A Burst of Sunlight but Darkness Looms:
Indonesia’s Draft Law on State Secrecy Threatens Freedom of Information

An Analysis of the Draft State Secrecy Bill Proposed by The State Cryptography Agency in November 2011

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I. Introduction: The Right to Information in Indonesia

On 3 April 2008, the Indonesian House of Representatives (DPR) passed Law No. 14/2008 on the Disclosure of Public Information (KIP). After a record eight years of deliberation, between 2000 and 2008, Indonesia became the 75th country in the world, and the ninth in Asia, to have officially adopted a right to information law. By putting in place a formal legal framework to impose obligations on public authorities to grant access to information in a transparent and efficient manner, this law has the potential to improve Indonesia's image internationally, as well as to help control corruption. The law is also a positive step for Indonesian democracy, guaranteeing the public the right to access the processes of State governance and hence the possibility of participating in decision-making.

The Law on the Disclosure of Public Information introduces clear rules on information classification, establishing rules regarding what information should be open to the public and what kinds of information can be kept secret. Theoretically, this should provide a solution for journalists, researchers and members of the public who confront official obstruction of their right to access information. The law should also help build momentum towards the transformation of Indonesia’s culture and bureaucracy into one with a broader respect for the civil rights of the citizenry. Importantly, the law provides for stiff sanctions for officials who fail to respect its provisions. The law is also a strategic tool which complements other anti-corruption laws that have been established, including Law No. 20/2001 on the Eradication of Corruption, Law No. 30/2002 on the Corruption Eradication Commission, Law No. 13/2006 Concerning Victim and Witness Protection and Law No. 15/2002 on Money Laundering.


However, these laws only provided for partial access to information and did not address such issues as the obligations of public authorities, the mechanisms to gain access to information, systems for dispute resolution in this area and systems of enforcement, including sanctions. As a result, full enfranchisement of the right to information only came with the passage of the Law on the Disclosure of Public Information.

The Law on the Disclosure of Public Information also strengthens freedom of the press, in support of Law No. 40/1999 on Press, by protecting the public right to obtain information through the media, as well as by allowing the press to obtain
better access to government information, including through requirements that public institutions release information regularly, promptly, and in some instances proactively, and by limiting what information can be excluded from disclosure.

The fact that these concepts are now spelt out in law is very important because the Indonesian press have often had to confront one-sided claims from the State regarding State secrecy, institutional secrecy, bureaucratic secrecy and officials’ professional obligations of secrecy. Indeed, these concepts were often manipulated to prevent public access to information. Furthermore, in the past public institutions and officials often failed to provide sufficient explanations when they refuse people, particularly journalists, access to public information. The Law on the Disclosure of Public Information changes this by requiring public authorities to recognise the right to information, and to explain why refusals to disclose are justified in line with the legal framework.

Unfortunately, this new era in transparency is already under threat even before it could be properly established. This is as a result of recent proposals by the government and the House of Representatives (DPR) to establish a Law on State Secrecy.

It is clear that some sort of regulation on State secrecy is needed. However, the draft Law on State Secrecy, in its current form, is not compatible with international standards, the values of democracy, the political rights of citizens or the right to information. As a result of the proposed Law on State Secrecy, Indonesians are faced with the prospect that hopes of a new era of transparency have been a false dawn, and that Indonesian society is being pulled back into the old style of secretive and closed government. Indeed, the proposed Law on State Secrecy is more suited a traditional arcana imperii regime of secrecy, which institutionalises the unlimited authority of State apparatuses to keep secrets.

In December 2009, the government and the House of Representatives (DPR) had completed deliberations on a Bill on State Secrecy and were about to pass it into law. However, intensive political lobbying and a public opinion campaign through the media and a civil society coalition persuaded the government and the DPR to delay the bill’s passage. Rather than dropping the bill altogether, the government and the DPR merely delayed its passage. As part of this process, the government convened a committee to review and revise the proposed Law on State Secrecy and, in November 2010, the State Cryptography Agency released a new draft Law on State Secrecy (the draft Law).

The new draft Law included some improvements over the previous one, having incorporated some suggestions from civil society, but the new draft remains highly problematic. This Report discusses the draft Law and how it has evolved, how inputs from civil society were incorporated, what problems remain in the new version and how the government should deal with this issue going forward.
II. Background to the Draft Law on State Secrecy

The genesis of the development of State secrecy legislation lies in the government's concern about the publication of sensitive and strategic information in a manner that would threaten national security. The government view has been that such protection needs to be systematic in nature, to protect State sovereignty, and intelligence capabilities and operations.

