

Author: Lawrence Repeta, Professor, Omiya Law School, Japan

Title: Business confidentiality versus human health: the role of Japan's information disclosure laws

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Abstract

This case study presents a detailed description of events covering a ten-year period from the filing of a freedom of information lawsuit in 1995 through final court judgment in 2005. The plaintiff is a resident of a city of 170,000 who successfully obtained a court judgment directing disclosure of diagrams of a biotechnology laboratory built near his home.

The case illustrates approaches to resolve the conflict between the desire of residents to know about nuisances near their homes and the desire of businesses to maintain confidentiality of sensitive information. It also provides a detailed example of the operation of Japan's information request procedures and litigation process. The narrative and legal analysis rely heavily on original Japanese court documents.

Governments obtain large volumes of confidential information from business entities through the regulatory process. Sensitive to the importance of protecting trade secrets and other confidential information, drafters of freedom of information laws ordinarily provide an exemption for confidential business information. However, the interest in protecting business confidentiality sometimes conflicts with a strong public interest in disclosure of the same information. In such cases, the freedom of information laws of many countries provide for a balance of interests in order to determine whether information should be withheld or disclosed.

Japan's national and local laws establish "public interest overrides" requiring that human health and certain other public interests prevail in cases of such conflict. This case study tells the story of one of the leading court precedents in Japan interpreting such a provision.

INTRODUCTION

The freedom of information laws of many countries explicitly require government officials to take the “public interest” into account when determining whether to disclose certain kinds of requested information. Disputes sometimes arise over how such a broad concept should be applied, especially when requested information comes within an exemption for confidential business information.

Because the most powerful catalyst to the formation of a freedom of information movement in Japan was the fear of mass injury due to defective drugs and other consumer products, resolution of this conflict has been an especially important issue there. Early Japanese proponents saw the FOI law as one safeguard against such disasters. Accordingly, the ordinances of the local governments of Japan and its national freedom of information law provide public interest overrides requiring the disclosure of information which may serve to warn of a threat to public health or safety even though it would otherwise be exempt as a trade secret or confidential business information.

The Japanese approach to this issue crystallized at a very early stage. In 1982, the same year that the legislators of Canada, Australia and New Zealand passed national freedom of information legislation, the first wave of local government legislators in Japan were doing the same. Of greatest importance, the legislative assembly of Kanagawa, a prefecture bordering on Tokyo with a population of approximately six million, adopted an information disclosure ordinance in October

1982 that would set the pattern for other local governments and for Japan`s national law to follow.

The 1982 Kanagawa ordinance exempted confidential business information from disclosure but nonetheless required disclosure of such information where this might be necessary "to protect human life or health" or "to protect consumers from extreme difficulties related to daily life" (Repeta, L., 1999, p. 56).

In the more than two decades since, Japanese officials, administrative review panels and courts have confronted the puzzle of how to balance the interest in protecting confidential business information against other public interests. Cases where information has been disclosed include the names of companies with large numbers of complaints for fraudulent sales practices, details of the disposal of industrial wastes, and a wide variety of information concerning real estate, including applications for development under urban planning law, applications to review designations of protected forest land, notifications describing construction projects and others. Litigation has buttressed the right of agricultural communities to learn the types of pesticides used at golf courses nearby despite assertions that such information is a valuable commercial secret. On the other hand, authorities have denied requests for design specifications for industrial facilities and other construction projects and the names of companies that have been found to utilize banned substances in their products (Uga, K., 2001, p. 138).

In one of the most important cases interpreting Japan`s national law, the national administrative appeals board (board members are appointed by the Prime Minister) recommended in February 2004 that the public-interest override be applied to disclose a list of hospitals that had distributed a blood coagulant tainted with

hepatitis viruses. This recommendation overturned a non-disclosure decision by the Ministry of Health. The Ministry had withheld the information on the ground that release of hospital names could cause severe economic injury to the listed entities.

The case study that follows describes litigation leading to one of Japan's most important court precedents in this area, a decision of the Osaka High Court which became final in 2005. The Court held that the interest in public health outweighed the interest in business confidentiality in this case and invalidated the decision of a city government to withhold.

A BIOTECHNOLOGY LAB IN THE NEIGHBORHOOD

The Great Hanshin Earthquake struck at 5:46 a.m. on January 17, 1995, causing more than five thousand deaths and massive structural damage throughout the port city of Kobe and the surrounding area. It was the most lethal earthquake to strike Japan since the Great Kanto Earthquake of 1923. "The sky was black and the vibrations were terrifying," said Takashi Futaki, a resident of the City of Takatsuki, located about twenty-five miles east of Kobe. Mr. Futaki lives only 80 meters from the boundary of a biotechnology research center owned and operated by the Japan Tobacco Company (JT). "The electricity went out. I immediately picked up a flashlight and ran toward the JT facility to see if there was any damage. But I was so afraid of what might be released, I turned around and ran back home" (Futaki, T., 2004).

Construction of the JT biotechnology center in Mr. Futaki's neighborhood commenced in 1991 and was completed in 1993. Its mission is to develop new pharmaceutical products through recombinant DNA technology and other methods.

