ACCESS TO NATIONAL SECURITY INFORMATION

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What is national security information

Due to various modalities of this term in different countries and in various texts, in this discussion the term *national security information* (NSI) will be used to to refer to any data (regardless of the medium used for storage) or knowledge that can be communicated, which is of relevance to the security of a nation or state, and which is at the same time classified as confidential.

In comparative practice National security information is usually related to defense or foreign affairs, but it may also be attributed to territorial integrity and sovereignty, protection of a constitutional order, internal affairs, economy, or even protection of human rights and liberties.

Confidential is information which is classified as belonging to any of the three, somewhere four typical restrictive regimes – "classified", "secret", "top secret", or "for internal use", "restricted", "strictly restricted" and state secret". Information will be confidential when there is a danger or certainty that that possession of that information by unauthorized persons or entities would harm the safeguarded values – in this case vital security interests of the nation or a state.

We keep mentioning both the nation and the state, because those are more then just two interrelated terms. Focusing security to protect the "state" above all, resulted in a concept of "state security". Under the shadow of that term numerous grave violations of human rights have been committed all around the world, including Europe. The term "National", suggests that the value which is to be protected from threats is of human content, and that besides humans there are also their shared values, which all together constitute a nation, which is to be safeguarded. A third concept, followed by an appropriate term recently emerged – *human security*. It focuses at humans as individuals, arguing that the proper referent for security considerations should be the individual rather than the state. Human security is, still, far from having the leading role in modern security theory.

Traditional view on access to national security information

The executive branch of power has traditionally had the privilege to access and use national security information. This **executive privilege** is being explained as only natural, because the government possesses specialist knowledge and means, and can act swiftly and effectively to protect and advance the national security interests. In addition, Additional explanation, however rarely heard, is that the executive is the master of national security information because agencies that gather, process and disseminate those pieces of information belong to the executive.

Over the years, the **judiciary** has "acquired" the right not to be denied of NSI. This happened as a request for a fair trial became a fundamental human rights principle and a democratic requirement. When establishing someone's quilt for espionage or treason, for example, a judge will reasonably have to know what and how was betrayed. It is also a modern democratic requirement and achievement that the use of special measures such as interception of communications to protect national security interests is approved by court or a court-like body. To be able to authorize the measure, the judge must, or should know exactly what is at stake.

The right of **legislative** authorities – parliaments, to access national security information is of a newer date. The reasons that qualify parliamentarians to access NSI are the policy and oversight roles of a parliament.

Countries with strong parliamentary democracy have their parliaments to adopt policies, and governments to execute them. In others the constitution entrusts the government to adopt and implement policies, and parliament mainly to adopt laws. More the parliament participates in policy making, more it has to be allowed to the NSI.

Parliament exercises oversight on executive, too, at least when it is not what is known as "the rubberstamp parliament". Parliamentary oversight of security services is a part of a civilian democratic control of armed forces and a major democratic requirement. Some parliaments, or to be more precise – their security oversight committees, have more potent control powers than others, e.g. the US Congress and German Bundestag, or to be more precise, their various oversight committees. However, it does not come as only natural to the executive: very well known is the long and exhaustive battle between the Congress and the intelligence community in US for the effective right of congressmen to know everything they believe should be known in order to truly control the appropriateness of special operations abroad, or oversee the depth of the "big brother's" insight into private life of Americans in their homeland.

Access to national security information by independent bodies

A crucial criterion that is applied whenever access is granted or denied to someone to access national security information is – *need to know* rule. It says that access to confidential information should be granted only when knowing that very information is necessary for the seeker to exercise the duty or authority prescribed by the law. Executive needs to know to be able to act properly; judiciary needs to know to issue a sentence or approve special measure; parliament needs to know to decide on policy or oversee… Why should independent bodies, especially ombudsman need to know, and are they in practice allowed to know?

Institutions that are usually referred to when speaking about independent bodies are various kinds of parliamentary commissioners such as data protection or information officers which hold administrative authority (their decisions have *imperium*); state auditing institutions which independently control the appropriateness and legality of spending public funds, and, finally, ombudsman institutions, vested with protecting human rights and controlling the work of administration.

Why should, in a democratic society, an independent, non-executive body have authority to access national security information?

David Banizar, a Deputy Director of Privacy International, states that "access to government records and information is an essential requirement for developing and maintaining a civil and democratic society. Access provides an important guard against abuses, mismanagement and corruption. It can also be beneficial to governments themselves – openness and transparency in the decision making process can assist in developing citizen trust in government actions. This is especially true for access to information about intelligence services and other national security bodies." Also, as American justice Potter Stewart wrote – when everything is secret – nothing is secret!

These arguments were certainly amongst the reasons that made the new US president, Barak Obama, to say in his first day in office, that his "For a long time now there's been too much secrecy, and that his administration will, for a change, stand on the side not of those who seek to withhold information, but those who seek to make it known."

