



MEMORANDUM

on

The Romanian Law On Classified Information

by

**ARTICLE 19
Global Campaign for Free Expression**

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Introduction

The Law on Classified Information does contain some positive features, including a recognition in general terms of the right to access public information, a clause to the effect that it does not limit the right to access information as provided for under international law and a prohibition on classifying documents for illegitimate purposes, such as covering up corruption. At the same time, the law suffers from some serious defects. This Memorandum sets out ARTICLE 19's key concerns with the law. Our comments are based on an unofficial English translation of the law as passed by the Chamber of Deputies on 26 February 2002, which we understand is essentially the same draft that was passed by the Senate.

We are concerned that the Law on Classified Information will substantially undermine the fledgling Law Regarding Access to Information of Public Interest, particularly given the climate of secrecy that still pertains in Romania. Indeed, we question why these two laws were not developed together, and in particular why the Law on Classified Information makes no reference to the freedom of information law, given the close relationship between their subject matters. In addition, we are concerned that the new law places onerous and largely undefined obligations on all

legal bodies to protect “professional secrets”, that it fails to define State secrets appropriately narrowly and that it does not provide for a public interest override or for protection for whistleblowers.

International and Constitutional Standards

International Guarantees of Freedom of Expression

Freedom of information is of fundamental importance. During its first session in 1946, the United Nations General Assembly adopted Resolution 59(1) which stated:

Freedom of information is a fundamental human right and...the touchstone of all the freedoms to which the UN is consecrated.

In ensuing international human rights instruments, freedom of information was not set out separately but as part of the fundamental right of freedom of expression, which includes the right to seek, receive and impart information. The Universal Declaration of Human Rights (UDHR) is generally considered to be the flagship statement of international human rights, binding on all states as a matter of customary international law. Article 19 of the UDHR guarantees the right to freedom of expression and information in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The International Covenant on Civil and Political Rights (ICCPR), a legally binding treaty which Romania ratified in 1974, guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, also in Article 19. The European Convention on Human Rights, which Romania ratified on 20 June 1994, protects the right to freedom of expression and information at Article 10. These guarantees allow for some restrictions on freedom of expression and information but only where these are prescribed by law, pursue a legitimate aim and are necessary in a democratic society to protect that aim.

Standards Relating to Freedom of Information

Numerous official statements have been made to the effect that the right to freedom of expression includes a right to access information held by public authorities. The right to information has also been proposed as an independent human right. Some of the key standard setting statements on this issue follow.

The UN Special Rapporteur on Freedom of Opinion and Expression has frequently noted that the right to freedom of expression includes the right to access information held by public authorities. He first broached this topic in 1995 and has included commentary on it in all of his annual reports since 1997. For example, in his 1998 Annual Report, the UN Special Rapporteur stated:

[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems....¹

In November 1999, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – came together for the first time under the auspices of ARTICLE 19. They adopted a Joint Declaration which included the following statement:

Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.²

Similarly, in October 2000, the Inter-American Commission on Human Rights approved the Inter-American Declaration of Principles on Freedom of Expression,³ the most comprehensive official document to date on freedom of expression in the Inter-American system. The Principles unequivocally recognise freedom of information, including the right to access information held by the State, both as an aspect of freedom of expression and as a fundamental right on its own:

4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

Within Europe, the Committee of Ministers of the Council of Europe recently adopted a Recommendation on Access to Official Documents.⁴ Principle III of that Recommendation states:

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

Principle IV of the Recommendation, which deals with exceptions to the right, states:

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

- i. national security, defence and international relations;...

The European Union has also recently taken steps to give practical legal effect to the right to information. The European Parliament and the Council adopted a regulation

¹ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14. These views were welcomed by the Commission. See Resolution 1998/42, 17 April 1998, para. 2.

² 26 November 1999.

³ 108th Regular Session, 19 October 2000.

⁴ Recommendation No R (2000)2 of the Committee of Ministers to member States on access to official information, adopted 21 February 2002.

on access to European Parliament, Council and Commission documents in May 2001.⁵ The preamble, which provides the rationale for the Regulation, states in part:

Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights....

The purpose of the Regulation is “to ensure the widest possible access to documents”.⁶

In 1999, ARTICLE 19 elaborated a set of standards on freedom of information, *The Public’s Right to Know: Principles on Freedom of Information Legislation*.⁷ These Principles, which set out 9 key standards on freedom of information have been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression.⁸ Principle 1, the Principle of Maximum Disclosure, stipulates: “The principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances.”

These international developments find their parallel in the passage or preparation of freedom of information legislation in countries in every region of the world. Most States in Europe now have freedom of information legislation on the books. In Asia, a Freedom of Information Bill is currently before the Indian Parliament and draft legislation has been or is being prepared in Pakistan, Nepal and Sri Lanka. Freedom of information laws or codes have been passed in Hong Kong, Japan, the Philippines, South Korea and Thailand and bills are being presented in Taiwan and Indonesia. Similar developments are taking place in Africa and South America.