Deliberations on a State Secrecy Bill began as early as 1994, during the Suharto era, according to documents from the Ministry of Defence. The proposal first emerged as a result of a ministerial meeting on politics and security. The Secretary General of the Ministry of Defence then organised inter-ministerial meetings to discuss the idea. In January 1995, the parties concerned began to formulate a framework for the new law, which was completed in May 1996. In September 1996, a government team developed this framework into an early draft of the law. Between January and February 1997, the team formulated an academic draft of the law, with the initial draft being completed in December 1997.2

These early discussions laid out the foundational aspects of the law, including the definition of a State secret, the reasons why a State secrecy law was needed, the purpose of the proposed law, the forms and classification levels of State secrets, the periods within which secrets could be kept, which officials would be vested with the authority to classify State secrets and how secrets would be identified, criminal provisions and judicial oversight processes, the philosophy underlying the bill and which aspects would need to be clarified further through government regulations.

However, before the draft could be brought to the House of Representatives, the political situation changed drastically when, in 1998, the nation saw the demise of the New Order regime under Suharto. In the period following Suharto’s fall, and in light of the reformasi sentiment that dominated at the time, it was not possible to continue discussions around a law to strengthen State secrecy, and these were dropped. However, in October 2000, the State Cryptography Agency floated the idea of reviving deliberation of the Law on State Secrecy during a hearing with the DPR’s Commission 1. In November of the same year, the State Cryptography Agency sent a letter to the DPR’s Commission 1 highlighting the need for the development of a Law on State Secrecy.3

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1 The chronology is based on the Position Paper on the State Secrecy Bill, developed by the People’s Alliance Rejecting Secrecy Regime, May 2009, in which the author of this Report was involved. See page 4.
2 The data was presented by Maj. Gen. Adang Sondjaya, the then head of the Legal Division at the Ministry of Defence, in a Focus Group Discussion on the proposed Law on State Secrecy organised by the National Human Rights Commission (Komnas HAM) on 29 May 2008.
3 According to Paulus Widiyanto, a member of the DPR’s Commission 1 between 1999-2004, at that time, the State Cryptogram Agency and the DPR’s Commission 1 had agreed to deliberated on a Law on the State Cryptogram Agency. This effort was intended to strengthen the power of the State Cryptogram Agency, because it had previously operated only under a Presidential Decree. The Law on the State

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The Commission 1 gave a green light to the proposal, under assurances from the State Cryptography Agency that the new law would be adjusted to fit in with Indonesia’s reform and democratisation programme. The government, through the Ministry of Defence and the State Cryptography Agency, then conducted a study to reformulate the proposal along these lines. In September 2006, a new draft of the proposed law (the 2006 draft) was completed and handed over to the DPR through a Presidential Letter.

Unfortunately, this new proposal was drafted in the same spirit as the previous version prepared in 1997. Although the preamble of the 2006 draft mentions Article 28 of the new Indonesian Constitution, it nonetheless fails to properly recognise the openness that Indonesia’s democratisation is supposed to have brought, particularly in relation to the Constitutional guarantees of the right to information, based on the protections for freedom of expression. In fact, the mention of Article 28 in the preamble to the 2006 draft was merely window dressing.

In May 2008, the DPR's Commission 1 returned the 2006 draft to the Ministry of Defence, giving the Ministry three months to improve it and, in particular, to bring it into line with the recently passed Law on the Disclosure of Public Information, adopted on 20 April 2008. In August 2008, the DPR received a modified version of the secrecy law.

Between August and November 2008, the DPR and the government intensified deliberations on the proposal. During this period, input and criticism from civil society and the mass media were largely ignored. The DPR and the government insisted that deliberations would be completed before the change of government in the first quarter of 2009. In December 2008, 70 figures from various sectors of society issued “Petisi 70”, a petition aimed at terminating the proposed Law on State Secrecy, which was sent to President Susilo Bambang Yudhoyono.

Using the petition, along with a public opinion campaign run through the media and a political process, in December 2009 the Coalition of Civil Society succeeded in preventing the bill’s passage into law, and the President instructed the Ministry of Defence to withdraw the proposal, which at the time was in its final stages of deliberation.

Because the proposed Law on State Secrecy was a government initiative, the DPR had no choice but to accept the President’s decision and, since the DPR’s term was almost over, the bill was not redrafted before the next sitting. However, as noted above, the bill was not dropped but just delayed, as it was to return again soon in a redrafted form.

Cryptogram Agency was also expected to enhance protection of strategic information. Mr. Widiyanto has no idea why the government instead chose to focus on the proposed Law on State Secrecy.
III. The Need for a Secrecy Law in Indonesia

It is generally accepted, including by Indonesian civil society, that governments should protect certain information from public disclosure. However, this must be regulated in a manner that is consistent with the principles of democracy, and with the right to information. Secrecy in Indonesia is already protected by a patchwork of different laws, including ten separate articles within the Criminal Code (KUHP). There is no evidence to suggest that these provisions have been ineffective in protecting confidential information, or any suggestion of a breakdown in government secrecy that would give rise to a pressing need to introduce new legislation. Indeed, the government has not properly evaluated the sufficiency of the Criminal Code in protecting secrecy information.

