

The Information Disclosure Law and the Development of Democracy in Japan

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I. INTRODUCTION

Greetings. It is with great pleasure that I am able to address the Information Disclosure Law and its impact on democracy in Japan.

In 1981, I became a legal apprentice after passing the Japanese Bar Examination.¹ Through my interests in politics and Japan's bureaucracy, I began to pay attention to the United States' Freedom of Information Act as a member of the Japanese Civil Liberties Union ("JCLU"). JCLU is an independent non-profit organization that aims to protect and promote human rights for all in accordance with internationally recognized human rights principles, especially the Universal Declaration of Human Rights.²

Throughout my research, I was inspired by a quote from James Madison:

A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. And a people who mean to be their

* Attorney at Law, Doctor of Laws, and former President of the Daini Tokyo Bar Association. This paper is based on the author's speech given at the University of California Law San Francisco at their 2023 Japanese Law Symposium, "Shining a Light into the Halls of Government: Achievements and Challenges of the Open Government Movement in Japan."

¹ In order to qualify to become an attorney in Japan, one must complete a one-year apprenticeship, which consists of training at the Shihō-kenshū-jo [Legal Training Research Institute of the Supreme Court] after graduating from a law school (or, alternatively, by passing a preliminary test known as "yobi-shiken") and passing the bar examination. See Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, 2 ASIAN-PAC. L. & POL'Y J. 88, 109-11 (2001); see generally *The Legal Training and Research Institute of Japan*, SUP. CT. OF JAPAN, https://www.courts.go.jp/english/institute_01/index.html (last visited Jan. 9, 2023).

² *About JCLU*, JCLU, <http://jclu.org/english/> (last visited Dec. 28, 2023). JCLU was founded in 1947 with the assistance and influence of Roger Baldwin, one of the founders of the American Civil Liberties Union. The JCLU members are forever grateful for the support and encouragement of the ACLU.

own Governors, must arm themselves with the power which knowledge gives.³

Indeed, some of Japan's greatest tragedies occurred because the government failed to properly disseminate important information to the public, as exemplified by the 1931 Mukden Incident and subsequent invasion of Manchuria by Japanese military forces.

On September 18, 1931, the Japanese army planted a bomb that destroyed the South Manchurian Railway, a train line owned by Japanese interests.⁴ However, the incident was blamed on Chinese nationalists and used as justification to invade and occupy all of Manchuria.⁵ The pretext for Japanese military actions was the protection of Japanese citizens and property in the region.⁶ Within days, additional Japanese troops stationed in Korea poured into Manchuria without the permission of the Japanese civilian government.⁷ From 1931 through 1945, the Japanese military and its supporters in government engineered Japanese policies deceptively.⁸ As the Japanese military took an increasingly stronger role in government, both on the continent and Japan itself, elected leaders served as mere figureheads.⁹ Now, we see a similar tragedy unfolding in another corner of the world: Ukraine.

The movement for a freedom of information law in Japan began in the 1970s.¹⁰ There was growing public concern and desire to combat government secrecy because of severe cases of industrial pollution and political corruption, as well as fatal incidents from defective drugs and food products.¹¹ The JCLU played a critical role in this movement. In November

³ Letter from James Madison to W.T. Barry (Aug. 4, 1822) (on file with the Library of Congress).

⁴ *The Mukden Incident of 1931 and the Stimson Doctrine*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1921-1936/mukden-incident> [<https://perma.cc/RP5T-C8DB>] (last visited Dec. 28, 2023).

⁵ *Id.*

⁶ *Id.*

⁷ *Japanese Invade Manchuria*, HISTORY CENTRAL, https://www.historycentral.com/DEP/JapanInvadesManchuria.html#google_vignette [<https://perma.cc/6KE6-R52A>] (last visited Dec. 25, 2023).

⁸ *See id.*

⁹ *See The World at War: 1931-1945*, ASIA FOR EDUCATORS: COLUMBIA U., http://afe.easia.columbia.edu/special/japan_1900_power.htm [<https://perma.cc/4A65-Z2GN>] (last visited Dec. 25, 2023). The Japanese army governed Manchuria indirectly through the "puppet" state of Manchukuo and developed heavy industry there under its favorite agencies, disliking and distrusting the zaibatsu (large Japanese corporations).

¹⁰ Lawrence Repeta & David M. Schultz, *Japanese Government Information: New Rules for Access - The 2001 Information Disclosure Law, and a Comparison with the U.S. FOIA*, NAT'L SEC. ARCHIVE, (May 23, 2002), <https://nsarchive2.gwu.edu/nsa/foia/japanfoia.html> [<https://perma.cc/GH3T-YL7J>].

