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Arguments on Information Secrecy Made by Public Agencies in Indonesia: A Case Study in the Disputes over Access to Information, 2010-2016

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Public information transparency is one of the instruments to monitor how well government organizations cater to the people. The Public Information Disclosure Act of 2018, which obligates government institutions to disclose information to the public, arose due to the law and the demand from the people. This article is focused on the secrecy arguments that were presented by public agencies during the information dispute. These government organizations have not yet fully catered to the people in a proactive manner. Ironically, part of the allegedly confidential information is supposed to be proactively declared to the public. From 2010-2016 there were 232 non-litigation adjudication decisions by the Central Information Commission. Public agencies have refused to provide information by offering a variety of arguments, such as the information requested is a state secret, the applicant is not entitled to the requested information, and the information requested may be misused.

Keywords: *public agency, information dispute, information secrecy, and information disclosure*

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Introduction

One of the instruments issued by the government to support good governance is information disclosure. The principles of public transparency, participation, and accountability are closely related to information. It has become an integral part of the many policies that have been conceived since the Indonesian Reform Era (Sakapurnama, et al. 2012).

The development of technology also takes part in supporting information transparency that is beneficial to both government organizers and the public. Countries that wish to improve their social welfare compete by making use of information technology. For that reason, electronic government (e-gov) as a part of state administration transparency is developing. In this context, Hanna (2010) writes: "This vision of a transparent and accountable government may guide the development of e-government strategies in general, and the use of e-government applications to enhance governance and transparency in particular. It is crucial for e-government projects to establish clear standards of performance, feedback, and monitoring channels to ensure openness and accountability. They should also specify and enable the legal, political, and economic means for customers to influence policy makers and providers."

Policy makers in many countries believe that the embodiment of the principle of openness or transparency will result in good governance, less corruption, collusion, and nepotism, and greater efficiency and effectiveness as well as state administration. At the very least, the faith of the adjudicators can be seen through the trend of legislation in post-reformation Indonesia that better accommodates transparency principles and access to information (Sipahutar 2007). The culmination stage is the ratification of the Law Number 14 Year 2008 about Public Information Transparency, later called the Public Information Disclosure Act (PID Act).

This trend can still be seen after the PID Act is enacted. For instance, the transparency principle is one of the types of General Principle of Good Administration. In the context of state administration, the principle of transparency means tending to the people, so that they can access and obtain information that is factual, authentic and not discriminative in the process of governance while still paying attention to personal rights, groups, and state's secrets. (See Article 10 paragraph (1) letter f Act No. 30 Year 2014 about Government Administration)

One of the policies that is catching the world's attention, particularly in

Indonesia at the moment, is the eradication of corruption. In doing so, information transparency is seen as an instrument that can prevent or eradicate the chance of corruption in government bureaucracy. The right to access information has become a part of the national integrity system (Pope 2007). Information transparency is seen as a precondition of the success of a complaint mechanism for personal and collective complaints, which is needed to wipe out corruption in the government (Ackerman 1999).

Quoting a report regarding open government by the Danks Committee in New Zealand, Pope (2007) noted several advantages that can be relished if an administration is open with information:

- The public that is better informed can participate better in the process of democracy;
- The Parliament, press, and public must reasonably follow and scrutinize the actions of the government; secrecy is a major impediment to the government's accountability;
- Public servants make important decisions that affect many people. In order to be accountable, the government must give access to greater flows of information regarding the issue that they are dealing with;
- Better information flows results in a more effective government and help towards the more flexible development of policy; and
- Public's cooperation with the government will be enhanced by more information being available.

Information transparency has been recognized as an instrument to attain good governance, balance the government and public relations, and support responsible public policy decision-making. For that reason, the information transparency movement has been acknowledged worldwide through a series of policies, regulations, and interstate agreements. Since 2011, Indonesia has been involved in the Open Government Partnership, a multilateral initiative that has a goal of supporting transparency, empowering the citizen, battling corruption, and making use of technology to strengthen the government. On September 28, 2011, the Declaration on Open and Transparent Government was made. In Indonesia, September 28 is commemorated as the Right to Know Day.

