Information Disclosure In Japan

Jeff Kingston, Temple University Japan

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Information is the currency of democracy.
Ralph Nader, 1989 Japan lecture tour

Popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.
James Madison, 1822

There is no single change that would do more to weaken the [Japanese] bureaucracy and protect consumers than a national freedom of information law.
Miyake Hiroshi, Attorney

Introduction

If information is indeed the currency of democracy, Japanese citizens have been grievously shortchanged. However, recent developments suggest they are on the road to getting more of their money's worth. Since the 1970s there has been a sustained effort by a handful of citizens' groups to promote greater information disclosure at the local and national levels of government. This effort to broaden access to official information has been animated by public outrage over a number of bureaucratic and political scandals and inspired by the evident costs of opacity. Public officials free from scrutiny and accountability have too often betrayed the public trust and conspired against the public interest, leaving behind an onerous tab for ordinary taxpayers and citizens. As the profligate ways of Japan's governing elite have been unveiled in a cascade of scandals, heightened public awareness of the benefits of transparency has gradually eroded their cocoon of privilege and privacy. As a result, there has been an erosion of their immunity from accountability, albeit a gradual and limited one.

This is not to argue that transparency has become the norm; it is certain that there will be sustained resistance to the principle of open government. However, the rising tide of public expectations, greater awareness about the benefits of transparency, the growing sophistication of pressure groups and the proliferation of NPOs are all exerting pressure for greater accountability and public participation in government policymaking.[1] The fundamental crisis in the legitimacy of government is both sustaining demands for greater citizen participation and trimming the wings of the mandarins.

The US Freedom of Information Act, enacted in 1966 and amended in 1974 in the aftermath of the Watergate scandal (over the veto of President Gerald Ford),
has been a model for advocates in Japan. Disclosure laws are designed to set the ground rules for relations between private citizens and public servants, obligating the latter to release public documents

[1] This positive perception was recently confirmed in an interview (June 22,2005) with Miki Yukiko, Executive Director, Information Clearing House.

on demand subject to the rules and procedures stipulated in the legislation. Many democracies around the world have such legislation in place; Great Britain only in 2005.

In Japan, citizens' groups began to request information about pesticide use, food additives and drug side effects in the 1960s; they aimed to prevent public health tragedies by pressuring bureaucrats to disclose information and act with greater concern for public safety. While advocates suspected the government of negligence in these areas, they had no way of lifting the veil of secrecy that shrouded government deliberations and policymaking. In the end, their efforts proved in vain.

In the 1970s, growing support for a freedom of information policy was fueled by the Lockheed bribery scandal involving Prime Minister Tanaka Kakuei. It was information made public in the U.S. that proved decisive in breaking open the case and highlighting the merits of greater transparency to Japanese citizens. In 1976 growing interest in the ethics of disclosure led to a public demand for a freedom of information law by the Japan Consumers Federation. This was followed in 1979 by a proposal from the Japan Civil Liberties Union (Jiyu Jinken Kyokai) that set out guidelines for a national disclosure law and, in 1981, by a Declaration of Rights to Information Disclosure by the newly formed Citizens Movement, an umbrella group for organizations involved with consumer rights and civil liberties.

Throughout the 1980s there was a lively debate about the need for transparency (joho kokai- literally "information disclosure") and the principle of shiru kenri (the right to know). Transparency and disclosure were actively promoted as a way of improving democracy and government while facilitating public participation in creating the nation's social and political agenda. Poor access to information was depicted as a significant national defect with great potential for harm to the people and an obstacle to the assertion of their constitutional rights.

In 1985, families of victims involved in Japan's largest air crash were driven to use the US Freedom of Information Act to acquire information related to their litigation. The media focused on the irony that information about events in Japan was more readily available overseas, generating a feeling that Japan was out of step with international standards. Citizens groups such as the Japan Civil Liberties Union capitalized on this sense of embarrassment by lobbying to have information disclosure placed on the national agenda.

However, in the absence of legal sanction, the spirit of disclosure languished amidst official inertia and resistance. In Japan, government is to a large extent at the mercy of the bureaucracy. Many LDP members are themselves former civil servants, and politicians are heavily dependent on bureaucrats for information and drafting legislation. In addition, many politicians play a brokering role between business and the bureaucracy and would prefer to shield such activities from public scrutiny. This helps explain why LDP politicians have been such reluctant supporters of information disclosure. Thus, while the theater of reform inched along at the national level, the substance of reform was left to citizen advocates at the local level.

Modest Origins, Growing Expectations

While politicians postured on the national stage, a handful of activists and grassroots citizens groups were working effectively to advocate transparency as a basic principle of democracy. Although demands for disclosure started modestly, a wildfire of expectations rapidly engulfed Japan, overcoming the best efforts of bureaucratic firefighters to bring it under control. At the beginning of the 1980s, few could have anticipated the developments that in the 1990s popularized the concept of public access to

government files and made it a yardstick by which Japanese governments are judged. In a short span of two decades, what was once anathema to the ruling elite has now become a common and judicially sanctioned practice that officials are trained to implement.