¹¹ *Id.*; see also Hiroshi Miyake, *How the Freedom of Information Act Became Law in Japan*, HARAGO & PARTNERS LAW OFFICES 1, 1-7 (May 24, 2002), https://www.hap-law.com/harago/wp-content/themes/harago/pdf/miyake/how_the_freedom_of_information_act_became_law_i

of 1976, the organization established a subcommittee to study freedom of information, and in September of 1979, the JCLU advocated for the freedom of information through a publication entitled, “An Outline of a Freedom of Information Act.”¹²

The JCLU also held a public “Assembly to Consider a Freedom of Information System” in the same year, triggering the formation of a citizens’ movement.¹³ On March 29, 1980, the Citizens’ Movement for a Freedom of Information Act, an umbrella group that included the JCLU, consumer groups, and other democracy activists, was formed.¹⁴

Of course, I joined the Citizens Movement.

The Citizens Movement published the “Declaration of Right to Public Access to Information” in January 1981, which directly referenced the 1931 invasion of Manchuria and the Asia-Pacific War.¹⁵ I would like to share the following key passage:

Important information concerning the power of government has for a long time been kept beyond the reach of the people. The most significant reason for this is that the people’s right to know, which is inherent in the concept of the sovereignty of the people, has been disregarded. Through our experience in the past war, we ourselves have suffered the bitter result that can occur when the eyes and the ears of the people are blocked and they are isolated from fundamental information concerning the operation of government.¹⁶

Leaders of the Citizens’ Movement proposed that local citizens’ groups in every part of Japan should advocate for the adoption of freedom of information ordinances through local governments because they directly influence citizens’ administrative business.¹⁷ The JCLU published a model draft ordinance for this purpose in October 1983.¹⁸ I worked on this document as a member of JCLU.

The first local information disclosure ordinance was adopted in March 1982 by Kanayama Town in Yamagata Prefecture.¹⁹ Kanagawa and

[n_japan.pdf](https://perma.cc/NFS3-5XRX) [https://perma.cc/NFS3-5XRX].

¹² *Id.* at 8.

¹³ *Id.* at 9.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 47.

¹⁷ *Id.* at 9. The Constitution of Japan Article 94 says that local public entities shall have the right to manage their property, affairs, and administration and to enact their own regulation within law. *See* NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] art. 94 (Japan).

¹⁸ *See* Hiroshi Miyake, *How the Freedom of Information Act Became Law in Japan*, HARAGO & PARTNERS LAW OFFICES 1, 9 (May 24, 2002), https://www.hap-law.com/harago/wp-content/themes/harago/pdf/miyake/how_the_freedom_of_information_act_became_law_in_japan.pdf

¹⁹ *See* Miyake, *supra* note 18, at 10.

Saitama Prefecture followed Kanayama Town's lead in 1983.²⁰ By the end of April 1990, thirty one prefectures, including Metropolitan Tokyo and Osaka Prefecture, and more than a hundred smaller local governments established a freedom of information system, ultimately giving approximately two-thirds of Japan's citizens legal grounds for information access.²¹ These systems were strongly influenced by the United States in part through the direct involvement of key American actors, such as Lawrence Repeta, a then practicing attorney, and Robert Lefflar, University of Arkansas Law Professor.²²

In short, by the time of Nader's visit in the late 1980s, the local governments' freedom of information systems had been operating for several years, but were nowhere near perfect.²³ Some allowed people to access to only a limited range of information. Others created broad exemptions that excluded information from public examination. At the very least, these ordinances were being used effectively in various ways by the people and made a number of positive accomplishments in many parts of Japan.

II. HISTORY OF THE INFORMATION DISCLOSURE LAW

The best examples of the salutary impact of freedom of information in Japan are in the new local regulations requiring transparency in government officials' entertainment spending. A new type of public interest activist appeared in Japan in the 1990s that we call "Citizens'

²⁰ See Miyake, *supra* note 18, at 10.

²¹ Disclosure ordinances were adopted by 136 smaller administrative units comprising cities, towns, villages and the 23 wards of Tokyo. This was less than 10% of all the local governments, but when converted to population, we saw that more than two-thirds of all Japanese lived in places with freedom of information systems.

²² Attorney Repeta and Professor Lefflar greatly helped us. Note-taking had not been allowed in Japanese courts, but Attorney Repeta changed this by filing a lawsuit, which led to a favorable 1989 Supreme Court judgment that removed the ban. I was one of the five attorneys who represented Attorney Repeta in the suit. Professor Lefflar made arrangements to invite former presidential candidate and activist, Ralph Nader, to Japan in the autumn of 1989. Professor Lefflar and I went around with Nader for two weeks, holding a series of lectures across Japan. Nader inspired Japanese audiences with stories of consumer advocacy in the United States, especially by explaining the importance of the Freedom of Information Act. Nader delivered an exciting call to arms everywhere, loudly declaring, "Let's pass the Freedom of Information Act in Japan!". See generally Lawrence Repeta, *Why We Sued the Judges*, 22 LAW JAPAN 49 (1989); see also *Repeta v. Japan: Judgment of the Supreme Court of Japan, Grand Bench, March 8, 1989*, 22 LAW JAPAN 39 (1989) (John B. Chafee, Jr., trans.); see also David E. Sanger, *Tokyo Journal*; *U.S. Lawyer Makes Japan Sit Up and Take Notice*, N.Y. TIMES (Mar. 16, 1989), <https://www.nytimes.com/1989/03/16/world/tokyo-journal-us-lawyer-makes-japan-sit-up-and-take-note.html>.

