

The New Administrative Information Disclosure Law in Japan

Narufumi Kadomatsu

On May 14, 1999, the long-awaited Administrative Information Disclosure Law¹ (hereafter „AIDL“) was enacted in Japan. The Appendix stipulates that the law is to come in effect within two years. This paper aims to briefly introduce its historical background and review its content.

I. BACKGROUND

1. Beginning with Sweden’s Press Freedom Law and especially after enactment of the U.S. Freedom of Information Act (FOIA) in 1966, information disclosure laws have been enacted in most developed countries, for example: Denmark, Norway (1970), France, Netherlands (1978), Austria, Canada, New Zealand (1982), Austria (1987), Belgium (1994), Korea (1996), Ireland (1998).

Although it took a long time to be enacted as a national law, discussions on an Information Disclosure Law in Japan began in the early 1970s. The key phrase that determined the discussion was “right to know”. HATA explains the concept as follows:

(I)n order to express his or her opinion on a particular problem, a person must have ample information related to it. For it is not until he/she has enough information that he/she could form an informed opinion. From such a point of view, scholars in the mid-1960s began to insist that Article 21, Paragraph 1 guarantees the right to know as the premise for freedom of expression. (HATA/NAKAGAWA 1997,129).

This view, which stresses the importance of taking the recipient side of the communication flow into consideration, gained consensus among constitutional scholars as a principle. The Supreme Court also mentions the “right to know” in some decisions. For example, the Hakata Station Film Case decision points out that “in a democratic society the reports of the mass media provide the people with important materials on which to base their judgements as they participate in the nation’s politics, and they serve the people’s right to know” (Cf. ITOH/BEER 1978, 246-250(248)). In this case, the legality of the lower court’s order to present a part of a news film for evidential use was in

1 *Gyōsei kikan no hoyū suru jōhō no kōkai ni kansuru hōritsu* (Law concerning disclosure of information possessed by administrative organs). Note: The “*gyōsei kikan*” (administrative organs) used in the AIDL is defined in Art. 2. It includes, among others, all “organs” in or under the Cabinet. It is here, therefore, an organizational concept and not a functional one. In this essay I use “administrative bodies” for translation and may sometimes replace it by “agencies”. The latter term is here, however, not used in its functional sense as it is used for the translation of “*gyōsei-chō*” in the official translation of the Administrative Procedure Law.

question. In the decision, the Supreme Court balanced the freedom of the newspaper to gather information for informational purposes and the interest of a fair trial.

Nishiyama Secret Telegraph Case is another important case that mentions the “Right to know”. In 1972, Mr. *Nishiyama* of Mainichi Newspaper revealed the content of a certain telegraph about a secret pact between Japan and the US government concerning the reversion of the Okinawa Islands. *Nishiyama* gave the information to a prominent congressman of the Socialist Party and the congressman made it public during a Diet session. *Nishiyama* obtained the information from a female secretary in the Ministry of Foreign Affairs, and he was prosecuted on the grounds of Art. 111 of the National Public Employee Law (NPEL)², which prohibits “inducing” national public employees to reveal their occupational secrets³. During the trial, *Nishiyama* contended that the content of the telegraph should have been made open to the public in view of the principle of democracy, therefore its content should not be regarded as “secrets” protected by the NPEL. Although the Supreme Court found *Nishiyama* guilty, it confirmed that “secrets” protected under NPEL are “substantive facts not known to the public that are worthy of protection as secrets.....their determination is subject to judicial decision” (BEER/ITOH 1996, 543-547(544)). It does not suffice that the concerned administrative authorities see or designate certain facts to be secret. The position taken by the Supreme Court is commonly called “substantive secret theory” as opposed to “formal secret theory”.

The limit of the activities of the mass media was the issue in these two cases. These cases, as well as other cases that mention “the right to know”, do not explicitly speak of citizens’ constitutional concrete rights against the state or mass media to obtain specific information. In addition, as to the legal ground for the “right to know”, there is no unanimous view. Many scholars are of the opinion that it is founded upon Art. 21 (Freedom of Expression), some scholars find its ground in Art. 13 (Liberty for pursuit of happiness) or in the general principle of democracy. In sum, the “right to know” has gained consensus as a principle, but has not been fully developed as a usable legal tool.

2. With the above-mentioned *Nishiyama* Incident acting as an instigator, the need for an Information Disclosure Law began to be discussed among scholars. Such proposals gained the support of citizens’ movements, especially consumer movements. In 1980, a network of such movements was established under the title, the “Citizen’s Movement for Information Disclosure Law”. The Lockheed-Scandal, uncovered in 1976 and in

2 *Kokka kômuin-hô*, law no. 120 / 1947.

3 There is no general State Secrecy Protection Law in Japan, which punishes revealing of state secrets by itself. However, occupational duties of public employees to keep secrets are protected not only by disciplinary measures but also by criminal punishments. Those who “induced” public employees to reveal secrets are also subject to criminal liability, which was the case in *Nishiyama* incident. In addition, secrets in relation to Japan-US Security treaty enjoy special legal protection. For details, cf. GASSMANN 1990.

which prominent politicians including former Prime Minister *Tanaka* were charged with receiving bribes, provided further impetus to this movement.

In November 1979, “legislation of an information disclosure law” was mentioned in the memorandum on policy agreement between the Liberal Democratic Party (LDP) and the New Liberal Club (*Shin-Jiyû Kurabu*)⁴, but the government did not take concrete legislative measures. With the support of the public opinion at the background, opposition parties submitted information disclosure bills, but they could not overcome the reluctance of the government. In March 1983, the final report of the 2nd Provisional Commission on Administrative Reform proposed a study group for the legislation, which was then established under the Management and Coordination Agency. But the proposal meant the postponement of legislation. It took about seven years for the study group to submit an interim report, based on which the intra-administrative “Standard for administrative information disclosure” was made. The Japanese people had to wait even longer for binding legislation.

