

Analysis to State Intelligence Bill, Viewed from Perspective of Transparency of Information

Written by SET Foundation, Jakarta

I. BACKGROUND

House of Representatives (DPR) and the government are currently deliberating Bill on State Intelligence. Referring to the DPR's working agenda, the deliberation process is approaching final stage, in which the bill is poised to be passed into law in July this year.

It has to be admitted that the presence of Law on State Intelligence is badly needed, on the ground that the presence of regulation on information intelligence has been common in democratic regimes. On top of that, in the Indonesian context, the presence of that law is much more relevant, on the ground that the country needs stronger regulation to deal with pressing issues on terrorism and the national defense and security.

Elements of society also support political initiatives to institutionalize state intelligence. Various quarters of civil society, who have heavily criticized the contents of Bill on State Intelligence, for example, have not rejected the establishment of Law on State Intelligence. And even, they support the process of institutionalizing Law on State Intelligence. They only demand that the presence of Law on State Intelligence has to be integral part in civil society's efforts to reform national intelligence affairs. The civil society also demand that the presence of State Intelligence Bill does not fetch negative effects to the principles of democracy, good governance, protection of human rights and freedom of information.

The problem lies here. The Law on State Intelligence has strategic value, but people need to pay attention on the contents and process of deliberating the Bill before it is passed into law. The Bill on State Intelligence being deliberated has not been in line with the drive to reform state intelligence affairs, in which it contains some articles that may prohibit efforts to enhance efficiency, professionalism and accountability of state intelligence structures.

Moreover, contents of the Bill - including the government's DIM (daftar isian masalah=list of contentious issues?), which serve as government's responds to the bill - have the potentials to threaten principle of democracy, human rights, rights of public to information and freedom of the press.

The next problem, the deadline for the Bill to be passed into Law is nearing. Once again, the DPR has planned to finalize the deliberation of State Intelligence Bill in July this year. But, until now, the responses from elements of society, including the media, to the deliberation of State Intelligence Bill, have still been lackluster. It is disappointing given that the lackluster responses may lead into inclusion of articles that threaten human rights, freedom of information and freedom of the press.

Therefore, during the deliberation of process of State Intelligence Bill, the thing that needs to be anticipated is not just bad intention from the government or the DPR in drafting State Intelligence Bill, but also low key responses given by the media and elements of civil society that may lead into establishment of State Intelligence Law that is against democracy and human rights.

II. OBJECTIVES

Based on those backgrounds, the Foundation for Science, Aesthetic and Technology (SET Foundation) attempts to analyze the State Intelligence Bill, viewed from the perspective of the transparency of public information. The analysis has objectives as follow:

1. To point out some articles in the State Intelligence Bill that are against public rights to information and freedom of the press.

2. To show some articles in the Bill that are against Law on Transparency of Public Information and Law on the Press.
3. To identify consequences toward the principle of public right to information, in case the State Intelligence Bill is passed into law without any changes. In its latest draft, the Bill still contains articles that rule on the secrecy of intelligence information, authority to do communication interception and arrest.
4. To give inputs to the DPR and the government to allow them improve State Intelligence Bill, so that the Bill will be parallel to the principle of democracy.
5. To enhance awareness and care of the media and elements of civil society toward the deliberation and substance of Bill on State Intelligence.

III. ANALYSIS TO BILL ON STATE INTELLIGENCE

Next, we are going to drop some notes on State Intelligence Bill from perspective of freedom of information:

1. Scope on Secrecy of Intelligence Information is too broad

The category of secrecy of information should not end up on general and broad categories, in which its implementation heavily depend on interpretation and subjectivity of institutions or officials authorized to deal with the secrecy of information. Secrecy of information, or the other term is exclusion of information, has to refer to certain and specific information. In the context of transparent and open regime, or in the context of Information Transparency Law, the principle being used is the principles of maximum disclosure and limited exemption.