It is not an easy task to build a transparent government. In fact, according to Santosa (see Khatarina 2003), there are at least four misleading perceptions about transparency, including information openness in decision or policy-making: (i) transparency supports negative acculturation that will widely

disadvantage the people; (ii) transparency threatens the sovereignty of the country and the nation; (iii) transparency gives a nuance of discomfort; and (iv) transparency hinders the enforcement of the law.

These negative perceptions arose and were suggested during the meeting forum of the government due to unawareness, a dominating paradigm of obscured administration that is very tough to repel, as well as bureaucrats, and the interests of particular groups that want to preserve their status quo in a closed bureaucracy. However, after going through a seven-year long process, the PID Act was accepted and implemented in 2010. The PID Act is needed to implement good governance, and act as a medium to optimize public control towards the government and public agencies as well as all matters that affect the public's interest.

Essentially, the PID Act was made to support bureaucracy reform, improve public service and the public's participation in public policy-making, and support the accountability of the government. The PID Act has a strong correlation with the process of public policy-making and its purposes are as follows:

- To ensure the rights of the citizen in acknowledging the agenda of public policy-making, public policy program, and the process of public decision-making, as well as the reason behind the decision;
- To support the public's participation in the process of public policy-making;
- To increase the public's active role in the public policy-making and in managing the public agency;
- To manifest good governance, which means the administration is transparent, effective, accountable and responsible;
- To acknowledge the reason behind public policies that affect the lives of many people;
- To develop knowledge and educate the nation; and/or
- To improve information management and service in the scope of the public agency in order to create information service with good quality.

Information openness that is able to trigger public participation can result in good flows of information for the public in decision-making. In contrast, obscuring information with an excuse of secrecy, or even considering the demand for information as a form of impediment, can make the information that is accepted, managed, and kept by the government institutions seem vague. Decisions that stem from vague information will become a major

disadvantage, and the price of it can be really costly. This is a type of reactive approach. The reactive approach is highly dependent on the demand for information from the community. With a proactive approach, the government actively seeks feedback directly from citizens and publishes data in an open format, especially that which must be announced and provided, and creates dashboards for citizens to view real-time information on service delivery. The PID Act is based on a proactive approach, and "forces" governments to voluntarily and consistently publish important data in an open format.

The big consequence that could arise if the information was to be obscured can be seen in the resolution of information disputes through the CIC. Aside from the consumption of time and resources, dispute resolution does not come cheap. Article 38 Paragraph (1) of the PID Act states that the resolution of public information disputes shall be conducted through mediation and/or non-litigation adjudication. Mediation is the settlement of public information disputes between the parties through the assistance of the mediator of the CIC, while adjudication is the process of settling a public information dispute between the parties that the CIC has decided upon. Mediation is the initial effort to resolve the Public Information Dispute and is a voluntary choice of the parties. Mediation cannot be used to resolve information disputes based on exclusion reasons. Adjudication can only be used if mediation efforts are unsuccessful or if either party (government/public agency) argues that the requested information is confidential.

In Indonesia, several public agencies have hired advocates to help them face disputed matters. Disputes can also happen because public agencies are not responsive to requests. They can also happen if the response that is given is considered insufficient, or if the price that is charged is too high. Every dispute is resolved through the CIC that has the legal power.

Several previous researchers, both in local public agencies and central public agencies, have undertaken research on information disclosure. Putro and Berenschot (2013) have conducted research in five areas in Central Java (Semarang, Pati, Jepara, Batang, and Kudus) related to community experiences with justice-related access to information issues. Sakapurnama, et al. (2012) have previously conducted research in two areas of Surakarta and West Lombok. The results show that in both regions the implementation of the PID Act still has problems, but Surakarta City is much better at implementing it compared to the West Lombok regency. Pratikno, et al. (2012) have also conducted research in four areas of East Java, West Papua, Aceh, and DKI Jakarta. Kontras in 2013 carried out research in five state commissions, namely the National Commission of Human Rights, the

Ombudsman, the Judicial Commission, the Prosecutor Commission, and the National Police Commission. The results show the lack of implementation of the KIP Law mandate and its derivative regulations, as well as the international principles of freedom of information. This is based on Kontras' experience of requesting information from five state commissions, requests that were not responded to in accordance with PID Act standards, and even tended to be ignored. Another tendency is that these five state commissions have not fully utilized the pages/websites to publish the information for which it is liable.

