



# Understanding the mistrust surrounding the law on protecting specific secrets

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## ► To cite this version:

César Castellvi. Understanding the mistrust surrounding the law on protecting specific secrets. 2014.  
hal-02554363

**HAL Id: hal-02554363**

**<https://hal.science/hal-02554363>**

Submitted on 10 Jun 2020

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## CURRENT ANALYSIS

### 1. Understanding the mistrust surrounding the law on protecting specific secrets.

- **CÉSAR CASTELLVI**

In the night of the 6<sup>th</sup> to 7<sup>th</sup> December 2013, almost one month after the draft law was originally proposed, the law on protecting specific secrets (*tokutei himitsu hogo hō*) was adopted by the two Houses that make up the Japanese parliament. This rapid approval<sup>3</sup>, which complements the law facilitating the creation of a Japanese version of the American National Security Council (*Kokka anzen hoshō kaigi*) was a key moment for Abe's second government, occurring as it did, one year after his victory in the general elections of December 2012. Within a context of almost

uninterrupted diplomatic tensions between Japan and its neighbours, particularly China and North Korea, since 2010, the combination of these two laws is meant to be one of the cornerstones of a military defence and cooperation policy between Japan and the United States. The laws should also be placed within a global context in which the boundaries between public and private are being erased by growing internet usage and where Japan is trying to avoid controversies such as the Snowden and Wikileaks affairs.

The fact that this law was adopted despite protests organised outside the Diet buildings continues to provoke violent reactions from opposition parties and the general public. There are many different criticisms of this law, which create a bipolar debate that is often reduced to a fight between those “in favour” and those “against”. However, it is obvious that reactions to the vote on the law on protecting specific secrets are more complex. In order to improve our understanding of the situation, it is important to look at the circumstances surrounding the approval of the law and the

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<sup>3</sup> Deliberations in the House of Representatives only lasted for 44 hours, making this one of the laws most quickly adopted by ministers from the parliamentary commission responsible for examining the project, along with the law on sending the Self Defence Forces to Iraq in 2003 and the law on protecting private information in 2003 (*Asahi shimbun*, editorial of 27 November 2013).

way in which the debate was held. Only then can the criticisms of this law, which mainly seem to involve issues of form, be analysed. Finally, the difficult ambiguity of the criteria used to define “secrets” will be discussed, along with their consequences on access to information by investigative journalists.

## Origins of the Proposed Draft Law

The law on protecting specific secrets should primarily be viewed as part of the Abe government’s policy of collaborating with the United States to exchange information. It is linked to the creation of a National Security Council (NSC) based on the American model, which will strengthen the Japanese government’s power in relation to foreign policy and defence, giving the Prime Minister more room for manoeuvre. One of the starting points for this law is a visit to the United States and the United Kingdom by Isozaki Yōsuke, a special adviser to Abe Shinzō who was tasked with collecting information to create the new National Security Council. During his visit, his American hosts - particularly Evan Medeiros, director of the Asia section of the NSC - shared the uncertainty felt by the United States with regard to the current state of Japan’s legislation protecting classified information, despite the fact that the country is Japan’s special partner for strategic information exchange. Legal reinforcement was suggested<sup>4</sup>.

At the time, Japan already had several laws dealing with the issue. As part of the Japanese-American military collaboration, the Mutual Defence and Assistance treaty signed on 8 March 1954 had already anticipated the creation of a “specific defence secret” status for some information relating to national security. Any distribution of this

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<sup>4</sup> “1985, Repealing a draft law due to negative public opinion” (1985, yoron no hantai de haian), *Asahi Shimbun*, 26 October 2013.

classified information could result in up to ten years imprisonment<sup>5</sup>. Japanese legislation for the Self Defence Forces (JSDF) also had a “defence secret” provision for classified information, whose distribution could lead to up to five years imprisonment<sup>6</sup>. In 2009, a new law expanded the scope of this law to government civil servants<sup>7</sup>.

