IN THE CONSTITUTIONAL COURT
OF INDONESIA

JUDICIAL REVIEW
OF LAW NUMBER 17/2011 ON STATE INTELLIGENCE

Case number 07/PUU-X/2012

PUBLIC
AMICUS BRIEF BY

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I. Introduction

1. This amicus brief is submitted on behalf of ARTICLE 19, the Global Campaign for Free Expression, ("the Amicus") in accordance with the rules on intervention set by the Constitutional Court of Indonesia. ARTICLE 19 is an international human rights organisation, independent of all ideologies and governments. It takes its name and mandate from the nineteenth article of the Universal Declaration of Human Rights, which proclaims the right to freedom of expression, including the right to receive and impart information and ideas. ARTICLE 19 seeks to develop and strengthen international standards that protect freedom of expression by, among other methods, making submissions to international, regional and domestic tribunals and human rights bodies and convening consultations of experts on free speech issues. ARTICLE 19 is a registered UK charity (No. 32741), with headquarters in London and field offices in Bangladesh, Kenya, Senegal, Tunisia, Mexico and Brazil. ARTICLE 19 has previously submitted briefs to the Court in Case 140/PUU-VII/2009 relating to defamation of religion, and evidence in Decision Number 14/PUU-VI/2008 relating to criminal defamation.
2. The Amicus submits that laws that seek to prevent access to information and punish discussion of matters of public interest in the name of national security are only permissible in the narrowest of circumstances.
3. More specifically, the Amicus submits that the *Law Number 17 of Year 2011 on State Intelligence* ("the Law") contains a number of provisions which are in contravention of international human rights law on freedom of expression and access to information. The decision of the Amicus to intervene in this case is motivated by a serious concern about the human rights of individuals to be able to access information about government activities and to use that information to engage in public debate and discussion of the activities of those charged with upholding the laws and acting on their behalf, even in the often sensitive area of national security. The Amicus is concerned that the law will restrict legitimate debates and discussions of ideas on important matters of public interest. The Amicus therefore submits that a Constitutional Court decision upholding the law would severely impact human rights in Indonesia and undermine Indonesia's international obligations.

II. Submissions

i. Summary of Submissions

4. The Amicus submits that the subsequent provisions of the law are fundamentally incompatible with Indonesia's international human rights obligations on freedom of expression. The International Covenant on Civil and Political Rights ("ICCPR")[1] provides the principal legal framework for Indonesia's international obligations in relation to these rights, which are protected in Article 19 (freedom of opinion and expression) of the Covenant. Indonesia acceded to the ICCPR on 23 February 2006, and is therefore bound by that Covenant. Indonesia is required, both under the ICCPR itself and under general international law, to enact legislation giving domestic effect to its provisions and to bring domestic laws into line with the ICCPR.[2] Indonesia has made no reservations or declarations in relation to the ICCPR's provisions on the rights at issue in this case and therefore must fully meet the obligations which flow from them.
5. In particular, the law imposes severe restrictions on the right to freedom of expression and the right of access to information protected by Article 19 of the ICCPR, as well as the right to privacy of communications protected by Article 17 of the ICCPR.

ii. Obligations Under International Law

6. Article 19 of the ICCPR protects the right to freedom of expression in broad terms. Under that article, States parties are required to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds and regardless of frontiers. Notwithstanding the importance of the right to freedom of expression, that right is not absolute and may be restricted in certain circumstances. General Comment No 34 of the UN Human Rights Committee, which was adopted in July 2011, sets out the authoritative view of Committee on Article 19:

> This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.[3]

[1] International Covenant on Civil and Political Rights adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976.
[2] Article 2(2) of the ICCPR; Articles 2(1)(b) and 15 Vienna Convention on the Law of Treaties 1969.
[3] Human Rights Committee, General Comment No 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011.

