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**Access to information and
limits to public transparency**



CENTRE FOR INTEGRITY
IN THE DEFENCE SECTOR

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The Centre for Integrity in the Defence Sector (CIDS) is promoting integrity, anti-corruption measures and good governance in the defence sector. Working with Norwegian and international partners, the centre seeks to build competence, raise awareness and provide practical means to reduce risks of corruption. CIDS was established by the Norwegian Ministry of Defence in 2012.

The views expressed in this booklet are those of the author and do not necessarily represent the views of, and should not be attributed to, the Norwegian Ministry of Defence.

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FOREWORD

CIDS is publishing the fourth booklet of the series *Guides to Good Governance*. Our objective with this series has been to present key issues within the area of 'good governance' to a wide audience, briefly but without oversimplifying.

The author has attempted to summarize international best practice in the area of public access to information. It is challenging to strike a balance between public access to information and the state's legitimate need to protect certain information, for instance to protect the safety and security of the nation and its citizens. This is particularly challenging with regard to defence, where secrecy is to some extent a necessity. Sometimes, however, the sole purpose of invoking national security considerations may be to withhold information that should be made public and subjected to public discussion. I hope we have succeeded in striking the right balance.

This guide was written by Francisco Cardona, one of CIDS's senior international experts. I would like to thank him for his efforts and for letting us benefit from his expertise and long experience.

I would also like to thank the centre's editor Ingrid Busterud for editing the guide.

We hope that this contribution to good governance can be utilized by a broad audience both within the public and the defence sectors and outside. Public access to information is crucial in a democratic and open society and represents a basis for good governance. CIDS is happy to receive any feedback on this guide.

Oslo, 23 May 2016



Per Christensen

Director

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Introduction

Information, freedom of expression and transparency are instrumental to democracy because they are indispensable for citizens' informed participation in the political process and, ultimately, for the protection of human rights. Access to information is part and parcel of any true democracy because it supports citizens' participation, public officials' accountability and overall government transparency. It contributes to enhancing the self-respect of individuals as citizens and reduces the risk of authoritarianism, corruption and maladministration.

This paper deals with the gradual establishment of transparency as a public virtue in many countries. At present, transparency exemplifies good governance. The more open and transparent a state is, the better the public governance system is likely to be.

We explore the extent to which transparency is gaining ground in administrative practices in OECD and EU countries. We also pinpoint the limits to access to public information. We gauge the extent to which the barriers to transparency are being removed from administrative practice or the opposite is happening.

The main limits to transparency stem from the protection of state secrets and from the protection of individual privacy. These limitations are legitimate. However, they should be considered to be exceptions to the main principle, which is full access to information.

The protection of state secrets is legitimate insofar as it is justified, while transparency does not need any justification. However, this is far from being a fact in many countries. Moreover, the 'right to know' and the protection of state secrets pull in opposite directions. Many people continue to believe, mistakenly, that national security and national defence should by definition be kept outside the purview of the law and democratic scrutiny.

The paper will deliberately leave aside the protection of private data (either personal or business-related) in order to focus on access to information of public importance. This is because free access to this latter kind of information is more likely to reinforce good public governance, while its concealment tends to diminish the quality of democratic regimes and governance.

A 'right to know' still under construction

We are witnessing a rising demand for transparency and freedom of information. Some 105 countries now have laws on access to public information¹, though of varying quality and scope. In addition, many governments are joining the Open Government Partnership, a global alliance to promote transparency which was formed in 2011. In 2015 this organization included 66 countries.²

International human rights bodies, including the United Nations Human Rights Committee (2011), the Inter-American Court of Human Rights (2006) and the European Court of Human Rights (2009 and 2013) have ruled that access to information from public bodies is a human right, an assertion mirrored by the 2010 Treaty of Lisbon (article 15 of the Treaty of the European Union-TEU).

Article 15 of the TEU establishes that 'in order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible', and reiterates that 'any citizen of the Union, and

any natural or legal person residing or having its registered office in a member state, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium'. The EU Charter of Fundamental Rights, now binding on all the member states, explicitly guarantees 'the right of every person to have access to his or her file' (Article 41) and the right of access to EU institutions' documents (Article 42).

According to the OECD/SIGMA, the right of access to administrative documents has only recently been recognized as a fundamental right. Nevertheless, administrative transparency has long been considered a positive, though often inconsequential, idea in many western countries. A remarkably early positive example was Sweden, where a principle of public access to official records had been introduced as early as in 1766 within the framework of a regulation on freedom of the press. Finland introduced a similar regulation in 1951, followed by Norway and Denmark in 1970. In the United States, the first Freedom of Information Act (FOIA) was enacted in 1966. Australia, Canada and New Zealand followed suit in 1982-1983. In the United Kingdom and in Continental Europe, the principle of transparency met strong-

1 Global Right to Information Rating (RIT). Available at <http://www.rti-rating.org/country-data>

2 Open Government Partnership. Available at <http://www.opengovpartnership.org/>

er resistance. Initially, it was implemented only by means of Administrative Procedures Acts (APAs). However, during the last two decades, such 'procedural transparency' has been complemented with the spread of Freedom of Information Acts worldwide.³

In 1999 Yehezkel Dror elaborated the requirement for transparency and openness in government.⁴ After conceptualizing them as norms and instruments, he concluded that 'increasing transparency and openness must be considered and reconsidered within upgrading capacities to govern and moving towards 'quality of democracy' as a whole'. Likewise, Amartya Sen (1999) proposed that the guarantee of transparency is a key instrumental freedom contributing to the freedom of individuals and to reduce corruption.⁵

Many countries recognize access to information as a constitutional human right. The interaction between national FOIAs and international standard-setting activism would

seem to be fuelling an unstoppable pro-transparency movement. However, this perception may misrepresent the reality. Transparency as a characteristic of public governance is a work in progress and an aspirational goal in many parts of the world.