First, the principle is used to make sure that the secrecy of information does not badly affect public rights for information, and also, secreting information is done for the sake of public interest. *Second*, the principle is utilized to create realistic and effective secrecy mechanism. Experiences in some countries show that keeping secrecy of information is difficult and complex problems, and tend to burden bureaucracy. Keeping secrecy of information also often put bureaucracy on hot seat, which may hamper the works of bureaucracy. Moreover, in current era of technology, information diffusion is unpreventable. Therefore, the trend that currently develops is that secreting information is being done through the principle of maximum disclosure and limited exemption. The principle gains currency now because it is much more easy to keep limited exemption than to keep broad and excessive style of secrecy of information. With other words, the limited exemption lighten the burden of institution or official responsible for keeping secrecy of information.

Here, we spot first problem coming out from the Bill on State Intelligence from perspective of transparency of information. The Bill formulates secrecy of intelligence information in pure categorical form, without putting adequate explanations and details. Article 24 of Bill on State Intelligence rules on the scope of secrecy of intelligence information as follow:

- a. State intelligence system
- b. Accesses related to the implementation of its activities
- c. Criminal intelligence data related to prevention and handling of any forms of transnational crimes.
- d. Plans related to prevention and handling of any forms of transnational crimes.
- e. Documents on intelligence related to the implementation of national security
- f. State intelligence personnel related to the implementation of national security

The problem is, there is no further elaboration on the categories of secret intelligence information. "State intelligence system", "accesses related to the implementation of its activities", "Plans related to prevention and handling of any forms of transnational crimes", are general category of information and it needs to be elaborated further. Unfortunately, we fail to find the elaboration or explanation on State Intelligence Bill, so that the secrecy of intelligence information ends up in general categories.

We can also question how far is scope of state intelligence personnel; which personnel it covers; does it cover all intelligence personnel, from top brass intelligence personnel down to the bottom of organization ladder? Is all information about the head of State Intelligence's Coordinating Institution categorized as intelligence secret? How if the person aforementioned caught of violating law?

According to Law on Transparency of Public Information, transparency and accountability has to be imposed on all people assuming posts of public offices or people who are holding mandates in running functions of public office. The problem is, do all personnel in state intelligence structure need to be included in the category of public officials? Due to special characteristic of intelligence, there are many aspects of life of intelligence personnel need to be kept secret, but do all aspects need to be kept secret, and should the Bill cover all intelligence personnel ranging from personnel at the helm of the organization down to the lowest rank of the organization ladder? It needs adequate explanation and discussion on this aspect. We can not ignore accountability aspects of public officials in the context of State Intelligence Bill.

The other thing that needs to be watched out closely is that, while Law on Transparency of Public Information introduces concept of information exclusion, the State Intelligence Bill – if there are no significant changes – will introduce the exclusion of institution or personnel. Other public institutions and officials can be transparent and obey the Law on Transparency of Public Information, but the intelligence institution and personnel operate within its own regime that does not necessarily need to obey the principle of transparency and accountability as ruled by the law on Transparency of Public Information.

The scope and formulation of secret intelligence information in the State Intelligence Bill have the potential to grant immunity rights for officials working for strategic institutions, ignoring possibility that the officials may violate or deviate the regulations on intelligence secrets. The formulators of State Intelligence Bill need to pay attention on this aspect.

The scope of intelligence secrecy, which is too broad and excessive, always sparks problems for freedom of the citizens. The study of *Organization for Security and Co-operation in Europe (OSCE)* in 2007 shows that 48 out of 56 countries being members of OSCE in Europe use broad definition of intelligence secrets and have not yet harmonized the principle of freedom of information among themselves.

These countries, in reality, often ignore public rights to know and let public officials making one sided claim related to the state secrets.¹ Because in reality, those - who know precisely which one secret intelligence information and until when the secrecy takes effect - are actually personnel within the state intelligence agencies themselves. With other words, the interpretation and subjectivity of people authorized to run state intelligence organizations is very important and becomes decisive factors.

The thing that needs particular attention is that society never knows which information is categorized as intelligence secret. Once again, the category of "intelligence information system and access related to its activity implementation", for example, is broad and elastic category. At this point, we are confronted into a possibility: the citizens, including journalists, can only be aware for

¹ Quoted from Position Paper on Draft of State Secret Law, formulated by Society Alliance Rejecting Secrecy Regime, May 2009, page. 13.

having accessed, leaked or disseminated intelligence information secret when they are confronted with claims, questioning or even arrest being done by security officials. Public are always late in spotting which information categorized as intelligence secret. The later problem is that the sanction handed down to those who leak secret intelligence information, whether it is intentionally done or not, is very severe.

