

CONFIDENTIALITY AND PUBLIC INFORMATION: RESOLVING ADMINISTRATIVE DISPUTE ABOUT PUBLIC INFORMATION DISCLOSURE

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ABSTRACT

Recognition of citizens' rights to information disclosure on the one hand, and the obligation for the State Administration Officials to convey information openly to the public is two things that are attracted to be further examined. In this connection, the public information disclosure has the potential to create a dispute between citizens and the State Administration Officials. The accountability of the government may be considered as a logical consequence of the government's authority to grant or deny the fulfilment of public information as a citizen's right regarding types and forms of information which may or may not be open to the public in accordance with their confidential or public in nature. This study seeks to describe the legal provisions of Indonesian Law No. 14 of 2008, concerning Public Information Openness. In essence, this regulation gives an obligation to every Public Agency to open access for every public information applicant to obtain public information, except for certain information. However, on the other hand, the public who feel that their interests and rights are threatened by not disclosing certain information can submit to the court the request to the court to order the government to disclose certain information. Although basically the legislation of this Law is to guarantee information disclosure and general freedom, this Law provides opportunities for citizens through a court process to file claims regarding the disclosure of certain information that is considered to threaten public order and freedom. At this point, disputes can occur between citizens and the government in connection with requests for information. Here, information disclosure legislation also means that the public can participate in controlling the implementation of information disclosure rights and get assurance that information will be safe and free from state intervention.

Keywords: Information Disclosure, Human Rights, Government Accountability.

INTRODUCTION

One essence of community participation for citizen is the creation of the “*right to know*” (on information) principle. The right to obtain information is one of fundamental rights for every citizen (Saragih, 2013). This right is guaranteed that its fulfilment and respect, both in international legal instruments, and in the laws and regulations in Indonesia. As stated in International Human Rights Instruments that access to information is a fundamental right and is inherent in all cultures and systems of governance. Article 28F of the 1945 Constitution, which specifies that:

“Everyone has the right to communicate and obtain information to develop personal and social environment, and the right to seek, possess, store, process and convey information by using all kinds of channels available.”

Thus, the government must fulfil, develop, and guarantee its protection. For this reason, the right to public information is not only described in the legislation as a implementing regulation, so it is not only moral right, but also positive right and exercise right to realize the provisions of Article 28F of the 1945 Constitution of the Republic of Indonesia, and the enactment of Law Number 14 Year 2008 on Public Information Disclosure (hereinafter referred to as the Law on Public Information) (Yasin, 2007). In consideration, it is stated that information is the basic necessity of every human being and is a part of the citizen's rights (Asshiddiqie, 2004). Therefore, the state through the government must ensure the open access of public information to the public in a transparent manner (Gupta, 2008). The government must provide legal protection for the fulfilment of the right to obtain information by the public. However, it should also be noted that, the disclosure of public information must pay attention to other principles, such as maximum disclosure or that:

“The principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this may be overcome only in very limited circumstances” (Mendel, 1999).

The limitation for information disclosure exists to minimize the negative effect of information, thus harming the socio-political existing. On the other hand, the neglect of the government on the right of citizens to obtain public information, to the detriment of society, can make the government be sued to society. This public lawsuit is governed by the Public Information Disclosure Act, as it is considered a form of constitutional violation of citizen rights. In one of the articles of the Public Information Disclosure Act, it is determined that:

“Citizens may file suit against government actions that cover up the necessary information.”

Nomenclature of public lawsuit related to public information regulated in the Public Information Disclosure Act is a public information dispute lawsuit and can be submitted to the State Administrative Court. The existence of legality of citizen's right to information, which is guaranteed by both the Constitution and the public information law, on the one hand, and the ability of citizens to demand the disclosure of information that is considered public in nature to the government, on the other hand, makes this object attractive to be examined. This is due to the existence of the recognition of the right of information by the state, and the demand for greater information rights by citizens. In this context, this study would like to formulate the arrangement of public information disclosure as a means of community participation in Indonesia, and the government's administrative responsibility in public information disputes in Indonesia (Internal Conference on Right to Public Information, 2008).

