The Act on the Protection of Specially Designated Secrets (the “Act”) infringes upon the rights of citizens and the media, under Article 19 of the International Covenant on Civil and Political Rights (the “Covenant”).

1. Conclusion: The Act infringes upon the right to know of citizens and the media. We request that the United Nations Human Rights Committee (the “Committee”) express concern to the Japanese government concerning the enforcement of this Act without change, and recommend that the government take immediate measures in order to remove this infringement upon the right of access to government information, and of disclosure and correction, under Article 19 of the Covenant.

2. The Act breaches Article 19 of the Covenant

In Japan, the Act proposed by the government was passed on December 6, 2013, while many citizens gathered in opposition around the Diet building, and is set to enter into force within one year.

We are a network of human-rights organizations that have dealt with various human-rights issues in Japan. This issue has arisen in Japan after you published the “lists of issues,” and we have issued this report with a unified voice, because we recognize the serious human-rights abuses that this Act will cause. Many Japanese people strongly hope that you will comprehensively examine, and make stringent recommendations on, this issue.

There have been Japanese laws which defined state secrets and created punishments for persons who disclosed them, such as the National Public Service Act, the Self-Defense Forces Act, and the Act on Protection of Secrets Incidental to the Mutual Defense Assistance Agreement Between Japan and the United States of America. In addition, there have been systems which allow each government agency to specify secrets, without specific laws. However, there has been no system which actually and democratically controlled the designation and un-designation of secrets, and this situation, combined with an inadequate freedom of information system, has allowed the government to act in an arbitrary manner.

The Act that has been passed does not improve the past legal system for the protection of secrets. Rather, it creates a system that allows the government to keep any information it chooses a “secret.”

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1 See “Overview of the Act on the Protection of Specially Designated Secrets (SDS).”

2 It is also problematic that an undemocratic vote was held, in spite of the lack of sufficient information and severe protests by citizens. The government submitted to the Diet the bill of the Act in Autumn of 2013, and it was discussed from October 25. After the end of September 2013, when the content of the bill was published in every area, there was widespread opposition, such as by the Japan Federation of Bar Associations, by the media (including newspapers and broadcasting companies), by scholars, by artists (including writers and moviemakers), by international human-rights NGOs, by pacifist organizations, and by environmental protection groups, demanding that the government scrap the bill. However, while the opinion polls showed that a large majority of the Japanese people wanted the bill to be discussed more carefully, and all participants, including persons recommended by the government, in a public hearing, stated that they disagreed with or had conducted careful reflection on the bill, the government and the ruling parties railroaded the bill through the House of Representatives after a brief period of only one month’s discussion.

3 Disclosure requests are often rejected, despite the Act on Access to Information Held by Administrative Organs.
In broad outline, without confirming that citizens have the right of access to government information, (i) broad subjects are specified as secrets; (ii) specification of secrets is left to the discretion of the individual heads of governmental agencies; (iii) as a general rule, a specification of secrets will be valid for 30 years; however, this can be additionally renewed for 30 years after it becomes invalid, and un-specification of secrets is not guaranteed. In the case of documents, it is likely that the document preservation term will expire before the specification of secrets term will expire, and it is likely that the document will be disposed of without disclosure. (ix) In addition, a person can be punished not only if they disclose a secret, but also if they abet, conspire with, or incite others. This will apply without exception to the media, who help serve the public right to know. Furthermore, (x) the upper statutory penalty is 10 years’ imprisonment, which is extremely severe.

If this Act is enforced without modifying its fundamental weaknesses, it will become obvious that the public right to know is being unduly infringed upon. Therefore, we expect the Committee to recommend that the Japanese government take drastic measures.

Additionally, regarding this Act, Frank William La Rue and Anand Grover, who are Special Rapporteurs of the United Nations Human Rights Council, and Navi Pillay, who is the United Nations High Commissioner for Human Rights, expressed concern when the bill of the Act was being discussed in the Diet, which is unusual.

3. Disregard for the rights stipulated under Article 19 of the Covenant, and a lack of guidelines for restriction of these rights

(1) The government does not recognize that Article 19 of the Covenant ensures the public’s right of access to government information, and that the Act restricts this right.

As a result, this Act is unacceptable as a restriction on the public right to know under Article 19 of the Covenant, pursuant to Article 19, paragraph 3.