7. Article 19(3) of the ICCPR indicates that the exercise of freedom of expression carries with it special duties and responsibilities. For this reason, restrictions on the right are permitted to ensure the respect of the rights or reputations of others (Article 19(3)(a)), or the protection of national security or public order (*ordre public*), or of public health or morals (Article 19(3)(b)). However, when a State party imposes restrictions on the exercise of freedom of expression, these restrictions may not jeopardize the right itself. The Human Rights Committee has indicated that the relationship between right and restriction and between norm and exception must not be reversed.[4]

8. Article 19(3) also lays down specific conditions, and it is only subject to these conditions that restrictions may be imposed (the "three part test"): *first*, the restrictions must be "provided by law"; *second*, they may only be imposed for one of the grounds set out in Article 19(3)(a) or (b) of the ICCPR; and *third*, they must conform to the strict tests of necessity and proportionality.[5] Restrictions are not allowed on grounds not specified in Article 19(3) of the ICCPR, even if such grounds would justify restrictions to other rights protected in the ICCPR. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.[6]

9. Thus, the need to protect national security may warrant restriction upon an individual's freedom of expression, but only if such a limitation is justified on the grounds that it is provided by law and is necessary. Restrictions must be "necessary" for a legitimate purpose, in the sense that there must be a "pressing social need" for the restriction.[7] The principle of proportionality also has to be respected in the sense that any restriction "must be the least intrusive measure to achieve the intended legitimate objective and the specific interference in any particular instance must be directly related and proportionate to the need on which they are predicated".[8] The law framing the restrictions must respect the principle of proportionality, as must the administrative and

[4] See Human Rights Committee, General Comment No 27, Freedom of Movement (Article 12), CCPR/C/GC/21/Rev.1/Add.1, 2 November 1999, para 13.
[5] See Human Rights Committee, Communication No 1022/2001, *Velichkin v Belarus*, CCPR/C/85/D/1022/2011, Views adopted on 20 October 2005.
[6] See Human Rights Committee, General Comment No 22, Freedom of Thought, Conscience and Religion (Article 18), CCPR/C/21/Rev.1/Add.4, para 8.
[7] *Handyside v United Kingdom*, Eur Ct HR, Application No 5493/72, Series A No 24, Judgment of 12 December 1976, 1 EHRR 737, at para 48.
[8] Human Rights Committee, General Comment No 22, Freedom of Thought, Conscience and Religion (Article 18), CCPR/C/21/Rev.1/Add.4, para 8.

judicial authorities when applying the law.[9] The remainder of this brief will examine those requirements as applied in national security situations and as relates to the review of the Law.

iii. The Scope of the Legislation is Overly Broad

10. The Amicus submits that the Law adopts both an overly broad definition of national security as well as an overly broad definition of "intelligence secrets", which undermines the ability of all persons to seek, receive and impart information of public interest, in violation of international standards on freedom of expression and information.

a. Definition of National Security

11. As described above, it is well established that any interferences with the right to freedom of expression must pursue a legitimate protective aim, as exhaustively enumerated in Article 19(3)(a) and (b) of the ICCPR. Legitimate aims are those that protect the human rights of others, protect national security or public order or protect public health and morals. It is accepted in the case of the Law under review in this case, that the Law's general intent is to protect national security. The problem lies in its definition of national security relative to the boundaries acceptable under international law.
12. Article 1 of the Law defines the scope of the Law to apply to all threats against the nation. Sub-article 4 further delineates its application:

> "Threat" means any effort, work, activity and action, both domestic and foreign, which is regarded and/or proven to be endangering the safety of the nation, security, sovereignty, territorial integrity of the Unitary State of the Republic of Indonesia, as well as national interests in various aspects, whether ideological, political, economic, social, cultural, or defense and security.

13. While there is a no universal definition of national security, there has been extensive development on the scope and boundaries of the concept by UN bodies and experts in the past 20 years. These elaborations have taken a narrow view of the scope of the concept. As a preliminary matter, the UN Human Rights Committee has found that states must "specify the precise nature of the threat" relating to national security rather than relying on a general statement of the concept.[10]

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[9] Human Rights Committee, General Comment No 27, Freedom of Movement (Article 12), CCPR/C/GC/21/Rev.1/Add.1, 2 November 1999, paras 14 and 15. See also Human Rights Committee, Communications No 1128/2002, *Marques v Angola* CCPR/C/83/D/1128/2002, Views adopted on 29 March 2005; Human Rights Committee, Communication No 1157/2003, *Coleman v Australia* CCPR/C/87/D/1157/2003, Views adopted 17 July 2006.

