The Act on Public Information Disclosure Reformulation: A Comparative Law Study of Indonesia and Canada

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Abstract. Freedom of information (FOI), the prominent and integral part of fundamental right according to the 59th UN General Assembly's Resolution, is to embody the ideal and sustaining modern democratic state, open and accountable government institution. Indonesia, as one of the young democratic states, adopted FOI norms in the 1945 Constitution and Act No 14 of 2008 to minimize public rights issues regarding information. This Act governs that some limitations are applied to certain information that is classified as "state secret information". Due to the complex bureaucracy and different perceptions of each public official, these limitations become unclear. Some cases show that certain public officials deliberately hinder citizens' right to their rightful information moreover, the loss of important information regarding the murder of prolific human rights activists. Meanwhile, the implementation of FOI in Canada is already stepping ahead with its Access to Information Act, proven by the fact that Canada is labelled the most transparent country and currently serving as a top performer in open government issues. This paper aims to identify the core problems of the Indonesia FOI Act by comparing it with Canada's Access to Information Act while framing an adoption model that can be implemented in Indonesia. This research is doctrinal research conducted using the comparative method. From the analysis undertaken, Indonesia can be concluded to adopt the clarity and distinctiveness of Canada's FOI Act regarding the information categorizing and apparatus, as well as sustaining the core legal principles of confidentiality in the digital era.

Keywords: public policy · freedom of information · human rights · comparative method

1 Introduction

Democracy has come hand-in-hand with freedom of information and government accountability and integrity framework [1]. The effort to enhance the freedom of information (FOI) to promote transparent and accountable institutions is an important part of the rule of law. Freedom of information is an integral part of the fundamental right of freedom of expression, as recognized by resolution 59 of the UN General Assembly adopted in 1946 as well as by Article 19 of the 1948 Universal Declaration of Human

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Rights; "to seek, receive and impart information and ideas through any media regardless of frontiers" is a fundamental right of freedom of expression. (Nation, n.d.) The core idea of government transparency refers to the government structure, intention, and projection openness. A well-built transparency system is granted through the availability of information, data, and how to access them [2]. Open and transparent government systems are vital and essential to sustaining modern democratic government [3]. The aspect of transparency is wide-ranging and, importantly, has a positive effect on society. Government transparency improves the perception of social equity, which can also boost public trust to the current government institution [4, 5]. Continuous sustainability of FOI regimes can ensure a level of political transparency that could prevent corruption, nepotism practices, and any other form of political malpractice [5].

Furthermore, information transparency and disclosure could raise government accountability and the long-term health of democracy. A sincere engagement with FOI regimes provides a fundamental mechanism for scrutinizing government decisions while increasing and maintaining trust capital between citizens and the state. Governments, in turn, rely on this trust as the capital to take lawful but decisive action to protect the citizen [1]. Thus, healthy FOI regimes can be advantageous to both public interest and governance. This phenomenon could be a good start to restoring the public's faith in both politicians and the current political environment while also fulfilling the goal of democracy which is included in the FOI Act itself; meaningful public participation in the decision-making process. [5] FOI Act enables the public to access decision-making processes, the enforcement of police cases, and many other data that belongs to the government entities [6].

The adoption of the FOI law in Indonesia as a young democratic state has shown a positive trend by enacting the first legislation on public information disclosure in 2008 [7]. As stated clearly in Indonesia's 1945 Constitution on Article 28F, every citizen has the right to information to perceive a citizen's growth as a human, and it is related to their right to own dignity. Indonesia implements their commitment to freedom of information by enacting the Act No 14 of 2008 on Public Information Disclosure. This Act has allowed the public to be able to request the information from government public bodies based on the certain requirement. Indonesia's progress toward a functional "information freedom" regime gradually started. Substantial progress has been made since the FOI Act was signed. The number of regional information commissions that have been established and information officers who have been assigned has continuously grown. [8] Unfortunately, as the decade has passed since the Act's enactment, the public has yet to fully understand their rights of information to its potential. Correspondingly, several loopholes in the Act have been conveniently used by several government agencies to breach their duty.

Therefore, the enactment of the FOI Act in Indonesia is still facing some problems, such as; 1) the complex government bureaucracy, 2) no certainty about whether or not (or when) the citizen would acquire the requested information, 3) the thin-blurred line regarding information that classified as "state secrets", 4) no sanction or punishment for a government official that deliberately hinders citizen access to their rightful information; these problems certainly delay the overall implementation and practices of freedom of information in Indonesia [9]. In 2017, a group of human rights activists, KontraS,

faced difficulties accessing crucial information regarding the murder of Munir, one of the prolific Indonesian human rights activists. The officials claimed that the referred information had never been stored in the national database. Therefore, this important information was declared as lost information, with no potential to be able to disclose in the future [10]. Furthermore, the 2019 research conducted by Usman Noor also revealed the unfortunate conclusion that 65.87% of existing Public Government Official cannot be classified as having "satisfactory access to public information disclosure" [11].