Stocks of disease-bearing organisms are maintained and used in the ordinary course of work at the site. The biotech center is surrounded on all sides by homes and small retail shops, separated from the JT property by a narrow two-lane road. When residents learned of JT's plans to build in 1989, they launched a campaign to stop construction, but failed. Construction went forward and the facility began operations in 1993. Two years later, the earthquake struck.

Mr. Futaki is a high school teacher who has been concerned about environmental issues throughout his adult life. He was the leader of the residents' group that opposed JT's building plans. The unexpected Kobe earthquake¹ was especially frightening to Mr. Futaki. He and his family live within close proximity to laboratories where disease is cultivated and injected into lab animals and where gene-splicing and other biotechnology experiments take place. His brother was injured in a building collapse in another part of Osaka prefecture. As he pondered these facts, he saw a television documentary showing structural damage to a university biomedical research lab in another part of the Kansai area caused by the big quake. He and his neighbors had failed to stop construction of a potential source of biohazards in the neighborhood. What else could they do? Mr. Futaki resolved to learn as much as he could about the nuisance in his neighborhood.

INFORMATION REQUEST

Takatsuki is a city of over 350,000 (City of Takatsuki Website). The Takatsuki city council adopted an information disclosure ordinance in 1986, among the earliest of Japan's local governments to take such action (Ordinance No. 40, 1986).² Like disclosure ordinances all over Japan, it enables any resident to request to examine

documents in the possession of the city. The ordinance establishes a general rule of disclosure. City officials are authorized to withhold information only if they can cite a reason listed in the ordinance.

Two months after the earthquake struck, Mr. Futaki filed an information disclosure request seeking the floor plans and specifications for each floor of each building in the JT research center (hereinafter "floor plans"). He knew that JT was required to obtain building permits from the city of Takatsuki and that the floor plans would be attached to JT's application for a building permit. He hoped these documents would provide some comfort regarding the threat of biohazards in his community, or at least some clues to the nature of what was going on in those big buildings down the street.

Before deciding on the request, the city contacted Japan Tobacco to solicit the company's opinion regarding disclosure.³ JT responded that the documents contained confidential business information and disclosure would result in significant injury to its competitive position, thus claiming protection under one of the grounds for nondisclosure provided by the city ordinance. The city agreed with JT's position and formally denied Mr. Futaki's request on March 28, 1995, twelve days after he filed. In the wake of this defeat, he responded with two actions. First, on May 17, he appealed the city's decision to the Administrative Review Board appointed by the mayor and then, on August 23, he filed a separate information request for all documents related to meetings held by a "specialist committee" appointed to review safety measures employed at the site. Both steps would lead to the disclosure of additional information.

On April 30, 1996, the Administrative Review Board formally recommended that the City disclose records related to vibration tolerance for the facilities utilized in DNA experiments and in experiments involving disease-bearing organisms. The City released these documents three months later. The City also released documents related to the specialist committee. Mr. Futaki would later write that he “fairly danced down to the city office” when he received notice that he could see the material. But the pro forma documents he was shown did little to answer his questions about the JT operations, so he filed suit on October 7, 1996, seeking a court order mandating full disclosure of all requested documents (Futaki, T., 1997, p. 32).⁴

JT immediately intervened in the suit, seeking an order prohibiting the city from releasing its documents. JT was joined by its real estate development affiliate, JT Real Estate. Both companies declared that the documents contained valuable business information the disclosure of which would injure their competitive standing, presumably by enabling competitors to learn details of the design and construction of the facility.

THE TAKATSUKI FACILITY

Like other big cigarette producers around the world, JT has pursued a diversification strategy of its business, primarily by developing pharmaceutical and food products. As one element in this strategy, the company constructed the research facility that inspired this litigation. The Takatsuki research center represents a very large investment, with more than ten thousand square meters of

floor space and four hundred staff on site, approximately half conducting technical work. In a 1997 article, Mr. Futaki described it as follows:

This 'research center' is of such grand scale that pre-existing large pharmaceutical companies probably could not build it. It includes 'level P3 facilities' designed to conduct gene-splicing experiments. In addition, in order to develop new pharmaceuticals, it utilizes many different varieties of disease-bearing organisms, dangerous chemical substances and radioactive elements. This is an extremely specialized facility where a large number of animal experiments and other operations are conducted on a daily basis (Futaki, T., 1997, p. 27).

Mr. Futaki completed his description with the observation that "applying ordinary common sense, this is not the kind of thing you would build in a densely populated area in front of a train station" (Futaki T., 1997, p. 27).

JT had operated a cigarette manufacturing plant at the Takatsuki site for many years. After it was closed in the 1980s, the city entered into negotiations to acquire the site for a public park. But the discussions failed and late in 1989 Mr. Futaki and other residents were invited to an information session at which the company disclosed its plans to build a new pharmaceutical research center. This was his first notice of JT's construction plans. Another information session was held in April, but according to Mr. Futaki the content was the same. Using an overhead projector, JT spokesmen explained JT's transformation from a government entity to a public corporation and its shift in business strategy to rely less on tobacco products and more on other businesses including pharmaceuticals. Then they provided an

overview of the process of developing new drugs, barely touching on the topic of genetic experimentation. They provided little detail in response to residents' questions about safety issues (Futaki, T., 1997, pp.29-30).