PUBLIC INFORMATION DISCLOSURE ARRANGEMENT

Freedom of information is a human right because information is an integral part of communication between people (Muis, 2001). This is reflected in Article 19 of the Universal

Declaration of Human Rights dated December 10, 1948 (hereinafter referred to as UDHR-1948), stating that:

"Everyone is entitled to freedom of expression and opinion."

This right includes freedom to maintain opinions without coercion, the right to seek, receive, and disseminate information and ideas through anything and without exceptions. In international perspective, the right to obtain information is the basis of two paragraphs of Article 19 of the International Covenant on Civil and Political Rights (hereinafter referred to as the ICCPR), essentially containing the statement that every person has the right to maintain his or her opinion without coercion; and the person's position has the right freely for expression which includes the freedom to seek, receive and disseminate all types of information and ideas, without exceptions, whether oral, written or printed, in the form of art or through other media of his or her choice (Kasim, 2003).

In view of the ICCPR, the standard of freedom of information has been widely accepted by international human rights institutions, including Indonesia which recognizes it as the constitutional right of every citizen through the provisions of Article 28F of the 1945 Constitution of the Republic of Indonesia. Consequently, the State shall ensure its fulfilment, development and protection. The provisions of this article are further described in Article 14 of Law No. 39 of 1999 on Human Rights (hereinafter referred to as the Human Rights Act), which essentially determines that the right to communicate and obtain information necessary to develop their personal and social environment constitutes right of everyone.

In addition, everyone using all available means is also entitled to acquire, search, possess, store, process and convey information. The essence of the provisions of Article 14 of the Human Rights Law is in line with the provisions of Article 60 paragraph (2), which essentially determines that seeking, receiving and providing information according to intellectual level and age for the sake of self-development is the right of every child, insofar as it is in accordance with decency values. Hence, it appears that the principles of regulating the right to obtain information guaranteed in the 1945 Constitution. The Human Rights Act has similar characters to those listed in UDHR-1948 and the ICCPR. Comparing the regulation of the right to obtain information within the 1945 Indonesian Constitution with the Human Rights Act, UDHR-1948 and the ICCPR, it can be said that Indonesia pays great attention and respect to the recognition, fulfilment and protection of the right to information. Therefore, everyone, including the government, shall be obliged to respect and guarantee the freedom of use of the right to obtain information freely.

Information is a daily necessity for everyone; even information is seen as a primary need to develop the personal and social environment. Therefore, everyone has the right to obtain, and disseminate information. Information can help a person, group of people, even the government to plan and decide what to do. The accuracy of information greatly determines a person's success in determining the attitude and action. Accurate and balanced information can help people analyse problems to gain understanding, and decide on problems that occur, both individuals, communities, and the government. To create a democratic climate in society, a legal tool is needed to ensure the freedom of the community to obtain information transparently. Thus, the abuse of authority and arbitrariness of the authorities can be prevented and avoided. So, the implementation of government can be held in accordance with the wishes of the community,

which is guided by the principles of good government. Transparency of information is closely related to the accountability of government administration, because the information disclosure can encourage state administrators to be careful in using their power (Mason, 2010). Moreover, the right to obtain information can be used to influence the government in planning, executing and evaluating its policies (Wirawan, 2018). In a democratic country, the right to obtain information is the realization of the principle of popular sovereignty, while in developed countries; the success of community participation is determined by the ability of state administrators to disseminate information to the public in all aspects of their lives (Wicaksono, 2018). The effectiveness of information dissemination to the public can use and utilize information and communication technology that has been developed very rapidly at this time.