Article 38 of State Intelligence Bill states that: "Every person intentionally leaks secret intelligence information meant by Article 24 is sentenced to at least 7 years in jail and at the maximum 15 years, and is required to pay fine at least Rp 50 million and at the most Rp 500 million." While article 39 of State Intelligence Bill states that: "Every person, whose neglectful attitude leads into the leakage secret intelligence information meant by article 24, will be sentenced to at least 5 years in jail and the most 10 years, and will be fined at least Rp 20 million and at the most 100 million."

What is the ideal scope and definition of the secrecy of intelligence information? The scope of intelligence information secret is supposed not to formulate broad category or definition of information secret. The general or broad category will be ambiguous or create multiple interpretation. The thing that needs to be defined as secret is not supposed to be categories of information, but instead, the interests of parties are set to be threatened if the secrecy of information is not carried out.

So, the point of departure here, as well as the object of the secrecy of intelligence information is not supposed to be broad category of information, but the interests of concerned parties. "The personnel of state intelligence" in the formulation above, for example, is categorized as information, while the one (information) needs to be protected is the interest of the personnel of state intelligence.

In this context, the one needs to be ruled or governed by the State Intelligence Law is not supposed to categories of the secret state intelligence information, but instead, the list of interests that need to be protected in the context of state intelligence.

Related to personnel of state intelligence, for example, information that needs to be kept secret is about age, religion, home address and the personal email of intelligence personnel, which is part of their private information. With reservation that the secrecy of those information will no longer apply if based on the mechanism of public information testing, the information could be opened for public, or if the information has been published by the mass media or public forums. In other words, the private information is no longer categorized as secret after it has already been becoming public consumption.

According to international standard on the transparency and secrecy of information, written below are samples of legitimate (valid) interests need to be protected in the context of state intelligence:

- The ability of the intelligence system to fulfill its objectives.
- The ability of the intelligence system to investigate international crimes.
- The ability of the intelligence system to gather information needed to protect national security.
- The safety of intelligence staff and the anonymity of secret agents.
- Types of information that might need to be withheld could include:
 - Intelligence gathering techniques.
 - The identity of secret agents.
 - Information collected on a clandestine basis relating to the military capacity of other States.

It will be better if the interests above are elaborated further so that they can produce more detailed kinds of information.

2. *Fail to institutionalize public control*

In order to avoid possible worst scenario above, the management of secret information – learning from other countries – has to be done in details in the form of list of secret information, that specifically to protect certain interests. So, the secrecy of information does not end up on general and broad categories, but it is elaborated into the form of list of secret information, referring to the clear or transparent interests. Indeed, extraordinary efforts are needed to arrange “negative list” of state secret information. If the option is not realistic for the context of Bill on State Intelligence, there is still other option. Namely, the secrecy of information in the form of secret information category, but it has to be done through consequential harm test and balancing public interest test.

With other words, secreting information is not one-sided view of public body or the government (in which it is still being adopted by Bill on State Intelligence), but the secreting information has to be done using strong reasoning and rational explanation and always put into consideration public interests.

In principle, certain information can be categorized secret if authorized public body can explain satisfactorily the consequence or potential risk that the information may cause to some interest, let us say, the interest to protect the privacy or enforcement of law. The burden of proof lies on public officials who stipulate the exclusion, and not lies on the public who access information. The public interest test is done to make sure which one is more beneficial for public interest: open up information or keep it secret.

The two tests, although those fail to provide adequate details, have been adopted in Law on Transparency of Public Information. The consequent test is done to make sure that the secret information or excluded information is really secret information, and if it is opened to public, can cause harm or losses to public.

If the information is more beneficial for public when it is opened, then the information can not be kept secret. The principle being used here is: “the information can be kept secret after being weighed and ascertained that it is much more beneficial for public interest to keep it secret rather than to open it.”