After the first hesitant steps in the 1970s, the pace of activism quickened. The Japan Federation of Housewives Associations (Shufuren) took the government to task for its lack of transparency, while the Consumers' Union of Japan (Nihon Shohisha Renmei) and the Japan Civil Liberties Union lobbied for an information disclosure law on the U.S. model. In 1981 the latter group published a model ordinance that has been used extensively by local government bodies in crafting their own laws. In tandem with local citizens' groups, lawyers' associations and opposition party politicians, and drawing on favorable media coverage, advocates campaigned for information disclosure ordinances at the local and prefectural levels.

In response to this grassroots campaign, localities acceded to demands for greater citizen input, probably never imagining that it would become such a "nuisance". In 1982 the first town and prefectural information disclosure ordinances were enacted, initiating a trend that swept through Japan involving 36 prefectures and 136 towns and cities by the end of the decade. By 1996 all 47 prefectures had passed information disclosure legislation and by the end of the century more than 500 towns, including all major population centers, had adopted similar ordinances—a bewilderingly rapid transformation only made possible by the efforts of citizen groups. Conservative politicians joined their progressive colleagues and climbed on board the transparency train, recognizing the electoral advantages in an era of growing public skepticism about politicians and bureaucrats. Their support was crucial in transforming it into a mainstream issue and encouraging local and prefectural governments to adopt such ground-breaking legislation. They may have underestimated the implications of their actions and probably did not expect that the new rules would have such a strong impact in the years to come.

However, the adoption of new legislation did not mean that all the barriers to transparency were removed overnight. Patricia Maclachlan (2000: 17) notes that the disparate ordinances share a core of principles based on "the promotion of citizen participation in local government; the enhancement of citizen trust in and understanding of local administration; the promotion of the impartial implementation of government policy; and the realization of governmental openness." However, the achievement of such grand ideals has been a great challenge. At the outset, citizens who asserted their rights under these ordinances found that the spirit of transparency had not permeated among the officials responsible for implementing them. Many of the statutes are couched in vague language that allows bureaucrats considerable latitude in deciding what documents should be open to public perusal. The opportunities for stonewalling, manipulation and obfuscation are rife and draw considerable public ire.

Where citizens wish to challenge the authorities, there are various routes for appeal. In cases where requests for information are denied (hikokai), people can appeal to a local government review committee established to deal with disclosure cases. Generally, the local executive appoints these committees subject to legislative approval. While these review boards make recommendations, they cannot force disclosure. Citizens also have resort to legal action and can appeal to the courts for a legally binding ruling forcing disclosure. There have been a number of such lawsuits in the 1990s, heavily covered in the media, leading to revelations of lavish entertainment and faked travel expense claims. In exposing the profligate spending of local officials, citizen groups have reinforced public skepticism towards bureaucrats and provided impetus for a national information disclosure law. The sensationalizing of these cases by the media has also ensured maximum publicity for their efforts and public sympathy for their goals.

Local Efforts, National Consequences

The local information disclosure ordinances and their role in instituting greater levels of accountability have been examined by Lawrence Repeta (1999, 19) who regards them as creating a "revolution in the nature of the relationship between citizen and government." He focuses on the role of lawyers affiliated with the Zenkoku Shimin Ombudsmen (National Citizen Ombudsmen group) who have run several well-organized disclosure campaigns and devised a system of rating prefectures in terms of their openness. Repeta tells a fascinating story of how the legal system has been used by activists to promote open government and democracy. It is an object lesson in the unforeseen consequences of legal change and the degree to which seemingly inadequate reforms can be made to alter traditional forms of governance and the relationship between officialdom and the public. The bureaucrats, once referred to as okami (gods) with a mixture of fear and reverence, have been transformed into objects of recrimination, scorn and ridicule. The revolution referred to by Repeta is nothing less than the broad (and novel) expectation that officials are accountable for their actions to the people.

As a result of the new laws and heightened public awareness of transparency issues, official prodigality has come under increasing scrutiny. During the 1990s the Japanese lexicon was enriched by three new terms—kan-kan settai, enkai gyosei and karashutcho—describing some of the seamy realities of public life. Kan-kan settai (official-to-official entertainment) refers to the widespread practice of local government officials entertaining national government bureaucrats to curry favor and hopefully tap into central government funding. Enkai gyosei (partying bureaucrats) is the derisive appellation for officials who enjoy high living on the public purse. Karashutcho (empty business trip) refers to the claiming of travel expenses for non-existent business trips. Since 1994, media exposés of such practices have molded perceptions of public officials, highlighting the need for greater oversight and generating widespread public enthusiasm for still greater levels of information disclosure.

From the mid-1990s the Citizen Ombudsmen, a national network of activist lawyers, simultaneously filed similar information requests to all prefectural governments. In comparing the responses and then rating the openness of the various governments, the Ombudsmen generated considerable media interest and sent two clear messages to government officials: insufficient transparency would produce a lower rating that would reflect badly on both the prefecture and its public officials; and lavish wining and dining and falsifying expense claims would no longer be tolerated.

The size of local government entertainment budgets has been another key issue. The cost of entertaining central government officials, usually undertaken by prefectural government representatives dispatched to Tokyo solely for this purpose, amounted until recently to tens of millions of dollars and was hardly the nation's best-kept secret. However, the media had ignored this practice until citizens exercised their new rights to access government information and uncovered the extent of the spending and how it was systematically covered up. The public was shocked to learn that the 47 prefectural offices spent some $250 million a year on entertaining central government bureaucrats, a revelation that provoked considerable anger given the prolonged economic slump and declining tolerance of extravagant spending of taxpayer money. Once the story broke, the media played a key role in keeping such practices at the center of public attention for many months. During the latter half of 1995 alone, fifteen editorials appeared in national newspapers condemning excessive entertainment by civil servants.