In fact, even this framework goes beyond accepted international standards for secrecy. According to international standards, the starting point for deciding whether or not information should be made public should be the principles underpinning the right to information, with secrecy being a limited exception to this right. This is in keeping with the principle, paramount in any system of responsible government, that the public should have access to all information held by public authorities apart from information which is legitimately confidential due to the likelihood that its disclosure would harm a protected interest. Thus, an effective right to information law will include built-in exclusions along these lines, exempting material from disclosure if it would be likely to prejudice legitimate interests such as national security or law enforcement. Chapter V of Indonesia’s Law on the Disclosure of Public Information does exactly that, creating a regime of exceptions regime to ensure that sensitive material remains protected. But in this law, the exceptions are seen as secondary, while in the draft Secrecy Law, they are the primary system. The advantage of defining the limits of sensitive information through a right to information law is that it consolidates rules on disclosure and confidentiality in a single legal framework, ensuring consistency (ideally one based on the principle of maximum disclosure with narrow and limited exceptions).

Indonesia’s current patchwork of legislation already includes a certain degree of overlap, with the result being potentially conflicting rules and uncertainty over which should prevail. This may well confuse public officials who, potentially, could be required to disclose information under one piece of legislation, while being threatened with sanctions if they do not keep the same information secret under a second law.

It is important to note that the draft Secrecy Law does not present a solution to these weaknesses in Indonesia’s current framework for access to information for several reasons. Most importantly, it does not resolve potential conflicts or ambiguities in the law, leaving civil servants in a legally parlous situation. Second, as noted above, there is no evidence that the current system, where secrecy is protected through exceptions within the Law on the Disclosure of Public
Information and the Criminal Code, is not effective, or that there is any special need to provide a greater degree of protection to confidential information than what already exists.

Instead, the timing of the renewal of discussions around the draft Secrecy Law, which started just four months after the Law on the Disclosure of Public Information was passed, and two years before the law came into effect in April 2010, suggest that the real goal may be to undermine the new openness law. It is also clear from this timing that the government had not had time to evaluate whether or not the right to information law would be effective in protecting secrets, because it had not even come into force yet.

The real problem is that the current framework already falls below international standards on transparency, due to overly broad limits on the right to information, particularly in the areas of security and defence, protecting natural resources and protection of State economic interests. The exceptions in the draft Secrecy Law are even broader and hence it cannot be viewed as a solution to weaknesses in the right to information law. Instead of precise descriptions based on a consequential harm test, it includes general categories of secrets, which could easily be abused by officials to deny individuals the right to access information. Furthermore, it allocates powers to a wide range of officials to classify information.

There are other problems with the Law on the Disclosure of Public Information, including Article 51, which states: “Every person who deliberately uses public information for a purpose contrary to the law will be sentenced to up to one year in jail and/or fined up to Rp 5 million.” This is in contravention of international standards, which hold that the use of information which has been disclosed via a right to information law should not be subject to any special restrictions.

There are, therefore, real problems with the current legal framework on transparency, but do not related to a lack of security for sensitive information. On the contrary, they represent an access regime which is already overly secretive. Thus, arguments that the access framework can be improved by the passage of the draft Secrecy Law are clearly wrongheaded. In fact, as the analysis below clearly demonstrates, the draft Secrecy Law will make these problems in the access framework even worse. Claims made by the government that the draft Law on State Secrecy will prevent officials from deceiving the public, and improve the state of transparency in Indonesia, can be dismissed outright.

Government proponents of the draft Secrecy Law claim that State information must be afforded specific protection in order to ensure that sovereignty is adequately protected, particularly against threats from foreign agents, espionage and intelligence operations. Of these threats, the most serious originate from foreign powers. The government justifies the need for heightened security by citing the danger posed by hostile intelligence operations. But while the proposed Law on State Secrecy would drastically expand the government’s power to classify
documents and place strict limits on the abilities of the public to access State secrets, it would do nothing to curtail the ability of foreign powers to penetrate into the State secrecy apparatus, since this is generally done using far more sophisticated techniques than the filing of public access requests. Given the present exclusions within the Law on the Disclosure of Public Information for disclosing material that would be harmful to national security, it strains credulity to suggest that foreign agents are using this law as a means of obtaining sensitive government data.

Just as greater government transparency is not incompatible with adequate protection of State secrets, a reduction in transparency will not improve the security of sensitive information. Instead, as mentioned above, greater security can best be obtained by limiting the abilities of foreign intelligence services to operate clandestinely, and in fact this was the focus of the early academic draft of the Law on State Secrecy.