²³ See HIROSHI MIYAKE, SHIRUKENRI TO JOHOKOUKAI NO KENPO SEISAKURON [CONSTITUTIONAL POLICY THEORY OF THE RIGHT TO KNOW AND INFORMATION DISCLOSURE] 360 (Nihonhyouronsha, 2021).

Ombudsman.”²⁴ The Citizens’ Ombudsman are independent investigators that arose in nearly every prefecture and used information disclosure ordinances to uncover improper spending.²⁵

Information requests filed under local disclosure ordinances exposed shocking details of government misconduct. The Citizens’ Ombudsman took a critical step in 1995 when they requested the records of food and beverage expenses from all prefecture governments. The disclosures revealed that local ministers had improperly spent taxpayers’ money to hold entertainments for local and national government officials, and members of local legislative assemblies and the national Diet.²⁶ The reports unveiled major scandals, including one that led to the resignation of former Akita governor, Kikuji Sasaki, following allegations that he and other government officials had spent over 820 million yen on entertainment during business trips.²⁷ Due to the nationwide campaign led by the Citizens’ Ombudsman, some prefectural governors issued reform initiatives to tackle government corruption, resulting in a dramatic reduction of food and beverage expenditures in several areas.²⁸ A few prefectures even prohibited “official-to-official” entertainment entirely and required full disclosure of food and beverage expenditures.²⁹

I filed lawsuits seeking disclosure of the governor’s entertainment expenses for Tokyo and two other prefectures. I was successful as the governor’s entertainment expenses are now published on their respective government websites.³⁰ Despite such achievements locally, progress was slow at the national level. The conservative Liberal Democratic Party (“LDP”), which has long dominated Japan’s politics for nearly fifty years, did not support a freedom of information law and the national bureaucracy wanted to maintain government secrecy.³¹ Consequently, passing a national freedom of information law was nearly impossible.

²⁴ Iwao Sato, *Autonomy and Mobilization: Two Faces of Japan’s Civil Society*, 56 SHAKAI KAGAKU KENKYŪ [J. OF SOC. SCI.] 197, 200 (Mar. 30, 2005), https://jwww.iss.u-tokyo.ac.jp/jss/pdf/jss560506_197210.pdf [https://perma.cc/Y7QN-KE74].

²⁵ *Id.*

²⁶ See Miyake, *supra* note 18, at 13.

²⁷ Kevin Sullivan, *Corruption Scandals Rack Tokyo’s ‘Iron Triangle’: Struggle for Power in Japan*, N.Y. TIMES (Dec. 7, 1996), <https://www.nytimes.com/1996/12/07/news/corruption-scandals-rack-tokyos-iron-triangle-struggle-for-power-in.html>.

²⁸ Miyake, *supra* note 18, at 15.

²⁹ Miyake, *supra* note 18, at 15.

³⁰ See e.g., *Governors Office*, TOKYO METROPOLITAN GOVERNMENT, <https://www.metro.tokyo.lg.jp/tosei/governor/governor/kosaihi/index.html#kosai> (last visited Apr. 1, 2024) (For the entertainment expenses for the Governor of Tokyo); Governor/Vice Governor Entertainment Expenses, Kyoto Prefectural Government (last visited Apr. 1, 2024), <https://www.pref.kyoto.jp/hisho/chijikousaihi.html>; Execution of Governor Entertainment Expenses, Hokkaido Prefectural Government (last visited Apr. 1, 2024), <https://www.pref.hokkaido.lg.jp/ss/tsh/kousai/shikkou.html>.

³¹ Miyake, *supra* note 18, at 24.

There was a historic shift in political power in 1994—the LDP lost its dominion over Japanese politics after an uninterrupted thirty-eight year reign.³² A coalition of political parties that supported the freedom of information movement took power.³³ The newly formed government appointed a project team for the Enactment of an Information Disclosure Law.³⁴ I assisted that team. Now I was working not only as an attorney seeking disclosure of local governmental information, but also as a policy maker. The government also established an Administrative Reform Committee to study the issue in 1994, pursuant to a power-sharing agreement among the coalition parties. The agreement also required that the committee conclude its discussions within two years. The Administrative Reform Committee submitted their results in 1996 as a proposal for an information disclosure law.

This work ultimately led to a bill submitted to the Diet in March 1998. Shortly thereafter, Japan's Information Disclosure Law (the "Disclosure Law") was enacted in May 1999.³⁵ During this time, the Citizens' Movement held symposiums and gatherings in the Diet and put pressure on Diet members debating the bill for improvements and quick enactment.

The "Disclosure Law" took effect on April 1, 2001.³⁶ The Disclosure Law allows "any person," including requesters anywhere in the world, to request information held by the Japanese government.³⁷ Requesters will never be asked about the purpose of their requests.³⁸ The

³² Purnendra C. Jain, *A New Political Era in Japan: The 1993 Election*, 33 ASIA SURV. 1071, 1071 (Nov. 1993).