Mr. Futaki knew nothing about biohazards at the time but, suspicious of the company's motives, he commenced research. As he examined the writings of Japanese scientists, he became alarmed.

TOYAMA

JT was not the first to propose construction of major genetic laboratories in the midst of a crowded residential area in Japan. The National Institute of Infectious Diseases (NIID), Japan's largest biomedical research center, is located in the Toyama section of Shinjuku, Tokyo. A government entity overseen by the Ministry of Health, Labor and Welfare, the NIID is Japan's counterpart to the American National Institutes of Health, which is charged with conducting the highest level of research on infectious diseases in the United States. The institute is located immediately to the south of Waseda University, a prized central Tokyo location inside the Yamanote Line.⁵

In the early 1980's the Ministry of Health proposed consolidation of government infectious disease laboratories, which were scattered at several locations around Tokyo. The center of the proposed consolidation was to be Tsukuba, Japan's "Science City," located fifty kilometers northwest of Tokyo and the home of a major national university and many other research institutions. But leaders of the research

laboratories resisted this move, arguing that the proposed location was too inconvenient for its hundreds of researchers and other staff.

Mr. Futaki's research showed that he was not alone in opposing the operation of biotechnology labs in densely populated communities. He learned that, as in the Takatsuki case, a group of local residents had organized to oppose consolidation of infectious disease research at Toyama. (The Tokyo residents' group was joined by Waseda University.) But their complaints were brushed aside and the consolidation was executed as planned. So on March 22, 1989, a coalition of 128 individuals filed suit in Tokyo District Court, seeking an order to shut down the center as a dangerous public nuisance (Tokyo District Court, 1989).⁶ Subsequently, the number of plaintiffs increased and several similar suits were also filed. Mr. Futaki himself labels the Shinjuku facility as the "No. 1 Worst" and the JT Takatsuki facility as the "No. 2 Worst" (Futaki, T., 1997, p. 31).

THE 'SAFETY AGREEMENT' BETWEEN TAKATSUKI AND JT

Takatsuki city officials were aware that JT would conduct activities at its new research center that presented the possibility of life-threatening injury to members of the surrounding community. But since there was no law requiring a specific approval for construction of genetic research or infectious disease laboratories, local government had little authority to stop the project. JT had operated a cigarette factory at this site for many years, so it was zoned for industrial use.⁷ When it decided to convert the site to its present use, the proposed structures were required to comply with the general Building Standards Law, which sets minimum standards governing such matters as height-to-space ratios, setbacks from property lines and

general construction safety codes. The law said nothing to limit or control the activities that might take place *within* the new buildings.

Nonetheless, the mayor and city council members are elected officials and they were well aware that more than seven thousand individuals had signed petitions opposing the JT research center. In an effort to maintain harmony between city residents and Japan Tobacco (and insure safety to the community), the city organized the negotiation of a three-party agreement (*kyotei*) among the company, the residents and the city government. According to Mr. Futaki, the resident group insisted on several conditions including prohibition of "P3" level activities, prohibition of experiments on animals and others. These proposals were rejected. An impasse was reached after only a few negotiating sessions, so the city decided that the only practical course was to conclude a two-party compact. The city had already issued building permits and construction had started. There appeared to be little leverage to persuade JT to accept conditions it opposed. So the city went ahead and concluded an agreement on its own with JT on March 3, 1993.

The agreement provided for the appointment of an expert panel to oversee safety issues at the new research center. Members included representatives of the city government and Japan Tobacco, and five 'specialist' members. Four of the latter appointees are professors at Kansai area universities and one is the head of a clinic operated by Osaka Prefecture. The committee met three times between conclusion of the 'Safety Agreement' and opening of the Takatsuki facility in September 1993. It has met annually thereafter (Futaki, T., 1997, p. 32).

THE TAKATSUKI SUIT

Takatsuki is an incorporated city within Osaka prefecture. In order to challenge the city's non-disclosure decision, Mr. Futaki would have to file suit in Osaka District Court. His primary opponent in the litigation would not be the city; it would be the Japan Tobacco Corporation, one of the richest companies in the country.⁸ In order to succeed, he would need good lawyers willing to take on a potentially long and exhausting fight. As a public high school teacher and father of three, Mr. Futaki did not have the money to hire them. He approached a lawyer he had met in the anti-nuclear movement years before, but the man was not interested in this case. Mr. Futaki then hit upon a simple and direct solution to his problem.

The offices of the Osaka Bar Association are located in a central part of the city, in a grey office building next to the courthouse on the north bank of the Yodo River. When Bar Association members checked their mailboxes one day, they found that Mr. Futaki had delivered a memorandum to each of them seeking representation in his dispute with JT and the city. Eight lawyers took him up on the offer. None had met Mr. Futaki before. Each worked from a separate office and some had been unacquainted prior to representing Mr. Futaki. The team spanned generational lines, with two attorneys in their sixties well-known for their involvement in public interest cases and three with less than two years of experience. They all worked *pro bono publico*. Mr. Futaki paid related costs from his own pocket, but the lawyers worked for free.