Free and fair elections are necessary, but insufficient, to develop a quality democracy. In recent years many autocratic governments have been elected through formal electoral processes. Freedom House's Freedom in the World 2015 Report found an overall drop in freedom for the ninth consecutive year.⁶ It notes a disquieting development: a number of countries lost ground due to state surveillance, restrictions on internet communications, and restrictions on personal autonomy. The report notes that 26% of the countries in the world are not free. Furthermore, in some countries there are attempts to reverse the progress made in securing citizens' 'right to know' what governments do.

3 OECD. 2010. "The Right to Open Public Administrations in Europe: Emerging Legal Standards", *SIGMA Papers*, No. 46. Paris: OECD Publishing. DOI: <http://dx.doi.org/10.1787/5km4g0zfq27-en>

4 Dror, Yehezkel. 1999. "Transparency and Openness of Quality Democracy". *Openness and Transparency in Governance: Challenges and Opportunities*. M. Kelly, Ed. Maastricht: NISPAcee Forum, 1999, 25-43.
5 Sen, Amartya. 1999. *Development as Freedom*. Anchor Books, Alfred A. Knopf Inc. Publisher New York, 38-40.

6 Freedom House. 2015. "Freedom in the World 2015". Available at: <https://freedomhouse.org/report/freedom-world/freedom-world-2015?gclid=CLHLzT0o8gCFafnwgodQEMKkw#.Vg6JEfntmkp>

In the UK, a newspaper headline in the summer of 2015 read: *'Right to know' in peril as Government targets Freedom of Information.*⁷ Hungarian Prime Minister Viktor Orban said on 26 July 2014 that he wanted to abandon liberal democracy in favour of an 'illiberal state', citing Russia and Turkey as examples.⁸ The notion of illiberal democracies had been well explored and defined by Fareed Zakaria back in 1997 as formal democracies without individual constitutional rights, without institutions able 'to protect an individual's autonomy and dignity against coercion, whatever the source – state, church or society'.⁹ The notion of liberal democracy requires the inclusion of accountable government to be complete. As Fukuyama puts it, 'accountable government means that the rulers believe that they are responsible to the people they govern and put the people's interests above their own'.¹⁰

While on the one hand many international institutions and national governments are promoting democratic values based on access to information and freedom of expression, there increasingly appears to be a worrisome drift towards totalitarianism and authoritarianism in many societies, including some within Eu-

rope. How to understand this paradox? How to handle the consequences of such divergent trends? How is it that, despite the international movement towards government transparency, some of the most significant disclosures about public officials' behaviour and dubious state policies that have come to light in recent years are the results of massive leaks (Snowden, Wikileaks, Manning, Lux-leaks, Panama Papers, etc.)? Could these massive leaks have been avoided with sounder transparency policies on the part of governments?

This paper deals in part with the issue of how to manage the transition from transparency and the 'right to know' as abstract fundamental democratic values to their concrete institutionalization. We assume, like Hanna Arendt, that there is no freedom and democracy without institutions able to protect them. At the core of Arendt's political thinking is her insistence that freedom cannot exist outside of institutions. As had Montesquieu before her, Arendt saw that power and freedom belong together.¹¹

7 The Independent. 17 July 2015. Available at <http://www.independent.co.uk/news/uk/home-news/the-end-of-foi-right-to-know-in-peril-as-government-targets-freedom-of-information-10397935.html>

8 Simon, Zoltan. "Orban says he seeks to end liberal democracy in Hungary". Bloomberg. 28 July 2014. <http://www.bloomberg.com/news/articles/2014-07-28/orban-says-he-seeks-to-end-liberal-democracy-in-hungary>

9 Zakaria, Fareed. 1997. "The Rise of Illiberal Democracy". *Foreign Affairs*, Vol. 76, N° 6, Nov-Dec 1997, pages 22-43. Also available at: <https://www.foreignaffairs.com/articles/1997-11-01/rise-illiberal-democracy>

10 Fukuyama, Francis. 2012. *The Origins of Political Order*. London: Profile Books. 321.

11 Berkowitz, Roger. 2012. *Jacques Rancière and Hanna Arendt on Democratic Politics*, in Hanna Arendt Center-Bard College. Available at: <http://www.hannaharendtcenter.org/?p=14131>

Transparency: from abstract value to institutionalized practice and governance institutions

The 'right to know' is worthless if it is not backed up by public institutions guaranteeing free access to information. The international movement engaged in facilitating access to information and international standard-setting declarations on access to information as a human right will lead nowhere if national institutions are lacking or powerless.

The design of institutions capable of protecting access to information is contingent on the specific circumstances of a given national context. Countries which lack working democratic institutions will probably find it extremely difficult to guarantee not only access to information of public importance, but also other fundamental citizens' rights.