So it was local governments that took the lead in legislation. In March 1982, a small town Kaneyama enacted an information disclosure ordinance. Seven months later, Kanagawa Prefecture followed the move. The Kanagawa ordinance had a 2-year intensive study as a background and had a great influence on other local governments. As of April 1998, all 47 prefectures (*ken*) had information disclosure ordinances as well as 533 out of 3255 commune-level governments (*shi, chô, son*). Experiences with such local ordinances contributed a lot in the legislation process.

3. In the mid-1990s, two incidents brought information disclosure systems to public attention. First to be mentioned are the activities of the “Citizen’s Ombudsmen”. These are voluntary local watchdog groups monitoring public administration, mainly consisting of lawyers and paralegals, which later formed a nation-wide network. The network focused upon the budget item “food expenditure” (*shokuryô-hi*). It was known that the budget item was often abused by local administrations for the purpose of entertaining central government bureaucrats and sometimes with an indiscreet sum, since local governments needed to maintain a “good relationship” with Kasumigaseki. Such “government-government entertaining” (*kan kan settai*) was important especially in view of the

4 After a defeat in the general election on Oct. 7, there was a serious intra-party conflict (so-called “40 days conflict”) in the LDP. Non-mainstream fractions demanded the resignation of the Party President (and the Prime Minister) *Ohira*, but *Ohira* rejected it. On the Prime Minister Election at the following Diet session, the opposing fractions chose the former Prime Minister *Fukuda* as their candidate. In order to survive the election, *Ohira* sought for the support of the four Diet members of the New Liberal Club, which was established in 1976 by the members who left the LDP, criticizing the “plutocratic nature” of the party. The two parties arrived at the above mentioned policy agreement, and the New Liberal Club voted for *Ohira*. *Ohira* won the election, but the New Liberal Club did not take part in the Cabinet. The small party remained in opposition until it formed a coalition government with the LDP in December 1983.

financial dependence of local governments on the state. For this reason, it was considered to be not only a waste of public money but also a symptomatic expression of the lack of local independence. Making use of information disclosure ordinances, the network demonstrated that the “food expenditure” consumed by prefectures and certain large cities designated by Cabinet Order (*seirei shitei tôshi*) amounted to about 2950 Million Yen in the fiscal year 1993 and 80% was used for government-government entertaining⁵.

The AIDS scandal was the other incident that focused public attention on the issue of information disclosure. In Japan, due to delays in taking countermeasures against HIV-virus contaminated non-heat-treated blood products, at least 1806 hemophilia patients were infected and many of them have already died⁶. In 1989, a patients group filed state liability suits in Tokyo and Osaka. The group demanded disclosure of documents related to the “Study Group for the Prevention of Onset and Treatment of HIV-Infected Persons” in the Ministry of Health and Welfare during initial stages of infection, but the ministry denied the existence of such documents. However, in January 1996, the newly nominated Minister *Naoto Kan* ordered a search. The documents were soon “discovered” in the office of MHW and made open to the public. These so-called “MHW AIDS file”, proved to contain crucial pieces of information related to the responsibility of bureaucrats and doctors who took part in the decision-making process.

II. LEGISLATIVE PROCESS

1. In November 1993, the *Hosokawa* Coalition Cabinet, formed as a result of the political upheaval that ended the one-party rule of the LDP, began considering legislation. The *Murayama* Cabinet, which put the LDP once again in the governing position under a Social Democratic Prime Minister, continued this process. In December 1994, the Administrative Reform Committee (hereafter “ARC”) was established with the explicit task of introducing legislation on information disclosure. A Special Subcommittee for Information Disclosure (hereafter “Subcommittee”) began its activity in March 1995 under the Chief *Reijiro Tsunoda* (former head of the Cabinet Legislative Bureau and former Supreme Court Justice) and the deputy chief *Hiroshi Shiono* (Administrative Law scholar). It should be noted that the very same two figures also took an important role in the legislative process of the Administrative Procedure Law⁷, enacted in 1993 (Cf. KÖDDERITZSCH 1991; ABE 1995; DUCK 1996). The Subcommittee filed the “Outline for the Information Disclosure Law” (hereafter “Outline”) on November 1, 1996 and it was approved as an official opinion of the Administrative Reform Committee on

5 *Mainichi Shinbun* July 29, 1995.

6 See White Paper 1996: Annual Report on Health and Welfare.
http://www.mhw.go.jp/english/white_p/book1/p2_c3/c3_sect5.html (as of Aug. 1999).

7 *Gyôsei tetsuzuki-hô*, law no. 88/1993.

December 16. Based on the Outline, the Cabinet proposed a bill to the Diet in March 1998. After some diet sessions and negotiations between parties, an amended bill was presented to the diet as a joint proposal of the six major parties in February 1996, which was unanimously approved in the House of Representatives. After further amendment in the House of Councillors, the bill was returned to the House of Representatives⁸. With another unanimous vote on May 7, the bill finally passed the diet⁹.

2. What was the impetus for the legislation of AIDL? FUJIWARA emphasizes that the law was a “child of coalition governments” (FUJIWARA 1998,75-76; FUJIWARA 1999, 33-34). Not only that the *Hosokawa* coalition government initiated the move for the present legislation. FUJIWARA points out that politicians of coalition parties took an important role in some key stages of the legislation, such as putting explicitly the term “legislation” of AIDL into the agenda of Administrative Reform Committee in Nov. 1994.

Although not directly mentioning FUJIWARA, SHINDO criticizes such a view and contends that AIDL legislation should be linked with the “New Public Management” strategy taken by the governing side, the strategy which stresses efficiency, competitiveness, and consumer responsiveness (SHINDO 1998, 572). In the legislative process, information disclosure was always considered to be a part of administrative reform. As mentioned above, it was a subcommittee within the Administrative Reform Committee that filed the outline. In addition, “The Standards for Administrative Intervention”, a report submitted by the Public-Private Relationship Subcommittee within the committee, places information disclosure in the framework of privatization and de-regulation discussion. According to SHINDO, “Citizen’s Ombudsmen” show nothing but a “degeneration” of the information disclosure movement. The movement began as a consumer movement which combined the “right to know” with the right of welfare. In the 1990s, however, it turned out to aim one-sidedly for “a smaller government”. In his argument, in the aftermath of the AIDS scandal, public opinion was led against bureaucracy and for deregulation. On the other hand, the pressure group activities of multinational drug industries were exempt from ample criticism (SHINDO 1998, 558-561, 572).