These investigations showed that filing false or inflated expense claims had become routine and that preparing an obscuring paper trail was part of the clerical norm. It became clear that false documentation, padding expenses and the sequestering of fraudulently claimed funds in unofficial accounts was standard practice throughout the nation, a clever shell game that had gone unquestioned until citizens blew the whistle. Even government auditors were caught padding expenses. One of the

more eye-opening exposés involved counting the number of trips (37) ostensibly taken by Fukuoka officials on the bullet train at a total cost of Yen 3.7 million—at a time when the tracks were so badly damaged by the 1995 Kobe earthquake that the train in question was out of service!

The media coverage and public outrage over this squandering of public funds reveals how in a very short span of time the local disclosure ordinances have transformed the relations between the people and government. These revelations also changed the conduct and habits of government. Moreover, prosecutors also began taking a dim view of such practices, arguing that entertainment at such lavish levels can constitute a bribe. Suddenly, prefecture after prefecture began to clamp down on such entertainment. More than 20,000 officials around the country were reprimanded for filing false expense claims. What had been "business as usual" was now forbidden and subject to punishment—demonstrating the effectiveness of the legal system in promoting and applying standards of conduct in the public service, and the costs to those who do not comply.

Without the support of politicians, disclosure ordinances would either not have been passed or languished as little more than legislative ornaments. What is interesting is that these politicians range from outspoken defenders of freedom of information to opportunists, and include conservatives, liberals, mavericks and mainstreamers. Because they are accountable to their constituents rather than to the government, they have pushed transparency more forcefully and effectively than the courts. The emergence of such politicians across the political spectrum reflects popular support for disclosure and a desire for information on how taxes are being spent or squandered.

Prefectures now run annual training seminars aimed at weaning officials responsible for documents from established anti-disclosure attitudes. Officials are trained in how to handle requests and, in some prefectures, information specialists are employed to ensure proper interpretation of disclosure guidelines. In many cases, but certainly not all, local legislatures have revised ordinances in tune with user complaints and in line with court rulings, effectively expanding the scope of transparency and limiting exemptions and discretionary denials. Limits on who may request documents have been liberalized and reforms instituted to facilitate information requests.[2] And disgruntled citizens know they have recourse to the courts, something that may come as a surprise to many observers who have assumed, with considerable justification, that the court system is biased in favor of the government.

Despite the vagaries of the judiciary, the pro-disclosure posture of the courts has far exceeded expectations and has influenced bureaucratic practices and attitudes. A reversal ratio of 65.2% as of March 1999, in which the courts overturned information disclosure denials by local and prefectural governments in two-thirds of cases heard, is surprisingly high. As Repeta (1999,19) asserts, "The courts' adoption of such an aggressive role in correcting administrative behavior is without precedent in Japan's modern legal history." Why? According to Miki Yukiko it is because the burden of proof rests on the government in defending non-disclosure. In addition there is no practice of *in camera* sessions so that the government typically does not make the documents in question available for the judges to evaluate. Without access to the documents, it is difficult for the judges to rule in favor of disclosure denials and difficult for government lawyers to make their case about the harm that would result from disclosure.

More recently, Jonathan Marshall (2002) has confirmed the pro-disclosure inclinations of the courts, finding that in more than 50% of cases plaintiffs were successful in gaining greater disclosure than local

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authorities had decided to grant.[3] It is worth bearing in mind that expanded disclosure does not mean full disclosure and may very well be trivial in its effects. Nevertheless, this is still an astounding figure given the courts' usual reluctance to second-guess administrative decisions; plaintiffs typically win in less than 10% of all administrative lawsuits. Given ongoing fast paced judicial reforms, aimed at creating a more activist judiciary, the implications of this trend are vast.

Fifteen years of information disclosure at the local and prefectural levels between 1982 and 1997 generated strong popular demand for a national information disclosure system. The pro-disclosure stance of the media, echoed to some degree in the courts, created an extraordinarily favorable environment for its implementation. Successful application of information disclosure has altered citizen-state relations and generated higher expectations inimical to the closed file approach to information access that has been the bureaucratic norm. This revolutionary development cannot easily be squelched: too many positive precedents favoring greater transparency have been established while bureaucratic efforts at defending institutional turf have lost credibility and raised the public ire. As a result of kanson mimpi (literally "revere the official, despise the people", shorthand for bureaucratic arrogance), public officials in Japan have lost their privileged status and freedom from scrutiny for good. Self-inflicted wounds have irreparably undermined the facade of power and cocoon of privilege that in the past have permitted excesses, facilitated systematic defrauding of the public purse and stymied public oversight. The bureaucrats have lost their unbridled autonomy and more than ever are subject to popular sovereignty, a trend that is gaining momentum.

