

**ON BEHALF OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF ARMENIA**

**THE CASE ON CONFORMITY OF ARTICLE 8, PART 4, SUBPOINT “F,” ARTICLE 12, PARTS 6
AND 7 OF THE LAW OF THE REPUBLIC OF ARMENIA ON STATE AND OFFICIAL SECRETS
WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE
APPLICATION OF “HELSINKI CITIZENS’ ASSEMBLY VANADZOR OFFICE” NON-
GOVERNMENTAL ORGANIZATION**

Yerevan

6 March 2012

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), Justices K. Balayan, F. Tokhyan, M. Topuzyan, A. Khachatryan, V. Hovhannisyan, H. Nazaryan, A. Petrosyan (Rapporteur), V. Poghosyan, with the participation of the representatives of the Applicant: A. Zeynalyan and A. Ghazaryan, representative of the Respondent: A. Mkhitarian, the Senior Expert of the Legal Expertise Division of the Legal Department of the RA National Assembly Staff, pursuant to Article 100, Point 1, Article 101, Part 1, Point 6 of the Constitution of the Republic of Armenia, Articles 25, 38 and 69 of the RA Law on the Constitutional Court, examined in a public hearing by a written procedure the Case on conformity of Article 8, Part 4, Subpoint “f”, Article 12, Parts 6 and 7 of the Law of the Republic of Armenia on State and Official Secrets with the Constitution of the Republic of Armenia on the basis of the Application of “Helsinki Citizens” Assembly Vanadzor Office” Non-Governmental Organization.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by “Helsinki Citizens’ Assembly Vanadzor Office” Non-Governmental Organization on 23.11.2011.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, having studied the Law of the Republic of Armenia on State and Official Secrets and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Law on State and Official Secrets was adopted by the RA National Assembly on 3 December 1996, signed by the RA President on 30 December 1996 and came into force on 9 January 1997.

Subpoint “f” of Part 4 of Article 8 of the Law of the Republic of Armenia on State and Official Secrets, titled “Powers of the state bodies, local self-government bodies and officials in the fields of

referring information as State and Official Secrets and its protection”, states that public administration bodies, territorial and local self-government bodies:

“f) exercise other powers in the fields of referring information as State and Official Secrets and its protection within their competence.”

Parts 6 and 7 of Article 12 of the same Law, titled “Referring information as State and Official Secrets”, state:

“The heads of state bodies with the authority to refer information as State and Official Secrets, elaborate departmental expanded lists of cipherable information, which include

- a) State Secret information under their disposal,
- b) information referred as Official Secret.

The secrecy rate of each piece of included information is also mentioned in departmental lists. Those lists and amendments and supplements made to them are approved by corresponding Heads of State bodies. Departmental lists are ciphered and nonpublic.

2. The procedural background of the Case is the following. On 10.02.2010 the Applicant requested from the Minister of Defense of the Republic of Armenia information on the number, names and addresses of the fixed period and contract servicemen who died in 2009 while serving in the Armed Forces of the Republic of Armenia.

On 20.02.2010, in response to the request, the Ministry of Defense of the Republic of Armenia refused to provide with information, referring to the requirements of Article 8, Point 1 of the Law of the Republic of Armenia on Freedom of Information, and argues that the requested information is a secret information in accordance with the requirements of the Law and the RA Ministry of Defense expanded departmental list of cipherable information which was brought into action by the corresponding secret Order of the Minister of Defense of the Republic of Armenia, and it is an official secret according to the requirements of Article 4 of the Law of the Republic of Armenia on State and Official Secrets.

On 27.02.2010 the Applicant sent a new request for information to the Ministry asking to provide with corresponding secret Order of the Minister of Defense of the Republic of Armenia and the RA Ministry of Defense expanded departmental list of cipherable information, which was brought into action by that order, but referring to the requirement of the Law it was also denied by the Ministry.

