

CURRENT CONSIDERATIONS REGARDING THE LEGAL PROTECTION OF CLASSIFIED INTELLIGENCE

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Abstract: The requirement for information security which controls essential components of society represents a major challenge in the context of the concept of State of law, but also an important source of social power. Uncontrolled dissemination of information could harm national security interests and image. Within the security of classified information to support freedom of information, which is the only reason for its existence, but without jeopardizing national security without affecting the stability of state institutions or the person. The current context of the Romanian law system requires development of a new branch, the Information Law, which will regulate key aspects of the legal protection of information from existing sources of law.

Keywords: Intelligence, information, access, classified, security.

Introduction

We hereby intend to establish the main characteristics of classified information from the perspective of the relations arising between the civil society and the institutions holding such information. Particularly, we tried to analyse the legal framework regulating the access of the civil society to information of public interest and the exceptional restrictions concerning classified information.

The Romanian Constitution establishes several supreme guaranteed values, such as: *a sovereign, independence, unitary and indivisible national state, inalienable territory, unity of the people*, values that must be defended by legal regulations too. The fundamental fields of state activities, which achieve its function, operate with information, partially classified, which shall not be made public.

The word *information* means any documents, data, objects or activities, irrespective of their manner of presentation, formulation or circulation.

Classified information means national security information which, due to its level of importance and its consequences following its unauthorised disclosure or dissemination, must be protected.

The main legal source on the protection of classified information is Law no. 182/2002, published in the Official Journal, part I, no. 248/2002, whose main aim is to protect classified information and confidential sources ensuring such intelligence.

The national system of the protection of data does not infringe upon the right of access to information of public interest, which is guaranteed by the Constitution: *A person's right of access to any information of public interest shall not be restricted* (Romanian Constitution, art. 31, par. 1). Paragraph 3 of the same article of the Constitution even lists the circumstances in which such right may be restricted, namely, if it is prejudicial *to national security or the measures of protection of young people*.

As shown above, there is certain information of public interest that, particularly in order to serve the public interest, cannot be disclosed and managed by the public except in specific circumstances. This constitutes an exception to the principle of the right of people's access to information of public interest. As this means a restriction of the right to information, only classified information is exempted from the rule of unrestricted access, and the access to such information is allowed only in the cases, under the circumstances and with the observance of the procedures required by law. Nevertheless, it is not an absolute restriction, as

the access to classified information is allowed only in the cases, under the circumstances and with the observance of the procedures required by law.

National standards

The national standards for the protection of classified information were established by the Government Decision no. 585/2002, for the approval of the National Standards for the protection of the classified information in Romania, published in the Official Journal, part I, no. 485/2002. These standards contain the rules for the enforcement of Law no. 182/2002 on the protection of classified information concerning: the classification of information deemed as state secrets and the regulations on the minimum protection measures within each category; the obligations and liabilities of subjects of public or private law concerning the protection of information deemed as state secrets; the regulations on the access to classified information, as well as the procedure of security checks; the general rules on the identification and marking, inscribing, keeping of records, drawing up, storing, processing, copying, handling, transport, sending and destruction of information that is deemed state secrets.

According to art. 2, par (1) of the Government Decision no. 585/2002, the national standards for the protection of classified information are binding, as they identify with the national interest, the criteria and guidelines of NATO, but their legal value is subordinated to such information. The authority establishing these standards is the Romanian Intelligence Service.

The Protection of Classified Information

Following the analysis of legal texts, we may define the protection of classified information as a set of means and regulations aiming at the prevention of the unauthorised access to classified information, at the amendments or changes to its content, as well as against sabotage or unauthorised destruction, and at ensuring the secure transfer of classified information. These aims are achieved by means of: legal protection, protection by procedural means, physical protection, the protection of the personnel having access to such information or that is assigned to ensure its security, the protection of the information sources.

The legal protection of information means the set of constitutional regulations and of other legal provisions in force which regulate the protection of classified information. The main legal sources for this purpose are: the Constitution of Romania by means of art. 31 and art. 53, Law no. 182/2002 and the Government Decision no. 585/2002.

The protection by procedural means is actually a form of legal protection and designates the set of regulations whereby the entities generating and holding classified information determine the measures of work and internal order aimed at protecting the information and the general and special restrictions of access.

In order to make the protection of information more efficient and to determine the persons having access to such information, the classification is by category and level.

For the purpose of Law no. 182/2002, *classified information* is both the data concerning national security, whose disclosure may be prejudicial to national security and national defence, referred to as *state secrets*, and the information whose disclosure may be prejudicial to legal private or public law entities, referred to as *professional secrets*.

State secrets are, in turn, classified by levels of secrecy, depending on the importance of protected assets and the seriousness of prejudice following their uncontrolled dissemination. Thus the levels of secrecy of information classified as state secrets are:

- *Strictly confidential information of paramount importance* – a category containing the information whose unauthorised disclosure will cause damage of *exceptional gravity* to national security.