National Information Disclosure

Legislation was approved in 1999, but promulgation was delayed until 2001 to allow public officials time to prepare for this dramatic innovation at the same time they faced other administrative reforms including a reduction in the number of national ministries. The task of establishing a unified filing system was another major reason for the delayed implementation. In addition, critics have pointed to the time-consuming process of weeding out "inconvenient" documents. At the end of 2004 an information request concerning government ministries use of waste disposal services indicates that in the period between 1999-2001 there was a suspiciously huge increase.[4]

The favorable political environment of the mid-1990s facilitated passage of a law that was unexpectedly progressive given its conservative sponsors. With reform in the air and the creation of an administrative reform council, support for freedom of information gained momentum. Politicians and the media raised public expectations that improved governance would be the major benefit of increased transparency in government proceedings and policy deliberations. The logic of reform rested on open government and those opposing it were easily depicted as defenders of vested interests and part of the problem; transparency was the solution. The public's right to know and ability to access pertinent information also fit with the spirit of deregulation. With Thatcherian enthusiasm, the Hashimoto administration advocated a reduced role for government and saw deregulation as a means to revive the economy and improve efficiency. The mantra of deregulation and restructuring—the oversold solution to what ails contemporary Japan—proved popular at this time and had consequences for information disclosure. In a changed environment where the government's refereeing role would decline, consumer

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[3] According to the Information Clearing House, in 20% of these cases the court ordered full disclosure.

[4] Part of this increase can be attributed to administrative reforms that now permit ministries to dispose of documents that they previously were barred from destroying. In connection with this a new national archive law in 1999 has promoted a centralized, permanent system of documentation involving transfer of documents from the respective ministries to the national archive staffed by information specialists. Interview 6/20/05 Miki Yukiko.

citizens were encouraged to become more involved and knowledgeable. Thus, the government was trapped by its own logic—it could not advocate deregulation and at the same time restrict the flow of information citizens would need to participate more effectively in society and better protect their own interests.

The final legislation reflects a compromise. Bureaucratic hostility and political wrangling led to the insertion of provisions that weakened the law as a tool of transparency. Exemptions to disclosure were expanded and the scope of non-disclosure was kept vague, while special public corporations (tokushu hojin) were not subjected to the law until 2002. [5] Despite these deficiencies, the new legislation provides the legal basis for expanding public oversight of, and participation in, the affairs of government. It includes some significant improvements over local disclosure ordinances. For example, the national government is bound to respond to requests from any person and there is no residency requirement as is common in the local ordinances. In another major step forward, the national law applies to any document in the possession of an administrative agency and available to officials in the performance of their duties; local regulations typically applied only to documents reflecting some formal action by a government official. [6]
Thus, at the advent of the 21st century, an era of transparency was dawning for the Japanese. Finally, after decades of campaigning, advocates have earned a means to slowly and incrementally bring about an end to unaccountable government and official impunity. However, despite grassroots support for open government and the new legislation, successful implementation will require well-organized and independent citizen groups that are able to sustain pressure, focus on critical issues and effectively marshal the information they gather. The legislation will have little impact unless there is a significant community of requestors able to demand specific kinds of information and put it to effective use in the policymaking process. In this sense, the 1998 NPO legislation is partially encouraging in that independent policy organizations can now obtain independent legal status. However, this legislation is also problematic and reflects the government's inclination to monopolize the policymaking process and to keep non-government organizations dependent and subject to bureaucratic oversight. However, Repeta (1999, 42) draws a more optimistic conclusion: "The NPO law may be a harbinger to the appearance of better organized and informed citizen groups articulating alternative visions of the public interest and more effectively participating in policy debates of the future."

Electoral Implications

The mayor of Yokohama, Nakada Hiroshi, was elected in 2002 promising to make government more open to public scrutiny. Upon assuming office, Nakada encountered the expected bureaucratic resistance to open disclosure. City officials complained that publishing lists of people attending public functions would infringe on their privacy—an example of how selective concerns about privacy are often invoked to inhibit transparency. The mayor responded with the clear message that public money should not be spent on anything that cannot pass public scrutiny. Details of his own social expenses are accessible on the city's homepage and he has set other disclosure precedents by divulging the balance of municipal debt and the market price of real estate owned by the city.

Supporting transparency has become good politics. Around the country, advocates have generated a groundswell of popular concern about dysfunctional government practices and put information disclosure on the nation's political agenda. These concerns are having a pay-off at the ballot box: in several prefectures, candidates in gubernatorial elections backed by mainstream political parties have been defeated, often by political neophytes with no organization and limited campaign funds. In recent

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[5] In 2002 a FOI law was passed that covers thee public corporations.
[6] In addition, local ordinances have been revised to incorporate provisions of the national law that broaden the scope of documents subject to disclosure. Interview 6/22/05 Miki Yukiko, Informational Clearing House.

years voters have elected governors eschewing party affiliation in the prefectures of Akita, Chiba, Miyagi, Nagano, Tokushima and Tochigi. These newcomers have run against the establishment, embracing open government as a keystone of their campaigns. They have effectively tapped public anger against a rigged system that is widely viewed as a major obstacle to Japan's recovery from a prolonged economic slump.