(2) Fundamentally, information, even that which constitutes a state secret, is owned by the citizens in democratic nations.

The Committee states in its General Comment 34 (Paragraph 18), “Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source, and the date of production,” and “the right of access to information includes a right whereby the media has access to information on public affairs and the right of the general public to receive media output.” Also, it points out in its General Comment 34 (Paragraph 19), “To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information.”

Regarding lawmaking in the national security area, the Global Principles On National Security And The Right To Information (the “Tshwane Principle”) provides the principle to balance reasonable measures for national security and the protection of the right of access to government information. This principle provides, “Everyone has the right to seek, receive, use, and impart information held by or on behalf of public authorities, or to which public authorities are entitled by law to have access” (1(a)), and “The burden of demonstrating the legitimacy of any restriction rests with the public authority seeking to withhold information” (4(a)). This understanding is an international human-rights standard.

In other words, even secrets which the government has and which cannot be immediately disclosed should eventually be disclosed to the public. Therefore the Act, which
restricts public access to certain information as secrets, is a restriction on the rights articulated in the Article 19 of the Covenant.

As a result of strong criticism from the media after the publication of the text of this Act, the government has modified the bill and added interpretative criteria, such as, “When this Act is applied, this Act shall not unduly infringe upon citizens’ fundamental rights by extended interpretation, and freedom of reporting and news gathering which help to protect the public’s right to know should be adequately respected.”

However, the government has not acknowledged that citizens have the right of access to government information that should be protected by Article 19 of the Covenant. The lack of understanding that “Secrets” should be owned by the citizenry, and need to be democratically controlled, is the root of various problems, as follows.

(3) The Act should not be permitted, as a restriction on the right to know.

Article 19 of the Covenant acknowledges that the public right to know may be restricted due to national security, public order, or public health, or protection of ethics. However, General Comment 34 points out, “Paragraph 3 lays down specific conditions, and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality” (paragraph 22). The Comment also points out, that the government “must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat” (Paragraph 35), and “they must be appropriate to achieve their protective function” (Paragraph 34).

As a tangential point, according to the explanation by the Japanese government, the purpose of this Act is “to prevent highly-confidential information, from the perspective of protecting security, from being divulged, and ensure the safety of the country and people.”

In addition, it explains that the reason for establishing this Act at this time is that since “the security environment around Japan is very severe..., and international terrorism is also on the rise,” “Japan needs to gain credibility for its information control system from other countries in order to obtain sensitive information from them,” “in order to obtain more beneficial information from relevant countries.” The Japanese government explains that by enacting this legislation, “information beneficial to Japan’s national security will be shared and utilized, as a result of which information exchange will progress between other countries and Japan, and in the government.”

However, even during the discussion in the Diet, the government has never explained why a threat against Japan’s national security will arise unless Japan broadly restricts the rights of its people, especially for the length of time that this Act provides, or explained the “nature of the threat, the necessity, and the proportionality of the measures by concretely and individually showing a direct relationship between the expression and the threat.”

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4 “Q&A for Act on the Protection of Specially Designated Secrets” (office of the Cabinet Secretariat for enforcement of the Act)(“Q&A”) Q1.
5 Q&A Q2.
6 Q&A Q3.
Furthermore, a person who served as a high-level officer in charge of national security insists that there has been no case where allies refused to provide beneficial information because of defects in Japan’s secret protection legal system.\(^7\)

Accordingly, the purpose of this Act is abstract, and woefully insufficient to justify the restrictions on citizens’ rights; furthermore, the strict restrictions of rights by this Act violates the fundamental rule (the principle of the LRA) that in order to restrict citizens’ rights, the restriction must be to a minimum extent, and there must not exist any less restrictive alternatives that would achieve the purpose of the restriction.

Therefore, this Act does not properly restrict the right to know under Article 19 of the Covenant. Rather, it unduly infringes upon the right.

4. The provisions of the Act breach Article 19 of the Covenant

(1) The Act breaches Article 19 of the Covenant. Furthermore, it deviates from the Tshwane Principle that was created to provide principles for balancing reasonable national security measures against protection of citizens’ right of access to government information. Below are some examples.

(2) The procedures to specify the secrets to which access is restricted are not democratically controlled.