Mr. Futaki told them his story and they set about drafting a complaint. The nineteen-page document provides a clear description of the claim (Complaint, *Futaki*

v. Toshio Emura, Mayor of Takatsuki, 1996). After reciting the administrative history of the request, it describes the physical circumstances of the JT Property, stressing its proximity to Takatsuki Station and listing dimensions of 63,759 square meters on the ground and floor space of 15,392 square meters. Then it shifts into a description of the gruesome consequences that could result if infectious material maintained on-site is released, citing the AIDS pandemic as an example where infectious disease has quickly spanned the globe, resulting in incalculable human suffering. This kind of injury is especially terrifying because victims may not be aware of their condition until years after they are infected and, even then, may not know the cause.

The complaint declares that regulation of the building of such facilities in Japan is “completely inadequate,” depending on “autonomous safety measures” selected by facilities builders themselves. It cites guidelines issued by the Science and Technology Ministry and by the National Institute of Infectious Diseases, but says they are not legally binding and there is no way to determine whether facilities operators actually follow them. In summary, it declares that “in Japan there is no requirement of environmental impact evaluations for biotechnology facilities, no safety standards set by law, and no on-site inspections at all” (Complaint, p. 9).

In contrast, the complaint describes much tighter regulations in other parts of the world, including the requirement of environmental impact statements in the United States, a directive of the EU governing council requiring public disclosure of evaluations of impacts on the environment and potential threats to public health prior to construction, tight German regulations and guidelines issued by the World Health Organization (Complaint, pp. 7-8).

In the plaintiff's view, the Japanese government had defaulted on its obligation to provide reasonable measures to protect public health. Takatsuki residents had no choice but to take on the task themselves. The hapless residents had earnestly sought to learn the nature of the JT operations in their midst, but had been met only with superficial statements, obfuscations and refusals to provide meaningful information. In the plaintiff's search for a means to hold JT accountable, the plaintiff had hit upon the Takatsuki disclosure ordinance, "in the present circumstances, the sole means to secure the safety of biotechnology facilities is through strict monitoring by the eyes of the citizens" (Complaint, p. 18). To the question of how citizens could accomplish this task, the complaint concludes with this flourish:

(T)he request for information disclosure in this case fills a gap in legislation and carries the great significance of making possible the inspection for dangers posed by these facilities and confirming their safety from the viewpoint of residents. It is not too much to say that this lawsuit is the sole means of realizing access to information concerning biotechnology facilities (Complaint, pp. 18-19).

THE DISTRICT COURT DECISION

At the time he filed suit, Mr. Futaki expected a quick judgment instructing the city to release the documents. This was not to be.

The first court hearing was held on December 11, 1996, and the final hearing four years later on December 4, 2000. During the course of the trial, the court conducted 23 live sessions. In addition to pleadings and evidentiary statements filed

by all parties, the court considered the testimony of five witnesses. Japan Tobacco called two of them: the associate director of its Takatsuki center and an executive from the architectural firm that designed the facilities. They spoke of the confidential nature of the information embodied in the documents and safety features employed at the facility (Futaki, T., 2003, p.46-47). Takatsuki called one witness, the scholar who had been appointed head of the disease research center operated by Osaka prefecture and to serve on the specialist committee charged with monitoring safety at the JT facilities under the terms of the "Safety Agreement." Mr. Futaki himself testified about the threat perceived by neighboring residents and the importance of public disclosure (Ibid.). Finally, his attorneys were allowed to call one other witness, a licensed architect who had once worked in the design of manufacturing facilities but in recent years had shifted to the role of advising residents and consumers of the risks presented by production facilities located near residential areas.

This architect, Yukio Kawamoto, had become so concerned with the threat of biohazards that he had become the executive director of a public interest group called the "Citizens Center for Prevention of Biohazards." His testimony was intended to show that valuable information concerning safety measures could be learned by examining the requested documents and that the documents were unlikely to contain any information whose release would cause meaningful injury to JT (Futaki, T., 2003, pp. 47-48).

The primary issue before the Court was application of Section 6(1)(2) of the Takatsuki ordinance, which protects information "the disclosure of which would cause damage to the competitive standing or other proper interests" of a business

(Ordinance No. 40, 1986). The Court separately considered the interests of Japan Tobacco and JT Real Estate.

JT presented evidence indicating that the time required to develop a pharmaceutical product ordinarily runs from ten to eighteen years and development costs total 15-20 billion yen. Timing is critical. The producer first to the market with an effective drug can collect big revenues. Several different products are at various stages of development in the Takatsuki labs at any time. Accordingly, the court found there is no question that the leak of valuable development information to a JT competitor could result in significant financial loss (Osaka District Court, 2001, 61-62).