On 19.04.2010 the Applicant filed a claim to the Administrative Court of the Republic of Armenia against the Ministry of Defence. Having considered the administrative claim of “Helsinki Citizens” Assembly Vanadzor Office Non-Governmental Organization against the Ministry of Defence, demanding to recognize the violation of the right of “Helsinki Citizens” Assembly Vanadzor Office Non-Governmental Organization to freedom of information and, as a derivative demand, the case ՎԴ/1314/05/10 on abolishing the RA Ministry of Defense Order on the expanded departmental list of cipherable information and obligating the Ministry of Defense of the Republic of Armenia to provide with the required information

requested by inquiry Ё/ 2010-051 dated 10.02.2010, the Administrative Court of the Republic of Armenia rejected the claim by its decision of 23.11.2010, stating that not providing the information required by the Plaintiff based on the provisions of Article 43 of the Constitution of the Republic of Armenia and Article 6, Part 3 of the Law of the Republic of Armenia on Freedom of Information, and, therefore, there is no violation of the Plaintiff's rights to freedom of information.

Simultaneously, the Administrative Court also stated that: "... the mentioned analysis is fully sufficient for rendering a final and reasoned judgment in the scopes of the Plaintiff's demands, regardless of the application of the last paragraph of Article 12 of the RA Law on State and Official Secrets. Accordingly, the Court does not address the merits of the motion indicated by the Plaintiff, at the same time stating that, in the opinion of the Court, the last paragraph of Article 12 of the RA Law on State and Official Secrets does not contradict Article 6, Article 83.5, Points 1, 2, 3, 5 and 6 of the RA Constitution."

By its Decision dated 16.03.2011 the Administrative Court of Appeal of the Republic of Armenia rejected the appeal filed by the Applicant, reaffirming the legal positions of the Administrative Court of the Republic of Armenia.

By its Decision "On returning the cassation appeal" dated 18.05.2011 the Court of Cassation of the Republic of Armenia returning the cassation appeal filed by the Applicant.

3. Challenging the constitutionality of Article 8, Part 4, Subpoint "f" and Article 12, Parts 6 and 7 of the Law of the Republic of Armenia on State and Official Secrets, the Applicant finds that they contradict the requirements of Articles 3, 5, 6, 27, 43, 83.5 and 117 of the Constitution of the Republic of Armenia.

According to the Applicant, the legislator left the legal regulations on referring information as State and Official Secrets stipulated by Article 8 of the RA Law on State and Official Secrets to be regulated by departmental acts, and based on Article 12 the legislator provided the public administration bodies with the authority to elaborate and, through adoption of acts confirm the expanded departmental lists of cipherable information under their disposal. Simultaneously, Article 12, Part 7 of the Law stipulates that the departmental lists on secret information shall be ciphered and they shall not be subject to publication, that is, "the departmental non public secret legal acts determine the information which is secret."

According to the Applicant, in terms of such legal regulation an important domain of the public bodies remains beyond civil control, which is incompatible with the fundamental principles of legal and democratic society. The Applicant also states: "As it is a secret what information is secret, then any information well-known to the members of the society, with a certain probability may be included in those lists, and its imparting may result in factual and legal consequences for the participants of legal relations."

As regarding Article 117 of the RA Constitution, the Applicant notes that the Law in dispute was adopted before the 2005 constitutional amendments, and finds that the RA Law on State and Official Secrets is one of the many laws which was not reviewed and amended by virtue of Article 117 of the Constitution of the Republic of Armenia after the amendments to the Constitution entered into force.

4. Objecting the arguments of the Applicant, the Respondent states that the right to freedom of expression, including freedom to seek, receive and impart information and ideas, is not an absolute right. Inter alia, the justified restriction to this right for national security reasons is stipulated in a number of international instruments.

The Respondent finds the assertion of the Applicant according to which the legislator has left the legal regulations of referring information as State and Official Secrets to the regulation by departmental acts to be ill-founded, as the legal relations concerning the right to freedom of expression, including freedom to seek and receive information are not regulated by departmental acts, but the possibility of such restriction is stipulated by international legal instruments and the Constitution of the Republic of Armenia, and the mentioned legal relations have been more thoroughly regulated, particularly by the Law of the Republic of Armenia on State and Official Secrets and the Law on Freedom of Information.

According to the Respondent, the RA Law on State and Official Secrets clearly defines the procedure for referring information as State and Official Secrets. The law determines the information to be referred as State and Official Secrets, as well as restrictions to referring it as State and Official Secrets. Public officials, empowered to refer information as State and Official Secrets, are not entitled to go beyond the scopes predetermined by the Law and they are competent only to detail them by domains and departmental belonging, and not to establish a new category of information.