The Public Information Disclosure Act is a legal basis for the implementation of the right to obtain public information, as well as a juridical basis for public claims if the right to obtain public information is not fulfilled by the government. The Public Information Disclosure Act can also be used as a legal instrument to improve quality and the spirit of community participation in providing input to the government in making public policies (Suparno, 2017; Rokhmad & Susilo, 2017). The general explanation of the Public Information Disclosure Act determines that its existence is essential as a legal basis relating to: (1) the right of everyone to obtain information; (2) the obligation of the Public Agency to provide and serve requests for information quickly, timely, proportionate fees, and a simple way; (3) exceptions must be strict and limited; (4) the obligation of Public Agency to fix the documentation system and information service.

Essentially, Article 4 paragraph (2) the Public Information Disclosure Act determines that every person has the right to see and know public information, obtain information from public meetings, obtain copies of information in accordance with applicable procedures, and also disseminate public information in accordance with regulations applicable laws. The law also regulates some non-public information. It is based on the assumption that stored information will be better than accessible to the public. These exceptions of information disclosure are explicitly provided in the provisions of Article 6 paragraph (1) of Public Information Disclosure Act. Such information is relating to the interests of business protection from business competition which is not healthy; information relating to personal rights; information relating to secret positions; and/or requested public information has not been controlled or documented. This exception is related to the government's efforts to protect the community and also one's personal rights. Moreover, information relating to the state's secrets should be stored and not accessible to everyone because of its ability to endanger the security of the state and public security alike.

LIABILITY IN PUBLIC INFORMATION DISCLOSURE DISPUTE

Constitutionally, every citizen has the right to obtain the necessary public information in his or her own development effort, except on public information that is nominally stipulated in the Public Information Disclosure Act. The regulation of the use of public information rights will result in an obligation for the government to publish public information widely, except to excluded information. Such obligations in international legal instruments are called the principle of maximum disclosure. The principle of maximum disclosure shall be the presumption that all information shall be subject to disclosure and that this presumption may be limited in some circumstances. Regarding the right of citizens to obtain public information on the one hand, and the obligation for the government on the other hand in fulfilling the rights of public information

disclosure, it will potentially cause discrepancies in public information services. Nonconformity of interpretation in the fulfilment of public information will give rise to public information disputes between citizens as applicants and Public Agencies or State Administration Officials as State Appellants. Therefore, the government authorized to issue public information is normatively accountable if citizens are not satisfied or feel their interests are harmed.

The possibility of the existence of the public lawsuit is due to the government authority to refuse or grant the community's request to obtain the fulfilment of public information. In the perspective of positive administrative law in Indonesia, the rejection or acceptance of the fulfilment of public information is part of the legal acts of government (*rechtshandling*) because the rejection or acceptance of the request to obtain information by the public is a form of decision of the State Administration Agency/Officer (Hadjon, 1993). This decision is a unilateral and final public decision, which in positive law; it is referred to as the State Administrative Decree (*beschikking*) which can be claimed in the State Administrative Court. This is stipulated in the provisions of Article 1 point 9 of Law No. 51 of 2009 regarding the Second Amendment to Law No. 5 of 1986 regarding State Administrative Court (hereinafter referred to as the State Administrative Judicature Law). The provisions of this article relate to the liability of the government, in this case the State Administrative Officer, for issuing a decision (*beschikking*), when a decision is considered detrimental to a person and/or a civil legal entity.

The function of the State Administrative Court in the rule of law is as a means of control over government actions, especially the decisions which are characterized to have unilateral in nature, which may harm the community. The existence of the State Administrative Court is expected to limit the behaviour of the authorities and as a means of administrative action to the government or the state officials who violate the legal provisions in administering the government, especially in order to provide public services. Government transparency in public information is in accordance with the principle of accountability, in which the government must be accountable in the administration of government included in the fulfilment of public information. The application of the principle of accountability in the actions of the government has two meanings as a form of supervision of government action, and as a means of legal protection for the community.