Rather than attempting to reduce transparency as a whole, the early academic draft attempted to curtail the ability of foreign agents to operate in Indonesia. But by shifting the emphasis away from this, the current draft Law limits the ability of the public to gain insight into the actions of government while doing little to conceal strategic information from foreign powers.

This, then, reflects one of the ironies of the draft Law. Foreign governments have a multitude of ways of collecting information. For example, the Law on the Disclosure of Public Information precludes Indonesians from accessing information about natural resources, but foreign governments can reasonably easily access much important information in this area. The same is true of national economic interests.

The question of who is responsible for breaches of secrecy is also relevant. In most cases, an official will be primarily responsible for this. And yet the draft Secrecy Law places equal blame for this on the private individual or body to whom the information is leaked. Thus, the law targets not only officials, but also ordinary Indonesian people.

Contrary to the government’s claims that the draft Law is about protecting national security, this suggests that the true aim of the proposal is to protect the bureaucracy, whose interest in greater secrecy runs contrary to the public interest in a more open government. Borrowing terminology from Steven Aftergood (1996), it is important to distinguish between whether the law aims to protect national security secrecy, bureaucratic secrecy, or political secrecy.

This is particularly germane when considered in the context of the high level of discretion which the draft Law grants to officials as part of the classification process, since it is almost entirely dependent on official interpretation of its provisions, with no mechanism for public oversight of the process and no avenue to ensure that its provisions are not abused to protect bureaucratic or political secrets. The fact that the draft Secrecy Law does not impose sanctions on officials who refuse to disclose
information that is not secret, and only on those who wrongly disclose secrets, exacerbates this problem, and creates the potential for conflict with the Law on the Disclosure of Public Information.

As the record from the Law on the Disclosure of Public Information demonstrates, Indonesia's bureaucracy has a poor record when it comes to this kind of interpretation. Among the types of information which are routinely claimed as State secrets are:

- Drafts of State or regional annual budgets (RAPBN/RAPBD)
- Policies of public institutions
- Drafts of policies of public institution
- Project plans
- Schedules for visits by public officials
- Remuneration systems
- Routine expenditures
- Internal activities of public institutions
- DPR/Regional council sessions

The culture of secrecy this reflects, as well as the concomitant damage to the public interest which results from it, must be taken account of in considering whether the adoption of a law that grants State bureaucrats even greater discretion over information disclosure would be in the public interest. The significant public interest in greater transparency and, in particular the interests of the people to exercise public control over the bureaucracy, have not been factored into the decision about adopting a Secrecy Law.

**IV. Specific Problems with the Draft Law on State Secrecy**

Assessed from the perspective of the general principles outlined above, it is possible to conclude that there are a number of specific problems with the draft Law, which are examined below in more detail. It should be noted that there have been several changes in the draft Law which have improved it somewhat over previous versions but, as the following list of issues illustrates, the draft remains extremely problematical.

**1. Overly Broad Definition of State Secrecy**

Article 1 of the draft Law defines State secrecy as "the secrecy of information, which includes things or certain activities that are stipulated by the President based on this law to be protected in line with standard procedure, and which, if illegally discovered by certain parties, can endanger the sovereignty, security or safety of the Unitary State of the Republic of Indonesia."
One problem with this definition is that it fails to distinguish between “information, things and activities”. The notion of State secrecy should be confined to information, which may be held in different forms. This will focus the efforts of officials to manage information in an efficient and effective manner, thereby reducing the leakage of State secrets.

It also fails to place clear boundaries on the scope of secrecy. A study carried out by the Organization for Security and Co-operation in Europe (OSCE) in 2007 showed that 48 out of 56 European OSCE countries defined “state secrecy” overly broadly and inconsistently with the right to information. In practice, this has led to over-classification, undermining the public’s right to know in these States. The OSCE study recommends that the definition of State secrets should be limited to data the disclosure of which could have severe negative consequences on national security, which should be clearly identifiable and substantial. The OSCE study also recommends that information categorised as a State secret should be limited to that impacting national security, rather than other professional or official secrets which are more appropriately protected within the context of other legislation.

2. Misunderstanding the Public Right to Information

Article 1(14) of the draft Secrecy Law references the right to know by saying: “The right to know is ‘the right of certain public officials to know or access information classified as a State secret, which can not be known by other people’.”

This passage demonstrates a fundamental misunderstanding of the right to information, which should properly be understood as the right of the public to access any information held by public bodies. Instead, the definition in the draft Law seems to revolve around special access accorded to officials.