There are truths to be found in *both* arguments. Coalition governments as well as the “New Public Management” strategy could probably be seen as two sides of the same coin. Namely, they are both reactions of a national political system to the changing environment of the 1990s. In the author’s view, SHINDO’S argument is important in that it confirms the fact that an evaluation of a legal scheme should never be detached from the surrounding context. Although information disclosure is by its nature neutral to the deregulation discussion, it was realized at a national level only after the linkage between the two issues was established. In this sense, we can see some similarity with the

8 Constitution Art. 59 para(2).

9 See *Japan Times* May 8,1999, Foreign Press Center, “Diet Enacts Freedom of Information Law”, May 14 1999 (<http://www.nttl.co.jp/fpc/e/shiryo/jb/j9911.html>).

Administrative Procedure Law (APL) enacted in 1994. Both had long been “pet policy alternative” (ABE 1995, 13) for academics, but they were actually legislated only after becoming coupled with current political agenda.

3. Another interesting aspect of the background of the legislation is, as already mentioned above, the experience of local ordinances. Before the national legislation, all prefectures and many commune-level governments had already enacted information disclosure ordinances. This is completely different from the Administrative Procedure Law, which had no local predecessors worthy of mentioning. During the drafting process in the subcommittee, stipulations of the local ordinances were taken into consideration as well as existing foreign information disclosure laws.

These local ordinances had extra significance in that they gave rise to many legal disputes and hence court decisions. According to a list made by FUJIWARA, there were at least 158 decisions concerning information disclosure ordinances by April 1998 (FUJIWARA 1998, 208). Considering the miserable situation of administrative case litigation in Japan (Cf. KÖDDERITZSCH 1998), this is a significant number¹⁰. These cases contributed very much to clearing out the issues of information disclosure, and they were given ample consideration in the legislation process. In this sense, information disclosure is a field in which local ordinances had performed an “experimental” role before it was legislated on the national level.

III. THE “RIGHT TO KNOW” AND “ACCOUNTABILITY”

1. Probably the foremost issue which drew public attention in the drafting process was not necessarily the most important, if we speak only from a practical point of view. The ARC Subcommittee decided in 1996 not to explicitly mention “the right to know” in the Outline. According to the Commentary attached to the Outline¹¹ (hereafter “the Outline Commentary”), while the Outline recognizes that the “phrase” (“the right to know”) facilitated the process for the legislation of information disclosure, it allows too much room for interpretation as a legal concept. As such, it is not necessarily appropriate for the use in a paragraph of the law¹².

As explained above, “the right to know” concept was surely the impetus for the movement aiming at information disclosure. It came as no surprise that the above decision was severely criticized by constitutional law scholars (e.g. UZAKI 1998) and

10 FUJIWARA also points out the high increase ratio. When he made the same list as of April 1993, the number of cases was only 46.

11 *Jôhō kôkai-hô yôkô-an no kangaekata* (Commentary on the Guideline for Information Disclosure Law.)

12 It has been a customary legislative technique in Japan to state the purpose of the law in Article 1. It is commonly understood that these “purpose clauses” serve as a guideline for the interpretation of the law. Cf. SHIONO 1998.

lawyers (HABU 1999). Although opposition parties again and again demanded stipulation of the phrase, it was not realized¹³.

Some of the critics argue that the explicit mentioning “the right to know” in the law could have limited the range of information exempt from disclosure. However, seen from a practical point of view, such an argument is questionable. As of April 1996, 3 prefectural ordinances stipulated “the right to know” as their purpose¹⁴. In Osaka, one of these prefectures, two district court decisions mention “the right to know” and put a strict standard on non-disclosed information¹⁵. However, in these cases, “the right to know” was only one of the reasons mentioned in the decisions. Moreover, reasoning in these cases is rather exceptional and not shared by the Supreme Court.

Even if we stand on the premise that the concept “right to know” should lead to an interpretation of the law, it does not necessarily follow that the phrase should explicitly be stipulated. Theoretically speaking, assuming that “the right to know” is directly derived from the constitution, one can utilize the concept as a tool of interpretation even without the phrase in the law (cf. HASEBE 1999, 4) There is also an actual example. KAGOSHIMA district court showed a strict interpretation of the “personal information” exemption in the ordinance, emphasizing the constitutional “right to know”, although the concerned ordinance does not use the term¹⁶.

We can conclude that the conflict about the “right to know” is to be placed more on an ideological level than at the level of legal technique. I mean here not only an attachment of the AIDL supporters to the “right to know”. A certain hostility seems to exist against the concept among some bureaucrats. In a “non-official” commentary on the Outline compiled by members of the Secretariat of the Subcommittee, a bureaucrat contrasted two kinds of approaches to law. One is a “deductive” approach that understands legal system to serve idealistic values. The other is an approach that focuses upon concrete functions and sees law as a method or a tool. Apparently the bureaucrat ascribes to the former approach to arguments demanding stipulation of “the right to know”. Behind this seemingly objective analysis of the debate, there lies the author’s mistrust against movements aiming at information disclosure. Namely, in his understanding, “information disclosure law had been demanded in Japan with a specific political ideology in the background” (FUJII 1997, 15-16).

13 As a compromise, the accompanying resolution of House of Representatives to the AIDL demands government to continue reconsideration of the debated issues, the “right to know” among them.

14 By that time, 44 prefectures out of 47 had enacted the ordinance. Thereafter, some prefectures stipulated “right to know” either by newly enacting or amending the ordinance.

15 Osaka District Court (D. C.) 1989.3.14 *Hanrei Jihô* Vol. 1309. p. 3, Osaka D.C. 1989.4.11 *Hanrei Taimuzu* Vol. 725 p. 129.

16 Kagoshima D.C. 1997.9.29, *Hanrei Chihô Jichi* Vol. 173. pp. 9.

2. Instead of the “right to know”, the AIDL chose “accountability”¹⁷ as the purpose of information disclosure. This “accountability” is to be based upon the constitutional principle of popular sovereignty (Art. 1).