With this pragmatic view of the risk, the court nonetheless concluded that release of the documents at issue would be unlikely to cause this kind of injury. When Mr. Futaki filed his original request in 1995, four years had already passed since the floor plans were submitted to the city office; as the court was drafting its opinion in 2001, ten years had passed. The court concluded that in an industry characterized by constant change, the likelihood that release of these old architectural drawings would shed light on “such matters as the direction, speed, scope or administration” of JT research, and thereby cause significant injury to JT, was low. Accordingly, the exemption for confidential business information did not apply.⁹

The Court reached a different conclusion when it considered the interests of JT Real Estate. Noting that dozens of technicians, including some architects holding first class licenses, had participated in the design of a highly specialized building with

many unusual features, the court ruled that the floor plans embodied valuable know-how and their release would clearly present a real threat of significant competitive injury to JT Real Estate (Osaka District Court, 2001, p. 68). Therefore, the documents qualified for protection under Section 6(1)(2) of the ordinance.¹⁰

Before the Court could reach the conclusion that the city had lawfully withheld the documents, however, its analysis would have to clear a second hurdle. A proviso to Section 6(1)(2) states that, regardless of the competitive injury that may result, information must be disclosed if it concerns “business activities that present a risk of injury to human life, the human body or health” (Ordinance No. 40, 1986, Art. 6(1)(2)).

A release into the community of disease-bearing organisms or other hazardous materials maintained at the Takatsuki site could cause the outbreak of disease and perhaps death. In addressing whether the nature of this risk was such that the documents must be released, the Court held that the term “risk” (*osore*), as used in the Takatsuki ordinance, referred to “the concrete and certain risk” present in this specific environment (Osaka District Court, 2001, pp. 75-76). In order to evaluate this specific risk, the Court entered into an intensive analysis of the numerous safety measures employed by JT and the city to ensure that such a ruinous discharge would never happen; the Court considered safeguards in place to prevent such leaks and to respond to them should they occur. The court’s discussion of these matters ran to more than twelve-typed pages of the opinion and concluded that, if the Takatsuki center is operated in accordance with the rules governing experiments and general safety, then the threat posed by the JT Takatsuki operations would be reduced below

the level of risk that triggers disclosure under the Takatsuki ordinance (Osaka District Court, 2001, p. 90-91).

The District Court recognized that it was tracking a moving target: "Of course, these standards are not absolute; daily confirmation and education are indispensable" (Ibid.). To accomplish these oversight tasks, the Court noted that the Takatsuki city officials retained the right to inspect the facilities and that the expert committee required under the "Safety Agreement" had been established to serve this very purpose. The Court therefore upheld the city's decision to withhold the information. It was total defeat for the plaintiff.

More than ten years had passed since Mr. Futaki began his opposition to construction of the pharmaceutical research facility in his neighborhood. Six and a half years had passed since the Kobe earthquake. Faced with defeat in Osaka District Court, he now contemplated the possibility of an appeal. Assuming the appellate court would agree with the District Court's assessment of the confidential nature and competitive value of the floor plans to JT Real Estate, the success of the appeal would depend on persuading the appellate court that the interest in public safety nonetheless required disclosure. To accomplish this, Mr. Futaki's attorneys would have to demonstrate either that the JT safety measures were inadequate or that the lower court had applied the wrong standard in gauging the level of risk that triggers disclosure under the Takatsuki ordinance. On July 12, 2001, they filed an appellate brief of forty pages focused mainly on these issues.

WARNING SIGNS

By tearing a great fissure in the earth and rattling the Futaki house 25 kilometers away, the Great Hanshin Earthquake had severely frightened Mr. Futaki and driven him to act. Another quake might bring down the walls of the JT compound and spill pathogens into his living room. But he and his neighbors were about to see a live demonstration that earthquakes were not the only threat. As the case moved forward, other nasty warnings of potential disaster appeared.

On December 20, 2000, just after the parties had completed final arguments before the trial court, an apparently deranged employee of the JT Takatsuki facility carried a radioactive substance from the plant and sprayed it around the entrance to the local railway station.¹¹ Although the volume of the substance released was not sufficient to pose a real threat of harm and no one was reported injured, the incident was a shocking display of vulnerability to this kind of attack. The perpetrator himself was employed as a researcher at the JT facility and appeared at the station in his white lab coat carrying three beakers of the material. When the 40-year-old man was apprehended, he is reported to have muttered barely comprehensible statements along the lines of, "This is a transient world and I acted to return the world to its origin."¹² An occurrence like this would immediately send the thoughts of any Japanese to the 1995 sarin gas attack in the Tokyo subway carried out by members of the *Aum* doomsday cult, which caused twelve deaths and more than five thousand injuries.

The site chosen by the man in the lab coat was well-suited to causing large-scale human injury. Takatsuki Station sits astride the Tokaido line of JR East, the

main trunk line running through Japan's great population centers. The station is commonly used by nearly all residents of the city and anyone who has business there. Passenger traffic is heavy. The JT facility is only a half-mile away.

Not long after this incident, there was more bad news. In June 2001 there had been an excessive discharge of a regulated substance (dichloroethane) from the JT Takatsuki facility but JT did not report the incident to the city as required. After a whistleblower notified a city council member who then sought action, the city demanded a report and conducted an on-site inspection (Osaka High Court, 2002, Sec. II(7)).