The concept of state accountability arising from the obligation of the state is meant for providing compensation or redressing, in case, any direct or indirect material or mental loss to its citizens resulting from the actions of the government (Djatmiati, 2007). The essence of the concept of state accountability is a reciprocal relationship between the losses suffered by society and the actions of government (Fuke, 1999). Likewise, Djatmiati (2007) states that the state liability concerns the government's accountability of a loss must be done through the courts. Hence, the government's accountability in relation to public information may be limited only to the compensation of people who feel disadvantaged as a result of government action in the fulfilment, development, or protection. In the event of a dispute arising from activities of public information, Public Law provides a legal basis for doing right to sue by the community who feel aggrieved by the actions of the public agency or state administrative officials. The rationality of legalization of the provision of the right to sue cannot be separated from state efforts to provide legal protection on the right of citizens to access public information.

Furthermore, the Public Information Disclosure Act determines ways for people to defend their right to obtain public information. This is reflected in the provisions of Article 37

paragraph (1) and paragraph (2) of Law No. 14 of 2008 concerning Public Information Disclosure which stipulates that:

1. The filing of a lawsuit shall be made through a state administrative court if the defendant is the State Public Entity.
2. The filing of a lawsuit is carried out through a district court if the person sued is a Public Agency other than the state Public Agency as referred to in paragraph (1).

Based on the provisions of the article, it can be argued that if the process of lawsuit is done through the judiciary, the lawsuit mechanism is made through two judicial institutions, namely the lawsuit through the State Administrative Court and the lawsuit through the district court. A lawsuit to the State Administrative Court shall be made if the defendant is the State Administration Officers. Whereas, if the defendant is not in the State Administration Officers, the lawsuit shall be filed to the district court. The two mechanisms of the lawsuit can only be filed or taken if one of the parties to the dispute declares in writing not to accept the adjudication decision of the Information Commission as specified in Article 48 paragraph (1) of the Public Information Disclosure Act.

The settlement of public information disputes by filing a lawsuit to the State Administrative Court as referred to in Article 47 paragraph (1) of the Public Information Disclosure Act indicates that the State Administration Court has the authority to hear public information disputes. However, the competence of the State Administrative Court is limited to public information disputes between the Public Information Applicants and the State Administration Officers. In the concept of administrative law, public information disputes constitute a State Administration dispute, and this dispute occurs because it is preceded by government actions which are characterized to have unilateral and final decision. In the context of public information disputes, the acts of government that can be sued are in the form of positive decision, negative decision of state administration, or fictitious state administration decision as well as in general state administrative disputes. Broadly speaking, the information required by the public administration officers can be divided into three categories, namely:

1. Information that must be published periodically six months, relating to Public Agency, activities and performance of Public Agency, report financial and/or other information regulated in legislation.
2. Information that must be announced, which may threaten the livelihood of the public and public order.
3. The information which must be available at any time, whereby all public information under its control, excludes the excluded information, the decisions of the public authority and its considerations, all the policies and their supporting documents, the project work plan including the estimated annual expenditure of the public agency, the public agency agreement with third parties, information and policies submitted by public officials in open meetings, work procedures of employees of the public agency relating to services.

These 3 kinds of information can be a basis for the cause of the public information disputes. It is stipulated through the provisions of Article 35 paragraph (1) of the Law of Public Information, which determines:

1. Rejection of request for information based on reasons for exclusion as referred to in Article 17.
2. The non-availability of periodic information as referred to in Article 9.
3. Not responding to requests for information.

4. Information requests are not responded to as requested.
5. Non-fulfilment of information requests.
6. Imposing unnatural fees.
7. Delivery of information beyond the time provided for in this Law.

The seven types of governance actions are the types of actions of the State Administration officials in the field of public information, which can be requested by the public information applicant to be fulfilled as referred to in Article 1 paragraph (9) of Law No. 51 of 2009 as a second amendment to Law No. 5 of 1986 concerning State Administrative Courts, which are individual, concrete, unilateral and final. Therefore, the decision of the State Administration agency/official as referred to in Article 35 paragraph (1) of the Public Information Disclosure Act can be categorized as a State Administration Decree, and therefore becomes the authority of the State Administrative Court.