The Preamble of the Constitution of Japan understands government as the “sacred trust of the people”¹⁸. It seems therefore quite reasonable to relate popular sovereignty with accountability, which originates in the law of trust. However, an objection can be raised against this, which emphasizes the parliamentary cabinet system in Japan. OKUDAIRA quotes an anecdote that a young bureaucrat showed a critical view toward information disclosure, saying: “The Constitution of Japan adopts a system of representative or indirect democracy, which assumes that the administration is responsible to the Diet. It would be against the principle of democracy that the administration should answer (by disclosing information) vis-à-vis a certain individual” (OKUDAIRA/SHIONO 1997, 11)¹⁹. Instead of showing a clear-cut position, the Outline Commentary expresses a compromising position. “Japan adopts a parliamentary cabinet system, in which the Cabinet is responsible to the Diet in the exercise of executive power. The establishment of a system through which administrative organs fulfill their accountability to the people would contribute to more effectively realizing the management (*un’ei*) of the government based upon the idea of popular sovereignty under the government structure of the present constitution.” In fact, the legislation of information disclosure laws in Westminster Charter countries such as Australia, Canada and New Zealand (1982) and the positive moves in the United Kingdom have diminished the persuasiveness of the above-mentioned scepticism based upon the parliamentary cabinet system.

There is another problem regarding the relationship between popular sovereignty and the AIDL. Art. 3 stipulates that “any person”, natural or juridical, can claim the disclosure of administrative documents, regardless of nationality or residence. This is a notable point of the legislation, since most local ordinances limit the range of claimants. Although this decision is to be welcomed, one should note that it is not the only logical consequence of popular sovereignty. It could have also been equally acceptable to limit the claimant to those with Japanese nationality, together with foreigners residing in

17 Literally, Art. 1 AIDL speaks of “the duty of the government to explain its activities”, in short, a “duty to explain” (*setsumei sekinin* or *sekimu*), but the Outline Commentary makes it clear that the term is equivalent to “accountability”. The concept was at the time rather new, but it spread quickly throughout the Japanese legal community and public administration as a cliché.

18 The Constitution of Japan proclaims “that sovereign power resides with the people” (Preamble, the official translation), but the original Japanese for “the people” is “*kokumin*”, which can also mean “nation”. In the legislative process of the Constitution, there was a tug of war between the General Headquarters (GHQ) and the Japanese Government in “translating” the GHQ draft to the governmental bill. “People” and “*kokumin*” was one of the main issues, cf. INOUE 1991 184-205, KOSEKI 1997, 119-120, 179-181.

19 The bureaucrat’s opinion has nothing to do with the view of the leading liberal constitutional law scholar.

Japan (*Tagaya* 1999, 52). However, the fact is considered that Japanese citizens often utilize the U.S. FOIA, which adopts an “any person” policy. Moreover, even if the law intended to limit the claimants as above, such a limitation could easily be evaded by using “dummies”. For these practical reasons, the AIDL chose an “any person” policy. It should be also noted that the AIDL is indifferent to the claimant’s subjective purpose in requesting for information. Commercial use of information, which only indirectly (if it does) serves democratic discourses, is not ruled out. On the contrary, there is also an expectation that such purpose would dominate the use of the AIDL, judging from the result of the U.S. FOIA or Tokyo Ordinance (SHINDO 1998, 576; FUJIWARA 1999, 45 (n. 36)).

The object of information disclosure under the AIDL is not the information itself but “administrative documents”. “Documents” cover not only paper documents but also “Electro-magnetic records” (Art. 2), which doubtlessly include magnetic tapes and floppy discs. As for information recorded on a hard disk or RAM, this is open to discussion (TAGAYA 1999, 64-65).

Under the AIDL, administrative documents are subject to disclosure except for those documents defined in Article 5 as exempt from it. Therefore, the definition of “administrative documents” is crucial to the operation of the system. Article 2 defines its requirements as (1) “created or obtained by staffs of administrative bodies” and (2) “maintained by the body for organizational use”. The latter requirement is understood to be similar to the “under agency control” requirement in the FOIA. Compared to many local ordinances, which limit themselves to definitive documents that already underwent decision-making procedure, this position of the AIDL is generally considered as being progressive. For example, many of the documents in the above-mentioned AIDS scandal, which were not definitive in the above sense, would be subject to disclosure²⁰ (UGA 1999, 25).

IV. NON-DISCLOSED INFORMATION

1. Art. 5 stipulates the duty of the head of an administrative body to disclose the claimed administrative documents, except to the extent that such documents are protected from disclosure by one of 6 items named in the article. However, when portions that contain exempt information are easily segregable and deletable, the head of the body must disclose the remaining portion (Art. 6, Partial disclosure).

Such information is not only “exempt” from disclosure. In principle, administrative bodies have the duty not to disclose such information. However, it is stipulated in Art. 7 that the head of an administrative body can disclose such information when there is a “special need of the public interest”. Since each exemption category, as explained

20 Needless to say, however, we should remember that those documents had to be “found out” by bureaucrats before they were disclosed to the public.

below, includes balancing between the public interest and the interests protected by the category, it is questionable whether such discretionary disclosure actually takes place.

When the confirmation or denial of existence of requested documents practically means to reveal the non-disclosed information, the head of the administrative body may refuse the request for disclosure without confirming existence or non-existence of the documents (Art. 8). As an example, the Outline Commentary shows, among others, "clinical history of a specific person". This scheme, the so-called "Glomar" response²¹ had no precedent in local ordinances, and was introduced in the Outline as a product of comparative law study (UGA 1998, 68).