National Security and Secrecy

An authoritative statement of the principles relating to national security restrictions for reasons of secrecy are set out in the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, adopted in October of 1995 by a group of experts in international law and human rights convened by ARTICLE 19 and the Centre for Applied Legal Studies of the University of the Witwatersrand. The *Johannesburg Principles*, which are based on international law, standards for the protection of human rights, evolving State practice, and the general principles of law recognised by the community of nations, outline the prevailing standards for withholding information in the name of national security.

The *Johannesburg Principles* recognise that the right to seek, receive and impart information may, at times, be restricted on specific grounds, including the protection

⁵ Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

⁶ *Ibid.*, Article 1(a).

⁷ (London, June 1999).

⁸ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 43.

of national security. However, national security cannot be a catchall for limiting access to information. A number of the *Johannesburg Principles* are relevant to the issue of classification laws, including the following:

Principle 2: Legitimate National Security Interest

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 16: Information Obtained Through Public Service

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

Constitutional Guarantees

The right to freedom of expression is also protected by Article 30 of the Romanian Constitution, which states in part:

- (1) Freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, by words, in writing, in pictures, by sounds, or other means of communication in public are inviolable.
- (2) Any censorship shall be prohibited.
- (3) Freedom of the press also involves the free setting up of publications.
- (4) No publication may be suppressed.

This Article also envisages limited exceptions to the right, for example for defamation or incitement to hatred. No mention is made in this article of national security.

Article 31 of the Constitution guarantees the right to information as follows:

- (1) A person's right of access to any information of public interest cannot be restricted.

This article also envisages two exceptions, for protection of the young and for national security.

Relationship with the Freedom of Information Law

The Law on Classified Information makes no reference to the Law Regarding Access to Information of Public Interest, although Article 2(1) does note that the right to access public information is guaranteed by the law.

In our view, the regime of exceptions in a freedom of information law should be comprehensive and should not be permitted to be extended by other laws.⁹ As a result, the freedom of information law should dominate in the case of an inconsistency with any other law. Unfortunately, this is not the case with the Romanian Law Regarding Access to Information of Public Interest, which is inferior to secrecy laws.

Despite this, the Law on Classified Information should at least recognise the Law Regarding Access to Information of Public Interest and make an effort to be consistent with its provisions. As it is, the two laws appear to operate totally independently of each other, with the secrecy law dominating in case of clash. This clearly and unnecessarily undermines the right to freedom of information.

Recommendation:

- The Law on Classified Information should ideally provide that in case of inconsistency with the Law Regarding Access to Information of Public Interest, the latter should dominate. In any case, the Law on Classified Information should make explicit reference to the freedom of information law and it should be drafted in such a way as to take that law into account.

The Obligation of Professional Secrecy

Article 15(c) of the Law on Classified Information defines two different kinds of secret, State secrets and professional secrets. Article 15(e) defines the latter as information which, if disseminated “may produce progresses or prejudices of another kind to a public or private legal person”. Chapter III of the law (Articles 31-33) places a legal obligation on all bodies to protect professional secrets, as determined by the head of the body according to norms set out by Government Decision. Article 33 prohibits the classification as a professional secret of certain information, including information required to ensure the public’s right to know about matters of public interest. Article 39 provides for sanctions for a failure to protect a professional secret. The law does not define a professional secret in any detail.

These provisions are seriously problematical. Although it is not contrary to international law to require private bodies to keep some information secret, this obligation can only extend to a limited category of clearly defined information. In practice, in most countries, an obligation of this sort applies, if at all, only to personal information and is in any case the subject of extensive legal rules, including numerous exceptions. The Article 15(e) definition of professional information is extremely general, vastly overbroad and wholly inadequate for a restriction of this sort. The

⁹ See ARTICLE 19 Principle 8.

level of harm required completely fails to take into account the importance of the right to information. For example, much political commentary may cause prejudice of some sort to those involved but clearly cannot be required to be classified.

It is inappropriate to leave the scope of this obligation for future Government Decision, as Chapter III does. Furthermore, it is quite unclear from Article 39 what sort of sanction an individual might expect for breach of these provisions since that article simply refers to “disciplinary, civil or criminal liability, as is the case.” Article 33 slightly mitigates these problems, by excluding certain types of information from being classified as a professional secret, but it is too vague to overcome the problems noted above. A journalist, faced with a choice between relying on Article 33 and therefore risking possible undefined sanctions or not publishing may well chose the latter option.

Recommendation:

- All obligations relating to professional secrets should be removed from this law. If this matter is to be dealt with, it needs full consideration, including a fully developed regime of exceptions.

Definition of State Secret

Article 15(b) defines classified information generally as information “which is not addressed to the public”. This is somewhat refined in Article 15(d) which defines a State secret as information regarding national security, broadly defined, which if disseminated, “may affect the national security, the nation’s defense or other fundamental interests of Romania, indicated as such by the law.” This is again further refined by Article 15(f), frequently referred back to throughout the law, which distinguishes between information which is “strictly confidential of outstanding importance”, “strictly confidential” and “confidential”. The first category is information the disclosure of which may produce “prejudice of exceptional gravity”, the second information the disclosure of which may produce “severe prejudice” and the latter information the disclosure of which may produced “damages”. This classification system is for some reason repeated in Article 18.