- *Strictly confidential information* – a category of information whose disclosure will cause *serious* damage to national security.

- *Secrets* – information whose disclosure will cause damage to national security.

The category of *information classified as state secrets* is regulated by art 17 of Law and includes the information that represents or refers mainly to: the national defence system and its basic elements, military operations, manufacturing technologies, characteristics of weapons and fight techniques used exclusively within the national defence system; the military plans as well as the devices, the number and missions of forces employed; state cipher and other cryptology elements established by the relevant public authorities, as well as the activities related to their development and use; the organisation of the systems for the protection and defence of objectives and sectors and the special and military computer networks, including their security mechanisms; the intelligence activity carried out by the public authorities duly determined to defend the country and ensure national security; the work means, methods, technique and equipment, as well as the specific sources of information used by the public authorities carrying out intelligence activities; etc.

Allocating secrecy levels

When information is developed, it is allocated a level of secrecy by the people in the dignitary and public positions specified by law in art. 19 (Law no. 182/2002).

The following are entitled to allocate the level of strictly confidential of paramount importance to information, when such information is developed: the President of Romania, the Chair of the Senate and the Chair of the Chamber of Deputies, the members of the Supreme Council of National Defence, the Prime-Minister, the members of the Government and the secretary general of the Government, the governor of the National Bank of Romania, the directors of national intelligence services, the director of the Protection and Guard Service, the director of the Special Telecommunications Service, the secretary general of the Senate and the secretary general of the Chamber of Deputies, the chairperson of the National Statistics Institute, the director of the National Administration of State Reserves, other authorities authorised by the President of Romania or prime-minister;

For the strictly confidential information, all the above are entitled along with state secretary officers, according to their material competences.

For confidential information, such level is allocated by the people entitled for strictly confidential information of paramount importance and for strictly confidential information, as well as by the state sub-secretaries, general secretaries or general directors, according to their material competences.

Any Romanian legal or natural entity may appeal against the classification of information, the duration for which such information has been classified and against the way in which the level of secrecy was allocated.

The classification of information may be challenged according to the procedures of administrative law (Law 29/1990) by any Romanian legal or natural person, and the petition is addressed to the authorities having made the respective classification. However, this article has given rise to some controversies with the civil society, who proposed that the special procedures under Law 544/2001 be applied, which by means of art. 21 and 22 provides for a special procedure. The main difference between the two procedures is the possibility of appealing against the classification. In terms of procedure, Law 182 requires trial in accordance with the procedure directly specified by Law 29/1990, while Law 544 specifies its own procedures and only a material competence of the administrative court [1].

We believe that the provisions of art. 20 of Law 182/2002 are criticisable, because they do not restrict the right of appeal in order to defend a legitimate interest. The right of appeal under art. 20 may be claimed on a discretionary basis, which makes us agree with the

opinion according to which such right must be analysed from the perspective of constitutional provisions, as well as the provisions of Law no. 544/2001 on the unrestricted access to information of public interest, which requires at least the existence of a legitimate interest of the petitioner.

The information classified according to the law may be declassified by means of a Government Decision upon the justified request of the issuer, or based on the admission of appeal, as well as in case there is a court decision of the relevant court for this purpose.

Professional secrets

The professional secrets are information whose disclosure may be prejudicial to a public or private law legal person.

Professional secrets are determined by the chair of the legal entity according to the regulations set forth by a Government Decision. Documents containing such information shall bear the inscription *personal* on each page when it is meant for specially designated people. Such information is accessed based on written authorisations issued and handled in accordance with the procedure used for state secrets (art .28 of law no. 182/2002

The directors of public authorities and institutions or of the fully or partially state-owned companies and of other public or private law legal entities shall determine the information deemed as professional secrets and the rules for their protection, shall coordinate the activity and control the measures concerning the confidentiality of professional secrets. The classification shall be determined by the director of the legal entity with the observance of the regulations provided by a Government Decision. Such information shall bear the inscription *personal* on each page when it is meant for specially designated people.

The leaders of public authorities and institutions or of the fully or partially state-owned companies and of other public or private law legal entities shall determine the information deemed as professional secrets and the rules for their protection, shall coordinate the activity and control the measures concerning the confidentiality of professional secrets, according to their competences and in compliance with the regulations set forth by a Government Decision.

The natural persons who have been made aware of classified information shall ensure its protection under the law and shall comply with the provisions of the programmes preventing leaks of classified information. These obligations apply after the termination of work and professional relations; during the whole period such information stays classified.

Obligations, liabilities and sanctions

The people who have access to information classified as state secrets shall be checked in advance in terms of their honesty and professionalism concerning the use of such information.

The candidates of public positions, where the activity involves the use of such information and the competence of authorising access to this type of intelligence, shall be checked prior to their appointment in such positions and such check shall be requested by the appointing authority. The people meant to carry out an activity or be employed at a workplace that requires access to classified information shall submit to the manager a written commitment to keeping confidentiality.