2. Art. 5 Item 1 (personal information) exempts "information related to an individual" from disclosure. The category is further defined to mean "information through which one can identify a certain person by name, birth date etc". Needless to say, this is a common exemption in information disclosure laws of many countries. Roughly stated, regulations on this category can be divided into two types, (A) personal identifiability type (B) privacy invasion type. Some local ordinances, similar to the U.S. FOIA, adopt (B) type. For example, Osaka prefectural ordinance enumerates categories of personal information (personal belief, religion, physical features etc) and further limits them by the requirement that "it deems justifiable that people generally prefer those information not to be known by others". Many local ordinances adopt (A) type, but as mentioned above, there are court decisions²² which show strict interpretations of the clauses similar to the (B) type. The AIDL chose (A) type because of the alleged "vagueness" of the privacy concept. However, it also stipulates that the information (i) that is or expected to be made public, either according to legal statutes or customarily (public domain information) and (ii) disclosure of which is necessary for protection of human life, health, wholesome living or property are exempted from the above "personal information". In addition, when the information concerns performance of duties by public officials, the status (but not the name) and the content of the performed duties shall be disclosed, even when such a disclosure lead to an identification of the public official.

In contrast to the U.S. FOIA (Exemption 6, Exemption 7(c)), the "personal information" exemption can also be used against a claimant requesting information pertaining only to himself. The Outline Commentary contends that the problem should be dealt with in the framework of personal information legislation *per se* and not in information disclosure system²³.

Item 2 (Corporate information) exempts the two following categories of corporate information possessed by administrative bodies from disclosure²⁴: (A) When the dis-

21 *Phillippi v. CIA* 546 F.2d 1009(1976).

22 e.g. Kagoshima D.C. 1997.9.29 (supra n.13).

23 NAKAGAWA 1998 is critical of such a view.

24 "Information pertaining business performed by an individual" is included in "corporate information", therefore the object of Item 2 and not Item 1.

closure hampers rights, competitive position or other justifiable interests of the corporation or the individual. (B) Information provided voluntarily to an administrative body upon request of the body and under promise of its confidentiality, when such promise²⁵ is deemed reasonable, for example when the confidentiality is customary. This reasonability shall be judged by the nature of information and the concerned circumstances. There is, however, an important limitation that concerns both categories. When the disclosure is necessary for protection of human life, health, wholesome living and property of a person, the concerned information shall be disclosed. This clause, which is far from common from the point of view of comparative law, was nevertheless common among local ordinances. It is said to be the fruit of citizen's movements, which influenced local governments (UGA 1999, 53).

The (B) category is influenced by the U.S. *Critical Mass* Decision²⁶, which distinguishes "financial or commercial information a person was obliged to furnish the Government" and "financial or commercial information provided to the Government on a voluntary basis". For the latter, exemption is granted "if it is of a kind that the provider would not customary release to the public". Compared with this decision, the AIDL puts a stricter standard. In addition to the above mentioned "reasonability" test, the "customary" nature of confidentiality shall be judged not by the standard of the concerned information provider but by the standard in the trade (UGA 1999, 55). It should be noted that this exemption is further limited by the "protection of human life, health, wholesome living or property" clause.

This issue was one of the most disputed, partly because of the very feature of the Japanese administrative style, namely its heavy dependence on informal activities, particularly *gyōsei shidō* (administrative guidance). Informal administrative activities are universal phenomena not unique to Japan, however its "especially extensive use" (OHASHI 1991, 235) marks the peculiarity of its administration. It is often pointed out that Japanese administrative agencies often resort to administrative guidance for implementation of administrative goals although they can formally take statutory actions²⁷. A similar tendency can be observed with regard to obtaining information. Agencies often obtain information about corporate activities on a "voluntary" basis from the corporations even when they legally enforce them to do so. It is not explicitly stipulated in Exemption 2 that such information is excluded from the exemption, therefore it has been criticized by some (e.g. AMANO 1997,51). Others try to solve the problem by interpretation (MATSUI 1999, 50). On the other hand, it also happened that corporations "voluntarily" provided information to agencies although even when there were no legal

25 The AIDL did not stipulate the word "promise" (*Yakusoku*) that was used in the Outline, because the term was regarded unsuitable as a legal term.

26 *Critical Mass Energy Project v. NRC* 975 F.2d 871 (1992), cf. also § 7(4) Umwelteinformationsgesetz.

27 NAKAGAWA 1998a calls this tendency "regulatory retreatism" (pp.19-20).

obligations²⁸. This would occur when a corporation wanted to maintain “good relationship” with an administrative agency, which is especially important in view of the Japanese public-private partnership. Focusing on the need to change this situation, FUJIWARA stresses the importance of respecting promises between corporations and agencies, provided that the Japanese administrative style changes and that agencies and corporations form an equal partnership (FUJIWARA 1998, 50). Anyway, there is a consensus among Japanese scholars that the transparency of information flow between agencies and corporation is important and that agencies should refrain from resorting to administrating guidance in this area. “Transparency” was also a stated goal of the Administrative Procedure Law (Art. 1). The regulation in the APL limited its scope to the regulation of the relationship between agencies vis-à-vis addressees of administrative dispositions, mainly corporations. We can say the AIDL showed clearly the relevance of the transparency of the agency-corporation relationship to the third party, in this case the concerned public.

3. Item 3 (National security information) excludes certain information from disclosure when the head of the administrative body finds, with reasonable grounds, that the disclosure has a risk of endangering national security or diplomatic relationship²⁹.

In contrast to Items 1 and 2, “the head of the administrative body” appears in the definition, which means to give discretion to his judgements to a certain extent. The same scheme is used in Item 4 (Public safety information). When the disclosure is found by the head of the administrative body to hinder enforcement of criminal statutes and thus “public safety and order”, the information is not disclosed. In I (a) we have already seen that the Supreme Court adopts “substantive secret theory” with regard to the interpretation of the National Public Employee Law. Discretion clauses in Item 3 and 4 may come into conflict with the theory, but the Outline Commentary takes the position that the non-disclosed information in the AIDL doesn’t necessary have to be linked with the “substantial secrecy” of the NPEL. How far the courts can control the interpretation of Items 3 and 4 remains to be seen.