To elaborate on these problems, this article will focus on answering the following questions:

1. What arguments will be given by public agencies refusing to disclose information to the public?
2. What is the verdict of the CIC towards the secrecy arguments that are given by public agencies?

Research Methods

To answer these questions, the author has conducted qualitative research using document studies, and the author has carefully read and examined the decision documents of the CIC. This research was limited by the verdict of adjudicators because more confidentiality documents are found in adjudication mechanisms. The resolution of the dispute over access to information through mediation means both parties had reached an agreement, and secrecy is less likely.

Another limitation is the decision of the CIC, which is the decision of the Provincial Information Commission, is not used as analysis material. In addition, the decision of the CIC is also limited in the 2010-2016 period. 2010 was chosen because the PID Act was implemented at this time. It is important to note that the number of judgments analyzed does not reflect the total number of cases handled and the decisions made by the CIC during said period.

Result and Discussion

To review the information disclosure and its position in the PID Act, it is

important for the reader to understand the explanation of the related concepts.

1. Information Category

To better help understand public information, the parliament and government have made classifications for what information must be provided and announced and what information must be excluded. The first is open information, sub-categorized into (i) information provided and published periodically, (ii) information that must be announced promptly, and (iii) information that must be available at any time.

The second is confidential information and categorized as excluded information according to the PID Act. Most information managed by government organizations is considered public information accessible to the masses. Only a fragment is declared secret to act as a "black box" in information disclosure. From the categorization of the mentioned types of information, we can conclude that the legislators want a proactive attitude from the bureaucracy to provide information to the public. This proactive attitude can be distinguished based on its characteristics. First, the information must be conveyed through any available means without being requested by the public. Second, not providing such information could automatically become the basis for citizens to file objections and then dispute public information to the Information Commission, as mentioned in Article 35 paragraph (1) letter b of the PID Act.

> "*Setiap pemohon informasi publik dapat mengajukan keberatan secara tertulis kepada atasan Pejabat Pengelola Informasi dan Dokumentasi berdasarkan alasan: b tidak disediakannya informasi berkala sebagaimana dimaksud Pasal 9.*" ("*Any applicant of public information may submit a written objection to the superior of the Information Management and Documentation Officer on the grounds of b) not providing periodic information as referred to in Article 9.*")

The types of information that must be provided include (i) information related to public agencies; (ii) information on the activities and performance of public agencies; (iii) information on financial statements; and (iv) any other information regulated in the legislation.

Third, not providing such information may result in administrative sanctions and criminal sanctions. Article 52 of the PID Act confirms that

public information that must be available at any time, and public information must be provided upon request in accordance with this law and must be issued at once. A public agency that deliberately does not provide, does not give, and/or does not publish public information on a periodic basis, ,is subject to imprisonment and/or fines. .

2. Excluded Information

Avoiding service is one of the characteristics of closed bureaucracy. Organizational reactions are only granted upon request. In the context of the informational disclosure, the avoidant attitude is manifested through the refusal to provide information requested by citizens, or through half-hearted service. The most common reason used by the bureaucracy to refuse these requests is that the information requested is either confidential or in the category of excluded information.

There are 10 types of information that can be excluded, and are further detailed in Article 17 of the PID Act; these are requests that: (1) may interfere with law enforcement process; (ii) may interfere with the protection of intellectual property rights and protection from unfair business competition; (iii) may compromise state defense and security; (iv) may expose Indonesia's natural wealth; (v) may be detrimental to national economic resilience; (vi) may harm the interests of foreign relations; (vii) may expose the contents of authentic acts that are personal and the last will or testament of a person; (viii) may reveal private secrets.; (ix) include memoranda or letters between public agencies that are by nature disclosed except by the decision of the CIC or court decision; and (x) include information that should not be disclosed under the Act. The PID Act still spells out some categories of excluded information in more technical items, more of which can be read in Article 17.

In addition to this article, rejection may also be based on Article 6 of PID Act. Article 6 is considered a procedural reason (Prayitno, et al, 2012) while Article 17 is a substantive reason. Procedural reasons relate to information requests that are not in accordance with the laws and regulations. For example, these requests may be past the deadline, not addressed to the appropriate public agency, lacking an objection filing, or having an invalid power of attorney.