Article 2, which explains that the protection of State secrets is based on “the principle of certainty and equality before law”, similarly fails to define how this principle has been applied in drafting the proposed Secrecy Law. The principle of equality before the law is far more relevant to the criminal code provisions on transparency (KUHP), which set rules relating to individual privacy. If the principle of equality before the law refers to the equality between the public and the government, which in turn refers to the right of the public to access information and a concomitant right of the government to conceal it, this belies another fundamental misunderstanding of the nature of the right to information. The right to information is not to be balanced against any government right to confidentiality. Rather, it is a right that stems from the notion of responsible government and that, ultimately, a democratic government must answer to its people, from whom it derives its legitimacy. Any exception to the right to information, including for national security,

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4 Quoted from the Position Paper on the State Secrecy Bill, developed by the People’s Alliance Rejecting the Secrecy Regime, May 2009, p. 13.
must be carried out in the interests of the people, rather than to protect interests of officials.

3. Problematic Principles

Article 2 of State Secrecy Bill states that the protection of State secrets is based on several principles, namely:

a. Protection of public and individual interests
b. Transparency, which is governed and limited by the constitution
c. Proportionality
d. Professionalism

The first puzzling aspect of this is why individual interests are listed under a law to protect State secrets. Whose individual interests are at stake? If the interests are related matters of security, defence, intelligence and international relations, they should be protected under those headings.

State secrecy does not relate directly to the protection of individual interests, including the interests of public officials which, if they are properly fulfilling their mandate, should not extend beyond those of the State with regards to their public role. This is also not necessary to protect officials’ privacy interests, since these are separately protected by an exception in the Law on the Disclosure of Public Information. In any case, public officials’ right to privacy is limited due to their position and access to public funds.

The second principle, “transparency, governed and limited by the constitution”, begs the question as to how the constitution limits government transparency? The Indonesian Constitution does not explicitly mention ‘transparency’ but the scope of constitutional limitations is discussed in Article 28J(2):

In implementing their rights and obligations, every person has to adhere to limitations imposed by laws, which are imposed with purpose of assuring that the rights and freedoms of other persons are acknowledged and respected, and to fulfil the demand for fair justice in line with the considerations of moral values, religious values, security and public order in a democratic society.

These limitations focus on the need to protect the rights of citizens, rather than the State, per se. They thus appear to be a poor reference for the draft Secrecy Law, which takes as its focus the protection of State interests.

The final principles, proportionality and professionalism, are also difficult to understand. Does their inclusion mean that people are required to use public information in ways that are proportional and professional? If so, this is a basic violation of the right to information. This concept also has no place within a secrecy law since, by definition, the law should be regulating information which should not be accessed at all.
Another possibility is that these principles are meant to assert that public institutions and public officials must act proportionally and professionally when classifying information as secret. This is a positive idea, but unfortunately it is not consistent with reality, which is that public officials and institutions often work to conceal public information, wrongly claiming that it is a State secret. If this language is meant to mitigate this behaviour, it has not been reflected in the detailed provisions of the law. Instead, this gives officials broad discretion to classify information and fails to impose these values on public officials in practice.

4. Overly Broad Scope of State Secrecy

According to international standards, State secrecy provisions should only apply to strategic information the disclosure of which would harm legitimate national security interests and which therefore must remain classified for a certain period of time. These interests are generally limited to defence, security, intelligence and cryptography.\(^5\) Classification for these purposes needs to be narrow and directed such that only information harmful to these interests is withheld. The draft Secrecy Law, in its current form, allows classification on far broader lines than this.

Article 4 of the draft Law states that State secrecy includes: information related to national defence and security; the planning, organisation, mobilisation and deployment of Indonesian military personnel; intelligence; systems of State cryptography; international relations; national economic health; and other State secrets as determined by law.

This is overly broad and, as demonstrated by the OSCE study above, is not in line with international standards regarding the right to information and the public’s right to know. In particular, State secrecy laws should not be applied to protect information related to national economic health or international relations.

Another problematic area is the inclusion of other State secrets as determined by law. The use of a patchwork of different laws to classify information is, as discussed above, problematic by itself, but this is compounded by the fact that the provision does not place any limits on what types of information can be classified. As a result, this provision could be used to classify the secrets of public bodies, bureaucratic secrets, political secrets, and other information that should not properly be classified as a State secret. This is another example of the principle of *limited access, maximum exceptions*, in contrast to the Law on the Disclosure of Public Information that applies the principle of *maximum access, limited exceptions*. As a result of this overly broad scope, the proposed Law on State Secrecy has the potential to make

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\(^5\) A similar opinion was voiced by IDSPS along with other non-governmental organisations concerned with the formulation of draft Law on State Secrecy. See: “Narrowing the Scope of State Secret”, in *Anti Arcana Imperii* Newsletter, edition III, 23 January 2011. Available at: [www.IDPS.org](http://www.IDPS.org).
government far more secretive, and to extend the reach of classification far beyond what is justified or necessary.

5. **Lack of Clarity in Regulation**

Another problem with the draft Law is its lack of clarity. Classified information is referred to regularly as “certain information”. This is in contrast to the universal principle of public information, which holds that a classification framework should refer clearly to what is being classified.