It is no wonder that the decision to give discretion was severely criticized, especially in view of the fact that the importance of the issue of defense or diplomatic information in the history of information disclosure such as in the *Nishiyama* incident. We should, however, also see the positive side of the Items. Concerning public safety information,

28 For the problem of “voluntariness”, cf. KÖDDERITZSCH 1995, 96-111.

29 A considerable number of constitutional law scholars contend that the present Self-defense Force of Japan is unconstitutional in view of the Art.9, renunciation of war clause. (Cf. AUER 1993) Even they don't reject this clause in the lump. Instead, they try to reformulate it, for example, into “It is not enough that the disclosure endanger military “defense” measures. The information shall be disclosed only when the disclosure directly and seriously affect the security of human life or person, property, or other fundamental human rights.” (OKAMOTO 1997, p.64).

all prefectural ordinances have so far excluded prefectural Public Safety Commissions from the scope of their application, so that police information is left in the lump “untouchable”. It should therefore be commended that the AIDL included all administrative bodies in its scope.

4. Item 5 (Deliberative Process) exempts information about “discussion, consideration, negotiation” within or between state or local governmental agencies from disclosure, when it has a risk of (i) unduly hampers frank exchange of opinions or neutrality of decision-making or (ii) unduly confuse the public or (iii) unduly benefits or harms specific persons. The word “unduly” was added in order to prevent the abuse of the item. The Outline Commentary says that the advantages of disclosure should be weighed against the disadvantages. Only when the disadvantage is substantial after consideration of public interest of the disclosure, the information is exempt from disclosure. It is to be noted here that many prefectural ordinances admitted the category of “collegial organ information”³⁰ by which such bodies could by themselves decide non-disclosure. But the AIDL did not admit such a category and handled the problem in the general framework of deliberative process privilege.

Item 6 is difficult to summarize concisely. It is the information that “due to the nature of the affairs, the disclosure hampers its appropriate performance”. In order to abuse the use of such a broad and vague category, the item enumerates, although not exclusively, typical categories of activities to be hampered by the disclosure. Namely, when the disclosure (i) hampers correct fact-finding or facilitates illegal or undue conduct in activities concerning audit, investigation, supervision or examination (ii) harms the position of the state or local autonomies in contract, negotiation or litigation matters. (iii) unduly hampers fair and efficient performance of research activity (iv) hampers fair and smooth personnel management (v) harms the due interest of the enterprises managed by the state or local autonomies. In view of the danger of its vagueness, TAGAYA stresses that the administrative agencies should, whenever possible, refrain from using the category. He also suggests framing intra-administrative standards for disclosure so that the discretion would be limited (TAGAYA 1998, 314-319).

V. PROCEDURE, EXAMINATION COMMITTEE AND LITIGATION

1. The head of the administrative body decides disclosure or non-disclosure of the documents within 30 days after receiving the application, and the decision is informed to the claimant. When there is a justifiable reason, the above 30 days period may be prolonged to 60 days (Art. 9, 10). When the documents contain information concerning a third party, the head of the administrative body may inform the concerned party and allow him to submit opinions. When the head plans disclosure under “protection of

30 Typically, *shingi-kai* (deliberative councils).

human life, health..." clause (Art. 5 Item 1, 2) or discretionary disclosure clause (Art. 7), such informing is mandatory (Art. 13).

If the disclosure request is totally or partially rejected, he can file a complaint according to the Administrative Complaints Inquiries Law (cf. OKAMURA 1988, 2-19).

The third party can also file a complaint against the disclosure decision, when the documents contain information about him. In those cases, the head of the administrative body in charge of the complaint must ask for an advisory opinion of the Examination Committee for Information Disclosure. The Committee is set up under the Prime Minister's Office (which will be transformed into the Cabinet Office in January 2001 as a result of the recent Ministries Reform) with 9 members, appointed by the Prime Minister with the consent of both Houses (Art. 18, 21-23)³¹.

When the Committee finds it necessary, it may examine the concerned documents *in camera*. The administrative body cannot refuse the request for that. The Committee can also order the body to classify the content of the documents, according to the formula designated by the Committee (Art. 27)³². The opinion of the Committee is informed to the complainant as well as made open to the public (Art. 34).

Although the Committee can *de jure* only issue an "advisory" opinion, it is expected that the opinion would have *de facto* binding power over administrative bodies. The Outline Commentary sees it "a matter of course" that the administrative body "respects" the opinion. The fact that the opinion is made public would probably sanction this "respect"³³ (UGA 1999, 102). The high-level appointment procedure of the committee members (NOMURA 1997, 109) and its special status in state organization³⁴ would support this. OKUDAIRA comments on this system that it is "in a certain sense, Japanese" (OKUDAIRA/SHIONO 1997, 8).

2. The claimant or the third party can also resort to administrative litigation, claiming for the revocation of the (non-) disclosure disposition³⁵. They are not required to use the above administrative complaint system in advance, but the use of which would usually be beneficial to the claimant, so long as the Examination Committee functions effectively.

Different from the procedure of the Examination Committee, an *in camera* inspection system was not introduced in the litigation process, although there were strong voices demanding such a move. The legislator refrained from the decision, especially

31 As for the Board of Audit, a special Committee is established for the same task, considering its special status, independent from the Cabinet.

32 The so-called "Vaughn index" in U.S. FOIA. *Vaughn v. Rosen* 484 F.2d 820.(1973)

33 The duty to "respect" was, however, not explicitly stipulated.

34 IWAHASHI 1999,68 contends that the committee performs the function of the Cabinet, having comprehensive competence across administrative branches.

35 ACLL Art. 2,8 "Revocation Litigation", which corresponds to "Anfechtungsklage". Cf. OKAMURA 1988, 27; KOBAYAKAWA 1997, 7.

since there is a debate as to the permissibility of the procedure under Art. 82 para. 1 of the constitution³⁶.