It needs to be asserted that the point of departure in defining secrecy of information as well as testing of public interests, does not fetch from broad (general) categories of information, which is currently being stipulated at the Bill on State Intelligence, but it departs from the principle of protecting specific interests. Hence, the recommendation on the implementation of the public interest testing should be aligned with the recommendation to change the scope of the secrecy of intelligence information, which specifically rules on the kinds of interests that needs to be protected with secrecy, and not the broad and ambiguous (vague) categories of information.

The absence of public interest and consequence tests poses potential risk for protection of public right for information, considering the broad and general definition and scope of secrecy of intelligence in State Intelligence Bill. Secreting intelligence information in State Intelligence Bill is not in line as well with the international standard on secreting information. Secreting information is full under domain of the government, and there is no chance for people to be involved in it.

The State Intelligence Bill also still fails to give opportunity for people to carry out monitoring over mechanism and process of secreting information. We are confronted with the problem here that there is no mechanism to balance between the interest to keep information secret and the right of public to obtain information through transparent and effective manner.

The institutionalization of secrecy of information in the State Intelligence Bill has not put into consideration public interest over freedom of information as part of political rights of the citizens, and it only sides with the interest of the government or state to keep information secret.

The monitoring is crucial because the secrecy of intelligence information can be misused in practice. The regulation on monitoring mechanism in State Intelligence Bill can be done in the form of DPR monitoring, which is currently carried out by DPR's unit responsible for intelligence monitoring or supervision.

There is no regulation that rules on internal, executive or legal supervision. At this point, elements of civil society propose that the monitoring, which is currently being done by the DPR, is supposed to be done by separate intelligence commission in the parliament. The DPR has to establish new commission that specially oversees works of state intelligence agency because monthly monitoring or monitoring at the level of working committee is not adequate to deal with the complex problems of intelligence affairs.

3. Problems in Bugging and Arrest

It needs to add that Bill on State Intelligence vests rights to intelligence institution to carry out bugging related to terrorism, separatism and threat, disturbance, obstacles and challenges that threaten the sovereignty of the unitary state of Republic of Indonesia.

Article 31 State Intelligence Bill states that: "Besides authority meant in Article 30 verse (1), Institution Coordinating State Intelligence has special authority to intercept communication and investigation into flow of fund suspected to have been used to finance terrorism, separatism, and threat, disturbance, obstacles and challenges that threaten the sovereignty of the unitary state of Republic of Indonesia."

In the attachment part of this the article, the Bill adds special authority for state intelligence apparatuses, namely that: in intercepting communication, the authorized intelligence personnel does not need to obtain clearance from chairman of state court.

The stipulation has potential to threaten human rights and safety of the citizens. The stipulation is also at risk of being abused for politics or economic interests by elements in power. The intelligence institution indeed needs authority to bug or intercept communication, but it has to be done through formal and rigid mechanism; it must have clear pre-requisite and has to be approved by the court. In this context, the Coalition of Civil Society demands that the special authority in intercepting communication has to be approved by chairman of state court.²

Moreover that the Constitutional Court – in its decision No. 006/PPU-1/2003; No. 012-016-019/PUU-IV/2006; No. 5/PUU-VIII/2010 – has firmly stated that there should be a new set of separated rules, which is equal to law, to prevent possibility of abuse of power in the context of bugging and recording. Therefore, deliberation of State Intelligence Bill is supposed to be concurrently done with the deliberation of Bill on Bugging (Communication Interception), in order to harmonize one law with the others in an attempt to regulate intelligence's communication interception.

Meanwhile, on regulation of communication interception, the State Intelligence Bill should only rule the authority of intelligence personnel to intercept, and also to rule on the basic principles on what could be done and what could not be done in intercepting communication. The more detail regulations regarding communication interception should be then ruled separately in the Bill on Communication Interception.

Besides communication interception, the State Intelligence Bill may also spark public controversy in the context of giving out authority to state intelligence agency, especially in regard to authority to arrest anybody considered threatening state safety. This idea does not appear on the draft of State Intelligence Bill proposed by the DPR, but it comes up on government's DIM (list of problems), which serve as government's responses to the Bill. Meanwhile, in some events, the Minister of Defense often insisted that the State Intelligence law should give authority to the state

² *Ibid.*

intelligence body to arrest anybody considered to have threatened national security, although during the same events, DPR members and elements of society expressed objection to the Minister's views.