³³ Miyake, *supra* note 18, at 24-25; see Jain, *supra* note 32, at 1074.

³⁴ Miyake, *supra* note 18, at 25.

³⁵ Gyōseikikan no Hoyū Suru Jōhō no kōkai ni kansuru hōritsu [Jōhō kōkai hō] [Act on Access to Information Held by Administrative Organs], Law No. 42 of 1999, CABINET SECRETARIAT OF JAPAN, <https://www.cas.go.jp/jp/seisaku/hourei/data/AAIHAO.pdf> [https://perma.cc/5GJM-36T4] (last visited Oct. 30, 2023) [hereinafter Jōhō Kōkai Hō].

³⁶ *Id.* at art. 3.

³⁷ *Id.* Article 3 ("Right to Request Disclosure") provides: "Any person may, pursuant to the provisions of this Act, request [from] the head of an Administrative Organ... the disclosure of Administrative Documents held by the Administrative Organ concerned."; *Id.* at art. 2, no. 2. "Administrative Document" within the meaning of the Act is defined as "a document, picture, [or] electromagnetic record... that, having been prepared or obtained by an employee of an administrative organ in the course of his or her duties, is held by the administrative organ concerned for organization use by its employees" and excluding "[i]tems published for the purpose of selling to many and unspecified persons, such as official gazettes, white papers, newspapers, magazines, and books" and "[i]tems that are, pursuant to the provisions of a Cabinet Order, specially managed as either historical or cultural materials, or as materials for academic research in the National Archives or other organs designated by a Cabinet Order."

³⁸ *Id.* at art. 4, no. 1. In submitting a Disclosure Request under the Disclosure Law, the only required information is the (i) name and domicile of the person (or representative if submitted on behalf of an entity) and (ii) name or other information sufficient to specify

Disclosure Law can be an effective tool for research. For example, if a requester is interested in overseas public works projects supported by the Japanese government, the Disclosure Law can be used to extract such information.

III. JAPAN'S INFORMATION DISCLOSURE LAW

As mentioned previously, anyone can file an information request and the government is obligated to provide a response.³⁹ When the government denies a request, it must cite an exemption specified in the Disclosure Law.⁴⁰ This is a revolutionary development because the Japanese government never had a legal obligation to open its files prior to the Disclosure Law.

Further, a broad range of government agencies are also subject to information requests, including all ministries, major government agencies, and other entities such as national hospitals and universities.⁴¹ The Cabinet Office itself, including the Office of the Prime Minister, is also subject to information requests under the Disclosure Law.⁴² The Law also applies to all information formats, including electronic formats such as e-mails, floppy disks, and computer hard drives, as well as video tapes, cassette tapes, microfilm, photographs, and others.⁴³

Of course, government agencies are not required to disclose *all* information requested without limitation.⁴⁴ Although the general rule requires disclosure, the Law provides six categories of exempt information

the Administrative Documents relevant to the disclosure requested.

³⁹ *Id.* at art. 5, para. 1. The response generally takes the form of one of the following:

- (iv) Disclosure of the requested Administrative Documents; Jōhō Kōkai Hō, art. 5, para. 1.
- (ii) Denial, provided that the requested Administrative Documents contains “Non-Disclosure Information” that falls under one of the Exemption categories (discussed further in *infra* note 47); Jōhō Kōkai Hō, at art. 5, para. 1.
- (iii) Partial disclosure, where portions containing Non-Disclosure Information are excluded and the remaining portions are disclosed. Jōhō Kōkai Hō, at art. 6, no. 1.
- (iv) Returned for deficiency, when the Disclosure Request is found to be deficient, in which case the request is returned to the requester with opportunity for revision and resubmission. Jōhō Kōkai Hō, art. 4, no. 2.

⁴⁰ *But cf.* Repeta & Schultz, *supra* note 10 (noting that there is no explicit requirement within the Disclosure Law that requires the requester to be supplied with specific reasons for denial—however, a provision within Japan’s Administrative Procedure Law requires administrative agencies to indicate reason when issuing adverse dispositions).

⁴¹ *See* Jōhō Kōkai Hō, art. 2, no. 1 (defines the Disclosure Law subject agencies to include (i) agencies within the Cabinet or established under the jurisdiction of the Cabinet, (ii) the Cabinet Office and the Imperial Household Agency, (iii) agencies prescribed in National Government Organizations Law, (iv) agencies prescribed in the Cabinet Office Establishment Law, and (vi) the Board of Audit).

⁴² *See* Jōhō Kōkai Hō, art. 2, no. 1, sec. ii.

⁴³ Miyake, *supra* note 18, at 28.

⁴⁴ *See* Jōhō Kōkai Hō, art. 5, par. 1.

which need not be disclosed.⁴⁵ These six exemptions are similar to the nine exemptions of the U.S. Freedom of Information Act (“FOIA”).⁴⁶

Major exempt categories include personal information, confidential business information, defense and foreign relations, criminal investigations, and certain information concerning internal administrative operations.⁴⁷ There are a few significant differences from the exempt categories of the U.S. FOIA.

