



**IN THE NAME OF THE REPUBLIC OF ARMENIA  
DECISION OF THE CONSTITUTIONAL COURT OF  
THE REPUBLIC OF ARMENIA**

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**THE CASE ON CONFORMITY OF ARTICLE 8, PART 4, SUBPARAGRAPH “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 THE NON-  
GOVERNMENTAL ORGANIZATION “HELSINKI CITIZENS’ ASSEMBLY  
VANADZOR OFFICE”**

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. Hovhanissyan, H. Nazaryan, A. Petrosyan (Rapporteur), V. Poghosyan,

with the participation of the representatives of the Applicant: A. Zeynalyan and A. Ghazaryan,

A. Mkhitarian, Chief Specialist of the Legal Expertise Division of the Legal Department of the National Assembly Staff of the Republic of Armenia involved as a Respondent,

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 Law on the Constitutional Court of the Republic of Armenia,

examined in a public hearing by a verbal procedure the Case on concerning the determination of the issue regarding the conformity of Article 8, Part 4, Subparagraph “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 the non-governmental Organization “Helsinki Citizens’ Assembly Vanadzor Office.”

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

Having examined the 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 **FOUND:**

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.

Subparagraph “f” of Part 4 of Article 8 of the law of the Republic of Armenia on State and Official Secrets, titled Authorities of state bodies, local self-government bodies and officials in the field of reckoning data among State and Official Secrets and in the field of their protection, states that the republican bodies of executive power, territorial power and local self-government bodies:

“f) in the scopes of their competence, fulfill other authorities in the field of reckoning information among State and Official Secrets and in the field of their protection.”

Parts 6 and 7 of Article 12 of this law, titled Reckoning information among State and Official Secrets, state:

“State bodies the executives of which are endowed with the authority to reckon data among State and Official Secrets, elaborate departmental lists of data subject to classification, which include

- a) data reckoned among State Secret they are endowed with the authority to dispose of,
- b) data reckoned among Official Secret.

Also the rate of each of included data is mentioned in departmental lists. That lists and amendments made to them are affirmed by competent executives of State bodies. Departmental lists are classified and nonpublic.

2. The procedural background of the Case is the following. On 10.02.2010 the Applicant addressed to the Minister of Defense of the Republic of Armenia requesting to provide with 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.

In response to the request, on 20.02.2010 the Ministry of Defence of the Republic of Armenia refused to provide with information, referring to the requirements of Article 8, Part 1 of the Law of the Republic of Armenia on Freedom of Information, and argues that, based on the requirements of the law and according to the expanded departmental list of information subject to classification of the Ministry of Defence of the Republic of Armenia and brought into action by the secret order of the Minister of Defence of the Republic of Armenia, the requested information is classified and, according to the requirements of Article 4 of the Law of the Republic of Armenia on State and Official Secrets, it is an official secret.

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 Defence of the Republic of

Armenia and the expanded departmental list of information subject to classification of the Ministry of Defence of the Republic of Armenia, which was brought into action by that order, but it was also denied by the Ministry, referring to the requirement of the law.

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 the non-governmental Organization "Helsinki Citizens" Assembly Vanadzor Office against the Ministry of Defence, demanding to recognize the violation of the right of the non-governmental Organization "Helsinki Citizens" Assembly Vanadzor Office to freedom of information and, as a derivative claim, the case VD/1314/05/10 on abolishing the order of the Ministry of Defence of the Republic of Armenia on the expanded departmental list of information subject to classification and obligating the Ministry of Defence of the Republic of Armenia to provide with the required information at the request Ե / 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 required information by the Applicant derives from 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 fact of violation of the rights of the Applicant to freedom of information.

At the same time, the Administrative Court also stated that: "... the mentioned analysis is fully sufficient for a final and reasoned judgment in the scopes of the Applicant'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 discussion of the petition pointed by the Applicant, at the same time it states 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 of 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 relegating the appeal" dated 18.05.2011 the Court of Cassation of the Republic of Armenia relegated the appeal filed by the Applicant.

**3. Challenging the constitutionality of Article 8, Part 4, Subparagraph "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 legal regulations of reckoning data among State and Official Secrets stipulated by Article 8 of the RA Law on State and Official Secrets have been left by the legislator to be regulated by departmental acts, and by Article 12 the legislator provided the bodies of executive power with the authority to elaborate and, due to their acts,

affirm expanded departmental lists of data subject to classification with the power to dispose they are vested. Simultaneously, Article 12, Part 7 of the Law stipulates that the departmental lists on secret data shall be classified and they shall not be subject to publication, that is, "the legal act of the agency, which shall not be subject to publication, determines the data, which is secret."