3. Arguments in Favor of Secrecy by Public Agencies

The type of information requested from public agencies by Indonesian

citizens or Indonesian legal entities varies widely. However, the most frequently asked questions are regarding financially-related information such as budgets, financial statements, Work Plans and Budgets (RKA), Budget Implementation Checklists (DIPA), and grants or social assistance. There is also information in the form of documents that will be used as evidence in a trial, or to advocate for the community.

From the records of the CIC obtained data since 2010 to February 2014, there have been 1232 disputed information requests handled by the CIC, and the type of disputed information is very diverse, from financial reports, performance reports, public information lists, permissions, contract agreements, to legal products. The taxpaying public wants to make sure the money paid is used as intended.

After studying the decisions of the CIC within the 2010-2016 periods, it was found that public agencies used the exceptional argument in every period except in 2016. At a glance, there seems to be a trend toward decline in the use of the exclusion proposition in the last three years even though the factor is not single. Yet, when the percentage is viewed, it cannot be interpreted that a decline is certain. The comparison of the number of arguments in favor of secrecy with the number of adjudicative decisions examined can be seen in the Table 1.

From the 232 non-litigation verdicts by the Central Information Commission that are analyzed, there are at least 73 cases (31.46%) in which secrecy arguments are involved and agencies have refused to disclose

TABLE 1
The Comparison of the Number of Arguments in Favor of Secrecy with the Number of Adjudicative Decisions Examined

Year	Number of Exceptional	Number of Adjudicative Decisions
2010	4	17
2011	16	30
2012	17	46
2013	18	76
2014	11	47
2015	7	15
2016	0	1
Total	73	232

information to the public.

To help ease the analysis, the proposed exceptions of the public agency may be specified based on the types of information exempted under Article 17 of PID Act.

a. Law Enforcement Process

Using arguments can disrupt the law enforcement process. The Supreme Audit Agency (or BPK), Police Headquarters, National Narcotics Agency (or BNN), and PT Kereta Api Indonesia have reportedly rejected the information application filed by the Center for Regional Information and Studies (PATTIRO). In the case of BPK, for example, the applicant requested the inspection report (LHP) of Investigative Report on the Hambalang case. BPK rejected the application because the information was deemed confidential. There were two *ratio legis* used by BPK. First, the LHP is used by law enforcement officers as a letter proof from the investigation for the trial. Second, the LHP is also useful as proof of expert information in the criminal procedural process in addition to being a letter proof. If the LHP is given or the information contained within it is opened to the public, it would disrupt law enforcement since the parties allegedly involved in a corruption act may escape, the parties involved could potentially eliminate evidence after reading the report, or if the LHP is used by an irresponsible party to form or steer an opinion where personal interest is concerned. The CIC dismissed BPK's argument because the LHP should also not be given to the People's Council (DPR) because DPR is not a law enforcement apparatus. However, referring to the BPK Law itself, the LHP already submitted to the DPR is open.

b. Intellectual Property and Business Competition

The Ministry of SOEs, State-Owned Enterprises and Regional-Owned Enterprises (ROEs) have used the Trade Secret Law as a basis for rejecting the request for information on agreements with third parties and financial projections (PDAM DKI Jakarta), mining contracts (BP MIGAS), and mining maps (District Mining Service Ketapang), while the argument of interfering with the protection of unfair business competition is used in disputing the information regarding copies of the National Examination (UN) questionnaire.

In many cases, the CIC has decided that public agency agreements with third parties are open-ended information. However, the Information Commission agrees that mining maps in Environmental Impact Analysis documents should be excluded. In this context, the most appealing

information is undoubtedly about the UN. The Ministry of Education and Culture reasoned (i) if the question and answer key were opened, it could undermine the questionnaire vault mechanism; and (ii) if the UN does not use the questions from said vault, it would be hard to compare the quality of each school, inter-regional, and inter-year education. The CIC approves this confidentiality argument because the Ministry of Education and Culture has no motives when it comes to making the questionnaire other than the national interest.

c. State Defense and Security

The State Intelligence Agency has made the state defense and security phrase a reason for rejecting the request for information from Forum Indonesia for Budget Transparency (FITRA) related to Work Plans and Budgets (RKA), Budget Implementation Checklists (DIPA), and a copy of budget realization in 2010.