One of the most visible of the new-style governors is Tanaka Yasuo, a famous novelist and commentator who won an unexpected electoral victory in 2000 against the handpicked successor of the outgoing governor of Nagano. Tanaka ran on a simple platform of more open government and "no more dams". He also benefited from public outrage over dubious spending on the Nagano Olympics (1998) and the destruction of related documents that could have been used to indict officials. His stance on dams also won him kudos from environmental activists. Not content with simply thumbing his nose at the political establishment's backroom dealing, upon taking office Tanaka installed himself in a literally transparent office in the lobby of the prefectural government building and publicized an open door policy for citizens to drop in. This novel openness to his constituents, combined with frequent town hall-style meetings and his stance against environmentally destructive, wasteful spending has ensured him high approval ratings. [7]

Until the economic implosion of the 1990s, voters tolerated the peccadilloes of their politicians as long as they delivered the goods. In Japanese politics, pork-barrel projects are the basis of the doken kokka (the construction state). As detailed by Gavan McCormack (1996) and Alex Kerr (2001), the vast amounts of money channeled into Japan's largest industry literally cement the political ties between central government politicians and their local support base. They also provide ample opportunity for siphoning off campaign funds and give politicians at all levels the wherewithal to maintain and expand their influence. The system of bid rigging (dango) revealed in a series of scandals in the 1990s exposed the systematic plundering of the public purse by unscrupulous businessmen and their political sponsors. Information disclosure laws were essential to gathering evidence on bid rigging on sewer systems in particular. Armed with this experience, activists are expanding their investigations into other misappropriations of taxpayer monies, estimated at 15-30% of the value of typical public works contracts.

The early years of the 21st century thus provide a basis for limited optimism about the trend favoring open government and a significant diminution of the immunity from scrutiny and accountability that enables corruption to flourish. Just as exposés of lavish entertainment spending and falsification of expense claims drew public ire, the squandering of the far larger sums involved in the doken kokka has shaped public perceptions of Japan's elected and non-elected government officials. They have emerged as co-conspirators in a massive fraud at a time when people were feeling the economic pinch and growing anxious about possible loss of jobs and security.

[7] According to Miki Yukiko (6/22/05) who serves on the Nagano Prefectural FOI Review Board, disclosure has become a political weapon. For example, Tanaka has many enemies in the local media and among local politicians and their supporters. They appear to be making requests designed to embarrass him not only by making damning information public, but also by provoking non-disclosure as a method of tarnishing his government's image for transparency. For example, it was once thought that documents related to Nagano's Olympic bid were all destroyed to cover up malfeasance. Tanaka successfully campaigned against such corrupt practices. Now it appears that copies of some of the documents have been discovered and that the government is refusing to disclose them. It argues that disclosure would adversely affect ongoing criminal investigations and possible prosecution.

Japan's *Glasnost*

Developments at the local level have nurtured new attitudes, raised public expectations and generated new norms in the practices of government and in the relations between citizens and government officials. In the nearly two decades between the enactment of the first local information disclosure statute (1982) and the implementation of the national information disclosure law (2001), the political landscape has changed dramatically in favor of open government, as revelations of abuses have generated a momentum in support of transparency. Central government officials have been presented with a fait accompli, an insurrection that began at the fringe and has relentlessly bored into the political mainstream. The battles won in the legislatures, courts, local assemblies and media have created a more favorable context for fuller information disclosure. Transparency advocates have won the hearts and minds of the people, generating a climate of *glasnost* aimed against the bureaucrats and their grudging concession of power. Their ability to control the information that has enabled them to monopolize and direct policymaking is slowly, incrementally eroding. It is becoming ever more difficult to shield policymaking from public view. The verities and assumptions of governance are fading and the relations between civil servants and the public are being transformed by Japan's quiet revolution.

Naturally it is too soon to proclaim victory and exult in unconditional surrender. So much change has happened so rapidly that the implications are still being digested and defenders of the status quo remain well entrenched. Furthermore, the institutions in place to support transparency remain very weak. Clearly the system has some serious teething problems.

From Freedom of Information to Freedom of Surveillance

Despite the very real signs of change vestiges of the old ways are evident, perhaps most alarmingly in the Defense Agency. In May 2002, barely a year after the Freedom of Information law took effect, the Defense Agency was caught transforming it into an excuse to compile dossiers on 142 requestors. The *Asahi* warned: "There is something ominously anachronistic about the fact that the Defense Agency abused the very system of information disclosure intended to encourage 'administrative openness'." [8i] Lawrence Repeta, currently a professor at Omiya Law School, added: "A freedom of information law is intended to promote citizen knowledge of government, not government surveillance of citizens."[9] All government agencies are subject to the disclosure law and must provide requested documents unless they can demonstrate that any of six exemptions applies. [10] Both Japanese and foreign nationals may request documents and need not state a reason for the request or provide personal details. In violation of a 1988 privacy law and clearly trampling over the spirit and intent of the Freedom of Information law, Defense Agency officials compiled lists of requestors, conducted investigations on their backgrounds and classified them so as to identify likely "troublemakers". Staff at the Agency then tried to cover up these extra-curricular activities once reporters had gotten wind of them.