According to the applicant, in terms of such legal regulation an important domain of the bodies of public authority remains beyond civil control, which is incompatible with the basic principles of legal and democratic society. The Applicant also states: "As it is a secret what the secret data is, then any data available to the members of the society, with a certain probability can be included in that lists, and distribution of such information may result in factual and legal consequences for the participants of legal relations."

As regards Article 117 of the RA Constitution, the Applicant, noting that the Law matter at 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 after the amendments to the Constitution entered into force by virtue of Article 117 of the Constitution of the Republic of Armenia.

**4.** Objecting the arguments of the Applicant, the Respondent states that the right to freedom of expression is not an absolute right, including freedom to search, receive and impart information and ideas. Among other things, for the benefit of State Security a number of international documents stipulate the legitimacy of limitation of that right.

The Respondent finds that the assertion of the Applicant is groundless concerning the fact that the legislature has left the legal regulations of reckoning data among State and Official Secrets to be regulated by departmental acts, as the relations concerning the right to freedom of expression, including freedom to search and receive information are not regulated by departmental acts, but the possibility of such limitation is stipulated by international legal acts 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 reckoning data among State and Official Secrets. The law determines the data subject to be reckoned among State and Official Secrets, as well as restrictions on the reckoning it among State and Official Secrets. Officials, empowered to reckon data among State and Official Secrets, shall not be competent to go beyond the scopes predetermined by the law and they shall be competent only to concretize them by domains and departmental belonging, and not to establish a new category of data.

As regarding the Applicant's allegation that because of secrecy of the expanded departmental lists any data well-known to the members of the society, with a certain

probability can be included in that lists, and distribution of such information 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 data containing State Secret by the person who has the right to get acquainted 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, not being unconstitutional by their content, up to this day have not aroused necessity of reviewing.

5. The Constitutional Court states that, according to Article 27 of the RA Constitution, the right to freedom of expression also includes freedom to search for and receive information. Accessibility to public information before democracy and the public is one of the essential prerequisites for transparency of state governance. Democratic control exercised due to public opinion stimulates transparency of actions of the state power and facilitates accountability of public authorities and officials.

However, this constitutional right is not an absolute right and it shall be 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 the state security, determines the nature of its possible restrictions. The possibility of restriction of freedom to search for and receive information in the legitimate interest of protection of state security, as prescribed in Article 43 of the RA Constitution, allows the state power to reckon it among State or Official Secrets, and thus to restrict the availability of the data, dissemination of which can harm state 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 availability 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 or not the implementation of the legal authority to reckon data among State or Official Secrets by the bodies of executive power in the framework of their competence assumes restriction of the right to receive information, and thus, whether or not the expanded departmental lists of information subject to classification and elaborated by that bodies of executive power, by themselves, are restriction of that right,

b / whether or not the classification and the nonpublic nature of the expanded departmental lists of information subject to classification are legitimate.

To answer these questions the systemic analysis of the law is first attached importance to, which will make possible to find out, whether or not the law determines clear, specific and complete standards to qualify any data 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 Secrets." According to that Article, information, that relates to the RA military, external affairs, economic, science and technology intelligence, counterintelligence, operations and intelligence domains, is classified as state secrets, which are protected by the state, and distribution of which may result in serious consequences for the security of the Republic of Armenia.

In addition to this definition, Article 9 of the above mentioned Law defines the framework of information subject to reckoning among state secrets. According to all the domains mentioned in Article 2, this Article highlights the information subject to reckoning among state secrets. At the same time, Article 10 of the Law defines the information that can not be reckoned among state secrets. Article 11 of the Law also prescribes the principles of classification.

Determination of state secrets defined in Article 2 of the RA Law on State and Official Secrets, together with the scope of information subject to reckoning among state secrets prescribed in Article 9 of the Law and restrictions defined in Article 10, let us state that the law determines the scopes of reckoning certain information among state secrets and, as a result, their availability, hence, also the scopes of restriction of the right of a person to search for and receive information.

The RA Law on State and Official Secrets also defines the degrees of secrecy, at the same time determining the orienting criteria by which the competent officials classify certain information by the degree of secrecy.

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 sub-legislative acts are provided with the function of ensuring the implementation of the requirements of the law.