More developed countries will probably be better equipped to guarantee the 'right to know' in both their public and private sectors, especially if the media are sufficiently independent and professional. France, Scandinavian countries and Canada seem to be the countries where media ownership is more transparent and where advertisers have less leverage over editorial boards, according to the 2014 survey of the World Federation of

Advertisers.¹² The role of the state is crucial in protecting their citizens' right to know, but in these latter countries the private sector media can supplement the role of the state by providing reliable information of public interest.

Nowadays, the 'right to know' is more clearly considered as part and parcel of the right to free speech. It was recognized as such by the Inter-American Court of Human Rights in 2006 and by the European Court of Human Rights in 2009 and in 2013.¹³ In the same vein, in its General Comment 34 of 29 July 2011 the United Nations Human Rights Committee adhered to the idea that a fundamental right exists to free access to information held by public bodies and private bodies performing public functions, and that that right is linked to the well-established right to freedom of expression enshrined in article 19 of the UN International Covenant on Civil and Political Rights of 1948.¹⁴

12 Global Media Transparency Index. 2014. Available at http://www.cnnumerique.fr/wp-content/uploads/2014/12/WFA_MEDIA_TransparencyIndex_Feb2014.pdf

13 Inter-American Court of Human Rights: Case Claude Reyes et al. vs. Chile, Judgment of 19 September 2006 (http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf); and European Court of Human Rights: Case Társaság a Szabadságjogokért (Hungarian Civil Liberties Union) vs. Hungary, Judgment of 14 April 2009 ; (<http://hudoc.echr.coe.int/eng?i=001-92171>); European Court of Human Rights: Case Youth Initiative for Human Rights vs. Serbia, Judgment of 25 June 2013 (<http://hudoc.echr.coe.int/eng?i=001-120955>)

14 General Comment 34 of the UN Human Rights Committee: <http://>

In addition, the European Court of Human Rights, in its cases *Guja v Moldova* (Judgment of 12 February 2008) and *Heinisch v Germany* (Judgment of 21 October 2011), cited article 10 of the European Convention of Human Rights, i.e. on the protection of freedom of expression¹⁵, as grounds for the protection of whistleblowers.

Conceptually, therefore, it is possible to bind together the 'right to know' and the protection of whistleblowers. Both are manifestations of the right to freedom of speech and the right of the general public to know what is going on in public bodies. Free access to information of public interest would be incomplete without robust protection of whistleblowing as a civic right and duty. In fact, the case law of international courts goes in the direction of tying together protection of access to information, freedom of expression and the active engagement of individuals in public affairs.

The institutionalization of the 'right to know' needs an adequate legal framework and sound management procedures, which together can foster a culture of transparency, where previously a culture of secrecy and concealment was predominant. The transition from secretiveness to transparency and access to information may be a long and bumpy road, even in well-established democracies, as the case of the UK proves.¹⁶

Usually, the legal framework is made up of a Freedom of Information Act (FOIA), which establishes the basic legal arrangements and sets up managerial mechanisms, as well as institutions designed to protect access to information. These may include information commissioners or other specific agencies. It should also encompass the protection of whistleblowers, which is a very complex matter deserving a separate, standalone piece of legislation, as the OECD recommends.¹⁷

In terms of institutionalization, no 'right to know' system will function adequately without clear, formalized procedures that remove opportunities for abuse of discretionary powers and motivate civil servants at all levels to support its implementation (e.g. by balancing civil servants' duty of confidentiality with the public's right to access information). Such procedures should also encourage all areas of government to lead the way in signalling a commitment to the regular practice of information disclosure. These formalized practices are particularly important for records management, request processing and proactive disclosure. These three issues are the backbone of any institutionalization of the 'right to know'.¹⁸

www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf

15 European Court of Human Rights: Cases *Guja vs Moldova* (<http://hudoc.echr.coe.int/eng?i=001-85016>) and *Heinisch vs Germany* (<http://hudoc.echr.coe.int/eng?i=001-105777>)

16 The Economist. 21 November 2015. "Freedom of Information: A little less free. The government seems keen to cloud public-sector transparency". Available at: <http://www.economist.com/news/britain/21678823-government-seems-keen-cloud-public-sector-transparency-little-less-free?cid1=cust/noonew/n/n/20151123n/owned/n/n/nwl/n/n/EU/email>

17 OECD. 2011. "G20 Anti-Corruption Action Plan: Protection of Whistleblowers: Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation". Available at: <http://www.oecd.org/daf/anti-bribery/48972967.pdf>

18 Trapnell, Stephanie E. and Lemieux, Victoria L. 2015. "Transparency in the Public Sector: Drivers of Effectiveness in Right to Information Implementation". Paper presented at the 4th Annual Global Conference on Transparency Research. Università della Svizzera italiana, Lugano, Switzerland, June 4-6, 2015. Page 13. Available at: http://www.transparency.usi.ch/sites/www.transparency.usi.ch/files/media/trapnell_lemieux_transparency_in_the_public_sector_drivers_of_effectiveness_in_right_to_information_implementation.pdf

From national laws and international standards relating to the right of access to information, it is possible to draw some core elements which should shape its institutionalization. Access to information is a universal right, it should apply to all information held by all public bodies (unless non-disclosure is well justified), the right may be exercised free of charge and without having to give reasons, requests should be answered as rapidly as possible and in no more than 20 working days (most countries' legislations stipulate between 15 and 30 days), exceptions should be limited and should be subject to both harm and public interest tests, and there should be oversight by some independent body, often an ombudsman or information commissioner. Those exercising their right to access information should also be able to bring the matter before the judicial authorities (Darbishire, page 13).¹⁹