A reporter was tipped off about the illicit background investigations and the storage of requestors' dossiers on the Agency's computer system where they would be widely accessible to staff. The media pounced on the story, raising questions about why the Agency would mount unauthorized investigations against Japanese nationals trying to find out what the armed forces are up to. The resulting brouhaha killed debate on proposed legislation on information protection that had drawn

[8] *Asahi*, 5/29/02.
[9] *International Herald Tribune* 6/17/02
[10] There are six areas of exemptions from disclosure covering: 1) individual citizen's records; 2) business information of private firms; 3) national security; 4) judicial procedures involving police investigations and prosecution of criminal cases; 5) harm to government decision making, and;6) harm to government administrative procedures. In denying disclosure the government is obliged to explain the reason for doing so and this is subject to appeal.

sharp criticism from advocates of transparency. The new legislation would have effectively become the media muzzling law in that reporters who uncovered evidence of corruption among public officials would not have been allowed to name the people involved without receiving their permission first. The government tried to portray the proposed law as an attempt to protect the privacy of individuals from an often predatory press, citing cases of an insensitive media intruding on the grief of bereaved relatives and otherwise offending public sensibilities. There is no shortage of such cases. In their coverage of a Wakayama curry-poisoning incident (" the crime of the century") and a sarin gas attack in Nagano in the 1990s, the press acted as both prosecutor and judge, convicting the accused with sensational, obsessive coverage akin to that accorded to the O.J. Simpson case in the US. In response, media organizations have adopted tougher rules of conduct and self-imposed restraints aimed at placating critics and warding off legislation they regard as placing unconstitutional and unwarranted restrictions on their activities. Media advocates argue that it is their very success in keeping the public informed, and digging out information damaging to politicians and government officials, that has motivated the government's push for new controls, using evident media abuses of private individuals to draw a curtain around the activities of public officials.

The Defense Agency scandal has effectively worked against these attempts to muzzle the media. Even before the story broke, the new legislation faced substantial revisions; but in the wake of the scandal further attempts to place restrictions on the press face an uphill battle in the court of public opinion. [11ii] Yet again, government officials were caught breaking the rules thanks to media oversight. In this climate, those seeking to curb the media are suspected of having something to hide.

While the proposed bills on information protection and human rights started out as vehicles to protect people from government abuses, they were deftly transformed into measures to regulate the media and clamp down on whistleblowers and negative coverage about politicians and bureaucrats. Such seems to be the logic behind the Defense Agency's own efforts to reinterpret freedom of information as an excuse for prying.

Why would the Agency gather such information? Presumably requestors were viewed as potential enemies and exercising their legal rights was the basis for suspecting them. Gregory Clark suspects that the SDF "have been creating and distributing dossiers on the ideological beliefs of those who exercise their right to inquire into SDF affairs … [because] Japan's security agencies have long provided similar dossiers to firms keen to deny employment to pro-communists and other leftwing elements." [12iii] Ironically, a statute designed to facilitate public oversight has been interpreted as a license to investigate anyone exercising this right. This is a significant threat to information disclosure and sends a chilling message to other citizens inclined to exercise their legal rights: Big Brother really is watching.

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[11] Although new privacy legislation enacted in 2003 omits the controversial intrusions on media freedom, elements of the bill are still seen as too ambiguous and could be broadly interpreted in ways that have nothing to do with protecting citizens from snooping into their personal information. Under the law proposed in 2002, a reporter interviewing a politician involved in a bribery scandal would have been forced to get permission to use such information. Under the new bill, such permission is no longer required and punitive sanctions have been dropped. The government is also enacted a related bill designed to protect personal data held by central government offices. This bill introduces penalties for government employees who pass on personal information to third parties without just cause. Private firms are also subject to penalties for unauthorized use of personal data. Concerns about adequate safeguards remain, as do suspicions about the government's use of data collected under the JUKI Net system. The media has given a lukewarm reception to the new legislation, welcoming the revisions affecting journalism while expressing concerns about vague provisions that could permit government intrusion on civil liberties.

[12] *Japan Times* 6/15/02.

After being caught violating the 1988 privacy statute and subverting the information disclosure law, the Agency managed to inflict additional wounds on itself. First, it denied compiling lists and posting them on its internal computer network; it then admitted it had done so, but denied any wrongdoing. The bungled handling of a report generated by an in-house investigation into the case made matters worse. Initially the Agency released a four-page, sanitized summary of a longer report, but leaks about the longer version and reference to an aborted cover-up forced its subsequent release. This episode demonstrated a flair for disastrous public relations and reinforced perceptions that the Agency had something to hide. Moreover, the involvement of party bosses in deciding which version of the report to release implicated PM Koizumi's ruling coalition and further tarnished his claims to be a committed reformer. The desperate attempts by party bosses to evade responsibility for suppressing the longer, damning version of the report only added to the debacle.

Although political embarrassment over the affair has been acute, it has made it even more difficult to obstruct transparency. On a larger and more embarrassing scale, central government officials have learned the hard way the lesson already learned by their local government counterparts: thwarting public sentiments on open government is a recipe for disaster. The collateral damage to the government has also been substantial as opposition parties took the opportunity to shelve debate on crucial legislation aimed at transforming Japan's military posture and ability to act in emergency situations. The attempt to neutralize the freedom of information law has only served to highlight the dysfunctional character of the government and reinforce the perceived need for the law. The disingenuous and clumsy handling of the affair made a mockery of the public trust and underlined the need for civilian oversight.