Vesting the right to arrest to state intelligence is uncommon in the context of state intelligence functions. The function of intelligence agency is supposed to be limited to the function of supplying information swiftly and accurately to the state or apparatuses of law. Therefore, the role of intelligence has to be limited to functions related to information, and the functions should not be related to the legal handling of a case. The role of state intelligence has to be distinguished with the law enforcement role, although in practice, both are related. State intelligence agency can not enforce the law and can not do anything that violates the law.³

Vesting the right to arrest also may threaten human rights and confuse mechanism of criminal justice system. If it is implemented, then it could lead into legalization of abduction practice, considering that the intelligence has characteristic of secretive and silent, including in making the arrest. In this context, State Intelligence Bill can pose risk to the citizens. Moreover, once more, the citizens have to deal with broad scope of secret intelligence information aforementioned, which give leeway for state intelligence officials to interpret intelligence information in line with their interest and perspectives. The leeway could lead into abuse of power that may bring losses to the citizens. For example, the elements of society, activists or journalists suddenly become victims of arrest by state intelligence officials after they accessed or disseminated information, which is interpreted as intelligence information by state intelligence officials. Those elements of civil society did not realize earlier that the information was intelligence information. This misunderstanding that brings losses to elements of civil society can be prevented if the scope of intelligence information is detail and specific.

In the process of deliberating State Intelligence Bill, concerned parties need to avoid eufemism, for example regarding the use of term arrest. It is possible that the term "arrest" (penangkapan) – because it draws strong resistance from various quarters – then being watered down into term "intensive questioning", while actually the substance is the same. The possible term being used in this regard is "abduction", "arrest", and "intensive questioning", but who knows the three terms actually refer to the same definition, which could pose similar risk to citizen safety.

Once again, it needs to be emphasized (especially by the formulators of State Intelligence Bill) that the state intelligence is a non-judicial body, in which it is not part of judicial apparatuses, such as police force and prosecutors, so that the state intelligence apparatuses need not be vested with the rights to arrest anybody considered to have threatened national security.

In a lawful country, the right to arrest or detain is only vested to law apparatuses. It also needs to be emphasized here that vesting that right to state intelligence personnel also confuses mechanism of criminal justice system because the Criminal Code has formally ruled about authority and procedure of arresting or detaining somebody suspected to have violated the Criminal Code. It needs to be ascertained that the State Intelligence Law is not against Criminal Code and otherwise, it is supposed to be parallel with the Criminal Code in regulating the lawful arrest in the context of enforcement of law and protection of national security.⁴

³ Position Paper, Advocacy Coalition State Intelligence Bill, 2011, pages. 29 dan 31.

⁴ *Ibid.*

IV. RECOMMENDATION

a. Recommendation for Government and DPR

The government and DPR are supposed to be open mind and need not be easily offended by people's critics to the Bill on State Intelligence. It needs to be confirmed that the Coalition of Civil Society does not reject Law on State Intelligence. They only demand improvement on the draft of State Intelligence Bill so that the draft will be in line with the values of democracy, protection of human rights, freedom of information and parallel with the efforts to reform the whole intelligence affairs in the country. The DPR and the government should have seized this momentum. We have big potential to have democratic and legitimate Law on State Intelligence. It now depends on the flexibility and acceptability of government and DPR to people's aspirations.

Multiplying room for dialogs and synchronizing views from various quarters need to be done now, instead of hastening the process of passing the bill into Law on State Intelligence, which may lead into recklessness that could result into public controversy after the bill is passed into law. The recklessness will strengthen people perception that the DPR and government are not sensitive enough to people's aspirations and anxiety.

Hence, the ideal politics option now is not canceling the passing of Bill on State Intelligence into law or otherwise, hastening the process of passing it into law, in line with the legislation schedule at the DPR, namely July 2011. But, the ideal politics option is to delay the passing of the bill into law, then open up intensive dialog with elements of society and the media to build common understanding among the concerned parties.

