Bekasi Islamic Centre financial reports on activities, co-operation with other agencies and sources of funding for 2009–2010.[108] The Islamic Centre argued that it was not a public body because it received no money from the government, and instead relied on voluntary donations. However, the Commission accepted evidence that the Islamic Centre had received some funds from the Bekasi government and local community. The Commission found, therefore, that the Centre was a public body and was required to have reports on its finances and activities available for disclosure upon request.

In other cases, the respondent has argued that it is only formally "accountable" by law to a particular institution (such as the National Parliament) or an individual (such as the President) and is therefore not answerable to other individuals or institutions, including those who request information via the *FOI Law*. This argument was put forward by the National Intelligence Agency (*Badan Intelijen Negara* or BIN) in one case.[109] BIN argued that it was accountable only to the President, not to the people, and that it was not a public body because it did not provide public services. The Information Commission rejected this argument, holding that because the agency received money from the state budget, it was a public body and was required to disclose information under the *FOI Law*.

106 See, *e.g.*, *Galaksi v. Banten Regional Tax Office* (Information Commission Decision 253/VII/KIP-PS-M-A/2011); *Agoes Soeseno, SH, MM v. East Java Regional Land Office* (Information Commission Decision 374/XI/KIP-PS-M-A/2011); *Seknas Fitra v. Regional Autonomy Representative Council* (Information Commission Decision 112/IV/KIP-PS-M-A/2011).

107 *Muhammad HS v. Bekasi Islamic Center* (Information Commission Decision 146/V/KIP-PS-M-A/2011).

108 *Ibid*.

109 *Seknas Fitra v. State Intelligence Agency* (Information Commission Decision 102/IV/KIP-PS-M-A/2011).

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Another significant case on this issue was *PT Tiyasa Pirsa Utama v. Indonesian Independent Surveyors' Association*.[110] The respondent had cancelled the applicant's membership of the Indonesian Independent Surveyors' Association. The applicant sought information about how the Association made decisions, including about cancelling memberships. The main issue was whether the Association was a "public body". The Commission's decision was split – the only case studied that was not unanimous. The majority found that the respondent was a public body because it received "contributions from the community" (*sumbangan masyarakat*) in the form of membership fees, its aims included increasing national development, and it had accepted a one-off payment of Rp 8 million from the Trade Ministry. In dissent, Commissioner Ramly Amin Simbolon decided that membership fees were not contributions from the community and that a one-off payment of Rp 8 million was insufficient to make the Association a public body.

D. Information Excluded by a Law Other Than the *FOI Law*

As mentioned, on a textual analysis the *FOI Law* appears to provide scope for public bodies to exclude information from disclosure by issuing a law lower than a statute on Indonesia's hierarchy of laws, such as a departmental regulation or even a memo. These concerns have not yet borne out in the cases, because, as I explain below, the Commission has not been required to directly address the issue.

Respondents in several cases have argued that information is excluded from disclosure by a law other than the *FOI Law*. However, the Commission has avoided the issue by refusing to interpret the "other law" to require non-disclosure. For example, in *Busra Hasjim v. Kimia Farma Pension Fund*,[111] mentioned above, the law upon which the respondent sought to exclude the requested information[112] stated that reports on pension fund investigations must be sent to managers. The Commission interpreted this to mean that the obligation to send the information to managers did not prevent it also being disclosed to others. The Commission did not, in its published reasons, observe that the Ministerial Decision sits lower on the hierarchy than the *FOI Law* and must, therefore, not contradict it.

110 *PT Triyasa Prisa Utama v. Indonesian Independent Surveyors' Association* (Information Commission Decision 089/IUII/KIP-PS-M-A/2012).

111 *Busra Hasjim v. Kimia Farma Pension Fund* (Information Commission Decision 335/IX/KIP-PS-A/2011).

112 *Ministry of Finance Regulation 512 of 2002 on Direct Pension Fund Investigation*.

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In *Bandung Legal Aid Institute v. Ciamis Regional Government*,[113] the applicant was a member of the Environmental Community Communication Forum who sought from the government of Ciamis (a district in West Java) various types of approvals and permits that PS Mulya Jaya (a company) had obtained in order to receive a licence to build a hatchery. In deciding that the information was not excluded, the Commission pointed to Article 2(c) of *Interior Ministry Regulation 32 of 2010 on Guidelines for Issuing Building Permits*, which requires an open and transparent process of granting permits to the general community and business communities.