Although these protective systems existed before the new law was passed in December 2013, and while the amendment creating a Japanese version of the NSC was approved on 4 December 2013 by a significantly large majority<sup>8</sup>, discussions surrounding stronger penalties have occurred several times over the past 30 years. For example, a similar attempt was made in 1985, when the Nakasone government proposed a draft law on State secrets (*kokka himitsu hōan*). At that time, the general public largely rejected the draft law, particularly as it planned to impose the death penalty on any civil servant found guilty of distributing certain types of information to foreign powers<sup>9</sup>. A second attempt to increase penalties for civil servants was made by the Democratic Party of Japan in November 2010 when a video revealed a collision between a Chinese fishing boat and a Japanese coast-guard vessel just off the Senkaku islands (known as the Diayou islands in China). The video

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<sup>5</sup> From the government’s digital law database, <http://law.e-gov.go.jp/htmldata/S29/S29HO166.html>.

<sup>6</sup> From the Prime Minister’s website, [http://www.kantei.go.jp/jp/singi/jouhouhozen/housei\\_kaigi/dai2/siryou1.pdf](http://www.kantei.go.jp/jp/singi/jouhouhozen/housei_kaigi/dai2/siryou1.pdf).

<sup>7</sup> “Promulgating the law on protecting specific secrets: the structure of executive oversight by the executive” (tokutei himitsu hogo hō seiristu – “gyōsei ga gyōsei wo kanshi” no kōzō), *Nihon Keizai Shimbun*, 7 December 2013.

<sup>8</sup> This was mainly due to the fact that the main opposition party, the Democratic Party, also voted in support of the draft law.

<sup>9</sup> *Op. cit.*, *Asahi shimbun*, 26 October 2013.

was uploaded to the internet by a coast-guard almost two months after the events, in direct contravention of the professional confidentiality required by the Law on State Civil Servants (*kokka kōmuin hō*). It increased tensions between Japan and China and, therefore, reignited the debate. However, a draft law was rejected when the Noda government came to power in the autumn of 2011.

Finally, during an announcement to the press on 26 September 2013, government spokesperson Suga Yoshihide officially announced that a law was being drafted to complement the Japanese version of the NSC by reinforcing the protection of State secrets. The draft law was presented one month later during a session of the House of Representatives of the Diet on 26 October.

### **The Law on Protecting Specific Secrets and Access to Information: Contentious Issues**

According to the law on protecting specific secrets, a “specific secret” (or special secret) can be defined as any information relating to one of the four following subject areas:

- 1) defence,
- 2) diplomacy,
- 3) protection against designated dangerous activities<sup>10</sup> and
- 4) protection against terrorism.

This is information that, if distributed, could create a threat to national security.

Heads of the organisations involved (ministers, police commissioners) can classify any information as “secret”. The classification is then valid for five years and may be renewed up to a maximum period of thirty years. However, if a piece of information classified as secret is judged to be particularly sensitive

and if its concealment is considered necessary to safeguard the general public, its classified status may be extended to sixty years, with government approval. Should a piece of information be intentionally leaked by a civil servant or any other person with access through their job role, the penalty is up to ten years imprisonment<sup>11</sup>.

In addition to the debate about whether Japan actually needs a new law to protect information or not, the main problem with this particular law and how it affects access to information relates to the criteria used by the heads of the relevant organisations to classify information. The amount of information that could be included by the criteria, particularly in relation to anti-terrorist protection, is the reason why both the Japan Restoration Party (*Nihon Ishin no Kai*) and Your Party (*Minna no Tō*) only joined the majority group on the condition that an oversight organisation was set up to provide a right to inspection that was not included in the original draft law.