The objective, which is already agreed by all concerned parties, is: how to formulate Law on State Intelligence, which is effective to assure national defense and security, but it is still in line with the principle of democracy. Civil society's support or at least it's no-rejection-attitude toward State Intelligence Bill needs to be respected by the government and DPR and boost their efforts in establishing legitimate State Intelligence Law, which can be accepted by various quarters.

Below are some contents of State Intelligence Bill need to be improved:

- State Intelligence Bill has to be revised so that it is compatible with the principle of democracy, transparent and clean governance and the principle of human rights.
- State Intelligence Bill has to be paralled with the Law on Transparency of Public Information and Law on Press.
- The list of categories of secret information that is still vague and too general should be replaced with a list of interests which are protected against potentially harmful interests. This list should be supplemented by a more detailed list of the types of information which may cause such harms.
- The function of intellegence institution has to be limited only as the supplier of information to the state or law apparatuses. The role of intellegence has to be limited to the function that is related to information and not related to the legal handling of a case, and also not related to arrest done by law apparatuses.

b. Recommendation for Civil Society and the Media

Civil society needs to intensify advocacy for State Intelligence Bill. The thing that needs to be anticipated is that civil society's intensity of attention (advocacy) toward State Intelligence Bill loses steam at the time the deliberation of State Intelligence Bill is entering into final stages. It

occurs because at the same time, civil society is confronting other important issues, such as corruption eradication, the damage of the environment or succession of national leadership. Elements of civil society need to intensify lobbies to government and DPR to fight for needed changes in State Intelligence Bill before it is passed into law.

Media community also have to pay attention on the substance and deliberation process of State Intelligence Bill. The Bill is a serious matter for Indonesian media. The media is an institution that most often deal with government information and official documents.

Everyday, journalists try to access information from various public offices and process it and then disseminate it to public. The more exclusive the information, the more valuable it is. In performing its role as watchdog for the government, the media often must publish documents considered secret by certain public offices. No wonder, journalists often deal with claims by public officials, who stipulate that the information is state secret, public office secret or intelligence secret. In this context, the media community should have put attention on the substance and deliberation process of State Intelligence Bill. The media, which is in the front line in the context of exchange of communication between people and the government, is prone to negative effect posed by the presence of State Intelligence Bill.

The media has to pay attention to at least three issues, namely: the secrecy of intelligence information, the authority to intercept communication and the authority to arrest set to be vested to intelligence agency.

Hence, it is quite surprising that the national media community seem like spectator only as DPR, government and non-governmental organizations (NGOs) fight to promote their own versions on State Intelligence Bill. It seems that the media have only captured, quoted and published statements from NGO activists, legislators at the DPR and government officials, and the media have not yet made up their own stances to address the issue.

Similarly, media and journalist associations have not reacted immensely to State Intelligence Bill, which has potential to impede freedom of the press. The media should learn from bad experience suffered by the media after the implementation of Law on Information and Electronic Transaction; and Anti-Pornography Law. The media were late to realize that the laws were counterproductive for the freedom of the media, and they only reacted immensely after the laws took effect and claimed some losses to the media. With other words, the presence of regulations that are anti freedom of the media may not purely be caused by the conservative government or transactional DPR, but it emerges because the media community fail to produce significant efforts to prevent it.

Therefore, we recommend that the media should be more serious in determining stance toward the deliberation of State Intelligence Bill. Reporting deliberation of State Intelligence Bill is needed, but it is not enough. The community has to take politics stance. The politics stance can be materialized through writing editorial, discussing it in dialog or talkshow. More than that, the associations of the media (SPS, ATVSI, ATVLI, PRSNI, AJI, IJTI, PWI) may convey their politics stances on State Intelligence Bill to the DPR or the government.

In this regard, the Press Council has to express its politics stance because once again, the Bill on State Intelligence deal directly with the principle of freedom of the press.

The politics stance of the media community has to be spoken out loud before the DPR really passes the bill into law, scheduled in July this year. The media have to firmly demand for postponement of passing the bill into law, especially if the articles in the Bill - that really threaten freedom of the press and freedom of information - have not yet been omitted.

Jakarta, September 14, 2011,