Similarly, the Commission has, in the cases thus far, been able to avoid deciding whether other statutes that impose obligations of confidentiality prevail over the *FOI Law*. In *Muhammad HS v. National Transport Safety Committee*,[114] the applicant sought from the National Transport Safety Committee various regulations, a list of public information, a list of cases the Committee had handled up to 2010, planned activities for 2010 and its 2009 financial report. One of the respondent's arguments was to cite Article 359 of *Law 1 of 2009 on Aviation*, which lists various categories of confidential information. The Commission found that none of the information requested by the applicant could be construed to fall within those categories.

The Commission has not, to my knowledge, been required to consider whether public bodies can, in effect, deliberately regulate to permit non-disclosure. The cases just discussed where the Commission had reference to lower level laws, whether compliance with them was required, appear to indicate that the Commission has not ruled this out.

E. Personal Information

In several cases the respondent has refused to provide the information requested, arguing that it is personal and hence excluded under Article 6(3)(c). However, in the cases studied, any personal information requested concerned the applicant him or herself, or was at least related to the applicant's interests. The Commission's solution in such cases has been to order the respondent to release the information, but only to the applicant.[115]

113 *Bandung Legal Aid Institute v. Ciamis Regional Government* (Information Commission Decision 123/IV/KIP-PS-M-A/2011).

114 *Muhammad HS v. National Transport Safety Committee* (Information Commission Decision 61/XII/KIP-PS-M-A/2010).

115 *Padang Self-Help Consumer Protection Community v. Padang Provincial Land Office* (Information Commission Decision 385/XII/KIP-PS-M-A/2012); *Gito Purnomo v. Finance Ministry* (Information Commission Decision 329/VI/KIP-PS-A/2011).

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For example in *Agoes Soeseno v. East Java Regional Land Office*,[116] the applicant sought a land certificate, which the Commission classified as information about his personal assets. The Commission recognised that this type of information was formally excluded under the *Law*. However, given the applicant had provided written authorisation for that information to be disclosed under Articles 17(g) and (h) of the *FOI Law*, the Commission ordered the Land Office to show him the information. Similarly, in *Busra Hasjim v. Kimia Farma Pension Fund*,[117] the Commission determined that disclosing information to the public might compromise the business interests of the pension fund about which information was sought, and the personal information of those contributing to the fund. The Commission therefore ordered that the information requested be made available only to those who contributed to the fund.

In *Gito Purnomo v. Finance Ministry*,[118] the applicant sought a copy of his performance evaluation and a letter that recommended against his promotion, both held at the Ministry. The respondent refused, pointing to Article 17(h)(4) of the *FOI Law* which excludes personal information, including evaluations of capacity and ability. The Commission held that personal information could, in fact, be disclosed to the applicant if the personal information related to that applicant.

In *Muhammad HS v. Bekasi Forum for Religious Harmony*,[119] the respondent was an organisation established by the Religious Affairs Ministry to assess proposals to build places of worship.[120] The applicant sought copies of proposals submitted by the Forum to the Ministry in 2006–2010. He sought detailed information about the houses of worship proposed, whether they had been approved and, if rejected, reasons for the rejection. He also sought copies of community complaints made to the Forum, which contained the names of complainants and the Forum's responses to the complaints. The Forum failed to attend the various mediations and adjudications.

116 *Agoes Soeseno v. East Java Regional Land Office* (Information Commission Decision 374/XI/KIP-PS-M-A/2011).

117 *Busra Hasjim v. Kimia Farma Pension Fund* (Information Commission Decision 335/IX/KIP-PS-A/2011).

118 *Gito Purnomo v. Finance Ministry* (Information Commission Decision 329/VI/KIP-PS-A/2011).

119 *Muhammad HS v. Bekasi Forum for Religious Harmony* (Information Commission Decision 45/I/KIP-PS-M-A/2011).

120 *Minister of Religious and Minister of Interior Joint Regulations 9 and 8 of 2006 on Regional Head and Vice Head Guideline in Maintaining Religious Harmony, Empowerment of Religious Harmony Forum, and Establishing Place of Worship*.