As regarding the Applicant's assertion according to which the secrecy of the expanded departmental lists may cause the inclusion of any information well-known to the members of the society, with a certain probability in those lists, and its imparting may result in factual and legal consequences for the participants of legal relations, the Respondent finds it groundless, as, in particular, the Criminal Code of the Republic of Armenia determines liability for intentional disclosure of information containing State Secret by the person who has the right to become familiar with state secret and to whom it was entrusted or became known ex professo, if there are no signs of high treason.

The Respondent finds that the challenged provisions are not unconstitutional by their content and have not made their review necessary up to this date.

5. The Constitutional Court states that, according to Article 27 of the RA Constitution, the right to freedom of expression also includes freedom to seek and receive information. Access to public information is one of the essential prerequisites for democracy and responsible transparent public governance. Democratic control exercised through public opinion stimulates transparency of public administration actions and facilitates accountability of public authorities and officials.

However, this constitutional right is not an absolute right and it is subject to restriction on the grounds and in the manner prescribed by Article 43 of the RA Constitution. The correlation of this constitutional value with other constitutional values, especially with national security, determines the nature of its possible restrictions. The possibility of restriction of freedom to seek and receive information in the

legitimate interest of protection of national security, as prescribed in Article 43 of the RA Constitution, allows the state power to refer information as State or Official Secrets, and thus to restrict the access of information, imparting of which may harm national security. According to Article 43 of the RA Constitution, Article 8 of the RA Law on Freedom of Information, titled "Restrictions on freedom of information," restricts the access of the information that contains state, official, bank or commercial secret.

6. The constitutional legal dispute raised in the framework of the present Case, in particular, puts forward the following legal issues:

a / whether the implementation of legislatively prescribed power to refer information as State or Official Secrets by executive bodies within their competence assumes restriction of the right to receive information, and thus, whether the expanded departmental lists of cipherable information elaborated by those executive bodies, by themselves, are restriction to the mentioned right,

b / whether the ciphering and the nonpublic nature of the expanded departmental lists of cipherable information are justified.

For answering these questions, first, it is important to do systemic analysis of the law, which will make possible to find out, whether the law determines clear, specific and complete standards to qualify any information as State Secrets and to ensure the principle of restriction of the right exclusively by the law.

Article 2 of the RA Law on State and Official Secrets defines the concept "state secret." According to that Article, information, relating to the RA military, foreign affairs, economic, scientific-technical, intelligence, counterintelligence, operative-intelligence domains, is classified as state secrets, which are protected by the state, and imparting of which may cause serious consequences for the security of the Republic of Armenia.

In addition to this definition, Article 9 of the above mentioned Law defines the scope of information to be referred as state secrets. This Article marks out the information to be referred as state secrets according to all domains mentioned in Article 2. At the same time, Article 10 of the Law defines the information that may not be referred as state secrets. Article 11 of the Law also prescribes the principles of ciphering.

Comparison of the definition of state secrets stipulated in Article 2 of the RA Law on State and Official Secrets, the scope of information to be referred as state secrets prescribed in Article 9 of the Law and restrictions defined in Article 10, allows to state that the law determines the scopes of referring certain information as state secrets and, as a result, their access, hence, also the restriction of the right of a person to seek and receive information.

The RA Law on State and Official Secrets also defines the secrecy rates, simultaneously determining the orienting criteria upon which the competent officials classify certain information by the secrecy rate.

Based on the above mentioned, the Constitutional Court finds that the implementation of the constitutional principle of restriction of rights exclusively by the law is guaranteed, and the function of ensuring the implementation of legislative requirements is left to by-laws.

7. Article 8 of the RA Law on State and Official Secrets defines the powers of state bodies, local self-government bodies and officials in the domain of referring information as State and Official Secrets. In Article 9 of the Law the legislator stipulates the information to be referred as state secrets according to relevant domains and in Article 12 of the Law for the purpose of exercising unified state policy in the domain of ciphering the information authorizes the RA Government to elaborate list of information subject to referring as the RA state secrets, which also includes the list of state bodies with the authority to dispose of each information. According to the Law, the mentioned list shall be ratified by the RA President, reviewed if necessary and shall be subject to publication. Determining the public nature of that list, the Law provides its access and predictability of the concerned persons' actions.