Under this Act, each head of a governmental agency specifies the secrets to which access is restricted (Article 3, paragraph 1). However, there are no mechanisms which deter inappropriate secret specification.

The government has modified the draft of the Act, and added a system under which, with respect to the government’s uniform criteria for secret designation and un-designation and the “Appropriate Examination”\(^8\) (Article 18, paragraph 1), a third party, the council of external advisors, also provides input on the criteria (Article 18, paragraph 2). Additionally, the government subsequently added additional provisions, such as the provision (Article 18, paragraph 4) that the prime minister can require each head of a governmental agency to improve the manner in which he/she implements secrets designations and un-designations and the “Appropriate Examination.” Furthermore, the government created the Maintenance and Oversight Commission (Article 18, paragraph 4) and a position of Independent Public Document Officer (the “IPDO”), and the Information Maintenance and Oversight Division, which supports the IPDO (Article 9 of the Supplementary Provisions of the Act).

However, the council of external advisors can express an opinion only about the general criteria for secret specification, etc., and it does not have a right to address individual secret designations or un-designations.

The improvement requirements by the prime minister and the organizations, such as the Maintenance and Oversight Commission, that the government insists are “multi-strata systems\(^9\),” are actually controlled by the prime minister and organizations directed by the prime minister.

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\(^7\) Mr. Kyoji Yanagisawa, who was a defense bureaucrat and Assistant Chief Cabinet Secretary, said on an NHK (Japan Broadcasting Corporation) radio program on December 4, 2013, “I have come into contact with various secret information, and I have never experienced a case where the US refused to provide information for the reason that Japan does not have an adequate legal system to prevent secret information from being divulged.”

\(^8\) The examination as to whether there is a possibility that a person in charge of dealing with secrets will divulge them.

\(^9\) Q&A Q8
prime minister and officers directed by the prime minister. They are neither independent of, nor a third party to, the agencies which specify secrets, and they do not have oversight ability.

Additionally, although the Diet is discussing the creation of an agency which can oversee the operation by sharing secrets (on the basis of Article 10 of the supplementary provisions), a concrete system has not yet been determined.

The Tshwane Principle also indicates that states must have independent oversight bodies to oversee security sector entities. These oversight bodies should have legal powers sufficient to access and interpret any relevant information that they deem necessary to fulfill their mandates (principle 6 and 31-33). It is obvious that the oversight bodies under the Act do not have this capacity.

In other words, the “specified secret protection system” under this Act breaches the Covenant, because it infringes upon citizens’ rights of access to government information, and lacks any measures to minimize the infringement.

(3) The term of secret specification is unduly long, and information preservation is not guaranteed.

Under this Act, the term of secret specification is up to 5 years (Article 4, paragraph 1); however, as a general rule, the specification will not be automatically revoked after 5 years. The term of specification can be renewed repeatedly. The Act stipulates that “the term of specification shall not exceed 30 years in total” (Article 4, paragraph 3); however, with the approval of the Cabinet, specification of a further, longer term is possible. Although the maximum term is 60 years (Article 4, paragraph 4), under the provision that sets broad exemptions, revocation of the specification for many kinds of information is not guaranteed even after 60 years (the exemption set in Article 4, paragraph 4).

With regard to the revocation of the specification, the Act stipulates that the government shall “revoke the specification as soon as the specified information is found to no longer meet the requirements for specification” (Article 4, paragraph 7); however, the revocation of the specification is left to the discretion of the individual heads of the governmental agencies which specified the secrets, and there is no effective revocation process whereby citizens or remitted third parties can take the initiative.

In addition, if the information is in a document, and the document preservation term expires within the specification of the secrets term, the document will be disposed of without disclosure. With regard to defense secrets under the Self-Defense Forces Act, which is now in force, a large number of secret documents are being disposed of without disclosure, because the document preservation term has expired within the secret specification term. After the enforcement of this Act it is highly likely that a large number of secret documents will be disposed of when their document preservation term expires.

Under the Act, which stipulates such an excessively-long term of secret specification, without a system under which government agencies are obligated to automatically revoke the specification when the term of specification expires, it will become difficult for citizens to exercise the public right to know which is necessary for monitoring the state’s action. However, the government has never explained the reasons justifying such excessive restrictions on the right to access information.