The Commission found that the proposal and assessment details were public information that the *FOI Law* required the Forum to regularly publish. However, the Commission accepted that the personal rights of complainants to the Forum could be prejudiced by their names and addresses being disclosed. The Commission ordered that the requested information be released, but with the names of complainants redacted under Article 22(7)(e). According to the Commission, redaction would protect the personal data of the complainants, while ensuring the purpose of obtaining the data – to maintain accountability of the Forum – would still be achieved.

Similarly, in *LSM Sarvodaya v. Jakarta and Tangerang State Owned Electricity Companies*,[121] the applicant sought the names and addresses of particular electricity subscribers, the charges they had paid and the amount of electricity they had used. The respondent resisted, arguing that customer data was personal information because it revealed the financial position of customers. The Commission held that the general data was public and ordered its disclosure, but only after redacting any identifying information, including subscriber names and numbers.

F. Prejudicial to National Security and Law Enforcement

The Commission's approach has been similar in cases where respondents have claimed that the information sought would, if publicly revealed, prejudice national security or ongoing criminal investigations.[122] For example, in *Indonesia Corruption Watch Medan Branch v. Indonesia's State Owned Railway Company*,[123] Indonesia Corruption Watch (ICW) sought a copy of the contract between a company that provided train services and the regional government of Medan, North Sumatra.[124] (ICW had apparently been investigating allegations that insufficient compensation was paid for land acquisitions, in breach of the contract.) The respondent refused, noting that the contract was evidence in both civil proceedings and ongoing corruption investigations. The document

121 *LSM Sarvodaya v. Jakarta and Tangerang State-owned Electricity Companies* (Information Commission Decision 156/IV/KIP-PS-M-A/2012).

122 See, *e.g.*, *Seknas Fitra v. State Intelligence Agency* (Information Commission Decision 102/IV/KIP-PS-M-A/2011).

123 *Indonesia Corruption Watch Medan Branch* v *Indonesia's State-owned Railway Company* (Information Commission Decision 298/VII/KIP-PS-M-A/2011).

124 *Ibid*.

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therefore fell within Article 17(a) of the *FOI Law* and Article 44 of *Law 43 of 2009 on Archives*, both of which exclude documents from disclosure if their release could impede law enforcement. The Commission ordered the company to release the information, but only after redacting the names of individuals mentioned in the contract. The Commission feared that release of these names might prompt those named to attempt to destroy evidence of the corruption under investigation, thereby impeding law enforcement.

In another case,[125] ICW sought from the police the names of 17 people holding 23 accounts being examined by the Financial Transactions Reporting and Analysis Centre (*Pusat Pelaporan dan Analisis Transaksi Keuangan* or PPATK). The police refused, claiming that disclosure would impede a police money-laundering investigation. The Commission decided that disclosure would not impede the investigation because police had already questioned those 17 people. The Commission ordered the police to release the information.

In *Community Legal Aid Institute v. National Narcotics Board*,[126] the applicant sought three regulations from the national narcotics agency head. These regulations contained procedures for officers to follow in narcotics investigations. The Institute was concerned that some of its clients had been entrapped or set up for narcotics crimes. The respondent argued that the regulations were intended for internal use only and were not public information. The Information Commission pointed to Article 18(1) of the *FOI Law*, which prohibits public bodies from refusing to disclose the regulations they issue, and Article 11(1) which requires public bodies to always have available their decisions and the reasons for them. The Commission also mentioned Article 17(a)(1), which allows non-disclosure if disclosure would impede a criminal investigation. After viewing the requested information, the Commission concluded that information about the administration of the investigations was public, but that information about investigation techniques was excluded under Article 17(a)(1). The Commission required the narcotics board to release the regulations, but allowed specified portions of the regulation covering those techniques be redacted.

In *Fitra v. State Intelligence Agency*,[127] BIN argued, in an effort to avoid disclosing budgetary information, that presidential approval for disclosure was required because BIN's budget was a national secret. The Commission

125 *Indonesia Corruption Watch v. Indonesia Police Headquarters* (Information Commission Decision 002/X/KIP-PS-A/2010).

126 *Community Legal Aid Institute v. National Narcotics Board* (Information Commission Decision 163/V/KIP-PS-A/2012).