The protection of the 'right to know' is entrusted to different authorities in different countries, with different legal powers. A relatively recent survey (published in September 2013 and updated in November 2014) by the Centre for Freedom of Information of the University of Dundee, Scotland, indicates that in many countries information commissioners are required to belong to the legal profession (lawyers, judges and so on), and meet certain requirements that vary from country to country (age limits, not to have belonged to political parties, having senior management experience, etc.).²⁰

According to the above-mentioned survey, most information commissioners (76%) are independent quasi-judicial authorities, which have the power to issue binding decisions that must be complied with, while 24% of them can only make recommendations. The latter group's function rests on an ombudsman approach, which emphasizes dispute resolution through mediation or conciliation. Some of the information commissioners with quasi-judicial status are also entitled to use coercive mechanisms, such as the police, when it comes to information searching, as is the case in Slovenia.

85% of information commissioners who can order disclosure or otherwise require compliance with their decisions say that authorities either always comply or that compliance occurs in a significant majority of cases. By contrast, none of the commissioners who can only make recommendations reported that their decisions were always complied with, and only 45% said that compliance occurs in a significant majority of cases.

19 Darbishire, Helen. 2015. "Critical Perspectives on Freedom of Expression: Ten Challenges for the Right to Information in the Era of Mega-Leaks", in McGonagle, Tarlach and Donders, Yvonne, ed.: *The United Nations and Freedom of Expression and Information Critical Perspectives*. Cambridge University Press.

20 Centre for Freedom of Information. 2014. "International Survey of Information Commissioners and Ombudsmen". Available at: <http://www.centrefoi.org.uk/research.php>

An uneasy balance with other public values

Historically, the exercise of politics in absolutist or authoritarian political regimes was based on secrecy, which was highly valued and strongly institutionalized as *arcana imperii*²¹. Political decisions were exclusive to the sovereign, who was under no obligation to explain them to his subjects. Participative decision-making ran counter to the notion of absolute rule. In contrast to the secrecy granted as a privilege to the sovereign, subjects were held in check by social and legal frameworks, under which the sovereign had virtually unlimited power to access and inspect their private lives.

The Enlightenment marked a turning point in our understanding of the role of secrecy and transparency in politics. Secrecy was challenged and the monarch's power to inspect individuals' lives and property became progressively limited. As the concept of the 'rights of man and citizen', proclaimed by the French Revolution, began to take hold, the traditional legitimacy of government secrecy

started to fade away, to be replaced by the rational legitimacy of transparency.²²

Nevertheless, in many countries, even in those with well-developed democracies, balancing the freedom of access to information, the protection of whistleblowers, the protection of personal data and the definition of confidentiality and state secrets remains problematic.

FREE ACCESS TO INFORMATION AND THE CONFIDENTIALITY OF STATE SECRETS

The classical practice of *arcana imperii* was restored through the institutionalization of state secrets in all countries born out of the Congress of Vienna (1815). It mutated into the state secrets privilege (SSP) in England, under which the monarch enjoyed 'Crown Privilege', i.e. the absolute right to refuse to share information with parliament or the courts. The US Supreme Court upheld the government's claim of state secret privilege (SSP) or 'executive privilege' almost entirely during a Cold War case, *Reynolds v. United States* (1953). When the SSP is invoked, the

21 *Arcana imperii* is a Latin expression, which alludes to the necessity for the political power to keep parts or the totality of its actions and decision-making methods hidden. These should remain invisible to the subjects of a monarch or ruler in order for government to be effective. It needed to remain concealed from the public and as mysterious as possible, approximating the exercise of power to a religious or priestly function. Consistently, monarchs were ruling in the name of God. Nowadays it is an expression to designate the "state secrets" or "reasons of state" or, more generally even "the art of governing".

22 For an account of the historical evolution of secrecy and transparency, see Riese, Dorothee. 2014. "Secrecy and Transparency", paper presented at the ECPR General Conference in Glasgow, 3-6 September 2014. Available at: <http://ecpr.eu/Filestore/PaperProposal/2cedead9-5191-42de-ae36-7d320a28a304.pdf>

government submits an affidavit saying that any court proceedings would risk disclosure of secrets that would threaten national security and then asks the court to dismiss the suit based solely on those grounds. It can be said that today's mainstream democratic political culture proclaims openness and transparency as virtues, while branding secrecy and concealment as vices. In this context, the state's prerogative to classify information as secret is widely questioned, perhaps because it has been extensively abused. For many, the public interest, and therefore the national interest, is better safeguarded through transparency than through secrecy, which is deemed to serve the personal interests or agendas of those wielding political or bureaucratic power rather than the general interest of the nation.

One major problem with state secrets is that they are meant to protect vaguely defined national security or the defence of the country. These are unprecise notions. National legislation often refers interchangeably to national security, state security, public security, public safety, national defence, national interest, state secrets, security of the realm, of the republic and so forth. Governments, either in Laws of Access to Information or in Laws on Official State Secrets, create a dichotomy in which this hazy concept, which is undefined by national legislation, stands opposed to the quest for information by their citizens. In this way, it becomes an obstacle to free access to information which does not meet any recognized standards of legal certainty. The use of such an imprecise notion easily leads to a high risk that the executive or secret services may act arbitrarily in concealing information from the public eye.²³

23 Jacobsen, Amanda L. 2013. "National Security and the Right to Information in Europe". <http://www.right2info.org/resources/publications/national-security-page/national-security-expert-papers/>

Despite solemn legal declarations of transparency as being the general rule and secrecy being the exception, in the vast majority of the twenty countries surveyed by Jacobsen (see footnote 24), where there is doubt about whether the disclosure of information would harm national security, the law does not favour disclosure. Only the following countries favour disclosure in case of doubt: Belgium (until the information is classified), Norway and Sweden. However, in Norway information generated by some authorities (e.g. the military intelligence services) is automatically classified and the release of information by these authorities is a matter of discretion, according to Jacobsen.