Art. 12 para. 1 ACLL stipulates that the litigation “shall be brought before the court within whose district boundaries the administrative authority is situated” (OKAMURA 1988, 35). In the case of the AIDL, this means that most suits would fall under the jurisdiction of Tokyo District Court. Because of the alleged local residents’ burden, this was harshly criticized and became one of the final issues of conflict between ruling and opposition parties. Discussions in the House of Representative led to a compromise which allowed jurisdiction of 8 district courts in regions where high courts are located (Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo) (Art. 36). In the House of Councillors, the opposition parties demanded to add Naha District Court in Okinawa, resulting in Appendix 3 that obligates the Government to reconsider the issue. This jurisdiction issue may, however, have another aspect than local residents’ convenience. In a book written by a journalist, a view of “a certain person in the legal world” is quoted. The view: since Tokyo District Court and Tokyo High Court are under direct surveillance of the Supreme court, they are more administration-friendly than local courts, therefore there is no wonder that the administration desires Tokyo jurisdiction (TSURUOKA/ASAOKA 1997, 204). The author has no idea whether Tokyo courts are in fact, as the journalist indicates, more conservative than others. It is, however, quite probable that such feeling of mistrust against Tokyo Courts expressed in “the view” led to a strong feeling of rejection among lawyers against Tokyo jurisdiction.

VI. REMAINING PROBLEMS

“Special Corporations” (*tokushu hōjin*), i.e. semi-governmental organizations established directly by law or by a special act delegated by a special law, play an important role in Japanese society. They can be said to undertake part of administrative functions. Recently, some of them have been severely criticized in the mass media because of their ineffectiveness and “cozy” relationship with bureaucrats. Opposition parties demanded that the scope of the AIDL extends to special corporations, but this was not accepted. Instead, Art. 42 of the AIDL and Appendix 2 stipulates that the government must take legislative measures concerning special corporations within two years. To discuss this issue, Special Corporation Information Disclosure Commission (Chairperson: Prof. *Shiono*) was established under MCA on July 30 1999.

At the press conference on the occasion of the publication of the Outline by the Subcommittee (Nov. 1, 1996), the deputy chief Prof. *Shiono* compared the AIDL with “strong medicine” for the Japanese administrative style. While having immediate power-

36 Art.82 para1: Trials shall be conducted and judgement declared public.

ful effects, one should also be careful of the side effects, he refers to³⁷. The law is not yet put into effect, so it remains to be seen whether this famous anecdote really hits the mark. The experience of local ordinances surely shows that information disclosure can sometimes immediately change the administrative style, especially improving misdemeanors as in the case of food expenditure.

The information disclosure system, however, involves more than just correcting apparent misdemeanors or “monitoring the use of taxpayers’ money”. The system should be evaluated from the viewpoint of whether the system actually contributes to a more lively discussion in the public sphere³⁸. KATÔ anticipates that the AIDL promotes the way to an “open society” in JAPAN (KATÔ 1999, 230-234). Recently, other than the AIDL, there surely are some remarkable changes in the decision-making process of Japanese administration, at least in a formal aspect. Many councils (*shingi-kai*), which formally discussed issues behind closed doors, now make their protocols open to the public (especially using the internet), and some of them hold discussions with public participation. When there are special interested groups on the issue, the administration ask openly for their opinions, as in the case of AIDS-patient groups and former *Hansen*-disease patient groups in the legislative process of the Law on Prevention and Care of Infectious Diseases (Cf. KADOMATSU 1998). On April 1, 1999, the Public Comment Procedure was stipulated for the legislative process of administrative regulation³⁹. The most important point is, however, whether these formal reforms actually lead to a substantial change in Japanese politics and society.

Note: After finishing the manuscript, the author found out that the Japanese Management and Coordination Agency published the English translation of the law on the webpage (<http://www.somucho.go.jp/gyoukan/kanri/translation.htm>). Due to the time constraint, the author could not adjust the terminology. Deviations from the above translation are, therefore, not necessarily intentional.

37 On the other hand, *Shiono* sees the APL as a “Chinese medicine” that improves physical constitution gradually.

38 SHINDO is sceptical about this. He points out that in the case of local information disclosure ordinances, there has been no positive correlation between introducing the system and the voting ratio, which, SHINDO contends, is one of an index of the activeness of citizen’s participation.

39 Cf. <http://www.somucho.go.jp/gyoukan/kanri/990422.htm>.

Bibliography

- ABE, MASAKI 1995: Foreign Pressure and Legal Innovation in Contemporary Japan: The Case of the Administrative Procedure Act, paper presented at 1995 Annual Meeting, Research Committee on Sociology of Law (Section Meeting (F)) pp. 1-15.
- AMANO, YOSHIKO 1997: *Hôjin jôhō ni okeru nin'i teikyō jōhō no atsukai* (On Treatment of Voluntarily Submitted Corporate Information) in Uzaki et al 1997, 48-59.
- AUER, JAMES E. 1993: Article Nine: Renunciation of War, in: Luney/Takahashi(ed), Japanese Constitutional Law, University of Tokyo Press, pp. 69-86.
- BEER, LAWRENCE W. / ITOH, HIROSHI 1996: The Constitutional Case Law of Japan, 1970 through 1990, University of Washington Press, 1996, 543-547(544).
- DUCK, KEN 1996: Now that the Fog has Lifted: The Impact of Japan's Administrative Procedure Law on the Regulation of Industry and Market Governance, Fordham International Law Journal, Vol.16, pp. 1686-1763.
- FUJII, AKIO 1997: *Hō mokuteki* (The Purpose of Information Disclosure Law), in : Jōhō kōkai kenkyū-kai (Study Group on Information Disclosure), *Jōhō kōkai seido no pointo* (Important Points of an Information Disclosure Scheme), Gyōsei, pp. 6-17.
- FUJIWARA, SHIZUO 1998: *Jōhō kōkai hōsei* (Legal Schemes of Information Disclosure) Kōbundo, 1998.
- FUJIWARA, SHIZUO 1999: *Jōhō kōkai-hō no naritachi* (A History of the AIDL) in: Kobayakawa 1999 (infra), 25-45.
- GASSMAN, JÖRG 1990: Geheimnisschutz, Informationsfreiheit und Medien im japanischen Recht, Carl Heymann.
- HABU, TERUKO 1999: *Jōhō kōkai-hō no ronten to kōgō no kadai* (Issues of the AIDL and its Remaining Tasks) Jurisuto No.1156, pp. 24-29.
- HASEBE, YASUO 1999: *Jōhō kōkai-hō no mezasu mono* (The Goal of the AIDL), in: Kobayakawa 1999, pp. 3-22.
- HATA, HIROYUKI / NAKAGAWA, GO 1997: Constitutional Law of Japan, Kluwer Law International.
- IDE, YOSHINORI 1998: *Kōza jōhō kōkai* (Lectures on Information Disclosure), Gyōsei.
- INOUE, KYOKO 1991: MacArthur's Japanese Constitution. A Linguistic and Cultural Study of Its Making, 1991, University of Chicago Press, pp. 184-205.
- ITOH, HIROSHI / BEER, LAWRENCE W.: The Constitutional Case Law in Japan, Selected Supreme Court Decisions, 1961-7.
- IWAHASHI, TAKESADA 1999: *Jōhō kōkai-hō*, 18-36 Jō (Art. 18-36 of the AIDL) Jurisuto No.1156, pp. 68-74.
- KADOMATSU, NARUFUMI 1998: "*Rai yobō-hō*" no kyōkun to "*Kansenshō yobō iryō-hō*" no kadai (Lessons from "Leprosy Prevention Law" and tasks for the "Law on Prevention and Care of Infectious Diseases"), Hōgaku Seminā, Issue Aug. 1998, pp. 29-32.
- KATŌ, KOJI 1999: *Jōhō kōkai-hō to hirakareta shakai* (The AIDL and Open Society), in: Kobayakawa 1999, pp. 209-244.