The discourse of transparent government is heavily related to the term "open government", this term simply can be described as a running government that emphasizes the importance of openness and information dissemination. The term also refers to recent public management reform that aims to establish a collaborative and transparent governing structure apart from the precedented bureaucracy-oriented principles [12]. Acknowledgement of public information disclosure also plays an important role in pandemic times; thus, transparency of government officials in emergency times is a core moral responsibility that cannot be taken off easily Pandemic-related information, including the severity of the pandemic and socio-economic factors such as cities' administrative level, population, and health sector capacities must be accessible to the public because this is an important factor to build a sense of crisis within the public [13]. Transparency and accountability of government officials in times of crisis also can build a sense of trust in the public [14]. Proved by prior studies, it was found that trust in government directly influences public compliance with pandemic precautionary measures and policies [15, 16]. The concept of open government was also embraced by the United Nations as one of the efforts to respect human rights in the pandemic era. United Nations stated that authorities need to be open and transparent in their decision-making and willing to listen to public voices and respond to their criticism [17].

Unfortunately, Human Right Watch reports that Indonesia's government official has failed to provide transparency and access to information to battle the pandemic outbreak [18]. The prior studies also found that transparency measure in pandemic times released by the government official hits its low point [19] causing further problems such as problematic pandemic management in Indonesia due to the lack of data transparency and misinformation [20]. Based on these arguments, this study aims to conduct a comparative study between Indonesia's FOI Act and the same Act in another country to provide more data about the regulatory frameworks and also the enactment of said country. In this case, Canada was chosen since it had implemented a relatively advanced information management and service system based on its FOI Acts. Furthermore, Canada is one of the most transparent countries. According to a global perception survey conducted by the Transparency International Institute, Canada is seen as one of the most trustworthy countries in the world [21]. Correspondingly, this study also aims to formulate core points of Canada's FOI act that can be adopted in Indonesia's FOI act legal framework.

2 Research Method

This study belongs to the comparative law study method. Comparative law study, in accordance with Edward J Eberle, is an act of comparing one country's law to that of another. The most used model for comparison is a foreign law being contrasted against

the standard of one's own law. The comparison can be developed to include more than two laws, more than the law itself, and more than written words of law [22]. The key act in comparison is examining one legal information concerning another and then evaluating how the two legal data are similar and different. The essence of comparison will then be aligning similarities and differences between data sources and then using this as a measure to acquire an understanding of the data points' content and range [22]. One of the aims is to improve one's own legal system with a contextual approach that may be required [23].

3 Discussion and Analysis

3.1 FOI Act: In the Case of Indonesia

In accordance with the Universal Declaration of Human Rights, the FOI regime is one of the fundamental rights in negative terms; the one that hinders or deliberately prevents one's attempt to acquire information must face the consequences of sanction by law [24].

"Every person has the right to communicate and to obtain information to develop themselves and their social environment, and has the right to seek, obtain, possess, store, process and convey information through all available channels"—1945 Constitution clearly stated that every citizen possesses the rights of communication as well as the rights to access and acquire information in order to enrich and develop oneself and their social environment. Since the 1998 Reform Movement, the government realized the importance of information disclosure and began opening access to information across various circles and platforms. This was because the late regime of New Order (1966–1998) prohibited and prevented any kinds of advocacy movements that are vital for a healthy democracy, such as environmental sustainability advocacy, anti-corruption movements, human acts advocacy, as well as shutting off the freedom of the press. New Order regimes strip away civil spaces to perpetuate the regime.

Awareness regarding human rights issues and freedom of information sporadically emerged from the discussions and activities of non-governmental organizations (NGOs) at the beginning of the 1998 Reform. These activities were mainly driven by three major issues for the FOI regimes were intended as; 1) an effort to eradicate corruption, 2) upholding human rights, and 3) an effort to build a good governance. These three major issues are then outlined in the early draft of the Indonesian Act on Freedom to Public Disclosure [9]. The fundamental argument was that every citizen owns the right to know the process of decision-making and also possesses the right to participate in those processes—the phenomenon which back in the last regime of New Order was close to non-existent. Thus, the early draft of the bill was formulated to improve the quality of public participation in the decision-making process.