Article 16 of the Tshwane Principles provides that “(a) Information may be withheld on national security grounds for only as long as necessary to protect a legitimate national security interest. Decisions to withhold information should be reviewed periodically in order to ensure that this Principle is met,” “(b) The classifier should specify the date, conditions, or event on which the classification shall lapse,” “(c) No information may remain classified indefinitely. The presumptive maximum period of classification on national security grounds should be established by law.” Article 17 of the Tshwane Principles provides that “(d)
National legislation should identify fixed periods for automatic declassification for different categories of classified information. To minimize the burden of declassification, records should be automatically declassified without review wherever possible,” “(e) National legislation should set out an accessible and public procedure for requesting declassification of documents,” “(f) Declassified documents, including those declassified by courts, tribunals, or other oversight, ombuds, or appeal bodies, should be proactively disclosed or otherwise made publicly accessible (for instance, through harmonization with legislation on national archives or access to information, or both).”’ It is obvious that the provisions of the Act deviate from these principles.

(4) The punishment provided for by the act is severe, and even merely abetting, conspiracy, and incitement will be punished.

Under the Act, a person who discloses a specified secret without being authorized shall be punished by imprisonment for not more than 10 years (Article 23). Not only a person who intentionally discloses a secret, but also those who negligently disclose it, shall be punished (Article 23, paragraphs 4 and 5). In addition, there is a provision that punishes a person who abets, conspires with, or incites others even if they do not breach the Act by themselves (Article 25).

Such punishment provisions cannot be seen as the minimum regulations necessary for the purposes of the Act; therefore, such provisions breach Article 19 of the Covenant.

(5) The media’s freedom of press is not ensured.

Since it was revealed that the government was preparing this Act, it has been pointed out that there will be a danger to the media’s freedom of the press, especially a risk that journalists’ actions in the process of collecting information will be punished as abetting, conspiracy, or incitement.

Therefore, the government added the provision that “news gathering by those engaged in publishing and the press shall be lawful as long as it is intended exclusively to serve the public interest and is not judged to be done through violations of laws or grossly unreasonable means” (Article 22, paragraph 2).

However, this provision is merely an advisory provision for interpretation and operation, and does not ensure the protection of the right provided under Article 19 of the Covenant.

Article 19 of the Covenant says that “Extreme care must be taken by State parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security, or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information” (paragraph 30).

The interpretation of Article 19 of the Covenant comes from the important lesson that monitoring the state is necessary for the protection of human rights (obtaining state information is essential for that reason) and the understanding that in modern societies, obtaining and distributing information is a proper role for journalists. Such an interpretation is broadly shared in democratic countries.

The Tshwane Principles clearly do not permit punishing a person only for abetting, conspiring with, or inciting others, by stating that “A person who is not a public servant may not be sanctioned for the receipt, possession, or disclosure to the public of classified information,” ”(b) A person who is not a public servant may not be subject to charges for
conspiracy or other crimes based on the fact of having sought and obtained the information” (Principle 47 (a)).

However, in the Act, there are no provisions that admit the importance of the media in this role, and protect the media’s useful activities. As the government can restrict freedom of news gathering and the press by threatening journalists with criminal punishment whenever the government judges that there is undue access to information threatening national security, it is clear that the Act breaches Article 19 of the Covenant.

(6) Examinees are not ensured of the rights to request disclosure and to correct information gathered for the “Appropriate Examination”.

This Act stipulates that the individual heads of agencies will examine the suitability of those who are expected to handle designated secrets, and that the government will gather information with respect to the examinees regarding (i) involvement in designated harmful activities and terrorism, (ii) criminal and disciplinary records, (iii) records of abuse of information, (iv) misuse of drugs and their influence, (v) mental health, (vi) abuse of alcohol, and (vii) financial records, including credit standing, and names, dates of birth, nationality, and addresses of the examinees’ relatives and cohabitants (Article 12).

The proper application of the “Appropriate Examination”, with respect to those who are expected to handle designated secrets, concerns those important matters which are directly related to the examinee’s position and job description, when the gathered information contains extremely sensitive matters.

However, under the Act, the examinees will only be notified of the results of the examination (Article 13). There is a system for examinees to complain regarding the results of the examination (Article 14). However, there is no provision that sets out the examinees’ right to request disclosure and correction of their own information.