If truly done so, and not only in US, the Freedom of Information Acts, other side of coins opposing various secrecy acts, will be gaining in importance. As it stands now, in many countries Freedom of Information Acts do not even apply to security apparatus. Great Britain is such example. On the other side stand countries like Hungary and Slovenia, whose specialized parliamentary commissioners, standing independent from the executive, are entrusted to widely enforce Freedom of Information Acts and in doing so, review and, if necessary, change the status of state secrets –declassify them.

In 1995, a group of experts met in South Africa's capital to work on finding a balance between national security and access to information. They developed guidelines known as **the Johannesburg principles**, which were later endorsed also by the relevant UN and OSCE institutions. The Principle 14 reads: *The state is obliged to adopt appropriate measures to give effect to the right to obtain information. These measures shall require the authorities, if they deny a request for information, to specify their reasons for doing so in writing and as soon as reasonably possible; and shall provide for a right of review of the merits and the* ***validity of the denial by an independent authority****, including some form of judicial review of the legality of the denial.* ***The reviewing authority must have the right to examine the information withheld****.*

Ombudsman as guarantor

But some pieces of information have to remain non-public. There are cases in which especially the individual in concern needs to be denied of the information on the governmental activities about him or her. The role of an independent, official human rights institution such as ombudsman is to check the legality and properness of the governmental action in such circumstances, and to **guarantee** to the citizens that there are no abuses and wrongdoings in the work of the executive which is necessary to be kept in discretion vis-à-vis the individual and the general public.

When will a human rights ombudsman find him or herself in such a situation? Most obviously, when a person reasonably complaints, or information occurs, that the recognized human rights of an individual or a group are violated by illegal or improper activities of the state authorities, which are hidden behind the veil of secrecy. As an example, this happens when a human rights ombudsman learns that there may be a secret prison in his/her country, where people are possibly held in incommunicado and tortured, and which is allegedly organized by domestic or foreign, or both secret services?

In few rare countries, ombudsman would legaly be prohibited to investigate such an complaint or information. Such is the case in Etiopia. The law there explicitly states that the Ombudsman has no mandate over security forces and units of Defense Forces in respect of matters of national security or defense.

Unlike that, our Dutch colleague has an explicit mandate to oversee the respect of human rights in the work of intelligence and security services. Such is the case in vast majority of the countries with parliamentary general ombudsman. The culprit for this model comes from Sweden, where ombudsman has full, unrestricted access to any information held by the executive, regardless of its level of secrecy. This is the case also in countries with not-so-long ombudsman tradition – Montenegro, FYR of Macedonia, Albania, Serbia…

UK, which does not have a general human rights ombudsman, has found “a gentleman’s way” to deal with this issue. When the St. Andrew’s Agreement from 2006 gave the British Security Service MI5 mandate over the anti-terrorist intelligence in in Northern Ireland, the Police Ombudsman retained statutory powers to hold to account all police officers and have access to all information held by the police. But handing MI5 responsibility for national security matters also moved many intelligence documents out of the Ombudsman's reach. To redress it, the Prime Minister announced that the Ombudsman's office and the Security Service will agree arrangements for the Ombudsman's access to sensitive information held also by the MI5, where necessary for the discharge of the Ombudsman's statutory duties. Police Ombudsman Al Hutchinson in deed signed an agreement with MI5 to access secret intelligence for his investigations into policing. This example shows how executive and secret services may realize that there is a benefit for them in additional legitimacy of their operations, arising from the fact that they are overseen by an independent human rights institution, acting as a guarantor to the citizens.

As presented, there is more than one way to arrange access of ombudsman to national security information, but there is no proper way for a human rights ombudsman to do his or her work in its entirety if they are banned from NSI.

Access to NSI requires an ombudsman, just like any other authorized person, to maintain the information confidential. Ombudsman is, therefore, fully obliged to respect the secrecy protection laws and procedures, and nothing that ombudsman does must jeopardize legal and legitimate national security interest protected by the confidentiality regime. Ombudsman institutions must, therefore, have well thought-out procedures and communication to citizens in order to protect vital information while, at the same time, assuring them that their human rights are respected.

But if ombudsman finds that classified information conceals violations of law, human rights abuses, inefficiency or administrative error, than then his/her role and duty is to vigorously address both – the initial problem, and the abuse of secrecy law. If necessary and appropriate, this may be done in public!

Unrestricted authority of ombudsman to investigate and establish all facts necessary to accomplish the institutional duty to safeguard human rights, including preventively, is especially important in the current moment of history, when various threats to human freedom, life and other fundamental rights arise not only from the terrorists, but also from our loosely guarded guardians.

Serbian national ombudsman (official title is: Protector of Citizens) currently has no limitations whatsoever towards the national security information. However, the drafting of a new secrecy act is ongoing and there is an idea in the drafting group to restrict Ombudsman and Parliamentary Commissioner for Public Information and Personal Data Protection from accessing some of the most delicate national security information. Both the Commissioner and the Ombudsman are very strongly against any restriction to their investigative powers, arguing that those limitations would be detrimental to the protection of human rights, and are against international standards and best practices.

Benjamin Franklin said that who trades a piece of liberty for a piece of temporary security, deserves none and looses both. For all the reasons stated above, the same should be applied when deliberating the relation between human rights and security.

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