Interestingly enough, the argument on this point is not only used by intelligence and military institutions but also the Department of Transportation of Sumenep Regency, East Java. This public agency refused to submit information on The Budget Implementation Checklists for confidentiality because the Department of Transportation is included in the regional intelligence community. This argument was dismissed by the CIC because the exclusion was not based on the Act, and the Department of Transportation could not explain that the regional intelligence community has its own duty to cover the information.

d. Indonesia's Natural Wealth

Indonesia is abundant in natural resources such that the state is very much dependent on the natural wealth. Public agencies may make this point an excuse if the request for information is considered too revealing of Indonesia's natural wealth. Unfortunately, there is no detailed explanation of what natural wealth is and what deeds can be categorized as "revealing" (Murharyanti et.all, 2008). The Ministry of Energy and Mineral Resources (Ministry of ESDM) and Executive Agency for Upstream Oil and Gas Business Activities (BP MIGAS) have reportedly rejected the request for work contract documents (KK) and cooperation contract documents (KKS). The Ministry of ESDM is willing to provide a list of contracts of work but refuses to submit the documents because it contains reports of exploitation. BP MIGAS refused to provide KKS because it contained a contract area map. The arguments of the two public agencies were dismissed by the CIC. The

exploitation report is a separate document from the KK; while the contract area map turns out to be just general data, so the reason for the confidentiality is irrelevant.

e. National Economic Resilience

The Financial Services Authority (OJK) has reportedly used this argument when it refused to provide information on the number of certificates of deposit and certificate of Sovereign Bond issued by the legal counsel of Nasari Savings and Loans. The Capital Market Law and the Banking Law also reinforce OJK's argument.

The OJK's policy of concealing the intended information is accepted by the CIC because it has undergone through a mechanism called the trial of consequence and trial of the public interest. But in the end, the Information Commission put forward the issue of justice, namely the protection of consumer interest. Such information, although confidential, may be disclosed only to the applicant of information, as the applicant is an insurance policyholder with a direct interest in the requested document.

f. The Interests of Foreign Relations

The benefits of cooperation between oil and gas and mining management in Indonesia and between national and foreign companies have been questioned over time. Government agencies tend to close access to contract documents, and negotiation processes tend to be closed to the public. BP MIGAS has once denied the request for information on oil and gas cooperation contracts with foreign companies with the argument that it could disrupt foreign relations interests. Similar is the rejection of PAM Jaya (one of the ROE's drinking water) to PT Palyja and Aetra (as private companies). If the contract documents provided disrupt the negotiation process, they may ultimately disrupt the relationship between Indonesia and the country of origin of the investor. The CIC decided that if the potentially-exploited natural contents are on the location maps, then contract documents should be provided.

g. The Contents of Authentic Acts and the Last Will of a Person

This argument has been used by the State Secretariat to refuse the request for information on a number of Presidential Decrees concerning pardons and leniency. The Presidential Decree on pardon is considered an authentic deed which, if opened, will bring two implications: (i) it may be used for the sake of proof based on filing a Presidential Decision with the State Administrative Court; or (ii) the State Secretariat Ministry may be accused of unlawful acts

in the sense of obstructing the subjective rights of others relating to pardons. This argument was rejected by the CIC.

In other information disputes, the Judicial Commission has refused to provide information on the selection of a candidate for Supreme Court Justice. In the hearing, the candidate whose information is requested states no objection to the request for such information. This is consistent with the provision that exceptions to an authentic deed or testament shall not apply if the person concerned gives written consent.

h. Private Secrets

This point includes, among others: medical history and family treatment, income, assets, and account balances, the results of psychological evaluations, and educational records. However, this information cannot be excluded because of public office if there is consent from the person concerned.

Despite these limitations, Police Headquarters has rejected the request for names of 17 police officers suspected of owning accounts with suspicious values. Although the officers were categorized as public officials, Police Headquarters refused to provide information, using the argument against revealing the private secrets of the account owners. These information disputes, known as "cases of fat bank accounts," are of great interest to the public.

i. Memoranda and Letters Between Public Agencies

There are three parameters specified if this argument is to be used as an argument for establishing confidential information. First, if opened, these documents can seriously disadvantage the policy-making process by reducing freedom, courage, and honesty in proposing, communicating, or exchanging ideas in relation to the decision-making process. Second, they can hinder policy success due to premature disclosure. Third, they may disrupt success in a negotiation process that will be or is still being implemented.