The damage that the Defense Agency has inflicted on itself is incalculable. After WWII, the armed forces were disbanded and then resurrected under a constitutional subterfuge at the insistence of the US. The constitutional legitimacy of the SDF has been questioned from the outset and the Defense Agency has taken pains to cultivate an image distanced from the military abuses of the past and memories of political suppression under military controlled governments in the 1930s and 1940s. This affair has undone those efforts and revived invidious comparisons. The SDF operates under a bitter legacy that places it under special scrutiny and is expected to meet the highest standards of conduct. Even its advocates would be hard pressed to defend this blatant attempt to derail the spirit of transparency in a way that can only arouse suspicion about its motives and routine practices.

Prominent among the Agency's critics is Umebayashi Hiromichi, president of the NPO Peace Depot. In his view, "the Defense Agency failed to honor even the most basic of human rights, which is that no administrative entity may discriminate against citizens for their thoughts or beliefs. The Agency's failure goes to show there are administrative authorities who think nothing of arbitrarily deciding what constitutes human rights … It is now clear that these individuals understood squat about the spirit of the law… Was this Defense Agency scandal just an aberration? I don't think so. On the contrary, it simply embodied what is totally 'normal' among central government bureaucrats who believe their job is to keep the citizenry in line." [13iv] Umebayashi expresses pessimism about the prospects for freedom of information in the absence of a fundamental "cultural revolution" among bureaucrats.

The public furor over the affair, however, reveals an encouraging vibrancy and resilience in Japanese society. Not too many years ago a scandal like this may not have seen the light of day. Now, the media is shining a harsher light on the government, ferreting out stories that keep the public informed about what the government is up to. The scandal has produced a consensus that personal "background checks" are inimical to the spirit and practice of information disclosure. In addition, the public has been alerted to the need for increased vigilance and oversight of the government. In this sense, the Defense

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Agency has unwittingly buttressed support for transparency and undermined government resistance to information disclosure and the media's watchdog role.

Teething Problems

Users of FOI in Japan cite a number of problems with how the law is being implemented and advocate some revisions to facilitate access. One of the major problems involves the appeal process for cases in which the requestor's request for documents is either partially or fully denied. In such cases the requestor may file an appeal with the review board established for each ministry within 60 days of being informed about the ministry's disclosure decision. After the appeal is filed, there an internal review of the disclosure decision and if this does not lead to a change in the decision the ministry is obliged to refer the case to the review board. Typically, members of the review boards are staffed by lawyers, academics or those who participate in relevant NPOs. They review the documents under question and render a decision. According to Miki Yukiko, Executive Director of Information Clearing House, review boards have overturned information denials in approximately 40% of cases brought to them. However, the problem in the system is the lack of a time limit for the ministry to file the appeal. Thus, there are significant opportunities for foot-dragging and stonewalling. Furthermore, there is no time limit on the review board to render its decision nor is there a time limit for the ministry to comply with a review board decision in favor of fuller disclosure. FOI is thus undermined by a time consuming process enmeshed in red tape. The second major problem is the cost of fees associated with processing a request. There are no fee waivers as in the US for requests by the media or for public interest purposes. Many of the disclosures are made digitally and high fees are charged, about Yen 220 per 0.5 megabyte. Given the volume entailed in some information requests, including photos and data, fees can quickly mount to Y500,000. The digital files are scanned from the originals which according to users also makes them more difficult to use. Even if documents are photocopied, a similar request at Yen 20 per page could cost Yen 300,000. Fees of this magnitude are beyond the resources of most NPOs and private citizens. The third area of concern involves the exemptions and loopholes that ministries use to avoid disclosure and how these are invoked inconsistently. Similar requests to different ministries can yield very different outcomes, generating uncertainty among requestors about how to best access information.

When the national information disclosure was passed in 1999 there was provision for revision of the bill in 2005 but the government has decided not to initiate any revisions. Hearings were held under the Justice Ministry in 2004-2005 to gather information about how information disclosure was working, what problems there have been and what revisions would be welcome among users. However, the government has decided, without explanation, not to revise the legislation. Clearly, the government understands that open government presents formidable challenges and is not easy to implement. There is also a sense that implementation has been improving and the government may be taking a wait-and-see approach before proposing revisions. It is expected that the opposition Democratic Party of Japan will table revisions in 2005, including a fee waiver provision, but prospects for the DPJ bill are not encouraging.

Conclusion

Information disclosure is changing the way governments and officials conduct their business. Citizens are propelling Japan's quiet revolution by exercising their new power to monitor government officials and hold them accountable. This surprisingly successful experience has fundamentally changed citizens' assumptions about the nature of political power and raised their expectations, forcing bureaucrats and politicians to scramble to keep pace. Bureaucratic foot-dragging and stonewalling have served only to galvanize public support for more transparency, cheered on by a generally supportive

media. In order to win votes and address the concerns of their constituents, politicians have jumped on board the disclosure bandwagon, lending power and legitimacy to the popular quest for enhanced oversight of government activities. One unanticipated development in this story is the support for disclosure shown by some of the courts and their emergence as administrative overseers in a manner that has eroded the bureaucracy's power, autonomy and practice of self-oversight. In this sense the 1990s was a lost decade for the bureaucracy, as the emergence of a more vibrant civil society has been achieved at the expense of its cherished prerogatives. This quiet revolution is proceeding case by case, incrementally and cumulatively as citizens learn how to use their newfound powers and wield them more effectively. This process is gradually leading to more informed and responsible citizen participation in the affairs of government and society.