127 *Fitra v. State Intelligence Agency* (Information Commission Decision 102/IV/KIP-PS-M-A/2011).

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rejected this argument, pointing to various provisions of the Intelligence Law:[128] Article 12(b), for example, requires the Agency to be accountable, which the Commission found was consistent with disclosure of the budgetary information. The Commission also listed types of information constituting state secrets under Article 25(2). After reviewing the information, however, the Commission ordered the disclosure of information that it classified as "administrative", but that other types of information remain confidential. The Commission did not specify this information, nor justify why it should have been excluded, but it seems reasonable to speculate that this information related to "national security" which, as mentioned, is excluded from disclosure under the *FOI Law*.

G. Contractual Confidentiality and Intellectual Property

In several cases, the applicant has sought a copy of a contract and the respondent has refused to provide it, claiming that the contract contains a clause requiring the parties to keep its contents confidential – often because the contract contains technical or valuable information. In one early case,[129] the respondent refused to show the contract to the Commission, even though the Commission ordered that proceedings be closed to the public so that any confidential information would not be revealed during the hearing. Because the respondent refused to show the contract, it could not therefore prove that the contract contained a confidentiality clause. The Court ordered the respondent to provide a copy of the contract to the applicant.

If the respondent could have shown that the contract contained a confidentiality clause, this alone would probably have been insufficient to exclude the information. In a subsequent case,[130] the respondent put forward the same argument in an attempt to avoid producing a Rp 71 billion contract between the Water Resource Directorate of the Public Works Ministry and private company PT Waskita for flood control services in Medan, North Sumatra. In this case, the Commission rejected that argument and ordered disclosure, pointing to a Presidential Decision that required those who procure goods and services to provide information about those goods and services,

128 *Law 17 of 2011 on National Intelligence*.

129 *Research and Application Discourse Institute v. PT Blora Patragas Hulu* (Information Commission Decision 001/VII/KIP-PS-A/2010).

130 *Antoni Fernando v. Public Works Ministry* (Information Commission Decision 361/XI/KIP/PS-M-A/2011).

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including related contracts.[131] The respondent also argued that disclosure would affect intellectual property rights – namely, copyright and trade secrets – contained in and governed by the contract. The Commission held that even if "works" referred to in the contract were subject to copyright, this did not prevent their release. Also, because the respondent refused to show the contract to the Commission, the Commission could not determine whether the contract contained trade secrets. By contrast, in *People's Coalition for the Right to Water v. Jakarta's State-owned Water Company*,[132] the Commission refused to order disclosure of a financial projection contained in a contract on grounds that it constituted a trade secret, the continued protection of which was contingent upon the projection remaining confidential.

H. The Harm Test

As mentioned, the *FOI Law* establishes a "consequences assessment" or "harm test", under which the public interest in denying access should be weighed against the interest in allowing access (Article 2(4)). In the decisions studied, the Information Commission did not attempt to perform this analysis. Rather, the Commission's main concern appeared to be checking whether the public body itself had performed the assessment.

Importantly, given the presumption that information is "public", the Commission has emphasised that the onus falls on respondents to prove that they have performed a harm assessment. If they cannot, then the Commission will usually classify the requested information as public and order its disclosure. In most cases, the Commission found that an assessment was not made as required by the *FOI Law*.[133]

One potentially significant issue looms concerning the harm test: the *FOI Law* requirement that information-seekers provide the public body from which they seek information with reasons for seeking the information. Respondents have, in several cases, complained to the Commission that applicants did not provide reasons when applying for information. The Commission has decided that, even though the *FOI Law* requires applicants to give reasons, the public

131 *Presidential Decree 80 of 2003 on Guidelines for Government Goods and Service Purchases (Pedoman Pelaksanaan Pengadaan Barang/Jasa Pemerintah)*, Art. 48(6).

132 *People Coalition for the Right to Water v. Jakarta's State-owned Water Company* (Information Commission Decision 391/XII/KIP-PS-M-A/2011).

133 See, *e.g.*, *Herunarsono v. International Rawamangun Primary School 12* (Information Commission Decision Decision 002/II/KIP/PS-M-A/2011).