The first disparity concerns disclosure of information that can affect human health. Although Japan’s Disclosure Law creates exemptions to disclosure for personal and business information, they must be waived when it is “necessary to [...] protect a person’s life, health, livelihood, or property.”⁴⁸ This is sometimes called a “public interest override.”⁴⁹ Moreover, such information may be disclosed at the discretion of the appropriate agency if they determine that the benefits of disclosure outweigh the interests protected by non-disclosure.

Another difference concerns personal information. Unlike the U.S. FOIA, Japan’s Disclosure Law does not use the term “privacy” and only exempts information that affects privacy interests. Instead, the Disclosure Law exemption is broader—it applies to all information that makes it possible to identify any individual person, such as name, date of birth, or other identifying descriptions.⁵⁰ The exception to this are the names of government officials and information pertaining to their official duties.⁵¹

Government agencies usually cite one of the six exemptions when they deny, or partially deny, an information request. In some cases, however, another issue comes into play. The government may respond that the requested information does not exist in the agency’s possession.⁵²

⁴⁵ Jōhō Kōkai Hō, art. 5, sec. i – vi.

⁴⁶ While both Japan’s Disclosure Law and U.S. FOIA exemptions “establish a structure in which information disclosure is the general rule,” the statutory language that creates the Disclosure Law exemptions are more limiting to the scope of disclosure in comparison to U.S. FOIA’s narrowly defined exemptions. *See* Repeta & Schultz, *supra* note 10; *see also* Freedom of Information Act, 5 U.S.C. §552(b). *Compare* Jōhō Kōkai Hō, art. 5, par. 1 (providing exemption to disclosure for “Information concerning deliberations, examination or consultations [conducted by agencies] where disclosure is likely to cause unjust harm to the open exchange of opinions or the neutrality of decision making, cause unjust confusion among citizens, or bring unjust advantages or disadvantages to specific individuals”), *with* 5 U.S.C. §552(b)(6) (providing exemption to disclosure of “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”).

⁴⁷ *See* Jōhō Kōkai Hō, *supra* note 35, at art. 5, sec. I–VI.

⁴⁸ *See* Jōhō Kōkai Hō, *supra* note 35, at art. 5(i)(b).

⁴⁹ *See* Jōhō Kōkai Hō, *supra* note 35, at art. 5(2)(b).

⁵⁰ *See* Jōhō Kōkai Hō, *supra* note 35, at art. 5(i).

⁵¹ *See* Jōhō Kōkai Hō, *supra* note 35, at art. 5(i)(c).

⁵² *See* Jōhō Kōkai Hō, *supra* note 35, at art. 8 (“When Non-Disclosure Information will be disclosed by merely answering whether or not the Administrative Documents pertaining to a Disclosure Request exist, the head of an Administrative Organ, without

Sometimes, we challenge such a response because we have strong grounds to believe that the information is actually in the government's possession, although officials claim it is not.⁵³ In other cases, the rationale for denial is that the requested information is in the possession of an individual agency employee and not used in regular administrative operations. Or when it is not shared with other employees it, therefore, does not meet the definition of "administrative records" subject to request under the Information Disclosure Law.⁵⁴

IV. CHALLENGING NON - DISCLOSURE

Government denials of information requests, regardless of the reason for non-disclosure, can be challenged in two ways. The first is through an administrative appeal, and the second is through a suit filed in court.⁵⁵

Approximately one thousand administrative appeals are filed each year. There is no fee to be paid. On the other hand, there are only about twenty information disclosure suits filed per year.⁵⁶

Requesters who challenge government denials in court face numerous barriers. The first is cost: unlike the U.S. FOIA,⁵⁷ the Japanese government does not reimburse the cost of successful challenges under the Disclosure Law.⁵⁸ In reality, Japanese attorneys work *pro bono* in nearly all public interest cases.

Another reason is that not all courts have the authority to hear the Information Disclosure cases.⁵⁹ Courts in only eight locations around the

making clear the existence or non-existence of the Administrative Documents, may refuse the Disclosure Request.”).

⁵³ After a denial, requesters may appeal for a review of the non-disclosure decision through the “Information Disclosure Review Board” (a nine-member panel attached to the Office of the Prime Minister and established under FOIA), or they may file a suit for the nullification of the decision through the district courts. Repeta & Schultz, *supra* note 10, at Appeal Procedures, par. 1; see Jōhō Kōkai Hō, *supra* note 35, at art. 18, 21.

⁵⁴ Administrative Document must be “held by the administrative organ concerned for organizational use by its employees” in order to be considered a record subject to the Disclosure Law. Jōhō Kōkai Hō, *supra* note 35, at art. 2, sec. 2.

⁵⁵ See Sato, *supra* note 24 and accompanying texts (for details regarding appeal methods).