In another dispute, correspondence between the Ministry of SOEs with the State Secretariat and the Ombudsman of the Republic of Indonesia, including the disposition of the Minister of SOEs, is postulated as confidential information. Much of the information is ordered to be opened for reasons of weak exceptions, and the fact that the consequence trial is not based on the Act.

j. Information that Should not be Disclosed under the Act

There are many laws that strictly regulate confidentiality obligations. State organizers are required by law to keep the secrets of their office, with criminal consequences if these laws are violated. Exceptions of information by the public agency based on the Act are not automatically accepted. The CIC has reportedly canceled the Banten Provincial Tax Office designation that refused to provide information on the office budget using APBN 2010. If the information was given, it would reveal the tax report of the winning bidder for the construction of the office. The CIC dismissed the argument because it was proven that the audited financial statements of public agencies had been audited.

By looking at some of the examples described, we can see that the argument of secrecy often lacks a strong basis. The basis for such considerations may be juridical judgment, as well as consideration of the economic, social, and excessive impacts of disclosure of information on state security.

3. Implication towards Proactive Government

The CIC has passed a ruling on all the disputes under investigation. If there is no objection to the decision, then the verdict will be permanent. If the CIC decides that information is open, the ruling applies to similar information in the future. The CIC Decision has implications for similar public policies in the future.

One of the most obvious implications of the CIC's decision is the Ministry/Institution Work Plans and Budgets (RKA-K/L) and the Budget Implementation Checklists (DIPA). The RKA and DIPA documents have been regarded as the "secret treasury" of ministries and agencies for years. But the CIC decided that information is to be opened. The power of the CIC's ruling was then sustained by the Circular Letter of the CIC Number 1 of 2011, in response to the government's question on the openness of RKA and DIPA. It is no wonder now that the region is very open to budget information; some agencies even held a budgetary information display.

Based on research on the CIC's rulings, the result is that the greater public interest becomes a priority in the disclosure of public information, so even if a public agency has exempted information based on the consequence trial, it can still be opened after a public interest trial. Testing the arguments and facts in the CIC and judicial court proceedings at a later stage is the key to determining the nature of information disclosure. (Dipopramono, 2017)

Another possible implication is the gradual change in transparency. During this time, information disclosure is considered a means of opening the intended information to the public. Apparently, from the process of handling information disputes in the CIC), there is a gradation of transparency/openness. Open can mean: (i) information can be accessed by anyone; (ii) information is accessible only to the applicant; (iii) information may only be recorded by the applicant; and (iv) information can only be seen. All types of disclosure may still be considered as open access of information to the applicant.

Can government officials keep their travel expenses a secret from the public? Perhaps some people think they can because the use of travel funds by government officials is not a matter of public interest. Most of the information requests submitted to the public authorities are related to the budget and its use, and in some cases, the public agency considers information pertaining to the finances of the ministries and institutions to be confidential and only accountable to BPK, the Agency for Financial and Development Supervision, or another inspectorate.

Ultimately, it is not wrong if the public agency or bureaucracy postulates the confidentiality of any information requested, including the budgetary information. However, there are basic principles that must be considered if we would like to determine confidential information. Confidentiality must be strict and limited, and its determination shall be subject to a trial of consequence and a trial of public interest. Confidentiality assignment cannot be permanent as there will be a period of information retention.

Conclusion

Juridically, a public agency is allowed to declare the information that it manages and owns as excluded information. Dispute resolution through non-litigation adjudication is primarily sought due to the public agency's rejection of a request for access to information. The cecrecy argument is a law that is used to reject information disclosure requests. The confidentiality arguments postulated by public agencies in information disputes vary widely but are generally not accompanied by adequate judicial basis and considerations.

The CIC has the authority to declare if the argument of confidentiality by the public agency is irrelevant. The CIC's rulings that annul the argument of secrecy have encouraged the public administration to be more open. There is a chain effect of disclosure of information by the CIC on government work

units, such as with budgetary information.

This article has not yet reached the stage of analyzing collective public agency compliance with the verdicts from the CIC. One of the obstacles to this analysis is an existing court process that can be used by the public agency or the pleader if they disagree with the verdict from the CIC. Further research is needed in order to acknowledge the response of every public agency regarding the verdicts from the CIC.

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