[10] Keun-Tae Kim v. Korea, Communication No 574/1994, UN Doc. CCPR/C/64/D/574/1994 (4 January 1999), para 12.4.

14. In General Comment No. 34, the Human Rights Committee generally set out the permissible restrictions on freedom of expression for national security reasons under 19(3):

> Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress.

15. The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, which was developed by independent experts and has been repeatedly endorsed by UN human rights bodies, further sets out circumstances in which national security can legitimately apply[11]:

> 29. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.
> 30. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.
> 31. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.
> 32. The systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.

16. The UN Special Rapporteur on Promotion and Protection of the Right to Freedom of Opinion and Expression also set out his expert view on limitation in his report to the Commission on Human Rights in 1994:

> For the purpose of protecting national security, the right to freedom of expression and information can be restricted only in the most serious cases of a direct political or military threat to the entire nation.[12]

17. The Special Rapporteur, in cooperation with the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, issued a special declaration on freedom of information in 2004, stating:

> Certain information may legitimately be secret on grounds of national security or protection of other overriding interests. However, secrecy laws should define national security precisely and indicate clearly the criteria which should be used in determining whether or not information can be declared

[11] UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4.
[12] Mr. Abid Hussain, Report of the Special Rapporteur on Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1995/32, 14 December 1994, pp 48.

> secret, so as to prevent abuse of the label "secret" for purposes of preventing disclosure of information which is in the public interest. [13]

18. The definition of national security has also been further developed by the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, which have been subsequently endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression, the UN Human Rights Commission and various courts.[14] Principle 2 states:

> (a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
> (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

The broad definition of "national interests" in Article 1(4) in the Law violates international law on freedom of expression, as it goes far beyond established legitimate national security concerns such as protecting "a country's existence" or "its territorial integrity against the use or threat of force" and instead incorporates much less well defined concepts, including "ideological, political, economic, social, cultural…" and other non-protected issues which are not recognized as legitimate grounds for restricting speech under Article 19(3) of the ICCPR. Thus, Article 1(4) does not meet the limitations under the ICCPR, as it does not meet the strict requirements for limits allowed under Article 19(3).

b. Definition of Intelligence Secrets

19. In addition to the definition of threats, the Law sets out specific categories of information which are intended to be protected as "Intelligence Secrets" – to which access is limited and the disclosure of which is punishable – which also fail to meet the requirements of international law.

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[13] International Mechanisms for Promoting Freedom of Expression, Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 2004.

[14] Report of the Special Rapporteur, Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1996/39, 22 March 1996, para. 154; Commission Res. 1996/53; Gamini Athukoral "Sirikotha" and Ors v. Attorney-General, 5 May 1997, S.D. Nos. 1-15/97 (Supreme Court of Sri Lanka) and Secretary of State for the Home Department v. Rehman [2001] UKHL 47 (House of Lords).

20. Article 25(2) of the Law creates a category of "Intelligence Secrets" which can be classified and withheld as a state secret. A number of these definitions are overly broad. In particular, Article 25(2)(b) on "national resources that are categorized as confidential", 25(2)(c) on formation that is "detrimental to national economic security" and 25(2)(e) on "memorandum or letters that are by their nature need to be kept secret".
21. In its periodic evaluations of states' compliance with the ICCPR, the Human Rights Committee has examined laws on protection of state secrets in the context of freedom of expression and reaffirmed that 'state secrets' is a limited concept and cannot be used to apply to everything that a government deems sensitive. For example, in its evaluation of the Uzbek Law on Protection of State Secrets, the Committee stated:

> The Committee is particularly concerned about the definition of "State secrets and other secrets" as defined in the Law on the Protection of State Secrets. It observes that the definition includes issues relating, inter alia, to science, banking and the commercial sector and is concerned that these restrictions on the freedom to receive and impart information are too wide to be consistent with article 19 of the Covenant…The State party should amend the Law on the Protection of State Secrets to define and considerably reduce the types of issues that are defined as "State secrets and other secrets", thereby, bringing this law into compliance with article 19 of the Covenant.[15]