Legislation in OECD and EU countries (except in Sweden), does not generally take the public interest into account in connection with the disclosure of classified information. In Germany, for example, the concept of public interest is invoked only as concerns the public interest in preserving the secrecy of the information, but not as concerns the public interest in disclosing it.

It should be noted that some countries establish boundaries to restrict access to information: human rights abuses, the existence or not of a government entity (e.g. a spying agency or special police operational teams) or matters related to environmental protection cannot be exempted from free access to information. If the information has been classified in order to conceal a criminal offence, abuse of power or other such unlawful behaviour by public officials, the classification is void in

[jacobsen_nat-sec-and-rti-in-europe](#)

See also: Bigo, Didier et al. 2014. "National Security and Secret Evidence in Legislation and Before the Courts: Exploring the Challenges". European Parliament. Study for the LIBE Committee: Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509991/IPOL_STU\(2014\)509991_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509991/IPOL_STU(2014)509991_EN.pdf)

some countries such as Sweden. Unfortunately, in many other countries such information can be classified.

According to Cousido González (2015), official secrets legislation in European countries follows two different strands when it comes to disclosing classified information on national security or defence.²⁴ One strand (applied in Germany, Finland, France, Portugal, Italy, Lithuania, Poland, the Netherlands and Slovenia) imposes requirements prior to the release of information, such as various types of harm tests, to show that the disclosure will not impair national security. Sweden uses a variation of this approach, in which it is necessary to assess and balance the possible damage to national security against the benefit to the public interest deriving from the information's disclosure.

Other countries (Bulgaria, Czech Republic, Ireland, Croatia, Romania, Turkey and the UK) follow the line that where national security is concerned neither any harm test nor any evaluation of the benefits to the public interest of disclosing the information are allowed. The information is simply not released. However, in the UK certain matters are covered by a 'qualified class exemption', where a public interest harm test applies and harm must be proved by the authority holding the information.

All European Union countries, except France, allow the judicial review of decisions denying access to classified information on the basis of national security. In France, no judge is authorized to access classified documents. However, there is an independent administrative authority, the CCSDN (*Commission*

consultative du secret de la défense nationale), which is entitled to access classified information. This body has no authority to order the declassification of any document, but only to advise on the matter.

Contrary to France, in the vast majority of OECD and EU countries a judge may order the release of information if he is persuaded that it does not need to be kept secret, despite assertions by a public administrative authority that national security considerations justify the withholding of the information. In Spain, however, only the Supreme Court, not an individual judge, can reverse a classification decision.

In OECD and EU countries the time limits for keeping a document classified vary. The most commonly prescribed time limit is thirty years, usually extendible, although this will depend on the document's level of classification (i.e. top secret, secret, confidential or restricted). Certain countries do not set a maximum time limit (e.g. Poland, Spain, and Turkey).

The declassification of information can be requested by members of the public in the majority of countries, but the public authorities holding the information can simply refuse to do so on purely discretionary grounds.

Unauthorized disclosure of classified information is a criminal offence in all countries if the perpetrator is a public employee who has been granted access to classified information. However, the specific legal regimes vary. Some countries prosecute only intentional disclosure, while others also prosecute negligent disclosure. Some countries require clear evidence that an important public interest has been endangered by the disclosure.

²⁴ González, M.P.C. 2015. "Official Secrets and the Right of Access in Spain after the Enactment of the Law on Transparency". *EJoCLI* (2015) 21(2). Available at <http://webjcli.org/article/view/357/561>

In some countries the penalty is imposed only on the person having the duty to protect the classified information. In others, the penal liability is universal: any person using the information can be punished, including journalists. The severity of the punishments also varies from country to country (ranging from two years' imprisonment in Denmark to life imprisonment in Turkey).

The unauthorized disclosure of classified information raises the issue of the legal protection of whistleblowing. This is a controversial topic, on which we will focus more closely in the next section of this paper. Restriction of the 'right to know' on the grounds of the confidentiality of state secrets sets the democratic legitimacy of secrecy against the democratic legitimacy of transparency, which is more inherent to the notion of representative democracy.

The bottom-line is that the protection of state secrets is legitimate insofar as it is justified, while transparency does not need any justification. However, this is far from being a fact in many democratic countries. Moreover, the 'right to know' and the protection of state secrets pull in opposite directions. Many people continue to believe that national security and national defence should be kept outside the purview of the law and democratic scrutiny.

However, more and more people are gradually adhering to the idea that national security and defence are better protected if subjected to public scrutiny and judicial review. There is probably a long way still to go before more democratic and legal control of the state agents dealing with security and defence issues is achieved. This is one of the areas of state governance where the rule of law (as opposed to arbitrariness) in the public adminis-

tration remains largely absent, insofar as many decisions continue to be taken at the discretion of public officials.