For example, Article 5 of the draft Law states that State secrets are:

... 5. Information relating to military and non-military threats.  
6. Certain information relating to construction engineering, industrial testing on weaponry systems, including special products and industrial mobilisation ability, which is used only for the purpose of national defence.  
7. Information relating to readiness and support for national warfare planning, including physical weaponry support, financial support, resources that include primary components, reserve and support and arrangement instruments.  
8. Allocation planning and budget relating to defence missions and tasks.  
9. Certain information relating to budget allocation and spending, and government assets used for the purpose of national security.  
10. Certain information relating to the preparations, organisation and operation of transportation facilities used to ensure high-level state alertness.  
11. Certain information relating to special facilities for national defence.

What is the scope and breadth of this information? Which information is included? This is not clear, in part because the information is often described simply as “certain information”. Because this definition is vague and elastic, it is open to broad interpretation by officials, which runs against the basic principle that a legal framework which classifies information should be tightly constructed, limited and clear.

In addition, Article 5.b of the draft Secrecy Law includes: "State secrets relating to the planning, organisation and deployment and mobilisation functions of the Indonesian military, including information on the position and activities of State officials, who possess authority and are responsible for the national defence alertness situation and/or danger level." However, the law does not specify who these officials are, meaning that potentially all information about public officials could be considered State secrets. This is not an exception for particular information, but rather an exception for particular officials, preventing access to information related to certain people regardless of whether disclosure of the information would be harmful to any national interest. This violates basic democratic principles by placing individuals, particularly those connected to the military or other strategic institutions, entirely above public scrutiny, which creates broad potential for abuse.
This is a problem that recurs in the provision on national economic health (Article 5.f), which defines classified information as including: certain information and documents relating to negotiations regarding agreements on finance and the economy; results of studies done by the government or an institution appointed by the government for a specific purpose or interest in the economy; certain information relating to planning and projected trade in tools and strategic devices with other countries.

There are two problems with this. First, it does not define clearly and specifically the information it applies to, which opens the door to broad and subjective interpretation by officials. Second, the clause ignores the right of people to know about the state of affairs in the management of public wealth and natural resources. This is particularly important because government policy in these areas is often not transparent and is often not undertaken in a way that best benefits the public. Despite its vast natural resources, Indonesia remains a poor country which lags behind others. It is particularly important that its natural resources are managed in an open and participatory manner for the benefit of the people as a whole.

Unfortunately, secrecy attends the exploitation of national resources at every stage, beginning with negotiations on exploration and exploitation, whether with local or foreign business entities. Many feel that the benefits from exploitation of these resources benefit the few, as opposed to the many, a result which is particularly apparent in places like Papua and Kalimantan. Evidence of this is the fact that data on natural resources is closed to the public, but available to business entities close to those in power or to foreign parties, as well as foreigners, who use various sophisticated techniques to obtain this information. A secrecy Law designed to protect the public good would reflect the importance of transparency in relation to natural resources, rather than adding to the secrecy which surrounds them.

6. A Categorical Approach to Secrecy

As discussed above, the process for classifying information in the draft Secrecy Law is by broad and non-specific categories, rather than the describing particular types of sensitive information. Furthermore, classification is so far-reaching that classified information may not balances on government power. State secrets are even exempt from being disclosed in court, except by order of the President.

An important consequence of the categories approach is that classified information is not subject to a consequential harm test or a public interest test, in violation of the right to information. According to international standards, these two tests are fundamental to the classification process in a transparent and democratic society.

The first of these tests, of consequential harm, seeks to determine whether the disclosure of classified information would actually harm a specific protected interest of the State. It is not enough for officials to merely claim that the information is related to a protected interest, such as national security. Rather, officials wishing to
classify information should identify, in specific terms, the harm that will likely result if the information is disclosed. The burden of demonstrating this lies with the officials in question, and if they cannot satisfactorily discharge this burden, then the information should, by default, be disclosed.

The public interest test is carried out to ensure that information that is classified is done so in the overall public interest. This test is conducted by weighing the public interest in disclosure and transparency against the specific harm that the disclosure is likely to cause. Information should only be withheld if the harm outweighs the public interest in disclosure. Both of these tests are built into the Law on the Disclosure of Public Information.

Another problem with a categories approach to the classification of information is that it gives officials wide discretion to decide whether or not information should be classified, regardless of the public interest in transparency. This is compounded by the lack of an effective oversight mechanism to ensure that the classification process is done correctly, and to ensure that there remains an effective mechanism for ensuring access to information which should not be classified. The approach in the draft Law ignores the public interest in freedom of information and the political rights of citizens. Rather, it is only concerned with ensuring that government is equipped with tools to keep information secret.

7. Excessive Sanctions
Another problem with the draft Secrecy Law is that it imposes criminal sentences for wrongful disclosure of information (see Chapter X), while neglecting to provide legal protection for those who disclose information in the public interest.