22. This approach has also been adopted by a number of national and international bodies. In Canada, the Ontario Court of Justice ruled in October 2006 that the Security of Information Act was overbroad and disproportionate because it failed to define what constituted an official secret.[16] Similarly, the Parliamentary Assembly of the Council of Europe (PACE) issued a recommendation in 2007 urging all member states to ensure that their state secrets legislation was compatible with freedom of expression rights.[17]
23. U.S. Supreme Court Justice Potter Stewart warned in the *Pentagon Papers* case in 1971, "For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self protection or self-promotion."[18]
24. As with the definitions in 1(4), described above, the categories in 25(2)(b), (c) and (e) cannot be justified under Article 19(3) of the ICCPR because of their vagueness. They fail to meet the three part test set out above by the Human Rights Committee, which requires that any restriction be "the least intrusive instrument amongst those which might achieve their protective function".[19] In particular, 25(2)(e) on "memorandum or letters

[15] Concluding observations of the Human Rights Committee: Uzbekistan. 26/04/2001. CCPR/CO/71/UZB.
[16] Canada (Attorney General) v. O'Neill, 2004 CanLII 41197 (ON S.C.), (2004), 192 C.C.C. (3d) 255.
[17] Recommendation 1792 (2007) (fair trial issues in criminal cases concerning espionage or divulging state secrets); Resolution 1551 (2007) (fair trial issues in criminal cases concerning espionage or divulging state secrets).
[18] N.Y. Times v. United States, 403 U.S. 713 (1971).
[19] General Comment No. 34, above.

that are by their nature need to be kept secret" provides no guidance either to officials or to the public on what information is to be protected. Using the standard of "by its nature" potentially allows for the classification of all information about any subject as secret since there is no express limitation on what type of information the standard applies to, merely that it is deemed to be sensitive by the person classifying it.

25. Thus, the scope of the Law as defined in Article 1(4) is far beyond the legitimate restrictions allowed under Article 19(3). Furthermore, the specific information intended to be protected as "Intelligence Secrets" in Article 25(2) also fails to meet the strict criteria of international law by being too vaguely defined to meet the tests of necessity and proportionality.

iv. Freedom of Expression Limitations

a. The Application of the Law

26. The Amicus also submits that the Law violates international standards on freedom of expression because it allows the imposition of sanctions without requiring that harm be shown, is overly broad in its application of criminal penalties to all persons, and allows for the imposition of penalties for "negligent" disclosure.
27. Article 26 of the Law states that "Every Person is prohibited to open and/or leak Intelligence Secret." Article 44 sets a maximum penalty of 10 years imprisonment for anyone who "deliberately steals, reveals, and/or leaks Intelligence Secret", while Article 45 sets a maximum penalty of 7 years imprisonment for "negligently" causing the leakage of Intelligence Secrets.

a1. Failure to require harm

28. Article 26, as well as Articles 44 and 45, of the Law do not require that any harm to national security occur or could occur before permitting the imposition of sanctions. . Sanctions can be levied if it is shown that the information revealed fits within the broadly-defined categories of information covered by the Law without any further discussion. This allows for the imposition of penalties for the most trivial receipt and disclosure of information and has serious implications on freedom of expression.
29. As described in the above section, states must show that a restriction on freedom of expression on national security grounds is necessary. Among other requirements, necessity requires that the harm that is justifying the restriction be shown to have

occurred or be likely to occur before the imposition of sanctions.[20] As stated by the Human Rights Committee in General Comment No 34:

> It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.[21]