An important step in achieving a sound balance between the right to information and the preservation of state secrets relating to national security and defence is represented by the Tshwane Principles (Global Principles on National Security and the Right to Information), adopted in Tshwane, Pretoria, South Africa, on 12 June 2013. This document was crafted through the combined efforts of civil society organizations and academic centres, in consultation with international experts and special rapporteurs on freedom of expression, human rights and counter-terrorism from various intergovernmental organizations such as the United Nations (UN), the Organization of American States (OAS), the Organization for Security and Co-operation in Europe (OSCE) and the African Commission on Human and Peoples' Rights (ACHPR).²⁵ The approach of this document is minimalistic, in that restrictions on the right to access information should not go below the baseline standards contained therein, while states are encouraged to provide a much greater level of openness.

²⁵ Available at: <http://www.right2info.org/exceptions-to-access/national-security/global-principles>

FREE ACCESS TO INFORMATION AND THE PROTECTION OF WHISTLEBLOWERS

Protection of good-faith whistleblowers is the other side of the coin to access to information. As shown earlier in this paper, both sides are aspects of the same fundamental right of freedom of expression. Like the right of access to information, the protection of whistleblowers cannot yet be taken for granted in the majority of democratic countries.

On the contrary, most countries can prosecute public personnel if they disclose classified national security-related information when making an internal complaint (Belgium, Czech Republic, France, Hungary, Moldova, Norway, Poland, Romania, Russia, Slovenia, Spain and Sweden).²⁶ Paradoxically, many countries encourage public employees to make internal complaints concerning wrongdoings they may have witnessed, but few countries have established safeguards to protect against retaliation, with the outstanding exceptions of the UK, where the Public Interest Disclosure Act (PIDA) provides for compensatory remedies in the event of retaliation, along with disciplinary measures against those who retaliate, and the United States.

When it comes to the discharge of whistleblowers in court, in Denmark the public interest test requires that the accused was disclosing information in order to achieve an obvious public interest and that this interest exceeds the value of keeping the information secret. Most countries require that the actual or likely harm to national security resulting from the disclosure is proved in order for a criminal penalty to be imposed (e.g. Germa-

ny, Italy, the Netherlands, Norway, Spain and Sweden). Other countries do not require any evidence of harm to national security (e.g. Belgium, France, Hungary, Poland, Russia, Slovenia, Turkey and the UK), even if some of them admit that lack of harm to national security can be invoked as a mitigating circumstance in a criminal trial against a whistleblower.

Some countries (six out of the twenty surveyed by Jacobsen (see footnote 23)) have enacted whistleblower protection laws, namely Hungary, Romania, Serbia, Slovenia, Sweden and the UK. Most countries which do not have a specific, separate law provide protection to whistleblowers under other laws, whereas others provide no protection at all. Those countries which provide protection include personnel in the security sector within the scope of the legal protection. However, in general, the protection of whistleblowers leaves much to be desired in many European countries. In the words of Tom Devine, they are offered nothing but 'cardboard shields' with which to protect themselves.²⁷

The protection of whistleblowing is not yet a consolidated policy in many countries, especially when it comes to whistleblowing involving disclosure of the actions of military forces and intelligence services, or state secrets classified as such. In other areas, such as disclosing corruption, maladministration or malpractice, the situation is better in some countries, but in general the protection of whistleblowing is very poor also in these latter areas.

²⁶ Jacobsen.

²⁷ http://www.whistleblower.org/sites/default/files/pictures/Best_Practices_Document_for_website_March_13_2013.pdf

The awareness-raising efforts of many civil society organizations operating in international policy arenas are putting pressure on governments to engage more resolutely in the development of whistleblowing protection policies. Likewise, intergovernmental organisations such as the UN, the Council of Europe, the OECD, the OAS, etc., are recommending their member governments to take the protection of good-faith whistleblowers seriously, if they are to combat corruption. That suggestion deserves consideration, even if it clashes with many historical preconceptions.

Whistleblowing is an act of denunciation, born from the inner conscience of an individual rebelling against injustice, the immorality of public officials or prominent private sector entities, such as banks, media outlets, churches, etc. Deeds against which whistleblowers revolt are particularly abhorrent or distasteful in the eyes of ordinary citizens. This is one reason why in the debate going on in France, for example, advocates of stronger protections for whistleblowers, such as the lawyer William Bourdon, suggest an '*exception de citoyenneté*' as an acquitting or mitigating circumstance in penal cases where the disclosure of secrets was morally required by the public interest.²⁸

Detestable deeds imply the violation of socially shared moral or legal norms, as a consequence of which the perpetrator acquires benefits for himself or his group at the expense of the wider society. If publicly known, those deeds could destroy the reputation or legitimacy of their perpetrators or instigators. The public revelation of misdeeds vilifies those responsible, sometimes for ever, as 'Deep Throat' did in disclosing the Watergate case.

Whistleblowing protection provisions can encourage public servants or active citizens to expose wrongdoing committed by others, including their superiors, who are powerful enough to take revenge against those blowing the whistle. However, whistleblowing protection policies are conceptually difficult, politically risky, operationally complex and in many countries also controversial.

The conceptual challenge is rooted in the fact that defining whistleblowing as an activity deserving of public protection is difficult. It is loaded with cultural prejudice and negative connotations. Indeed, whistleblowing is linked in many minds to informers and public denunciation, especially in countries still holding living memories of absolutist political regimes.