⁵⁶ See Jōhō kōkai seido un'yō no jitsumu [Information Disclosure System Operational Practice] at 1763, MINISTRY OF INTERNAL AFFAIRS & COMMUNICATIONS, (last visited Feb. 3, 2024).

⁵⁷ “The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.” 5 U.S.C. §552 (a)(4)(e).

⁵⁸ See Repeta & Schultz, *supra* note 10.

⁵⁹ See *id.* Information Disclosure suits, as an action to appeal against a decision by an administrative agency and subject to the Administrative Case Litigation Law, must be filed at the district court that has jurisdiction over the area where the defendant administrative agency is headquartered, which creates a virtual requirement that such suits may only be filed with the Tokyo District Court. See Gyōsei jiken soshō-hō [Administrative

country—all in large metropolitan cities—have this authority (notably courts in Okinawa do not have this authority, so Okinawan requesters typically file and litigate suits at the Fukuoka District Court.).⁶⁰

Furthermore, it is extremely difficult to prevail in an information disclosure suit in Japan. Over the years, there have been positive recommendations by administrative appeals panels and a few favorable court judgments, but these are rare. The primary reason that courts tend to uphold information denials is that Japan's Supreme Court has a strong tendency toward judicial passivism.⁶¹

It is always difficult to win an Information Disclosure case for another fundamental reason: we cannot *see* the actual documents that are being withheld. It is difficult to apply the law to evidence you cannot see. In Japan's case, the courts do not use "in camera proceedings," so *even the judges* cannot see the requested documents when they make their judgments.⁶² For this reason, I have long advocated that the Information Disclosure Law should be revised to explicitly empower the courts to use

Case Litigation Law], Law No. 139 of 1962, art. 12, no. 1, *translated in* (Japanese Law Translation),

https://www.japaneselawtranslation.go.jp/en/laws/view/3781/en#je_ch2sc1at5

[<https://perma.cc/5DJ5-RE4Q>] (last visited Apr. 07, 2024). After much debate during the drafting of the Information Disclosure Law regarding the inconvenience posed to plaintiffs from outside of the Tokyo district in filing and litigating an appeal action, the Upper House reached a compromise and created an exception allowing the Information Disclosure suits to be filed with the district courts located at eight appellate court venues determined by plaintiff-based jurisdiction. *See* Repeta & Schultz, *supra* note 10; *see also* Jōhō Kōkai Hō, *supra* note 35, at art. 21, no. 1; *see also* Administrative Case Litigation Law at art. 12, no. 4.

⁶⁰ Opposition Diet members achieved special jurisdiction for district courts in eight major cities (Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo, and Takamatsu), but did not succeed in obtaining the same for Naha, Okinawa as a ninth venue. *See* Repeta & Schultz, *supra* note 10; *see generally* Courts in Japan, p. 5-8, SUP. CT. OF JAPAN, https://www.courts.go.jp/english/vc-files/courts-en/file/2020_Courts_in_Japan.pdf (last visited Mar. 4, 2024).

⁶¹ *See generally* David S. Law, *Decision Making on the Japanese Supreme Court*, 88 WASH. L. REV. 1365 (2011); Shigenori Matsui, *Why is the Japanese Supreme Court So Conservative?*, 88 WASH. L. REV. 1375 (2011); Craig Martin, *The Japanese Constitution as Law and the Legitimacy of the Supreme Court's Constitutional Decisions: a Response to Matsui*, 88 WASH. L. REV. 1527 (2011).

⁶² The Constitution of Japan requires all trial proceedings to be held in public and implies a general prohibition on in-camera proceedings. *See* Repeta & Schultz, *supra* note 10; *see* Nihonkoku Kenpō [Kenpō] [Constitution], art. 82, no. 1 (Japan). In comparison, U.S. Information Disclosure proceedings allow agencies to submit in-camera affidavits and documentation to assist the court in evaluating whether the government properly classified the subject document under a FOIA exemption category while also maintaining confidentiality as to its contents. *See* Repeta and Schultz, *supra* note 10; *see also* 5 U.S.C. §552(a)(4)(B). It should be noted that hearings held by the Information Disclosure Review Board "are closed to the public, effectively creating an in-camera procedure," indicating that administrative appeal is the means best fit to oversee the operation of the Information Disclosure Law. *See* Repeta & Schultz, *supra* note 10.

in camera proceedings.⁶³

V. CLEARINGHOUSE CASES AND THE MORITOMO GAKUEN CASE

After the Information Disclosure Law was enacted by the Diet in 1999, the “Citizens Movement for an Information Disclosure Law” was disbanded and a new organization called the “Information Access Clearinghouse Japan” (in Japanese, *Jōhō Kōkai Clearinghouse*) (“Clearinghouse”) was created to carry on the mission of advocating for open government.⁶⁴ As one of the Clearinghouse founding directors, I continue to support its work. In recent years, Clearinghouse has been led by a brilliant woman named Yukiko Miki.⁶⁵

As I mentioned, the number of the Information Disclosure lawsuits is rather low, but the plaintiff is Clearinghouse in quite a few of these cases. Clearinghouse typically files suits in especially important cases, or where the case raises a significant issue related to the operation of the Disclosure Law. Such cases are always represented *pro bono* by Japanese public interest attorneys.