These sanctions are applied to anyone who leaks, obtains or disseminates information which is classified as a State secret; or who holds, possesses, gives, causes to disappear, multiplies, alters, photographs, records, forges, destroys, copies or transports a State secret.

The minimum jail sentence imposed for these offences is four years, along with a minimum fine of Rp 100 million for violations involving information classified as “top secret” information. For “secret” information, the minimum jail sentence is three years with a minimum fine of Rp 50 million; while for information classified merely as “limited secret”, there is a maximum jail sentence of four years and a maximum fine of Rp 1 billion.

It is very problematical that the law does not properly differentiate between offences committed by officials and by private individuals. In particular, the sanction for public officials is only one-third greater than the sanction for ordinary members of the public who access or disseminate classified information. In reality, however, the responsibility and culpability of the two different actors is very different.
Public officials have direct knowledge of what information constitutes a State secret and are better placed to understand the risks of leaking this information. Private citizens, on the other hand, have no such knowledge. Considering the broad categories of information which may be classified, there is no doubt that public officials are in a much better position than ordinary citizens to know what is or is not a State secret. Members of the public may see that certain records are classified, but they have no way of knowing whether or not particular information is sensitive.

Public officials also have an official mandate, along with the facilities and salary, to protect and maintain State secrets, while private citizens have no such responsibility. It could also be argued that, once information has been released, it should not be properly considered a State secret, and that members of the public who access or disseminate information should not be held responsible for the government’s mistakes in releasing it. This is the position under international law, which holds that it is up to the government and its servants to protect its own secrets. The law even fails to differentiate between persons who knowingly access or disseminate classified information and those who do so without knowledge of its status.

Another problem is that the bill contains no sanctions for over classification. There are two ways that a framework for State secrecy can be violated: by the wrongful leakage of information that is properly classified, and by an improper claim of secrecy for information that is not properly classified. However, the draft Law does not contain any sanctions for public institutions or officials that apply it overly broadly, or who wrongfully claim that information which should be disclosed is a State secret, even though this type of abuse is very harmful to the public interest, and it has happened commonly in the past. Public officials have used claims that information is a State secret, official secret or institutional secret in order to close down media outlets or to deny people access to information without proper justification. The draft Law does not contain any sanctions for this type of violation. This may be due to an assumption that this sanction is already contained within the Law on the Disclosure of Public Information but, if so, it implies that the secrecy and transparency regimes are interlocked which, in turn, raises the question of why a separate State secrecy law is needed in the first place.

V. Conclusions

The analysis above demonstrates that there are serious problems with the draft Secrecy Law as currently proposed. An initial and important conclusion is that there has been no attempt to synchronise the draft Law with the Law on the Disclosure of Public Information. In other words, there has been no attempt to harmonise the framework for State secrecy and the framework for access to information. If this is not resolved before the passage of the draft Secrecy Law, there will be uncertainty in law regarding the scope of the public right to information. In addition, this will create overlapping areas between the two main frameworks which regulate
transparency and those that regulate secrecy, with the inherent potential for contradiction and incoherence.

Second, the draft Secrecy Law is unduly broad in scope, in particular because it relies on categories as a basis for classifying information rather than using a consequential harm test and public interest override. This means that there is no guarantee that the draft Law will be limited to protecting genuine national security, rather than information classified for bureaucratic or political reasons. This is also one concrete area where the potential for conflict with the Law on the Disclosure of Public Information is almost sure to be realised.

Third, without significant changes, the draft Law is likely to undermine the institutionalisation of good governance and efforts to eradicate corruption in Indonesia. Specifically, the draft Secrecy Law is likely to strengthen traditional attitudes of secrecy, allowing public institutions to regress back to conditions where officials acted with impunity. By allowing public authorities to unilaterally classify information, the draft Law is likely to undermine the principles of accountability and transparency, and foster a culture of impunity.

Fourth, without significant improvements, the draft Law is likely to undermine democracy and the system of checks and balances on public power in Indonesia more generally. Joseph Stiglitz, in his book *On Liberty, the Right to Know, and Public Discourse* (1999), states: “The tendency of bureaucracy for being part of secrecy regime is not phenomenon in authoritarian states, but also phenomenon in democratic countries, where transparency and public rights for information are institutionalized as part of good governance principle.” Stiglitz questioned the contradiction between States that claim to be democratic, and yet institutionalise excessive mechanisms of State secrecy, which undermine democracy. Vague rules on State secrecy will fail to protect strategic national security information, as well as increasing bureaucratic secrecy, which could lead to pervasive abuses of power.

The warning from Stiglitz is particularly relevant for the draft Secrecy Law since, as the law now stands, it will be likely to impede legislative oversight over the executive by allowing for sweeping classifications of information under the banner of State secrecy. In particular, the draft Law does not provide an exception for the oversight function of the DPR and other independent State institutions, or for those exercising their rights to freedom of expression to this end. In essence, it gives extremely wide authority to officials – and especially to strategic defence institutions – to classify any information being managed by them.