CONCLUDING REMARKS

In Indonesia, obtaining public information is a human right guaranteed to be fulfilled, respected, and protected by the government. Therefore, everyone is entitled to get it, except for the information that is excluded. Recognition, fulfilment and protection of public information are obtained through legal instruments that include the 1945 Constitution of the Republic of Indonesia, the Human Rights Act and the Public Information Disclosure Act. In the event of a dispute between the petitioner and the state administration agency/official as a result of nonconformity in the interpretation of the fulfilment of public information, the provisions of Article 47 paragraph (1) of the Public Information Disclosure Act, the settlement can be done through administrative efforts or filed a lawsuit to the State Administrative Court. The authority of the State Administrative Court is based on the provisions of Article 48 paragraph (1) of the Public Information Disclosure Act, that is, if it has already been resolved through an administrative effort and does not obtain a settlement. Dispute over public information by the State Administrative Court have some unique characteristics in which the dispute is tiered with prior administrative effort, the hearing is excluded from a closed nature, and legal remedies that can be made up to the appeal of cassation.

Although public information dispute is a dispute between the public information applicant and the state administration officers, in fact, this dispute and other state administrative disputes have a common background, namely the issuance of an adverse state administration decree. However, public information disputes have distinctive characteristics (*lex specialis*) compared to other state administrative disputes with the following details. Firstly, in a public information dispute, the State Administrative Court cannot automatically be authorized to hear, even though there is a loss of the community as an applicant. This is because the settlement must be pursued through the procedure of objection (*bezwaar*) first, i.e. filed an objection attempt to the official concerned. If the objection is denied, the applicant submits an administrative appeal (*administratief beroep/appeal*) to the officer's supervisor. If no agreement is reached, then the process of objection may propose mediation efforts to the Information Commission Centre, Province, or District/City level. If administrative efforts and mediation efforts are not reached to agreement or unsuccessful, then the public as a disadvantaged party may propose non-litigation

adjudication efforts to the Information Commission. If this adjudication is not reached, the State Administrative Court shall be authorized to hear such public information dispute. The requirement to undertake this administrative effort is regulated in Article 48 paragraph (1) of the Public Information Disclosure Act.

Second, the trial of a state administrative court dispute is an open trial for the public, including in a public information dispute. Meanwhile, pursuant to the provision of Article 48 Paragraph (2) of the Public Information Disclosure Act, the trial in the State Administrative Court is closed, but excludes relating to the dispute of public information relating to information exempted in Article 17 of the Public Information Disclosure Act. Thirdly, in the ordinary state administration dispute, the decision of the State Administrative Officer contains the rejection of the petition or invalidates the State Administrative Decision or ordering the public agency/state administration officer to revoke the State Administration Decree. However, in the dispute of public information, the Decision of the State Administration agency/officer has its own characteristics as stipulated in Article 49 paragraph (1) and paragraph (2) of the Public Information Disclosure Act, containing a decision to cancel the decision of the Information Commission and or to order the public agency to provide part or all of the information requested by the applicant for public information or refuse to provide part or all of the information requested by the applicant for public information. In addition, the ruling of the State Administrative Court may also instruct the information managing and documentation official to perform its obligations as stipulated in the Public Information Pollution Act, and/or order to meet the period of provision of information as regulated in this Law. The content of the decision also relates to the authority to assess the request for public information requesters, and also decide the cost of doubling the information.

Fourth, the last special character is about legal remedies. In the state administrative dispute in the State Administrative Court, usually legal efforts that can be taken are in the form of appeal, cassation and review. Whereas, local administration decrees can only be appealed. However, for public information disputes, the legal remedies that can be made to the dissatisfaction of the decision of the Administrative Court are not only limited to the first and the appeal efforts, but are given the opportunity to apply for cassation when the efforts when an appeal cannot or has not resulted in an expected decision as stated in article 50 of the Law on Public Information.

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