Article 17 provides a non-exhaustive list of 14 different categories of State secret, including information that refers to:

- the nation’s defence system;
- effective forces and their missions;
- communications systems;
- information sources used by the public authorities;
- blueprints relating to electricity and water supplies; and
- the printing of banknotes and coins.

Under international law a provision on secrecy is legitimate only if it meets a three part test, set out clearly in ARTICLE 19’s Principle 4: Exceptions, as follows:

The three-part test:

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and

- the harm to the aim must be greater than the public interest in having the information.

It is unclear how the different elements of definition in the Law on Classified Information, described above, work together. Article 15(b) is circular and hence provides no indication of what might legitimately be classified. Article 15(d) is excessively broad, covering a vast range of information. Furthermore, it fails to set out a harm test, requiring only that the disclosure “may affect” national security; the effect here could even, at least in theory, be positive. Article 15(f) does articulate harm tests for the different levels of State secret but the level of harm required for “confidential” information, namely that it “may produce damages” is minimal.

There are a number of problems with Article 17. First, it does not set out a harm test, covering all information that “refers to” the various categories. It may be that these categories are designed to be interpreted in conjunction with Article 15(f), which does include harm tests, but this is unclear. Second, the categories are themselves incredibly broad, covering a wide range of public activities, some of which have only very tangential bearing on national security, such as printing banknotes and water supplies.¹⁰ Third, despite its great breadth, Article 17 is not exclusive, as it only “includes” the categories listed.

Finally, the law fails to provide for a public interest override to allow for non-classification where the overall public interest is served by disclosure. Articles 24(5) and (6) do provide for non-classification in certain circumstances, but these provisions are more limited than a general public interest override.

Recommendations:

- The various elements of the definition of a State secret should be brought together in one article and the relationship between them should be clarified.
- It should be clear that only information which threatens substantial harm to national security should be able to be classified. The same substantial harm standard should also apply to “confidential” information.
- If a list of categories, such as that found at Article 17, is retained in the law, it should be clear that it is subject to the harm tests for the different kinds of classification. Furthermore, any list should be exhaustive and cover only categories of information closely related to national security.
- All classification should be subject to a public interest override.

Declassification

Article 24(4) of the Law on Classified Information provides for declassification of documents “by Government Decision upon justified requirement of the issuer of such information.” Article 24(10) appears to envisage declassification by “governmental authorities competent to approve the classification and the secrecy level.” No provision is made for review of classification or for automatic declassification after a certain period of time.

¹⁰ See the Johannesburg Principles No. 2 defining a legitimate national security interest.

It is unclear how these two provisions relate. In particular, it is unclear whether information can be declassified without a request from the issuer. If not, this is clearly a serious flaw in the law, since the issuer may well have illegitimate reasons not to declassify, or be unavailable or otherwise occupied. Any authority competent to classify the given information should be able to declassify it, not just the person who issued the original classification. Furthermore, it should be clear that a successful challenge to classified information pursuant to Article 20 results in the information being declassified.

More importantly, the law does not require regular review of classification or set out presumptive maximum periods of classification. As a result, material once classified will remain so unless someone in government actively takes an interest in having it declassified, an unlikely scenario. This may be contrasted with a similar law currently before the Bulgarian legislature, also for purposes of acceding to NATO, which requires classification to be reviewed every two years. The Bulgarian law also sets periods after which classification is presumed to lapse. Similarly, the Hungarian law provides for review every three years and also has presumptive maximum periods of classification. Although these may be extended, this has the virtue of requiring the authorities to prove a need for further classification.

Recommendations:

- The provisions on declassification should be brought together and it should be made clear that any authority with the power to classify a given document should be able to declassify it.
- It should be clear that a successful challenge to a classification, including the level of classification, results in that information being declassified or having its classification level downgraded.
- Classification, including level of classification, should be required to be reviewed regularly.
- The law should set out presumptive maximum periods of classification for each level of classification. These periods should only be allowed to be extended where the rationale for classification at that level remains in place.

Whistleblowers

The Law on Classified Information does not provide any protection to whistleblowers, individuals who release information on wrongdoing. To combat the prevailing culture of secrecy and to help expose wrongdoing, the law should provide protection to whistleblowers as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing. Wrongdoing for these purposes should include the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body. Protection should also be afforded to those who release information disclosing a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not.

Recommendation:

- The law should provide protection to whistleblowers.

Lack of Sanction for Wilful Mis-Classification

As noted above, the Law on Classified Information, at Articles 24(5) and (6) exempts some types of information from being classified as State secrets. While these provisions are welcome, the law fails to provide for a sanction for those who wilfully classify documents in breach of these rules. In particular, the law does not provide for sanctions for those who intentionally classify information for purposes of breach of the law, corruption or to limit the public's access to information.

Recommendation:

- The law should provide for sanctions for those who wilfully classify information in breach of the law.