A similar difficulty will be confronted by the KPK, BPK and BPKP when conducting accountability audits related to the use of State funds by public bodies, as they will be able to take refuge behind claims that certain information is a State secret, denying the auditors access to it. Defence and security institutions could also make the same claims when confronted with an investigation of human rights abuses by the National Commission on Human Rights. This is compounded by the fact that
Article 33 of the latest version of the draft Law on State Secrecy retains a clause that states: “State secrets cannot be used as evidence at trial, other than in cases involving state secret offences”. This will inhibit efforts by the Commission for Eradicating Corruption (KPK) and the Anti-Corruption Court (Tipikor) to investigate corruption cases involving officials from certain strategic institutions. This threat should be assessed in the context of a recent trend towards weakening the KPK as a driving force behind corruption eradication.

There is a clear need for appropriate measures to protect State secrets. At the same time, the draft Secrecy Law needs to be reviewed in light of the overriding need to foster democracy and good governance in Indonesia. It fails to conform to basic international and constitutional standards of openness, and it poses a potentially very serious threat to the recent trend toward greater openness, as manifested in the Law on the Disclosure of Public Information. The government should either withdraw this law entirely or fundamentally rework it before presenting it to the DPR.

**VI. Recommendations**

The foregoing analysis leads to a number of key overarching recommendations. It is essential that the rules on secrecy and on transparency be harmonised to create legal certainty around public information and State secrecy. There are two alternative ways to achieve this. The first is that the proposal for a Law on State Secrecy should simply be scrapped. The Law on the Disclosure of Public Information and Article 10 of the Criminal Code already provide sufficient protection to State secrets, and they can be further elaborated through regulations adopted by the Information Commission. This alternative is preferable based on the idea that openness should be the rule and secrecy the exception, and that the legal framework governing transparency and secrecy should be as integrated as possible.

The second alternative, if the government insists on passing a separate Secrecy Law, is to make sure that the contents and implementation of this law accord with the Law on the Disclosure of Public Information and, more broadly, with international and constitutional standards regarding the right to information. As a general point, to achieve this, the Law should be revised so that it focuses on preventing leaks of legitimately classified information, rather than granting wide discretion to officials to protect information as they see fit.

More specifically, classification of information is a limitation of the fundamental human right to information, which can only legitimately be carried out in accordance with established international standards. This requires the assessment of confidentiality to be carried out on a case-by-case basis, rather than through designating whole categories of secrecy information, and by incorporating a harm test and a public interest override.
Closely related to this point is the fact that the draft Law is significantly overbroad. Its scope should be narrowed and clarified, to minimise the potential for abuse. State secrets should be limited to strategic information directly related to national security, which should be limited to defence, military organisation and mobilisation, intelligence and cryptography. The grounds for withholding of information should be limited to those set out in the Law on State Secrecy and the Law on the Disclosure of Public Information, to the exclusion of exceptions found in any other law.

If the government does insist on adopting a secrecy law, civil society needs to be closely involved in the law’s development and the process of adoption should involve wide public consultations. Experience shows that a failure to conduct proper consultations can have serious negative consequences, as happened in 2009 when a previous draft of the Secrecy Law had to be withdrawn. Dialogue is important to foster agreement, or at least to reduce conflict among different social perspectives. In this context, it is also important for government to understand that civil society does not oppose secrecy, as long as it does not endanger democratic values.

However, it is important that this consultation be substantive. In the formulation of several previous laws, dialogue with civil society was treated as a mere formality, with the input provided being largely ignored. Civil society input should be built into the very process of developing the law, long before the draft is handed over to the DPR. Rather than merely inviting occasional comments, representatives of civil society should be integrated into the team established by the government to improve the draft Law. The involvement of civil society elements in this process should be permanent and systematic rather than symbolic and temporary. The government should also make sure that the individuals involved properly represent civil society; government should not intentionally elect those who will be sympathetic to the official stance toward the Law on State Secrecy.

The flipside of this is that civil society representatives must themselves commit to engaging fully in the process of dialogue and deliberation. Lessons can be drawn from the formulation of the Law on Information and Electronic Transactions, where civil society did not fully participate in the process of deliberation, instead offering only two comments. The media also failed to engage properly with the bill as it developed, and were slow to realise the potential harm that it posed to press freedom. Only after the bill was passed into law did civil society and the media respond strongly to its problematic provisions, at which point it was too late to effect significant change. This experience demonstrates that laws which undermine democracy get passed not only because of conservative factions within the government, but also due to the lethargy of elements of civil society whose role should be to advocate against problematic proposals during the deliberative process. These mistakes should not be repeated here.