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body from which they seek information cannot reject the application on the basis of those reasons.[134] In the cases thus far respondents have not, to my knowledge, pointed to the applicant's reasons as a factor to be considered when weighing up potential harm and benefits. This seems to indicate that, thus far, the relevant "harm" has been assessed by reference to the type of information itself, rather than to the proposed use to be made of it.

However, one danger appears to lie in the consequences assessment becoming subjective. A public body might argue that the reasons for seeking information are relevant to the harm assessment, for without knowing them, it does not seem possible to accurately weigh the potential harms and benefits of disclosure. This argument might be particularly strong in the case of information relating to national security and law enforcement. Given the Commission's general tendency to order disclosure, it seems unlikely that it would allow the "public interest" to obstruct requests for information in this way, but this possibility remains open.

I. Administrative Court Appeals

At time of writing, only eight appeals against Information Commission decisions had been posted on the Supreme Court's website,[135] which contains the most complete database of Indonesian court decisions. Of these, only three were appeals against central Information Commission decisions. The administrative courts may well have decided more appeals from the central Commission, but none were available as of 2013. The remaining decisions posted on the website are appeals from provincial commissions, primarily from the East Java Commission, whose original decisions I could not obtain.

Some cases seem to have been rather straightforward, with the parties presenting precisely the same arguments as they did before the Information Commission, and the Court refusing to disturb the Commission's decision, usually restating the Commission's reasons. For example, in one case, the

134 See, *e.g., Gebrak v. Sumenep Regional Transportation Office* (Information Commission Decision 003/VI/KIP-PS-M-A/2010).

135 *Bogor Regent v. Muhammad Hidayat* (Bandung Administrative Court Decision 34/G/2012); *PT Danu Berjaya Mas v. Garut Regent* (Bandung Administrative Court Decision 17/G/2012); Jakarta Administrative Court Decision 26/G/2011; *Muhammad Hidayat v. Head of Parks, Cemeteries and PJU* (Bandung Administrative Court Decision 47/G/2012); Bandung Administrative Court Decision 48/G/2012; *Bogor Mayor v. Muhammad Hidayat* (Bandung Administrative Court Decision 64/G/2012); Surabaya Administrative Court Decision 75/G/2012; Jakarta Administrative Court Decision 102/G/2012.

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Jakarta administrative court upheld the central Information Commission's decision not to require disclosure, accepting that the applicant had sought a type of information that was not formally recognised (a "Detailed Financial Report" rather than a "Financial Report") and had also sought information from a non-existent ministerial directorate.[136] In another,[137] the applicant appealed against a decision of the Information Commission of Bangkalan, a district of East Java. The Court upheld the Commission's decision, finding that the applicant had in fact already received a photocopy of the information. Similarly in another case, the Bandung Administrative Court found that, despite complaints from the applicant to the contrary, the public body had in fact provided the requested information.[138]

Information Commission decisions have been upheld in many of these cases. For example, one appeal brought by the widow of human rights activist Munir in the case against Garuda discussed above,[139] the Court accepted that the airline did not have a copy of the letter appointing a former BIN operative as an aviation security office for a particular flight, as had the Commission at "first instance".[140] This also meant that the Court could not examine the letter to determine if it was excluded under the FOI Law, such as for national security reasons.

It appears that administrative courts have strictly applied the 14-day deadline for lodging appeals against Information Commission decisions. In two cases, both heard in Bandung, West Java,[141] the Court refused to hear the case because the applicant failed to meet the deadline.

Of particular significance are two administrative court decisions that overturned information commission decisions in which disclosure had been ordered. The first case was an appeal against a West Java Information Commission

136 *Hidayat v. Education Ministry Information and Public Relations Head* (Jakarta Administrative Court Decision 26/G/2011/PTUN-JKT).

137 *Bangkalan Corruption Watch v. Bangkalan Parliament* (Surabaya Administrative Court Decision 75/G/2012/PTUN-SBY).

138 *Hidayat v. Head of Bekasi Department for Plantations, Graveyards and PJU* (Bandung Administrative Court Decision 47/G/2012/PTUN-BDG).

139 *Suciawati v. BIN* (Jakarta Administrative Court Decision 17/G/2012/PTUN-Jkt).

140 For more on the murder of Munir and subsequent trials, including of Pollycarpus (a former BIN operative), see Lindsey & Parsons, "The One that Got Away" *Inside Indonesia* (October 2008), online: <http://www.insideindonesia.org/weekly-articles/the-one-that-got-away> (last accessed 30 October 2013).