There have been some recent encouraging developments towards improving access to government information. The privacy protection law enacted in April 2005 allows individuals to request information that the government holds about them. For example, refugees may now request the government to release all data related to their requests for asylum. The new bar exam now tests aspiring lawyers about administrative law, including FOI procedures. In addition, nearly one quarter of the new law schools opened in 2004 have or are in the process of establishing legal aid clinics designed to provide free legal advice to those who need it. Some law students will also do internships at NPOs, giving them access to legal advice they otherwise could not afford. The Omiya Law School has established a specialized legal aid clinic for FOI requests, effectively helping individuals and organizations understand how to prepare and process requests. Thus many young lawyers will have greater knowledge of and experience in FOI and public service. It is also encouraging that many government agencies and departments are taking the initiative to publish much more about government activities, policies, deliberations and documents on official web sites that are easily accessible. Thus, all individuals have far great access without having to go to the trouble of filing a request. This is an example of the government increasingly adopting the habits of transparency even if it does not entail full disclosure. Better access to such information is important because it helps requestors better prepare their information requests and in some cases may lessen the costs of requests by allowing requestors to better define and limit their requests. However, even though governments increasingly have taken this initiative and are expanding access, it appears that few people are actually accessing the government sites. To some extent this may reflect low public awareness of what is freely available and scant media coverage.

It remains to be seen if the courts will remain supportive of transparency. In general, district courts have been most supportive of disclosure while the appeal courts have usually sided with the government. Currently there are 30-40 cases pending involving the national disclosure legislation implemented since 2001. These cases will provide some basis to assess whether the courts will provide the same degree of support on the national stage that has helped FOI to be as successful as it has been at the local and prefectural levels.

The success of information disclosure in Japan depends on a number of interrelated factors. Clearly, there have to be individuals and organizations willing to submit requests and deal with the time- and energy-consuming obstacles to accessing government information. It is also crucial that there are organizations enjoying a degree of autonomy insulating them from government pressures that know how to effectively use requested information to exercise oversight and participate in policymaking. Voters also need to elect politicians who will support disclosure. Intervention by politicians has proved decisive in many cases, for better and worse, highlighting the importance of electing political leaders who will establish and interpret rules favorable to transparency. Since the Diet will in coming years play a key role in determining the extent and evolution of information disclosure, representatives' stance on the issue will be a decisive factor. In addition, proposed judicial reforms that would reduce the influence of the government in the training of judges, and shift promotion decisions out of the Supreme Court, offer the opportunity to build a more independent judiciary. Thus, the future of

information disclosure will be determined by media support, the strength and autonomy of NPOs, elected officials and implementation of judicial reform. The trend towards improved information disclosure is vulnerable and can be derailed precisely because the institutional support for transparency remains weak while the vested interests opposed to open government remain powerful.

The kinks in the system are being worked out and bureaucrats are grudgingly getting used to sharing information. The courts have sent mixed but surprisingly encouraging signals about their support for transparency, while party competition for votes is creating a favorable environment for more citizen oversight and greater transparency. Meanwhile, NPOs, citizens, the media and business all have far more access to public information than ever before and are constantly "pushing the envelope". Officials now feel obliged—if only to cover their backs—to involve a wider range of people and interests in their deliberations and thus government is becoming more inclusive and subject to increasing scrutiny. The process of setting agendas and making policies must now pass more intrusive public inspection and, as a result, outcomes are being influenced by a broader range of opinions and interests than in the past.

A weary and wary public has come to know the value of oversight in curbing waste and corruption. This has whetted their appetite for better and more extensive access. One of a cluster of reforms aimed at promoting transparency and citizen participation in government affairs, freedom of information is being implemented in a social and political context far more favorable than could have been imagined in the late 1980s. Just as the Watergate scandal gave impetus to political reform in the US post-1974, the fading legitimacy of government in the scandal-plagued 1990s and beyond is boosting support for information disclosure in Japan. Justifiably suspicious of politicians and bureaucrats, citizens are coming to understand the benefits of setting the political agenda, establishing priorities and shaping a society based on popular sovereignty. The evident benefits of open government and democracy, and the high costs of the alternative, suggest that time is ripening the situation for even greater transparency and a more robust civil society. This process, however, will proceed slowly precisely because those who have so much to lose are still in a strong position to hamper these developments.

[ii] **Bibliography**

Kerr, A., Dogs and Demons Tales from the Dark Side of Japan. Penguin, London, (2001)

McCormack, G. The Emptiness of Japanese Affluence. M.E. Sharpe, Armonk, NY 1996.

MacLachlan, P., "Information Disclosure and the Center-Local Relationship in Japan.", in S. Smith, (ed.), Local Voices, National Issues: The Impact of Local Initiatives in Japanese Policy-Making. Monograph Series in Japanese Studies, no. 31, University of Michigan Press, Ann Arbor, 2000: 9-30.

Repeta, L., "Local Government Disclosure Systems in Japan," National Bureau of Asian Research, 16, October 1999.

________, "Birth of the Freedom of Information Act in Japan: Kanagawa, 1982."