These incidents occurred against a background colored by a long-running series of incidents of malfeasance at regulated entities around the country. As judges of the Osaka High Court considered Mr. Futaki's appeal in the summer and fall of 2002, they opened their morning newspapers to find shocking details of systemic failures in Japan's nuclear power industry, including widespread falsification of plant inspection reports and cover-ups of defective equipment. In lieu of repairs, company personnel created false reports indicating that everything was fine. These disclosures led to the forced resignations of the chairman, president and other high-ranking officers of TEPCO (Tokyo Electric Power), the world's largest electric power company. Even as this saga unfolded, in a completely unrelated case, nuclear power industry executives were being tried for criminal negligence in relation to unlawful procedures that led to the deaths of two workers at another nuclear power facility (*Tokaimura Criticality Accident*, 2000). A guilty verdict would be delivered by the Mito District Court only two months after the Osaka High Court's own decision in the Takatsuki case.¹³

THE HIGH COURT DECISION

On December 24, 2002, a three-judge panel of the Osaka High Court issued a judgment overturning the lower court decision and handing victory to Mr. Futaki. The High Court agreed with the lower court determination that release of the documents would cause competitive injury to JT Real Estate sufficient to warrant protection, but it also agreed with Mr. Futaki that the level of “risk of injury to human life, the human body or health” was sufficient to override the business interest and require disclosure (Ordinance No. 40, Art. 6(1)(2)(a)).¹⁴

The ordinance itself provides no answer to the question “What *level* of “risk” requires disclosure?” In addressing this question, the Court noted that in the current “age of high technology,” a vast array of business activities present risk of injury; the court even went on to say it might be difficult to identify business activities that present no risk of injury whatever (Osaka High Court, 2002, Sec. II.3). In order for society to function, there is a broad range of “accepted dangers” (*yurusareta kiken*) recognized by society without the need for special safety measures. Following this logic, the Court declared that the term “business activities” as used in the proviso means “activities that present a possibility of injury to human life, the human body or health and *whose existence would not be allowed by society in the absence of special safety measures*” (Ibid. [emphasis added]). Information concerning activities that carry this level of risk must be disclosed.

JT had worked hard to allay the Court’s fears over dangers at the Takatsuki site with evidence of safety measures employed there and the oversight role of the

"Safety Committee." Now the High Court somehow turned this evidence against it, explaining that the focus of the statute was on the risky nature of the business operation itself and not on the effectiveness of measures taken to reduce the risk. JT's safety measures did not change the underlying nature of the operations: "to the contrary, the necessity of these special safety measures to the business operations in this case" itself served as recognition of the risk contemplated by the disclosure ordinance (Osaka High Court Decision, 2002, Sec. II.6). The High Court showed no interest in the task of evaluating safety measures in the manner of the lower court. For the Osaka High Court, the key question became: "Are these the kinds of activities for which society would require 'special safety measures'?" (Osaka High Court Decision, 2002, Sec. II.5).

The answer was obvious: "Recombinant DNA technology has a relatively short history," wrote the Court. It continued:

Because there are aspects for which it cannot be said that sufficient experience concerning its safety has been accumulated, it is important that any and all appropriate measures be employed to prevent injury from unforeseeable and unknown dangers before it occurs. Moreover, once damage to the environment has been caused by live organisms, recovery is difficult; in particular, care must be given to the ecosystems of present and future life forms in order to allow future generations to inherit a good living environment (Ibid).

Such an evaluation of these matters, said the Court, is generally recognized as the "contemporary sense of society" (*genzai no shakai tsunen*). According to the

“general sense of society” (*ippantekina shakai tsunen*), other activities such as the JT Takatsuki operations are not allowed by society unconditionally, they are allowed only when accompanied by special safety measures (Osaka High Court, 2002, Sec. II(5)(6)). The High Court ruled in favor of disclosure. JT and JT Real Estate filed an appeal with the Supreme Court that was not joined by the city. On March 1, 2005, the Supreme Court issued notice that it would not accept the appeal and the High Court judgment became final (Supreme Court of Japan, 2005).

THE ORIGIN OF JAPAN`S PUBLIC INTEREST RULE

The requirement that public officials disclose business secrets in order to protect public health is an original contribution of Japanese activists to information disclosure law. The U.S. Freedom of Information Act (FOIA) provided the primary model for these activists as they searched for a tool to improve government accountability in the 1970s, but the U.S. FOIA has no provision empowering public officials to disclose business secrets in any circumstance. Exemption Four of FOIA protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential” (5 U.S. Code, Sec. 552(b)(4)). The JT floor plans clearly qualified under this standard. U.S. law does not allow this finding to be weighed against a “public interest.” Under the U.S. FOIA, that would have been the end of the analysis and the information declared exempt from disclosure. The Japanese legislators and legal experts who studied the American law did not find this to be an acceptable result (Information Clearinghouse Japan, 2002). They rejected the American model of absolute protection for business secrets.

Although the Osaka High Court decision concerned application of the disclosure ordinance of one small city, Japan's national law and most or all of its nearly three thousand local disclosure systems carry similar language (Repeta, L., 1999, 2001). The local disclosure rules each bear a similar structure, creating a right to examine documents except for information that comes within a short list of exempt categories of information. The national law, which came into effect in 2001 (fifteen years after Takatsuki), exempts six categories of information from disclosure, including sensitive business information and information that might identify an individual (Law No. 42, 1999). Like the ordinance addressed in the High Court decision, however, the national law qualifies the latter two exemptions, mandating disclosure in cases where government officials (or courts) determine that "it is necessary to publicly disclose information in order to protect human life, health, livelihood or property" (Law No. 42, 1999).