141 *Bogor Mayor v. Hidayat* (Bandung Administrative Court Decision 34/G/TUN/2012 PTUN-BDG); *Bogor Mayor v. Hidayat* (Bandung Administrative Court Decision 64/G/TUN/2012 PTUN-BDG).

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decision ordering the Mayor of Depok to provide three types of financial documents (the "Depok Mayor case"). These documents included the:

- National Audit Agency's (*Badan Pemeriksaan Keuangan*, or BPK) "Comprehensive Report Documents" (*Dokumen Lengkap Laporan*) relating to Depok City Government's Financial Reports of 2009 and 2010;
- Regular Investigation Report of the Depok Regional Inspectorate for 2009 and 2010; and
- asset report documents of all officials working in the Mayor's office.[142]

As for the Comprehensive Report Documents, the Court found that the applicants could access public information – including a BPK Report about the Financial Reports of 2009 and 2010 – in electronic form from the BPK's website, or by writing to the Ministry.[143] However, the Court noted the applicant had not sought this BPK Report, but rather the "Comprehensive Report Documents". Pointing to Article 11(a) of *BPK Regulation 3 of 2011 on the Management of Public Information in the BPK*, which declared Comprehensive Report Documents to be excluded information, the Court refused to disclose the Documents unless the applicant could show a personal and direct interest in their disclosure.

The Court also found that the Regional Inspectorate Report was excluded information. Part B(17) of the Schedule to *Internal Affairs Ministry Regulation 51 of 2010 on Guidelines for Supervision of Regional Governments in 2011* states that Functional Monitoring Officials Investigation Reports (*Laporan Hasil Pemeriksaan Aparat Pengawas Fungsional*), into which category the Inspectorate Report apparently fell, were state secrets (*rahasia negara*). They could not, therefore, be released before obtaining permission from the relevant authorities, although the Court did not specify who those authorities were.

As for the Asset Report, the Court referred to an Anti-corruption Commission (*Komisi Pemberantasan Korupsi*, or KPK) Regulation which required officials to submit asset reports to the KPK.[144] The Regulation also stipulated that the KPK was to provide open access to these reports. The Court accepted that the Depok mayor did not produce, store or manage such records, having sent the original documents to the KPK, concluding that the applicants should have sought the reports from the KPK, not the Mayor's office.

142 *Depok Mayor v. Hidayat* (Bandung Administrative Court Decision 48/G/TUN/2012/PTUN-BDG).

143 *BPK Regulation 3 of 2011*, Art. 11(a).

144 *KPK Regulation KEP.07/IKPK/02/2005.*

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The second case was an appeal against the central Information Commission decision in the "Medan Flood Control" case, discussed above.[145] As mentioned, the applicant had requested copies of contracts for goods and services for a flood control and coastal security project in Medan and its surrounds. The Ministry challenged some of the Commission's findings, including that releasing the document would neither impede healthy competition nor disclose intellectual property. The Ministry also pointed to a non-disclosure clause in the contract, arguing that it had sought permission from the other party to the contract to disclose the requested information, but that party refused to provide permission.

The Court held that the Ministry was not required to provide a copy of the contract to the information-seeker, overturning the Commission's decision on three grounds. First, it held that the Ministry had an obligation to fulfill the contract. Because the contract contained a confidentiality clause, the Ministry was obliged to maintain the confidentiality of the information contained in the contract. Second, the Court also found that the commercial information contained in the contract was subject to copyright and was, therefore, protected from disclosure. Third, the Court referred to Article 11(1)(e) of the *FOI Law*, which states that public bodies must provide information about contracts with third parties. In this case, however, the Court found that there was no third party and so disclosure was not required. The Court overturned the Information Commission's decision and ordered the Ministry to refuse to provide parts or all of the information requested by the applicant.