According to Act No 14 of 2008 Public Information Disclosure, public information is information that is generated, stored, managed, sent, and/or received by a public agency concerning the organizers and administration of the state and/or the organizers and operations of other public bodies, as well as other information related the public interest. Additionally, Act No 14 of 2008 introduced the state-of-the-art of Public Bodies/Public Agencies which is the bodies that consist of executive, legislative, judiciary, and other bodies whose main obligation is to provide accurate, truthful, and non-misleading public

information. As a result, this state-of-art enables the public, as an individual or as a group with legal entities, to request public information from Public Bodies according to the interest they may seek. Unfortunately, some cases show that the term "Public Bodies" is too broad and causes obscurity when classifying public and private entities. This is an actual legal weakness or "the loophole" that is used by irresponsible public agencies to avoid their duty and obligation to provide truthful public information by claiming that they do not possess the characteristics of public bodies [25].

The Act divides public information into two categories: the first one is information that must be provided and announced, and the second one exempts public information. Article 10 states that information related to issues that potentially harm the lives of countless individuals and disrupt public order is included in the latter category. But it appears that according to Article 24, the information officials can use their discretion not to disclose the information if it is regarded did more harm than good to the public interest. The disadvantage of this is that public bodies can individually decide to avoid information disclosure by labeling them as inappropriate, thus—the exempted information [25].

As stated in the prior chapter, the right to information, also known as the right to know, is one of the constitutional rights that must be respected by the government. Based on the idea that public information is a core factor for public empowerment—empowered citizens can be a powerful factor in controlling the state's accountability as well as controlling any implementation of public policy or decision-making in general. In a democratic country like Indonesia, the right to information is an important point for a better democracy. A sense of public empowerment can create awareness for more meaningful participation in healthy public debates, political events, and public policy choices [26]. According to a certain pattern in Indonesia's current state of democracy, the "participation" to meet the "public consent" thus far has been reduced to a mere "rhetorical participation" that tends to be manipulative, or as Noam Chomsky named it "„ manufactured consent". This unhealthy practice tends to occur because Government sees the public as incapable or does not know better when involved in making policies, and/or the Government merely uses a selected and specific kind of public to pass certain agendas for particular interests and specific groups [27].

In dealing with the COVID-19 pandemic, public information disclosure takes on a new dimension. The global multidimensional impact of this virus's spread has a major impact on how governments make decisions and run their governments. Transparency on pandemic information, including the government's efforts to overcome the pandemic, will foster trust toward a common understanding and better agreement in the communities [28]. According to Philips J. Vermonte, the pandemic and the crisis can be seen as a new barometer for all countries worldwide in terms of dependability, accountability, and good governance [26]. This is because a time of crisis like a pandemic exposes widespread anomalies, such as a gap in public knowledge by insufficient truthful information or public information inequality, and worse, a storm of false and inappropriate information pandemic-related that spread like wildfire [28].

According to Amnesty International, approachability and fulfillment of the right to information during a pandemic are essential and crucial for all levels of society—in particular, health workers as front-liners in dealing with pandemic outbreaks. Delays of information and a lack of transparency in handling pandemics could endanger the whole

public health system because front-liners would be unable to take most precautionary measures on time [29]. Concerned Public Bodies have not played an accurate or comprehensive role in informing the public about the present predicament of the pandemic. This series of events, also known as information asymmetry, causes additional issues and complicates disaster management response even further [28]. Indonesia's head of state, Joko Widodo, stated the same thing that the government has the duty and obligation to educate the public on pandemic information so that turmoil can be avoided while policies of pandemic counter-measure can operate effectively [30]. These ideals have yet to be attained, at least in Indonesia's counter-measure to the pandemic; due to official information delays and inconsistent way of public communication, public skepticism increased while some others failed to develop a sense of crisis [31, 32], resulting a massive financial failure and a sharp increase in the mortality rate [33, 34].

Overall, the scope of Indonesia's law on Public Information Transparency was a compromise between the government and civil society. Although it appears that a compromise was an effective response, critics argue that a substantial amount of public information was kept confidential. Indonesia's FOI regime and others have progressed slowly and steadily. Although there has been progress toward the rule of law and the recognition of fundamental human rights, the aspects of transparency and accountability were yet to be attained [25].

3.2 The Discourse on Canada's FOI Act

The Access to Information Act 1985, proposed in Canada in 1980 was aimed to achieve several goals; as a serious effort to stimulate a more insightful discourse between the state and people, to enhance the quality of decision making (policy making), as well as to help boost federal government and its entities accountability. When the federal Access to Information Act (ATIA) became law in 1983, Canada was only the eighth country in the world to have FOI legislation [35]. By adopting the law, Canada has taken the lead in an international movement. Furthermore, Canada had taken the law's execution gravely, whereas many other countries had not. It established special offices to handle the influx of requests, staffed its offices with trained professionals, and established formal process to empower the prompt processing of requests [36].

The same goal also stated in the Indonesia FOI Act, indicating that the sole purpose of information disclosure is to craft an effort for the government to formulate public policies that are truly needed by the public. Every FOI statute in Canada is premised on the notion that citizens have a right to public records [6].