²⁸ http://www.liberation.fr/france/2010/12/24/pour-une-exception-de-citoyennete_702803

Also, the notion of a 'self-policing society' is well entrenched in Europe, and elsewhere, as a pattern of relationships between the people, the political leaders and the policing authorities, whereby the duty of the 'good citizen' is to inform the authorities in order to hinder the commission of crimes, track down criminals and uphold the existing order. It assumes that a great deal of the policing of a society is done by its citizens themselves. Bentham's theory on the *Panopticon*, as reformulated in the theory of *panopticism* by Michel Foucault (i.e. the all-seeing society in which no one is left beyond surveillance) tries to capture that social sentiment.²⁹

However, many people have an ambivalent or plainly negative attitude to denunciation. Denunciation is telling the authorities about the wrongdoing of another citizen in the hope he will be punished. The rhetoric of civic virtue with which governments, schools, prisons and other closed institutions surround denunciation coexists with an underlying counter-discourse, in which denunciation is an act of betrayal. Ambivalence about denunciation has produced parallel lexicons in many languages: the French have the classic dichotomy of *dénonciation* (the good kind of denunciation) and *délation* or *indicateur* (the bad); the Russians have the pejorative *donos/donoschik* to set against various official euphemisms; Americans admire *whistleblowers* but disdain *squealers*, distinguishing the patriotic act of *providing tips* from the sordid habit of *snitching* (Fitzpatrick).³⁰ We could add the Spanish good *denunciante* against the pejorative *delator*, *soplón* or *chivato*.

There is no doubt that whistleblowing protection is politically risky. Whistleblowing may create significant political problems for a country or its government. A recent example is the ongoing Edward Snowden case in the US, as well as the information disclosed by Bradley (now Chelsea) Manning. Both Snowden and Manning are by many people perceived as genuine whistleblowers who helped uncover unjustified governmental mass spying and atrocities. On the other hand, they did reveal information that had been defined as classified. According to the US government, the exposure of this information has endangered human lives. These two cases clearly illustrate the complexity of whistleblowing and the ethical dilemmas connected to it. They also emphasise the institution's responsibility of informing the political authorities as well as the public about issues that need to be debated publicly. Caution and balance are needed in building a protective framework for whistleblowers.

The problem is in finding a way to strike a balance in the legal framework that protects those who dare rebel against the hypocrisy of looking elsewhere. Only 30% of the European population is in favour of revealing state secrets, while the figure in the United States reaches 50%.³¹ There is a cultural resistance in societies to staring at their own bare indignities.³² Revelations disturb the self-image that societies have been building over their past and present. Whistleblowers may contribute to changing the political paradigm in the societies in which they live if they are supported by 'professional whistleblowers', such as journalists and NGOs, but they generally have to pay a heavy price.

29 Foucault, Michel. 1975. *Surveiller et punir. Naissance de la prison*. Paris: Éditions Gallimard.

30 Fitzpatrick, Sheila. 2005. "A Little Swine". Review of *Comrade Pavlik: The Rise and Fall of a Soviet Boy Hero* by Kelly, C. *London Review of Books* [Online] vol. 27 no. 21 pp. 3-6. Available at <http://www.lrb.co.uk/v27/n21/sheila-fitzpatrick/a-little-swine>

31 Figures provided by Florence Hartmann. 2014. *Lanceurs d'alerte*. Paris: Don Quichotte.

32 *Ibid.*

In order for a whistleblowing protection policy to be effective it requires comprehensive legal frameworks and an institutional state apparatus trustworthy and capable enough to provide 'metal shields', not 'cardboard shields' to whistleblowers. Otherwise, that policy may be highly counterproductive. Very few countries, if any, are showing themselves capable of putting good protective mechanisms in place.

Many international organizations, including the UN, the Council of Europe, the OECD and the Organization of American States (OAS) are promoting whistleblowing protection policies. In March 2013 the OAS even proposed a Model Law to facilitate and encourage the reporting of acts of corruption and to protect whistleblowers and witnesses.

The brief international experience available to date shows that one of the success factors for a whistleblowing protection policy is to use a comprehensive legal approach and to frame it within a broader policy on the protection of freedom of speech. This requires a standalone, dedicated law on whistleblowing protection, such as the ones in the UK and the United States, which are born out of their own national cultural and legal backgrounds and national policy experience. Few countries in Europe or elsewhere have such laws working effectively. Indeed, in the majority of countries governments are approaching the protection of whistleblowers reluctantly.³³

If a standalone law on the protection of whistleblowers is out of reach, at least some provisions in the Public Service Act should be introduced to provide some protection to those public servants who refuse to comply with illegal or ethically questionable instructions, or who uncover illicit actions. The Public Service Authority should develop procedures to make those protections effective. The Public Service Act should also contain provisions declaring harassment and retaliation illegal. This would allow the imposition of disciplinary sanctions on those managers who take retaliatory action against public servants daring to refuse to comply with illegal orders. The Public Service Act should also forbid 'gag clauses' in public service agreements and should declare 'gag orders' illegal.

Grounds for such provisions may be found in the 2003 UN Convention against Corruption, which suggests (article 33) incorporating appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning corruption-related offences. We could also add facts entailing gross mismanagement, illegalities or violations of human rights.