Providing by Article 8 of the Law the public administration bodies with the authority to refer information as state and official secrets **within the scopes of their competence**, in Article 12 the legislator, simultaneously, clarified the nature of departmental lists subject to elaboration by those bodies, stating that they are **expanded lists**.

In accordance with Article 8 of the Law on State and Official Secrets, on 19 August 1997 the RA Government adopted the Decision No. 350 on Approval of the list of officials with the authority to refer information as state and official secrets." According to Articles 8 and 12 of the Law, by the Decision No. 173 of the RA Government dated 13 March 1998 the list of information referring as state secrets in the Republic of Armenia was approved, and the heads of executive bodies with the authority to refer information as state and official secrets were entrusted to elaborate the expanded departmental lists of cipherable information during one month period.

By the Decision No. 665 dated 29 October 1998 the RA Government approved the procedure for elaboration of the list of information referred as state secrets of the Republic of Armenia. According to Point 2 of the procedure approved by that Decision, "draft lists of information referred as state secrets shall be elaborated in accordance with the requirements of Article 9 of the Law of the Republic of Armenia on State and Official Secrets ..." That is, they should include **the information subject to referring as state secrets, deriving from the requirements of the Law**. It equally concerns also the expanded departmental lists.

Based on the above mentioned, the RA Constitutional Court finds that:

a/ the properly made detailed departmental lists of state secret information themselves, may not lead to restriction to the right to receive information. Restrictions to that right are provided by the law, and determining the authority stipulated in the challenged norms the legislator does not delegate its exclusive power to establish restrictions to the right to the executive bodies, but, exercising the constitutional authority to set limitations, it authorized **those bodies to implement the limitations provided by the law**,

b / the above mentioned Decisions of the RA Government, the legitimacy of which does not raise an issue, were confirmed by the RA President before the amendments to the RA Constitution dated 2005 and in accordance with the requirements of the current procedure. Taking into account the new procedure of adoption and enforcement of the decisions of the RA Government after constitutional amendments, the

legislator, based on the requirements of Article 117, Part 1 of the RA Constitution, had to make necessary amendments to Article 12, Part 5 of the RA Law on State and Official Secrets, keeping in mind that the RA President will no longer be able to confirm these amendments in accordance with the previously established procedure, if new amendments to the list of information referring as state secrets are necessary.

8. The Constitutional Court also finds important to refer to the issue of legitimacy of the non-public nature of expanded departmental lists of cipherable information. It must be considered in light of the common logic of legal regulation of cipherable information of the RA Law on State and Official Secrets, as well as in light of the legal regulation of determining criminal liability for disclosure and dissemination of state secrets, also taking into account the international obligations of the Republic of Armenia.

Article 3 of the RA Law on State and Official Secrets, which reveals the content of the concepts used in the Law, defined **the term "ciphering of information"** as "application of limitations to the information including state and official secrets and dissemination of such information-holders."

Article 13 of the Law titled **"Ciphering of information"**, states that ciphering is expressed in determining the secrecy rate of each certain information and giving secrecy mark to the certain information-holder in the manner prescribed by the RA Government.

Comparing the mentioned norms of the Law with the definition of the state and official secrets given in Article 2, the Constitutional Court states that, regarding the legal regulation of the process of information ciphering, from the common logic of legislative legal regulation follows, that according to the established procedure restrictions are **applicable to information**, the distribution of which may lead to serious consequences for the security of the Republic of Armenia.

Based on the above mentioned, the phrase **"departmental lists shall be ciphered,"** which is defined in the challenged Part 7 of Article 12 of the Law, would mean the application of restrictions to those lists owing to the fact that disclosure of their contents may lead to serious consequences for the security of the Republic of Armenia. Whereas the departmental lists only specify the domains mentioned in public lists, which are prescribed by law and approved by the RA Government.

As regards such possible situations when the title (name) of the certain information included in departmental lists itself may unavoidably be a state secret by virtue of the fact of establishment, in such situations, in accordance with the principles of ciphering following from the Law, in particular with the principle of reasonableness of ciphering, it may be considered as information, distribution of which may lead to serious consequences for the security of the Republic of Armenia, and it may be ciphered as certain information.