- KOBAYAKAWA, MITSUO 1997: Judicial Review in Japan, in: Yong Zhang (ed), Comparative Studies on the Judicial Review System in East and Southeast Asia, Kluwer Law International, pp. 5-14.
- KOBAYAKAWA, MITSUO(ed.) 1999: *Jôhō kōkai-hō – sono rinen to kōzō* (The AIDL – its Idea and Structure), Gyōsei.
- KÖDDERITZSCH, LORENZ 1991 (published 1994): Japan's New Administrative Procedure Law: Reasons for its Enactment and Likely Implications, Law in Japan Vol. 24, pp. 105-137.
- KÖDDERITZSCH, LORENZ 1995: Die Rolle der Verwaltungsvorschriften im japanischen Verwaltungsrecht, Nomos.
- KÖDDERITZSCH, LORENZ 1998: Rechtschutz gegen Verwaltung in Japan. Zeitschrift für japanisches Recht, Volume 5, 1998, pp. 146-162, first published in: Mitteilungen der DJJV vol. 7, 1992.
- KOSEKI, SHŌICHI 1997: The Birth of Japan's Postwar Constitution, (translated by Ray A. Moore. Japanese Original "*Shin Kempō no tanjō*", Chuō Kōrōn Sha, 1989), Westview Press.
- MATSUI, SHIGENORI 1999: *Jôhō kōkai-hō 5 Jō* (Art. 5 AIDL) Jurisuto No.1156, pp. 45-54.
- NAKAGAWA, TAKEHISA 1998: *Jôhō kōkai hōsei ni okeru honnin kaiji o megutte* (About Disclosing Personal Information to the Concerned Person Himself in the Scheme of Information Disclosure) Jichi Kenkyū Vol. 74 Issue 7, pp. 67-85 , Issue 8, pp. 54-74.
- NAKAGAWA, TAKEHISA 1998a: Administrative Guidance: A Tentative Model of How Japanese Lawyers Understood it, Kobe University Law Review No. 32, pp. 1-20.
- NOMURA, TAKESHI 1997: *Fufuku shinsa-kai no igi to kinō* (Significance and Function of the Review Committee) , in: Uzaki et al 1997, pp. 106-120.
- OHASHI, YOICHI 1991: Verwaltungsvorschriften und informelles Verwaltungshandeln, VerwArch 1991, pp. 220-245.
- OKAMOTO, ATSUHISA 1997: "*Kuni no anzen*" to *jôhō kōkai* ("National Security" and Information Disclosure), in: Uzaki et al 1997, pp. 60-71.
- OKAMURA, SHUICHI 1988: Administrative Complaints and Administrative Litigation, in : Z. Kitagawa (ed), Doing Business in Japan, XIV 9 1-49.
- OKUDAIRA, YASUHIRO / SHIONO, HIROSHI, *Jôhō kōkai-hō no seitei ni mukete* (Toward the Legislation of Information Disclosure Law), Hōritsu Jihō, Jan. 1997, pp. 11-23.
- SHIONO, HIROSHI 1998: *Seitei-hō ni okeru mokuteki kitei ni kan suru kōsatsu* (Reflections on a "Purpose-Clause" in Statutes), Seikei Hōgaku Vol. 48, pp. 5-31.
- SHINDO, HYŌ 1998: *Shimin sankā to jôhō kōkai* (Citizens' Participation and Information Disclosure) in: Ide 1998 (supra), pp. 557-589.
- TAGAYA, KAZUTERU 1998: *Gyōsei jôhō no kōkai to hi-kōkai* (Disclosure and Non-disclosure of Administrative Management Information), in: Ide 1998 (supra), pp. 314-330.
- TAGAYA, KAZUTERU 1999: *Jôhō kōkai hōsei no kihonteki no shikumi* (The Scheme of the AIDL), in: Kobayakawa 1999 (supra), 49-63.
- TSURUOKA, KEN'ICHI / ASAOKA, MIE 1997: *Nihon no jôhō kōkai-hō – teikō suru kanryō* (Information Disclosure Law in Japan-Opposing Bureaucrats), Kadensha, 1997.

- UGA, KATSUYA 1998: *Jôhō kōkai-hō no riron* (The Theory of Information Disclosure Law), Yuhikaku.
- UGA, KATSUYA 1999: *Jôhō kōkai-hō no chikujō kaisetsu* (Commentary on the AIDL), Yuhikaku.
- UZAKI, MASAHIRO 1998: *Jôhō kaiji seikyū-ken to “shiru kenri”* (The Right to Claim Information Disclosure and the “Right to Know”), in: Ide 1998 (supra), pp. 137-165.
- UZAKI, MASAHIRO / TAJIMA, YASUHIKO / MIYAKE, HIROSHI 1997: *Jôhō kōkai-hō – rippō no ronten to shiru kenri* (Information Disclosure Law – Issues in Legislation and “Right to Know”), Sanseido.