Both the Depok Mayor and Medan Flood Control cases undermined arguments, mentioned above, upon which the Information Commission had relied on heavily to dismiss arguments that public bodies had made, in an attempt to avoid disclosing information. The Depok Mayor case is perhaps the most egregious because the Court seems to have allowed public bodies to avoid disclosure by relying on internal regulations – whether their own or those of another body – which define particular information as excluded. The danger here, of course, is that there seems to be nothing to prevent an agency from deliberately and unilaterally regulating to prevent disclosure of sensitive information. Particularly problematic is that a public body might be able to rely on such regulations even if they appear to contradict the *FOI Law* itself – which, as mentioned, is clearly superior on the hierarchy of laws to internal regulations. Article 9(2)(c) of the *FOI Law* states that all public bodies are to periodically

145 *Public Works Ministry v. Antoni Fernando* (Jakarta Administrative Court Decision 102/G/2012/PTUN-JKT).

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disclose "information about financial reports". Surely "Comprehensive Report Documents" (*Dokumen Lengkap Laporan*) of the National Audit Agency concerning the Financial Report of the Depok City Government' would constitute information about a financial report. The *FOI Law* should apply to require disclosure even if an internal regulation seeks to exclude it. If not, then the *FOI Law* becomes a dead letter.

The three grounds employed in the Medan Flood Control case also do not withstand cursory scrutiny. Surely any contractual obligation of confidentiality applies as between the parties only and cannot override a disclosure obligation imposed by statute, including the *FOI Law*. If this were not the case, then parties could contract themselves out of any general statutory legal obligation – which would be absurd.

The copyright argument is particularly weak, because the essence of copyright is to protect information from being reproduced or announced without permission.[146] Mere release of information – without reproduction or announcement – will not breach or compromise any copyright material contained in that information. (However, if the Court had found that the information contained in the contract constituted a "trade secret", then an order preventing disclosure might have been more legally justifiable. Under Indonesian law, legal protection for a trade secret – commercially valuable information that has been kept confidential – is lost if disclosure takes place.[147])

As for the third party argument, the *FOI Law* requirement to disclose only the contracts between public agencies and third parties, and not other parties, is indeed "strange",[148] largely because it is unclear who those third parties would be. The Information Commission has interpreted "third parties" as "other parties",[149] thereby allowing for disclosure of contracts entered into by government agencies not otherwise excluded. It was also open to the Court to employ this interpretation. Instead, the Court appeared to favour an interpretation which will rarely, if ever, require disclosure of contracts that public bodies make.

146 See Art. 2(1) of *Law 19 of 2002 on Copyright*.

147 See Art. 3 of *Law 30 of 2000 on Trade Secrets*.

148 Mohamad Mova Al'Afghani, "*Perjanjian Badan Publik Dengan Pihak Ketiga Anotasi Pasal 11 ayat (1) (e) Undang Undang Nomor 14 Tahun 2008*" *Opus Citatum* (15 October 2012), online: <http://blog.alafghani.info/2012/10/perjanjian-badan-publik-dengan-pihak_3669.html> (last accessed 30 October 2013).

149 *Antoni Fernando v. Public Works Ministry* (Information Commission Decision 361/XI/KIP/PS-M-A/2011).

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IV. Conclusions

As critics have pointed out, Indonesia's progress towards a functional "freedom of information" regime began modestly. However, significant advances have been achieved in the years since the *FOI Law* became fully operative. The number of regional information commissions established and information officers appointed have steadily increased. Also, since 2012 the Information Commission has heard and decided a substantial number of cases in which it has readily ordered disclosure.

Even though the Commission has some difficulties enforcing its decisions, this is a problem also suffered by Indonesian courts. Despite these difficulties, one Information Commissioner argues that often a formal copy of its decision ordering disclosure is all that information officers need to spur their superiors into action. This seems to be confirmed by cases in which respondents have not contested whether the information should not be disclosed, but have simply declared to the Commission that they will provide the requested information within a particular time frame.[150]

The main threat to an effective freedom of information regime appears to be the courts. While the administrative courts have upheld Information Commission rulings in some appeals, they have overturned them in others, using arguments that do not bode well for the future. Yet, fortunately, an assessment of the likely future approach of the courts in these cases is premature. In early 2013, the Supreme Court had not yet published any appeals against administrative court decisions in information cases. It is to the Supreme Court, rather than first instance administrative courts, that the courts, or even the Information Commission itself, are likely to look for guidance in future cases.

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150 See, *e.g.*, *Herunarsono v. Jakarta Provincial Education Department* (Information Commission Decision 201/VI/KIP-PS-M-A/2012).