I would like to introduce some examples where Clearinghouse filed information disclosure suits. The first concerns the Iraq War. Unlike other countries, Japan’s government did not appoint an independent commission to investigate government decisions during the war. However, the Ministry of Foreign Affairs conducted a study on whether the Ministry’s actions were appropriate.⁶⁶ Unfortunately, the Ministry only disclosed a 17-page summary of that study. In July 2015, Clearinghouse filed suit, seeking a court order to disclose the full report. It was a partial victory because during the course of the suit, the Ministry disclosed part of the study. However, it continued to withhold the majority of the material, citing the Disclosure Law exemption for sensitive information that may affect foreign relations. Both the Tokyo District Court and the Tokyo High Court upheld the Ministry’s decision.⁶⁷ In my opinion, this is a clear example where the courts’ lack of *in camera* review affected the judgment.

⁶³ See HIROSHI MIYAKE, SHIRUKENRI TO JOHOKOUKAI NO KENPO SEISAKURON [CONSTITUTIONAL POLICY THEORY OF THE RIGHT TO KNOW AND INFORMATION DISCLOSURE] at 273-324 (Nihonhyouronsha) 2021.

⁶⁴ Information Access Clearinghouse Japan is a non-profit governmental organization founded by activists of the Disclosure Law. See JŌHŌ KŌKAI CLEARING HOUSE [INFORMATION ACCESS CLEARINGHOUSE], <https://clearing-house.org/> (last visited Apr. 07, 2024).

⁶⁵ See Lawrence Repeta, *Backstory to Abe’s Snap Election – the Secrets of Moritomo, Kake and the ‘Missing’ Japan SDF Activity Logs*, 15 ASIA-PAC. J. 1, 4 n.15, (Oct. 15, 2017) <https://apjif.org/2017/20/repeta> [hereinafter *Moritomo Article*].

⁶⁶ After the war, many countries that participated created independent commissions to investigate their country’s actions. See generally JAMES A. BAKER, ET AL., THE IRAQ STUDY GROUP REPORT (Vintage Books eds., 2006).

⁶⁷ The Tokyo High Court judgment was dated August 21, 2019.

Clearinghouse also filed an information request and then a lawsuit in another important ongoing case referred to as the Moritomo Gakuen case. Former Prime Minister Shinzo Abe's wife, Akie Abe, was allegedly involved in granting a right-wing school operator, known to indoctrinate kindergarten children with nationalistic and anti-Korean ideology, a heavily discounted government land sale located in Osaka.⁶⁸ The market value of the land was about 800 million yen (about \$7.8 million dollars), but the Osaka Bureau of the Finance Ministry sold it to Moritomo Gakuen for only 134 million yen, a discount of more than 80 percent.⁶⁹

Prime Minister Abe denied any connection with the incident in his testimony to the Diet on February 17, 2017, and declared that if any connection between him or his wife Akie was uncovered, he would resign as prime minister and as a member of the Diet.⁷⁰ One week later on February 24, 2017, a senior Ministry of Finance official appeared before a Diet committee and, in response to questioning, testified that except for the actual contract of sale, all government records related to the transaction—including negotiation of the sale price and internal government deliberations—had been discarded.⁷¹ Clearinghouse members doubted if this was true, so Clearinghouse filed information requests with several government offices seeking relevant records.⁷² It would later be revealed that not only did the documents exist, but at the very time the official testified they had been destroyed, Prime Minister Abe's subordinates were modifying the records to delete his wife's name along with certain politicians' names, among other changes.⁷³ Such falsification of government documents is a crime under Japanese law.

A Finance Ministry official named Toshio Akagi tragically committed suicide after being pressured to rewrite the documents and

⁶⁸ *Moritomo Article*, *supra* note 64, at 2. In 2017, during Japan Prime Minister Shinzo Abe's administration, there were a series of cases that centered around the Information Disclosure Law and its potential, as well as flaws, in revealing crucial governmental agency information. *Id.* The Moritomo Gakuen case, where Kagoike Yasunori inherited a private kindergarten and converted it into a school for indoctrinating students with his nationalistic ideology, is an ongoing case central to the Disclosure Law. *See id.* at 1-2.

⁶⁹ *Id.* at 3; *see also Key Questions in the Moritomo Gakugen Scandal Still Unanswered*, THE ASAHI SHIMBUN (Feb. 9, 2021), <https://www.asahi.com/ajw/articles/14176077> [<https://perma.cc/V4T5-A3Z2>].

⁷⁰ *See Shiho Matsumoto, Japanese Gov't Releases 'Tell-All' File on Tampering Scandal to Wife of Late Bureaucrat*, THE MAINICHI (June 22, 2021), <https://mainichi.jp/english/articles/20210622/p2a/00m/0na/019000c>.

⁷¹ *Moritomo Article*, *supra* note 65, at 4.