30. This standard has also been further elaborated in Principle 15(1) of the Johannesburg Principles of National Security, Freedom of Expression and Access to Information, which states that "no person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest" (emphasis added).
31. This standard has also been adopted by regional courts. The Constitutional Court of South Korea in 1992 ruled that the Military Secret Protection Act only applied to information "which are substantially valuable enough to create a clear danger to national security, if disclosed."[22]
32. Thus, it is clear from the Human Rights Committee and other authorities that, as matter of international law, it must be shown that harm has occurred or could occur before the imposition of any sanctions for the receipt or disclosure of information covered by Intelligence Secrets protections. The failure to do so would violate the requirement of necessity.

a2. Application to journalists and the general public

33. As stated above, Article 26 of the Law imposes obligations on "Every Person" to not make available "Intelligence Secrets".
34. The UN Human Rights Committee has expressed definitively that laws on national security should not apply to all persons. In its Committee Conclusions on Russia in 2003, it specified that the state should ensure that "no one is subjected to criminal charges or conviction for carrying out legitimate journalistic or investigative scientific work, within the terms covered by article 19 of the Covenant."[23]
35. The Committee in General Comment No 34 further elaborated, stating:

> It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to

[20] Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/6, 30 July 2008.
[21] General Comment No. 34 pp 30, above.
[22] 4 KCCR [Korean Constitutional Court Report] 64, 89 Hun-Ka 104
[23] Concluding Observations of the UN Human Rights Committee: Russian Federation, CCPR/CO/79/RUS, 1 December 2003.

> prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.

36. The UN Special Rapporteur on Freedom of Opinion and Expression, joined by the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, issued a special declaration on freedom of information which set out the states' obligations and duties in more detail:

> Public authorities and their staff bear sole responsibility for protecting the confidentiality of legitimately secret information under their control. Other individuals, including journalists and civil society representatives, should never be subject to liability for publishing or further disseminating this information, regardless of whether or not it has been leaked to them, unless they committed fraud or another crime to obtain the information. Criminal law provisions that don't restrict liability for the dissemination of State secrets to those who are officially entitled to handle those secrets should be repealed or amended.[24]

37. The overreaching of the application of the Law is further compounded by Article 45, under which any journalist, civil society representative or member of the public can be jailed for up to seven years and/or face a significant fine for the "negligent" disclosure of state secrets.
38. Under Article 19(3) of the ICCPR, limitations on individual speech must be clearly set out in law. As elaborated by the Human Rights Committee, the law "must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly."[25]
39. Article 45 has a far-reaching effect on every person in Indonesia and beyond. Since Article 26 renders the Law universally applicable to all persons, it follows that all persons, no matter where, are subject to Article 45 (this is reaffirmed in Article 46, which specifically applies to only "intelligence personnel") and can be jailed for up to seven years or face a significant fine for the "negligent" disclosure of Intelligence Secrets.
40. Thus, the Law affects the speech of every person in Indonesia and elsewhere by threatening state sanctions against for violation of the prohibitions on releasing state secrets, which the person may not know are secret or which may already be the subject of wide public discussion.
41. This section is <u>disproportionate</u> under Article 19(3), which requires that "restrictive measures … must be appropriate to achieve this protection function; they must be the

[24] International Mechanisms for Promoting Freedom of Expression, Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 2004. This was reaffirmed in the 2006 joint declaration of the three special rapporteurs.
[25] General Comment No. 34, pp 25.

least intrusive instrument amongst those which might achieve their protection function; they must be proportionate to the interest to be protected."[26]

b. The Lack of a Defense for Public Interest Disclosures Violates International Law

42. The Law also fails to recognize circumstances in which the unauthorised disclosure of information by public employees is in the public interest. Under international law, there is a recognised defense of disclosure in the public interest which overrides state secrets. These defenses include issues such as violations of human rights, corruption and other violations of law, and immediate threats to human life or the environment.
43. As stated above, Article 26 broadly and without exception prohibits the disclosure of intelligence secrets. In addition to the sanctions set out in Articles 44 and 45, Article 46 sets high penalties for any "State Intelligence Personnel" who reveals any "information", "efforts", "work", "activities", or "targets", regardless of the circumstance. It creates no exemptions or mechanisms for the revealing of gross human rights violations, corruption or other issues of public interest.
44. In contrast, the UN Human Rights Committee has long recognised the disclosure of information by public employees in the public interest as a necessary limitation to state secrets laws. For example, when evaluating the UK Official Secrets Act in 2001, the Committee stated:

> The Committee is concerned that powers under the Official Secrets Act 1989 have been exercised to frustrate former employees of the Crown from bringing into the public domain issues of genuine public concern, and to prevent journalists from publishing such matters. The State Party should ensure that its powers to protect information genuinely related to matters of national security are narrowly utilised, and limited to instances where it has been shown to be necessary to suppress release of the information.[27]

45. The UN Special Rapporteur on Freedom of Opinion and Expression, as well as the the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, have also recognised the importance of whistleblowers and public interest disclosures:

> "Whistleblowers" are individuals releasing confidential or secret information although they are under an official or other obligation to maintain confidentiality or secrecy. "Whistleblowers" releasing information on violations of the law, on wrongdoing by public bodies, on a serious threat to health,

[26] General Comment No 34, pp 34.
[27] Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland. CCPR/CO/73/UK,CCPR/CO/73/UKOT, 5 November 2001. This was reaffirmed in 2008. See Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/6, 30 July 2008.

> safety or the environment, or on a breach of human rights or humanitarian law should be protected against legal, administrative or employment-related sanctions if they act in "good faith".[28]

46. In 2010, Special Rapporteur Frank LaRue, in conjunction with the Organisation for American States' Special Rapporteur for Freedom of Expression, stated:

> [G]overnment "whistleblowers" releasing information on violations of the law, on wrongdoing by public bodies, on a serious threat to health, safety or the environment, or on a breach of human rights or humanitarian law should be protected against legal, administrative or employment-related sanctions if they act in good faith.[29]

47. This important protection has also been elaborated in Principle 16 of the Johannesburg Principles, which states:

> No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

48. The need to protect public interest disclosures has also been recognized by other important international human rights courts. In *Guja v Moldova*,[30] the European Court of Human Rights considered a freedom of expression claim by a civil servant who was dismissed from his employment after having disclosed to the media two classified letters that were sent to Prosecutor General's Office and which revealed political corruption. The Court found a violation of Article 10, holding that civil servants enjoy the right to freedom of expression and that, in considering the proportionality of any interference with that right, it is essential to take into account the public interest involved in disclosing the information, which could be sufficiently strong as to override their duty of confidence, even in information that was classified as secret:

> [T]he Court notes that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to a strong public interest. The Court thus considers that the signaling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection… The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence…

49. It should also be noted that whistleblower protections are included in the UN Convention Against Corruption (UNCAC),[31] Article 33, which was ratified by Indonesia on 19 September 2006, and in the ADB OECD Anti-Corruption Initiative for Asia-Pacific, which was endorsed by the Indonesian government on 31 November 2001.[32]

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[28] International Mechanisms for Promoting Freedom of Expression, JOINT DECLARATION by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 2004.
[29] Joint Statement on Wikileaks, 21 December 2010. http://www.cidh.oas.org/relatoria/showarticle.asp?artID=829&lID=1.
[30] Application no. 14277/04, Judgment of 12 February 2008.
[31] UN Convention Against Corruption. http://www.unodc.org/unodc/en/treaties/CAC/index.html
[32] *See* http://www.oecd.org/document/56/0,3746,en_2649_34857_35656056_1_1_1_1,00.html

50. Thus, the absence of any public interest defense or mechanism for release of information of public interest by civil servants constitutes a violation of Article 19 of ICCPR, as the restrictions are overbroad and not limited to only that which is necessary and proportionate but instead restrict legitimate expression of public interest.

v. Limits on the Right to Information

51. The Law also violates the fundamental right of access to information due to its overboard definitions and strong limitations and sanctions on disclosure of information.
52. The right of access to information held by government bodies is strongly recognised under international law as an essential component of Article 19(2) of the ICCPR. According to UN Human Rights Committee in General Comment No 34:

> Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. Public bodies are as indicated in paragraph 7 of this general comment.