The single most powerful force that drove Japanese people forward to demand information disclosure systems was anger at mass injury or outbreaks of disease caused by defective food and drug products. Japan's open government proponents believe that many such incidents resulted from the failure of government officials to take timely action and that they could be avoided or the severity of the injuries reduced if government accountability is improved by better public scrutiny.

The first widely recognized prototype for a Japanese information disclosure law was released by the Japan Civil Liberties Union (JCLU) in September 1979. The primary draftsman was a young lawyer who had served on the plaintiffs' team in a litigation seeking compensation from the government and pharmaceutical companies for birth defects caused by the drug thalidomide. Article 5(1)(5) of the JCLU proposal

provided an exemption from disclosure for business information only when release would cause a real danger of “a severe disadvantage” (*ichijirushii furieki*) and where non-disclosure is judged appropriate “in comparison with other interests” (JCLU, 1979). The brief commentary published together with the proposal baldly states that there are “much greater social values” than business confidentiality (JCLU, 1979, p. 29).

The “Citizens Movement for an Information Disclosure Law,” a coalition of citizen organizations and individuals, was formally launched in 1980, and in 1981 adopted its “Eight Principles of an Information Disclosure Law” (Information Clearinghouse Japan, 2002).¹⁵ Principle number 4 declares that “information relating to matters affecting the life, health and security of mind and body of the people . . . shall be absolutely subject to disclosure and disclosure thereof shall not be denied for any reason” (Ibid). When the influential Kanagawa ordinance was adopted by its prefectural assembly the following year, it also required that government records which include business secrets should be disclosed upon request when necessary to protect human life or health from business activities (Repeta, L., 2001). Like the city of Takatsuki, local governments all over Japan adopted disclosure rules with similar provisions.

The same logic applied when it was time to consider a national disclosure system. After a year and a half of deliberations, a commission of fifteen experts led by retired Supreme Court Justice Reijiro Sumida delivered a report on December 16, 1996, that set the foundation for the law that would pass the national parliament in 1999 (Administrative Reform Commission, 1997, pp. 214-31). The Commission carefully examined foreign models, especially the U.S. Freedom of Information Act.

When it came to an exemption for business secrets, they looked closely at the American provision, in particular the controversial leading case in the area, *Critical Mass* (Ibid., pp. 214-18).¹⁶ The Commission rejected the American rule of absolute protection for business secrets, instead proposed a balance-of-interests rule, much like the 1979 JCLU proposal. The law passed by the Diet would drop the balancing approach and supplant it with an “override” structure much like the Takatsuki rule (Law No. 42, Art. 5).

INTERNATIONAL COMPARISONS

In her comprehensive study of the “public interest” in Commonwealth freedom of information laws, Meredith Cook warned that cases involving a balance between a public interest and another protected interest “should be read with caution because it is inherent in the public interest test that its application will vary from case to case” (Cook, M., 2003, p. 9). Balancing conflicting interests inevitably requires careful study of the particular circumstances of each case, placing heavy responsibility on officials who make initial disclosure decisions and the courts and administrative review panels that oversee them. The United States Congress has resolved this problem with an absolute rule: if confidential business information is present, it must be withheld (5 U.S.C. Sec. 552(b)(4)). There is no room to consider “public interest” and no balance to be applied. Japan and many Commonwealth countries, on the other hand, show much greater confidence in the abilities of their officials and courts to weigh conflicting interests and deliver results that best serve society.

Moreover, in Japan’s case, national and local legislatures have provided little guidance to help determine the concrete circumstances that justify release of

otherwise protected information. When it interpreted the language of the Takatsuki ordinance to craft its resolution, the Osaka High Court liberally called upon the “general sense of society,” an undeniably subjective standard of judgment (Osaka High Court, 2002, Sec. II(5)(6). Judicial resort to this general standard is not unique to the determination of information disclosure cases. In fact, John O. Haley, a leading foreign scholar of Japanese law explains that “expressions for ‘the sense of society’ are among the most frequently used phrases in Japanese judicial opinions” (Haley, J.O., 1998, p. 157). He traces the origin of the practice to general civil code principles imported into Japan from France more than a hundred years ago.

When the Australian and Canadian national disclosure laws were adopted in 1982, they included provisions similar to the Japanese requirement to disclose business secrets when necessary to protect public health. The Australia Commonwealth Freedom of Information Act requires that officials consider public interest factors both for and against disclosure. According to the Meredith Cook study cited above, the public interest in disclosure has been found to outweigh the interest in exemption in cases involving “promotion of public interest in the processes of government,” “making a valuable contribution to public debate on an issue,” “environmental, and health and safety concerns,” “examining the effectiveness of controls and safeguards in relation to health and quality controls or safeguards against water pollution,” and other matters (Cook, M., 2003).