The checking procedures are those procedures that are compulsory for the people working within O.R.N.I.S.S (National Registry Office for Classified Information), who manage NATO-related information, according to the equivalence of the secrecy levels by virtue of Law no. 182/2002.

Requesting the security certificate for people having duties directly related to the protection of classified information is compulsory. *The security certificate* certifies that the

individual in question has been checked and has been endorsed to hold, have access to and work with classified information. The personnel specifically designated to ensure the protection of classified information is included in a system of ongoing training and education taking place on regular basis, according to the national protection standards

Access

It is necessary to make a distinction between the classified information and the information of public interest. The access to the information of public interest may be defined as any individual's possibility to acquire information in the possession of state institutions, a right that any country claiming to have a responsible government applies to greater extent. In a democratic society, access to information is important for several reasons, such as knowledge, forming the attitudes supporting or preventing change, progress, reforms, reducing the imbalance of power between the governing and governed parties. In order to be useful, the information should have three functionality characteristics [2]:

- availability – is the characteristic of a system or network of ensuring *complete information* to lawful/entitled users *when they need it*
- confidentiality - is the characteristic of a system or network of allowing the *access to information only for the users to whom such information is addressed and of providing sufficient guarantees to deny access to the other users;*
- integrity - is the characteristic of a system or network of ensuring *the delivery of information without accidental or unauthorised changes*[3].

As for the concept of *public information*, it has different definitions. Thus, for the purpose of Article 19, *public information means all documents held by a public authority, irrespective of the form (support) they are stored, their source (whether such documents has been drawn up by that public authority or by another) and the date of their drawing up*[4].

Furthermore, I believe that it is essential to make a comparison between unrestricted access and the access based on the need of knowledge, as both concepts define the possibility of accessing information. The first distinction is based on the object of these institutions. The *unrestricted access* is aimed at a broader, even general category of information, namely that of information of public interest, while, for the *need of knowledge*, there is a very clearly and restrictively defined object, that is the classified information. The second distinction is aimed at the general or special nature of institutions. When we talk about unrestricted access, it is obvious that we refer to the general rule. The exception from the rule is the classification of information, which is however subject to an exception in its turn, namely need of knowledge.

In Romania, the access to classified information is allowed with the observance of the *principle of the need of knowledge* only to the people holding a security certificate or an access authorisation, which are valid for the level of secrecy of the information needed to fulfil work duties. At the same time, the access to classified information is guaranteed on the condition of the validation of the election or appointment and of the oath, to the President of Romania, the prime-minister, ministers, the deputies and senators who, according to their specific duties, are entitled to have access to classified information without having fulfilled the checking procedures, by virtue of some internal procedures of the institutions they belong to, authorised by the National Registry Office for Classified Information, after they have become aware of their responsibilities concerning the protection of classified information and having signed a written commitment to keeping confidentiality[5].

The access to classified information is allowed only on the basis on a written authorisation issued by the leader of the legal entity holding such information, provided that the prior notification by the National Registry Office for Classified Information has been obtained. The authorisation is issued by classes and levels of secrecy following the checks performed on the applicant. Such checks shall be carried out based on the written consent of

the people in question. Each authorisation shall be verified at any time necessary so that it should guarantee that it complies with the standards applying for the positions such people hold. The regular check of the authorisation is compulsory and represents a priority anytime there are doubts that its preservation is no longer compatible with security interests.

The access to NATO classified information shall be granted based on the issuing by O.R.N.I.S.S. of the security authorisations and certificates, after the relevant institutions carry out the security checks.

The validity of an authorisation is up to four years, during which checks may be resumed at any time. The failure of granting the authorisation or its justified withdrawal entails the interdiction of accessing classified information.

The access to IT buildings and infrastructures where activities related to classified information take place or where such information is stored or preserved is allowed only under authorised circumstances.

Liability

The liability for the protection of classified information stays with the leader of either the public authority or institution or of another legal entity.

Company managers or managers of other private law legal entity managers, as well as the natural persons being made aware of state secrets as part of a collaboration relation, shall observe the legal provisions on the protection of such information.

The infringement upon the regulations on the protection of classified information entails disciplinary, contravention, civil or criminal liability, as applicable.

The people employed in the intelligence and security services or army, coming under the jurisdiction of the foreign affair service, as well as people specifically charged with the protection of state secrets, who are guilty of deliberate disclosure or negligence, who have facilitated the disclosure or leak of confidential information, shall lose such capacity irrevocably.

The Criminal Code regulates offences whose object is the protection of information: disclosure of secrets prejudicial to national security (art. 407), disclosure of information classified as state secrets (art. 303), disclosure of professional secrets or non-public information (art. 304), negligence in keeping information (art. 305) and treason by transmitting information classified information, as provided by art. 395 of the Criminal Code.

Should such act not constitute a criminal offence or a contravention, and should it be committed by a public officer, it may be sanctioned as a disciplinary offence as provided by art. 70 letter *e* of Law no. 188/1992, which orders that the *failure of preserving professional secrets or the confidentiality of confidential works* shall be sanctioned disciplinarily.

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