The independent oversight organisation that resulted from this agreement between the majority party and its political allies was included in the law approved on 6 December and is made up of three committees, each directly attached to the Prime Minister’s office. The first committee, the Information Protection Advisory Assembly (*jōhō hozen shimon gikai*), is an advisory body attached to the Prime Minister’s office that will draft criteria to designate or repeal classification. Its members will be taken from the general public, and Watanabe Tsuneo, owner and manager of the *Yomiuri shimbun*, the most popular newspaper in the country, was nominated as its president on 14 January 2014.

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<sup>10</sup> This generally corresponds to spying activities.

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<sup>11</sup> From the Prime Minister’s office website, [http://www.kantei.go.jp/jp/topics/2013/headline/houritu\\_gaiyou\\_j.pdf](http://www.kantei.go.jp/jp/topics/2013/headline/houritu_gaiyou_j.pdf).

The second committee, the Protection and Surveillance Committee (*hozen kanshi iinkai*), will be linked to the government spokesperson's office; it will bring together the heads of various organisations such as the Tokyo Police Department, the Ministry for Foreign Affairs, and the Ministry of Defence, and will oversee classifications and repeals once the proper time limit has expired. This committee is based on the American Interagency Security Classification Appeals Panel, an organisation designed to oversee and manage the balance between information that can be distributed to the public and information that must remain classified<sup>12</sup>.

Finally, the third committee is also directly linked to the government and is divided into two groups. The first, the Independent Official Document Oversight Group (*dokuritsu kōbunsho kanrikan*) is responsible for deciding if official information can be destroyed or not. The second, the Information Protection Inspection Office (*jōhō hōzen kansatsu shitsu*), will be a deliberative assembly of civil servants responsible for checking whether it is appropriate for information to be classified or not.

The main characteristic of this complex system of regulatory organisations, which have occasionally overlapping remits, is that it is almost completely and directly linked to the government and provides no parliamentary oversight mechanism<sup>13</sup>. This has been the main criticism of the law since it was approved. Two months after the law was approved, a poll by the *Mainichi shimbun*, published on 17 February 2014, revealed that 71% of respondents believed the law approved on 6 December 2013 should be amended to

create oversight organisations that are more independent of government<sup>14</sup>. The Secrets Protection Advisory Assembly represents the only part of the oversight system that does not depend on the government. Nevertheless, it has been criticised for two reasons: firstly, because its scope is limited to defining designation criteria without looking at how these are applied and, secondly, because of the government's decision to appoint as its president a media owner who clearly supports the Abe government.

### **Freedom of Information Issues Raised by the Law**

The problem of information which could be “classified” as “secret” by this law has been discussed critically by a large portion of Japan's media. While the press is mainly opposed to the idea that a new law on information is needed<sup>15</sup>, they also agree that there is a problem with the currently approved law due to the classification criteria used within it. Even newspapers that supported the law, such as the *Sankei shimbun* and *Yomiuri shimbun*, used editorial articles to call for the implementation of a decision oversight organisation that would be independent from the government and that would monitor the information classification decisions made.

The press are directly threatened by the vagueness of the classification process, as illustrated by previous incidents that have had significant consequences for Japanese

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<sup>12</sup> *Op. cit.*, *Nihon keizai shimbun*, 7 December 2014.

<sup>13</sup> Article 72 of the 1947 Japanese Constitution states that all administrative branches of the government fall under the control of the Prime Minister.

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<sup>14</sup> “70% of people support an amendment to the law on protecting specific secrets” (honsha yoron chōsa: himitsu hogo hō “shūsei hitsuyō” 70%), *Mainichi Shimbun*, 17 February 2013.

<sup>15</sup> The *Asahi shimbun*, *Mainichi shimbun* and *Tokyo shimbun* were clearly opposed to the draft law as a whole, while the *Sankei shimbun* and *Yomiuri shimbun* supported it. *Nihon keizai shimbun*, Japan's economic newspaper, did not express an opinion. The regional press were largely against the law.



journalists following the distribution of classified information. The most well-known of these is without doubt the Nishiyama affair that uncovered secret agreements between the United States and Japan on the reversion of Okinawa. In 1971, Nishiyama Takichi, a political journalist for the *Mainichi shimbun*, learned from a contact within the Ministry of Foreign Affairs that Japan had paid the equivalent of four million dollars compensation to its former occupiers. The information was not revealed by a journalistic scoop - as would be expected - but by a Minister from the Socialist Party who had been made aware of the secret agreement. The revelation led to a six month prison sentence for the journalist and a one year suspended sentence for his source, due to laws relating to civil servant secrecy that were valid at the time.