Canada’s “Federal Access to Information Act” was adopted in 1982 and came into effect the following year. It provides a general right of access to government documents subject to exemptions. Two categories of exemptions, including the commercial information exemption, provide specific overrides to allow disclosure

when it is in the public interest. Some provincial laws have similar provisions. Section 20(6) of the Canadian federal law permits the disclosure of commercial information from a third party if this would be in the public interest as it relates to health, safety or protection of the environment and the public interest in disclosure clearly outweighs any injury to the third party. This rule does not apply to third-party trade secrets.

Disclosure laws adopted subsequently by Commonwealth countries have expanded the requirement of public interest disclosure. For example Article 27(2) of the Freedom of Information Act of Ireland exempts “commercially sensitive information” from disclosure; however, this is qualified by Article 27(2)(e), which requires officials to grant requests where “disclosure of the information concerned is necessary in order to avoid a serious or imminent danger to the life or health of an individual or to the environment.”

Most recently, the Freedom of Information Act of the United Kingdom was adopted by Parliament in 2000 and the individual request procedure of the act came into effect in January 2005. The act provides a general right of access subject to exemptions for 25 categories of information. Disclosure of information in seventeen of the categories is to be determined by applying a balancing test. Section 2(2)(b) of the act recites the balancing test as follows: “In all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

The exemption for “commercial interests” is subject to this balance of interests rule. Accordingly, if officials applying the law determine that the “public interest” in

disclosure outweighs the interest in maintaining commercial confidentiality, the information must be disclosed. The law does not provide a definition for “public interest.”

FINAL COMMENT

Information disclosure systems have a limited mandate—to enable people to see existing documents—and cannot be expected to solve the entire problem of popular participation in the administrative process. The plaintiff in the Takatsuki case himself cried out at the failure of Japanese law to provide a regulatory regime to enable residents like him, and others, to have input to the process that approved construction of the biotechnology laboratory. But it is the very broad concept of the freedom of information law that enables it to fill gaps such as this and at minimum to provide citizens a means to obtain important information otherwise beyond their grasp.

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¹ Major earthquakes have repeatedly struck the Kanto (Tokyo) region throughout modern history and minor earthquakes are experienced frequently. This is not the case in the Kansai (Osaka-Kyoto) region. Somehow, the “slip fault” that runs beneath the city of Kobe had remained undetected.

² A revised ordinance was promulgated by the city on July 16, 2003.

³ The Takatsuki Ordinance explicitly provides for this procedure, Art. 9.

⁴ See also, Complaint and Futaki, T., 1996.

⁵ The Japan Rail “Yamanote Line” forms a large circle which serves, among other things, to define “Central Tokyo.” See “JR Yamanote Line” [Online], <http://www.japan-guide.com/e/e2370.html> [Accessed: 18th April 2006].

⁶ The request for an injunction was denied. Subsequently, the Tokyo District Court decision was upheld on appeal (Tokyo High Court, 2001). Background to the suit is provided in Association of Plaintiffs and the Attorneys Team, eds., 2001).

⁷ The area is called “*murasaki-cho*,” literally meaning “purple-town.” Futaki himself suspects that this name was selected due to the smoke produced by the factory.

⁸ Japan Tobacco Company is listed on the Tokyo Stock Exchange but the national government owns two-thirds of outstanding shares.

⁹ This paper addresses the competitive injury aspect of Article 6(1)(2); the exemption also applies to “other proper interests” (Ordinance No. 40). Both the District Court and High Court

recognized that disclosure of the floor plans would cause injury to JT's interest in maintaining security at the facility.

¹⁰ The court also found that injury to JT Real Estate would occur due to disclosure of confidential information protected by copyright law and by character rights enjoyed by the copyright holder. Requests for copies of architectural drawings raise an obvious conflict between public policy granting monopolies to copyright holders and granting citizens broad access to information held by government. These issues were argued by the parties and the Osaka High Court resolved the dispute in favor of disclosure. Analysis of these issues is beyond the scope of this paper.

¹¹ Asahi Shinbun, Dec. 20, 2000. This event was widely reported in the major Japanese news media.

¹² The quotation is from, *The case of scattered radioactive materials*, http://web.ffn.ne.jp/kross9/archive/2000_12.html [Accessed: May 2004] [This site has since been closed.].

¹³ A useful description of several highly publicized food contamination and other product defect cases that occurred during this period appears in Nottage (2004). This book also provides some description of the defective drug cases of the 1960s and 1970s that provided a catalyst for the launch of Japan's freedom of information movement.

¹⁴ The city of Takatsuki waived the right of appeal. Japan Tobacco and Japan Tobacco Real Estate, intervenors in the litigation, filed requests for appeal with the Supreme Court of Japan.

¹⁵ An English translation of the Eight Principles is appended to Information Clearing House Japan (2002).

¹⁶ Pages 214-218 contain a Japanese Translation of the U.S. Dep't of Justice memorandum analyzing the *Critical Mass* decision (*Critical Mass Energy Project v. Nuclear Regulatory Commission* (II), 975 F.2d 871 (D.C. Cir. 1992)).

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Author Details

Professor Lawrence Repeta

Professor, Omiya Law School

4-333-13 Sakuragi-cho, Omiya-ku
Saitama-shi, JAPAN 330-0855

E-mail: repeta@omiyalaw.ac.jp

Tel: (81) 048-658-8101 Fax: (81) 048-658-8102 (Lawrence Repeta)