³³ Transparency International. 2013. "Whistleblowing in Europe: Legal Protections to Whistleblowers in Europe". Available at: http://www.transparency.org/whatwedo/publication/whistleblowing_in_europe_legal_protections_for_whistleblowers_in_the_eu

The OECD and Council of Europe recommendations on whistleblower protection provide further guidelines that may encourage good governance polices in countries willing to pursue more openness and transparency in their public administrations, including the national security and defence areas.³⁴

More and more whistleblowing stories are reaching the media and are helping to raise awareness of the problem, thus fuelling public debates which could contribute to the development of stronger protections for whistleblowers.³⁵

34 OECD. 2012. "Whistleblower protection: encouraging reporting". Available at: <http://www.oecd.org/cleangovbiz/toolkit/50042935.pdf>
See also the Council of Europe's Committee of Ministers' Recommendation CM/Rec (2014)7 on the protection of whistleblowers. Available at [http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2014\)7E.pdf](http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2014)7E.pdf)

35 European examples include *Marianne*, a French magazine, which on 9 May 2014 published a comprehensive reportage on the matter (<http://www.ebay.fr/itm/MARIANNE-N-890-9-MAI-2014-MARIAGES-MIXTES-Ve-REPUBLIQUE-LANCEURS-DALERTE-/291193077163>) or the British newspaper *The Guardian*, which on 22 November 2014 published a compelling report on the matter (<http://www.theguardian.com/society/2014/nov/22/there-were-hundreds-of-us-crying-out-for-help-afterlife-of-whistleblower>)

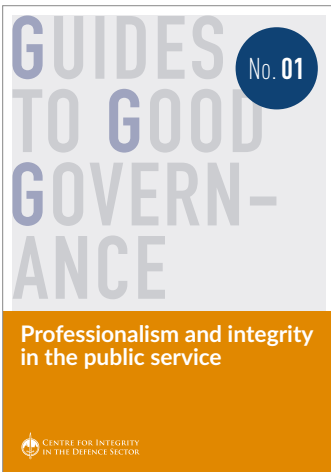
CONCLUSIONS

The bottom-line of this paper is that the protection of state secrets is legitimate insofar as it is justified, while transparency does not need any justification. However, this is far from being a fact in many countries. Moreover, the 'right to know' and the protection of state secrets pull in opposite directions. Many people continue to believe, mistakenly, that national security and national defence should by definition be kept outside the purview of the law and democratic scrutiny.

1. The right of citizens to access information that fulfils their right to know what their government is doing is still under construction. While it is embryonic in many countries, in others it does not exist at all. However, true democracies cannot work without access to public information and transparency. Today, transparency and openness in government constitute a precondition for good governance.
2. Introducing more transparency in public administration requires not only adequate legislation, but also consistent public management reforms and changes in the mentality of public officials. These latter need to internalize that the information they produce belongs to the citizens, not to themselves.
3. Governments generally work better when they are open to public scrutiny. Transparency is fundamental if public officials are to be held accountable. Weak accountability inevitably leads to corruption and maladministration.
4. Governments and legislatures should endeavour to establish a clear differentiation between what needs to remain confidential and what should be released into the public domain, i.e. to researchers, journalists and the general public. Openness and transparency should be maximized, while minimizing secrecy.
5. A sharp legal and practical conceptualization of state secrets is necessary. As flawless a distinction as possible needs to be drawn between state secrets and other information produced by public bodies, in order to reduce arbitrariness, abuse and corruption in the classification of information, and to increase the legitimacy of the way secrecy is handled.

6. Effective institutionalization of the citizens' right to know requires good legislation, good public management and an institution, at arm's length of the executive, endowed with sufficient powers to guarantee that right when public authorities attempt to refuse the disclosure of information.
7. A free, independent and professional media, combined with an active civil society engaged in vigorous public debates on the right to know, is one of the more efficient mechanisms for promoting transparency and openness in government, as well as for the protection of good-faith whistleblowers. Without that external pressure, governments are unlikely to adopt transparency policies and open themselves to public scrutiny.
8. We are still at the very initial phases in the development of whistleblowing protection policies and associated institutional and procedural mechanisms. With some exceptions, whistleblowers should still distrust, as unreliable, existing protective mechanisms in many countries.
9. As yet, we have not found a conceptual construction strong enough to overcome cultural preconceptions, lingering in many societies, and alter the balance such that judicious moral reasons may prevail over positive law, without putting the rule of law in jeopardy.
10. The concept of *exception de citoyenneté* is worth exploring further, in order to find better parameters for practical ethics and legal interpretation leading to better protection of whistleblowers.
11. We need to develop a better and more robust institutionalization that is able to both uphold and draw the boundaries for a twofold fundamental right: the right to know and the right to free expression.

Guides to Good Governance series



The guide *Access to information and limits to public transparency* summarizes best practice in the area of public access to information, and discusses the balance between transparency and the state's legitimate need to protect certain information.

Public access to information is crucial in a democratic and open society and represents a basis for good governance. However, this is particularly challenging with regard to defence, where secrecy is to some extent a necessity. In this guide, CIDS' senior international expert Francisco Cardona addresses the extent to which transparency is gaining ground in administrative practices in OECD and EU countries. Drawing on recent examples, Cardona reflects on the 'right to know' versus the protection of state secrets. He concludes that the protection of state secrets is legitimate insofar as it is justified, while transparency does not need any justification.

Guides to Good Governance is a series of small booklets each of which discusses a particular topic of importance to good governance in the defence sector. The guides can be read by individuals with an interest in learning more about one or several topics of direct relevance to good governance in the defence sector – or the public sector more generally – and they can be used for educational purposes.

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