The affair was particularly significant due to the ethical debate on methods of obtaining information that it sparked among journalists and was referred to during a press conference by Minister Masako Mori, responsible for the current draft law, who insisted that a similar incident would have the same results today<sup>16</sup>.

The main difference between previous legislative measures relating to civil servant secrecy and the current law on protecting specific secrets is the severity of sentencing provided by the law. Civil servants remain one of the main human sources of information for investigative journalists. The secrecy that surrounds classified information will now have two consequences. Firstly, it will become increasingly difficult for the press to convince potential sources to cooperate in investigations as these sources may fear an aggravated sentence following the disclosure of information. Secondly, and as a direct result of the practical difficulties of

the first consequence, journalists will find it increasingly difficult to investigate several areas relating to national security and public life. Specifically, the scope of the classification criteria means that information relating to the situation at the Fukushima power plant or to the deployment of *Osprey* aircraft on American bases in Okinawa could be defined as classified, thereby complicating any potential investigations. Yet, currently, there are no real measures in place to guarantee that excesses will not be committed, under the pretext of “protecting information”. This vagueness is even more worrying given that the legitimacy of Japanese authorities has clearly been called into question following the way in which information relating to the impact of the March 2011 earthquake has been processed<sup>17</sup>.

The law could have gained some popularity if it had been clearly explained to the general public before it was adopted. However, the speed at which discussions were held and the fact that public opinion canvassed by local government (particularly in the Fukushima province) was not taken into account, have only contributed to the public's mistrust of the law, despite the fact that the final aim does seem to be a legitimate one according to most of the population<sup>18</sup>. Even the LDP has taken critiques into account, as it put forward

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<sup>17</sup> This is supported by the fact that Japan dropped from 22<sup>nd</sup> to 53<sup>rd</sup> in the World Press Freedom Index published by Reporters without Borders, before this law was even approved. The country is now ranked 59<sup>th</sup> in the world, as the organisation took the approval of the law into account, [http://fr.rsf.org/IMG/pdf/classement\\_2013\\_fr\\_bd.pdf](http://fr.rsf.org/IMG/pdf/classement_2013_fr_bd.pdf).

<sup>18</sup> According to a poll carried out by the *Sankei shimbun* one week after the law was passed, on 14 and 15 December 2013, 50.5% of people asked answered positively to the question “Do you think this law is necessary?” However, 66.2% believed that the fact that it was passed during an extraordinary session of Parliament was not a good thing.

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<sup>16</sup> Remarks made during a press conference following the cabinet meeting of 22 October 2013.

a draft law on 5 March 2014 to implement an oversight organisation responsible for monitoring the classification of secrets within the House of Representatives<sup>19</sup>.

Although it is important not to be excessively critical and to remember that good information management and distribution is crucial during a crisis, this protection must not come at the expense of the fundamental rights to freedom of information. Guarantees are needed and those provided by the third-party monitoring system proposed by the new law are not particularly convincing due to their lack of independence. The context of defiance, hasty adoption and implementation without taking into account canvassed public opinion are issues that do not help the general public understand the importance of this law, leading to widespread scepticism, regardless of whether or not there are benefits to protecting specific secrets.

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<sup>19</sup> Sugisaki Shinya, « Law on protecting specific secrets: An oversight organisation in the Diet, a limited opening » (tokutei himitsu hō: kokkai no kanshi kikan – gentei kaisai), *Asahi Shimbun*, 5 March 2014.