53. In Indonesia, the right of access to information has been codified in Act 14/2008, the Public Interest Disclosure Act. The Act creates a mechanism for any person to demand information from a public body and for that information to be released, subject to certain exemptions. Article 17(c) of that Act defines categories of information that can be deemed classified information that "may be hazardous to the defense and security of the state" and therefore exempt from disclosure.
54. Act 17/2011 on State Intelligence seriously undermines the workings and effectiveness of the Public Interest Disclosure Act by setting up a parallel system of vague, overly-broad categories under Article 25(2) and a system of criminal penalties to limit disclosure, discussed in the previous sections. As stated above, any restrictions on this right must be subject to the same strict three part test under Article 19(3) as limits on freedom of expression.

a. The Retention Period is Excessive

55. The Amicus submits that the duration during which information may remain classified and the failure to create a mechanism for its review and release are disproportionate under international law and violate the right of all persons to obtain information held by government bodies, including security agencies.
56. Article 25(4) sets a "retention period" of 25 years for the withholding of all information in the broad categories set out in 25(2). However, the law makes no provision for

assessing if the 25-year period is necessary and proportionate and whether the imposition of a shorter time frame would be more suitable. It also provides for no processes for the assessment and release of the information once the need to protect it to prevent harm has lapsed. It also does not allow for disclosure in the public interest, which would require the release of the information in cases in which the public interest in disclosure is higher than the need to protect the information.

57. The right of access to information held by public bodies is a fundamental human right. Under international law, information can only be withheld from the public for the time that it would be necessary and proportionate to do so. The UN Special Rapporteur on Freedom of Expression, in conjunction with the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, issued a special declaration on freedom of information in 2004, in which he declared that "Secrecy laws should set out clearly which officials are entitled to classify documents as secret and should also set overall limits on the length of time documents may remain secret."[33]
58. In comparison, the Law requires the withholding of information for 25 years, regardless of whether harm is unlikely or even impossible, and even when there is a strong public interest in the disclosure of the information. This arbitrary and fixed duration of time for all information to be withheld, regardless of circumstances, cannot be justified under international law, which requires that any restrictions are assessed on a case by case basis.
59. The excessive period of classification is compounded by the absence of an adequate mechanism to review the classification to ensure that it is still appropriate and justified. Article 25(5) only allows for the opening of intelligence secrets in legal proceedings and provides that the classification must be re-imposed once the proceeding is complete.
60. At the same time, there is a not a clearly-defined relationship between this Act and the Public Interest Disclosure Act, which would ensure that information that is subject to an information access request is processed in an appropriate manner under the latter act and subject to release if no harm would result from its release or a compelling public interest in disclosure is found. In practical terms, it is likely to result in a reduction of disclosures as public officials will fear sanctions if they disclose information which may qualify under the broad categories of Intelligence Secrets.
61. The limitations on classification are especially clear in cases in which files are held by the security agencies of governments following a transition to a new democratic system. The

[33] International Mechanisms for Promoting Freedom of Expression, Joint Declaration, 2004, above.

European Court of Human Rights has held in a number of cases that the duration of classification is limited except in "compelling" circumstances.[34]

62. Thus, the extended duration of classification of information and the failure to create mechanisms to review its withholding violates Article 19(3) by failing to be proportionate and necessary.

vi. Wiretapping

63. Finally, the Amicus also submits that the Law violates international obligations on the privacy of personal communications as set out in Article 17 of the ICCPR, which also substantially affects Article 19 rights through the chilling effect on people seeking, receiving and imparting information.
64. Article 31 of the Law authorises the State Intelligence Agency to conduct wiretapping and gather information across a wide variety of areas including the "national interests" set out in Article 1(4), as well as areas relating to "ideology", "politics", economy", "socio-culture", "food", "natural resources" and the "environment".
65. The right of private communications is strongly protected in international law, through Article 17 of the ICCPR, which states that:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

66. As a preliminary matter, the categories listed in Article 31 are beyond the permissible boundaries of national security, as recognised in international law and as set out in the discussion above. As with Article 19, all restrictions on the privacy of personal communications under Article 17 must be set out clearly in law, must be "necessary" and must "protect legitimate aims". According the UN Special Rapporteur on Promotion and Protection of Human Rights and Fundamental Freedoms while countering terrorism:

> [A]rticle 17 of the Covenant should also be interpreted as containing the said elements of a permissible limitations test. Restrictions that are not prescribed by law are "unlawful" in the meaning of article 17, and restrictions that fall short of being necessary or do not serve a legitimate aim constitute "arbitrary" interference with the rights provided under article 17.[35]

[34] Leander v. Sweden judgment of 26 March 1987, Series A no. 116; Rotaru v. Romania, Application no. 28341/95, 4 May 2000; Segerstedt-Wiberg and Others v. Sweden, Application no. 62332/00; Turek v. Slovakia, Appliation 57986/00, [2006] ECHR 138 (14 February 2006); Bobek v. Poland, Application no. 68761/01, 17 July 2007.

[35] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/13/37, 28 December 2009.

67. In comparison, the categories in Article 31(4) are overly broad and open to subjective interpretation, as well as not clearly linked to legitimate national security interests. Protection of interests such as "socio-culture", "ideology" and "politics" create wide avenues for authorizing interception of communications and access to personal information with little guidance or restrictions. Thus, these categories fail the strict tests as required under international law for the "arbitrary" violation of rights.

68. Furthermore, Article 32 fails to provide a detailed process under which circumstances the interception may be authorized beyond the undefined "legal regulations" referred to in Article 32(1). This failure is inconsistent with international law, which requires that restrictions on privacy be based on the same permissible limitations requirements as are found for protection of the freedom of expression. In General Comment 16 on the Right to Privacy, the UN Human Committee stated that:

> The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant…. Even with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis. Compliance with article 17 requires that the integrity and confidentiality of correspondence should be guaranteed de jure and de facto. Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited.[36]

69. The Special Rapporteur has noted that, in order to meet the standards to justify an interference, there must be "a warrant issued by a judge on showing of probable cause or reasonable grounds. There must be some factual basis, related to the behaviour of an individual, which justifies the suspicion that he or she may be engaged in preparing a [criminal offense]."[37]

70. This expansive allowance of interception of communications also impacts other human rights, including freedom of expression. As noted by the Special Rapporteur in his 2009 report on the promotion and protection of human rights and fundamental freedoms while countering terrorism:

> Surveillance regimes adopted as anti-terrorism measures have had a profound, chilling effect on other fundamental human rights. In addition to constituting a right in itself, privacy serves as a basis for other rights and without which the other rights would not be effectively enjoyed. Privacy is necessary to create zones to allow individuals and groups to be able to think and

[36] United Nations Human Rights Committee, General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17), CCPR/C/GC/16, 4 August 1988.
[37] Ibid.

> develop ideas and relationships. Other rights such as freedom of expression, association, and movement all require privacy to be able to develop effectively. Surveillance has also resulted in miscarriages of justice, leading to failures of due process and wrongful arrest.[38]

71. The UN Special Rapporteur on Freedom of Opinion and Expression has noted that excessive surveillance may "undermine people's confidence and security on the Internet, thus impeding the free flow of information and ideas online."[39] The Special Rapporteur on Terrorism found that:

> These surveillance measures have a chilling effect on users, who are afraid to visit websites, express their opinions or communicate with other persons for fear that they will face sanctions…. This is especially relevant for individuals wishing to dissent and might deter some of these persons from exercising their democratic right to protest against Government policy.[40]

72. Thus, the provisions on interception of communications violate Article 17 of the ICCPR because they are both overly permissive and are not adequately limited.

III. Conclusion

73. For all the above reasons, it is respectfully submitted that Articles 1(4), 25(2), 25(4), 26, 31, 32, 44, 45 and 46 are all incompatible with Indonesia's international legal obligations on freedom of expression.

74. This is the opinion of ARTICLE 19, prepared by the undersigned, and is subject to the decision of this Court.

Submitted

David Banisar
Senior Legal Counsel
ARTICLE 19

[38] Ibid.
[39] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue to the Human Rights Council, A/HRC/17/27, 16 May 2011.
[40] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, above.