⁷² *Id.*

⁷³ *Wife of gov't official who killed self raps PM Abe over Moritomo doc tampering scandal*, THE MAINICHI (March 24, 2020), <https://mainichi.jp/english/articles/20200324/p2a/00m/0na/018000c> [<https://perma.cc/FRG9-XKZG>].

suffering from depression.⁷⁴ This case is symbolic of the low regard held by the Abe administration toward the Diet and the Japanese people. It was only after Akagi's death that we learned the full story of the concealment and falsification of government records.

Regarding the Clearinghouse request for documents, the government initially responded that no such records existed.⁷⁵ During the course of the suit, however, the government changed its position, admitting that it did possess the records, and changed its response to "partial disclosure."⁷⁶ The Moritomo suit is still ongoing today.

VI. CONCLUSION

Clearinghouse and pro bono lawyers, especially members of the JCLU, continue to fight for government transparency, but there is much work to be done. Building a governmental system that empowers the people to exercise their right to know, and to hold the government accountable in doing so, is a monumental task.

The first step is clear: we need effective information disclosure systems that enable people to request and receive information. If we are successful, this will lead to greater transparency. Increasing access to government documents can assist with developing a mutual understanding based on a shared factual record.

There is a glaring loophole in the Disclosure Law, where Article 2 excludes historical materials from the definition of administrative documents subject to disclosure.⁷⁷ A startling example of this gap concerns Japan's imperial family. The Documents Division (*Shoryōbu*) of the Imperial Household Agency is charged with administering documents more than 3 years old that deal with the Imperial family and includes those of past emperors.⁷⁸ Unfortunately, materials held by this agency are outside the scope of the Information Disclosure Law.⁷⁹ This is problematic and should be changed. Through broad disclosure of materials maintained by the Imperial Household Agency, Japan can demonstrate a truly "Open Imperial House" to the world.

A symbolic case regarding the record of a meeting between General Douglas MacArthur and Emperor Hirohito during the U.S. Occupation of

⁷⁴ *Id.*

⁷⁵ *Moritomo Article*, *supra* note 65, at 4.

⁷⁶ See *Zaimushō Moritomo Gakuen Bunsho de Ichibu Kuronuri o Fu Kaiji Bubun Nashi to Kettei* [Ministry of Finance Decides That Some Parts of Moritomo Gakuen Documents are Blacked Out and That No Parts are to be Disclosed.], in CLEARINGHOUSE.ORG (Mar. 26, 2019), <https://clearing-house.org/?p=2925>.

⁷⁷ See *Jōhō Kōkai Hō*, *supra* note 35, at art. 2.

⁷⁸ See *Kunaichō kunrei dai 2* [Imperial Household Agency Directive No. 2], in CABINET OFF., GOV'T OF JAPAN (Nov. 27, 2020), <https://www.kunaicho.go.jp/kunaicho/shinsei/pdf/bunshokanri.pdf> [https://perma.cc/2SZA-XVCN].

⁷⁹ See *Jōhō Kōkai Hō*, *supra* note 35, at art. 2.

Japan, was disclosed in response to a request under the Information Disclosure Law. Prior to the public disclosure of this meeting, it had been rumored that the Emperor had taken personal responsibility for the war on behalf of the people of Japan. However, no such statement appeared in the record. A fact like this might change the evaluation of the late Emperor.

Japan's first modern constitution was revealed to the country and the world on February 11, 1889, when the Meiji Emperor bestowed it on his subjects as a gift. The key to understanding the Meiji Constitution was the concept of imperial sovereignty.

The people were subjects, not citizens, and the Emperor was the source of sovereignty; moreover, there was certainly no concept that public records and government archives of historical facts and State action should be available for examination by the people. There was no "people's right to know."

Such thinking only became possible when Japan adopted a democratic Constitution in 1946, in which the people themselves became the source of sovereign power.

The Disclosure Law was enacted in 1999, fifty-three years after Japan's democratic Constitution was promulgated. Now, under the Disclosure Law and the Public Records and Archives Management Act,⁸⁰ the people have legally enforceable rights to access government files.

About sixty years ago, the great social thinker and political scientist Masao Maruyama, a professor at Tokyo University, proposed that we place our hopes not with the "historical fact" of the Japanese Empire, but instead with the "illusion" of post-war democracy.⁸¹ As for myself, I believe that with the tool of our new information disclosure system, we can now establish the "historical fact" of democracy. By zealously working to open government files, we can demonstrate that democracy is not merely an "illusion."

⁸⁰ See *Kōbunsho tō no kanri ni kansuru hōritsu* [Public Records and Archives Management Act], Law No. 66 of 2009, art. 12, no. 1, *translated in* (Japanese Law Translation) <https://www.japaneselawtranslation.go.jp/en/laws/view/2790/en> (last visited Apr. 07, 2024).

⁸¹ For additional information on Masao Maruyama's work regarding post-war democracy in Japan, see Curtis Anderson Gayle, *Progressive Representations of the Nation*, 4 SOC. SCI. JAPAN J. 1 1, 1-19 (2001).