With regard to Article 19 of the Covenant, the General comment by the Committee points out that “every individual should have the right to ascertain in an intelligible form what, if any, personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities, private individuals or other bodies control or may control his or her files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to have his or her records rectified” (paragraph 18).

This Act breaches Article 19 of the Covenant, because it does not set out the examinees’ right to request disclosure and correction of their own gathered information.

5 The danger to constitutionalism in Japan and the danger of the Act

In Japan, since the change of the governing party in December 2009, the government has disregarded constitutionalism and the idea of the natural rights of humanity, and has strengthened the movement toward a nation which controls its citizens, to head in a specific direction.

The Act was also planned as a system to prevent secrets that the government considers necessary from being divulged, for the primary purpose of national security. Therefore, almost no attention was paid to the public’s right to know, and freedom of the press, which contributes to the public’s right to know, until the opposition movement became more powerful and it became difficult for the bill to be approved in its original form.

From the end of World War II until now, under the Constitution of Japan enacted in 1947, Japan has aimed to be honored by the international community as a nation which respects human rights.

However, at present, Japanese domestic politics faces the danger that even the
fundamental understanding of the principles of the Covenants and the protection of human rights may recede.

6 Our Requested Recommendations

We request that the Committee, in its general comment based on the review of the Japanese government report, point out again that the public right to know under Article 19 of the Covenant includes the right to access government information, and that this right may only be restricted because of a pressing necessity. Also, we request that the Committee make recommendations to the Japanese government to conduct a holistic review of the system established under the Act, together with the existing National Public Service Act, the Self-Defense Forces Act, the secret protection system under the Japan-U.S. Security Treaty, the information disclosure system, the national archive system, and the whistle-blower protection system, based on the freedom of expression and the right to know that are guaranteed under Article 19 of the Covenant, and on the internationally-recognized Tshwane Principle and other applicable rules, in a way aimed at expanding information disclosure and enhancing the guarantees of the public right to know, including the following specific provisions:

1) To set up an independent body to monitor secret designation and un-designation, rather than leave them entirely to the administrative bodies, in order to enable the democratic control of the secrets;

2) To shorten the term of secret specification and clarify that the specification shall be revoked, in principle, when the specification term expires;

3) To assure implementation of the Act will be in conjunction with the national archive system which manages all secrets for eventual disclosure, in order to verify the government’s measures in the future;

4) To change the severe punishment policy which unduly restricts the right to know, to shorten the statutory term of punishment, and to remove the provisions concerning independent punishment such as for abetting, conspiracy, and incitement;

5) To clearly state that journalists, researchers, environmental activists, human-rights activists, and others shall not be prosecuted because they transmitted legitimate information which would not threaten national security, and so are being prosecuted in order to wrongly suppress such information;
6) To ensure that in criminal trials one can dispute whether or not the specified secret is a substantive secret in criminal trials;

7) To statutorily clarify that a public official who, by whistle-blowing, reveals information which is subject to the right to know, shall be free from any criminal punishment.

This report is endorsed by organizations below;

Aichi Campaign against the Special Secrets Act;
Center for Prisoners' Rights;
Human Rights Now;
Japan Association for Social Justice and Human Rights;
Japan Civil Liberties Union;
Japan International Volunteer Center;
Japan Network towards Human Rights Legislation for Non-Japanese Nationals and Ethnic Minorities;
Japan NGO Action Network for the Secrecy Law;
JAPANESE WORKERS' COMMITTEE FOR HUMAN RIGHTS;
Kanagawa Group Activating its Personal Information Protection Rules;
Society for Abolishing the Family Registration System and Discriminations against Children Born out of Wedlock;
Solidarity Network with Migrants Japan (SMJ);
Steering Committee for the “Full Implementation of UN Recommendations to the State of Japan”;
Support Group for the Case of Itabashi Highschool Graduation Ceremony and "Freedom of Expression" (IFE);
The International Movement Against All Forms of Discrimination and Racism;
The organization for the rights of children with disabilities, Japan RCDJ;
The Organization to Support the Lawsuits for Freedom of Education in Tokyo;
Women's Active Museum on War and Peace;
Yokohama NGO Network