In addition, referring to the standards of legitimate limitations of the freedom to seek and receive information, the RA Constitutional Court, as well as the European Court of Human Rights expressed the legal position that, first of all, the legal basis for limitation of that freedom shall be accessible and predictable. Significance of these requirements concerning the legal basis of limitation becomes more

emphasized when intervention of the mentioned freedom is expressed in subjecting the person to criminal liability for dissemination of relevant information.

The RA Criminal Code prescribes a number of *corpus delicti* concerning dissemination of state secrets, in particular, “high treason” (Article 299 of the RA Criminal Code), “espionage” (Article 302 of the RA Criminal Code) and “publication of state secret” (Article 306 of the RA Criminal Code). Based on the fact, that the conviction of a person for the mentioned acts, may be also legally based on the information ciphered by any departmental list, in addition to the RA Law on State and Official Secrets and departmental lists of cipherable information approved by the RA Government, the Constitutional Court finds that besides the information, ciphering of departmental lists may also be an obstacle for the legal subjects to foresee the legal consequences of their acts, in particular to consider that the disseminated information is a state secret and leads to criminal liability.

A number of international organizations have touched upon this issue. In particular, in Point 10.2 of the Resolution 1551 (2007) on “Fair trial issues in criminal cases concerning espionage or divulging state secrets” the Parliamentary Assembly of the Council of Europe stated the following principle: “...legislation on official secrecy, including lists of secret items serving as a basis for criminal prosecution must be clear and, above all, public. Secret decrees establishing criminal liability cannot be considered compatible with the Council of Europe’s legal standards and should be abolished in all member states.”

Simultaneously, Judgment of the European Court of Human Rights concerning in Case of *Stoll v. Switzerland* (10 December 2007, Point 44, *Stoll v. Switzerland*) refers to the comparative study of the legislations concerning state secret in the European Council member states carried out by the rapporteur on this Resolution, which, in particular, stated: “...Generally speaking, one can identify three basic approaches: the first consists in a short and general definition of the notion of official or state secret (or equivalent), presumably to be filled in on a case-by-case basis. The second involves lengthy and more detailed lists of specific types of classified information. The third approach combines the other two by defining general areas in which information may be classified as secret, and then relying upon subsequent administrative or ministerial decrees to fill in more specifically which types of information are in fact to be considered as secret. ... Each of these legislative approaches allows for reasonable responses to the difficult task of specifying in advance the types of information that the State has a legitimate interest in protecting, while nonetheless respecting the freedom of information and the need for legal security. But any administrative or ministerial decrees giving content to more generally worded statutes must at the very least be publicly accessible.”

Proceeding from the above mentioned and taking into consideration the practice of constitutional justice of various countries, the RA Constitutional Court finds that **ciphering of departmental lists** according to current procedure is out of the scopes of general logics of **information ciphering** expressed in the legal regulation of the RA Law on State and Official Secrets, and the non-public nature of the latter,

insofar as it does not concern any certain cipherable information, does not follow the legitimate aim of protection of interests of state security and causes problems in the domain of protection of human rights.

Proceeding from the results of consideration of the case and being ruled by Article 100, Point 1, Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 69 of the RA Law on Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. Article 8, Part 4, Subpoint “f” and Article 12, Part 6 of the Law of the Republic of Armenia on State and Official Secrets are in conformity with the Constitution of the Republic of Armenia.

2. To declare the provision of Article 12, Part 7 of the Law of the Republic of Armenia on State and Official Secrets “Departmental lists are cipherable and non public” insofar as it does not concern certain cipherable information, contradicting Articles 27 and 43 of the Constitution of the Republic of Armenia and void.

3. Proceeding from the requirements of Article 64, Point 9.1 and Article 69, Part 12 of the RA Law on the Constitutional Court, the final judgment rendered against the Applicant is reviewable due to new circumstances in accordance with the procedure prescribed by law, as well as taking into consideration that the RA Administrative Court acted ultra vires not considering the requirements of Article 93 of the RA Constitution while rendering the Judgment ՎԴ/1314/05/10 dated 23.11.2010 and stating that the last Paragraph of Article 12 of the RA Law on State and Official Secrets does not contradict Article 6 and Article 83.5, Points 1, 2, 3, 5 and 6 of the RA Constitution.

4. Pursuant to Article 102, Part 2 of the RA Constitution this Decision is final and enters into force from the moment of its announcement.

Chairman

G. Harutyunyan

6 March 2012

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