The Access to Information Act, R.S.C., 1985, c. A-1, establishes Canada as one of the countries with advanced information system management and services. These regulations exist to expand the provisions that provide broad access to information under government control as well as provide certain information to the public. Furthermore, the aim clearly stated in Article 2 is to increase federal institutions' accountability and transparency in order to emerge an open and democratic society. The principle of non-discrimination has been incorporated in this Act. This means that government agencies are required to assist information seekers regardless of their background identity. Under their FOI legislation, the majority of Canadian provinces have created a duty to assist information-seekers. The duty to assist requires the government agencies to "make every

reasonable effort to assist applicants and to respond without delay to each application" [37].

Additionally, the Act does not specifically define the term "information". Some Articles referred to them as records. In this context, records are defined as documentation material that is not restricted by form or medium thus. It is possible to conclude that the concept of information or record in this Act is very broad. Furthermore, information is divided into two categories: the former being information under the control of the government institution and the latter being information pertaining to third parties who are still associated with the government. Article 16 does, however, include provisions for confidential information, specifically information that is directly related to national security and law enforcement. Predefined types of macro-economic information are included as confidential based on Article 18. Crown corporations or executive branch records; cabinet confidences and legal opinions; third-party business information; personal information; information shared by other governments; and any documents that could significantly affect public safety, enforcement, financial interests, or heritage sites are among the most common information exemptions in Canada [6].

The progressiveness of this act can be identified by how they classified their government institution (or "public bodies" as referred to in Indonesia's FOI Act). These government institutions are; each Canadian department or ministry as well as agencies or offices listed in the Appendix part of the Act. The Appendix specifically names every institution and/or official ministry that falls into government agencies that are obliged to provide information to information seekers or the general public.

The Act restricts several types of right to access, which can be classified into four following categories: (1) obligated exemptions; (2) discretionary exemptions; (3) class-test exemptions; and (4) injury-test exemptions [38]. Government agencies are responsible for refusing the disclosure of requested records under the obligated exemptions category. However, the majority of the exceptions in these categories also govern specific circumstances in which disclosure is permitted if certain conditions are met.

Essentially, Indonesia's FOI Act states that certain information is excluded, with the exception specifically specified in Article 20 (as described prior, the discretion of the officials eventually can expand the many types of exempted information). In contrast, Canada Access to Information Act of 1985 states that no exemption or exception is absolute or permanent and that all information can be disclosed with the consideration and decision of the Information Commissioner and court ruling.

3.3 Lesson Learned from Canada's FOI Act

As described in the previous elaboration section, there is no fundamental difference in substance, nature, purposes, and types of information exemptions in both Acts. However, the essence of the exemption is different; Indonesia's FOI Act provision offers a rigid limitation of exempted information. Even in practice, these exemptions potentially can be broadened due to the Official's discretion;. At the same time, Canada FOI Act rules that the exemption is by no means absolute or permanent—based on consideration from Information Commissioner or court ruling, the information can be disclosed to the public.

To avoid the inconsistent exemption of public information in Indonesia's FOI regime due to discretion or different perception of Officials, which leads to different degrees

of transparency among the public bodies, an appendix of a list containing relevant and related legislation can be made. This list can be an assurance to ensure that each public body has the same standard in perceiving public information. The same practices are implemented in the Canada FOI Act provision, to be exact.

Additionally, the broad definition of "Public Body" in Indonesia is a disadvantage for the state's democracy as these entities can claim that they do not possess characteristics of public bodies while avoiding the rightful duties and obligations. Uniformity of definition is needed. In this case, taking the example of Canada's FOI Act to list and specifically mentions each name of ministries and/or government institution in the appendix would be an excellent concept.

Overall, Indonesia's FOI Act required to improve some of the provisions, which include the following points but are not limited to; how the sub-system works as a whole, procedures for considering and implementing the information exceptions, substantive content of various exceptions, standardized approach by with guidelines to determine whether any information is excluded based on public interest test.

Thus, uniformity is required to improve understanding of the exception regime, which includes, but is not limited to: a) how the system works as a whole b) procedures for considering and applying exceptions c) substantive content of various exceptions d) Standardize the approach by creating guidelines or guidelines for using the public interest test to determine whether any information is excluded.

4 Conclusion

Indonesia FOI Act is still lacking in uniformity, both in provisions of its legislation and perception of the apparatus/official regarding the legislation; characteristics of the public body and many types of exempted information. After examining Canada's Access to Information Act 1985, two main provisions ideas can be adopted from them. First, a clear and well-pronounced appendix containing a name list of government agency/public body entities—instead of the broad and vague definition used in current legislation. Second, an appendix of a list containing relevant and related legislation can be made to avoid different perceptions and implementation in the FOI regime in Indonesia, specifically regarding the exempted information.

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