7. Article 8 of the RA Law on State and Official Secrets defines the authorities of state bodies, local government bodies and officials in the domain of reckoning information among State and Official Secrets. Determining by Article 9 of the Law the information subject to reckoning among state secrets according to relevant domains, and for the purpose of exercising unified state policy in the domain of classification of information stipulated by Article 12 of the Law, the legislator authorizes the RA Government to elaborate list of information subject to reckoning among state secrets of the Republic of Armenia, which also includes the state bodies endowed with the authority to dispose of each of these data. 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 accessibility and predictability of the persons concerned in it.

Providing by Article 8 of the Law the republican executive bodies with the authority to reckon information among 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, according to which, the latter 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 reckon information among 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 was approved, which shall be subject to reckoning among state secrets in the Republic of Armenia, and the heads of executive bodies endowed with the authority to reckon information among state and official secrets were entrusted to elaborate in a month the expanded departmental lists of information subject to classification.

By the Decision No. 665 of the RA Government dated 29 October 1998, the procedure for elaboration of the list of information reckoned among state secrets of the Republic of Armenia was approved. According to Point 2 of the procedure approved by that Decision, "draft lists of information reckoned among 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 shall include **the information subject to reckoning among state secrets, which derives 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 detailed departmental lists of information themselves, which are state secret and made in proper manner, can not lead to restriction of the right to receive information. Restrictions on that right are provided by the law, and determining the authority stipulated by the challenged norms the legislator did not delegate its exclusive authority of establishing limitations on the right to the bodies of executive power, 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 ratified 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 ratify these amendments in accordance with the previously

established procedure, if new amendments to the list of information reckoned among 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 information subject to classification. It must be considered in light of the common logic of legal regulation of information subject to classification 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, and **the term "classification of information"**, is defined as " application of limitations to the information including state and official secrets and dissemination of such information-bearers."

Article 13 of the Law titled "**Classification of information**", states that classification is expressed in determining the level of secrecy of each certain information and classifying the certain information-bearer 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 finds that, regarding the legal regulation of the process of classification of information, it follows from the common logic of legal regulation of the law, that by the established procedure limitations 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 classified**," which is defined in the disputed Part 7 of Article 12 of the Law, would indicate the application of restrictions on that lists due to the fact that disclosure of their contents may lead to serious consequences for the security of the Republic of Armenia. While the departmental lists only specificate the domains mentioned in public listings, which are prescribed by law and approved by the RA Government.

As regards such possible situations when the title (name) of the concrete information included in departmental lists itself can unavoidably be a state secret by force of the fact of establishing, in such situations, in accordance with the principles of classification following from the law, in particular with the principle of reasonableness of classification, it can be considered as information, distribution of which may lead to serious consequences for the security of the Republic of Armenia, and it can be classified as concrete information.

In addition, referring to the standards of legitimate limitations of the freedom to search for 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 acceptable 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* (elements of crime) concerning dissemination of state secrets, in particular, “high treason” (Article 299 of the RA Criminal Code), “espionage” (Article 302 of the RA Criminal Code), “publication” (Article 306 of the RA Criminal Code). Taking as basis the circumstance that for the accusation of the person for the mentioned deeds, in addition to the RA Law on State and Official Secrets and departmental lists of information subject to classification approved by the RA Government, also the information classified by any departmental list can serve as basis, the Constitutional Court finds that besides the information, also classification of departmental lists can hinder the subjects of law to foresee the legal consequences of their deeds, in particular to consider that the disseminated information is state secret, thus leading 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, in the Judgment of the European Court of Human Rights concerning the Case of *Stoll v. Switzerland* (10 December 2007, Point 44, *Stoll v. Switzerland*) the comparative analysis of the legislations made by the rapporteur on this Resolution concerning state secret in the European Council member states, where in particular it is 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.”

Deriving from the above mentioned and taking into consideration the practice of constitutional justice of a number of countries, the RA Constitutional Court finds that **classification of departmental lists** by current procedure is not in the scopes of general logics of **classification of information** expressed in the legal regulation of the RA Law on State and Official Secrets, and the non-public essence of the latter, as far as it does not

concern any concrete information subject to classification, does not follow the legitimate objective of protection of interests of state security and causes problems in the domain of protection of human rights.

Based on the review of the Case and being governed 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, Subparagraph “f,” 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 shall not be subject to classification and publication,” as far as it does not concern concrete information subject to classification, contradicting Articles 27 and 43 of the Constitution of the Republic of Armenia and void.

**3.** Deriving 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 held against the Applicant due to new circumstances is subject to review in accordance with the procedure prescribed by law, as well as taking into consideration that the RA Administrative Court in the Judgment VD/1314/05/10 dated 23.11.2010 surpassed its authorities by not taking into consideration the requirements of Article 93 of the RA Constitution and stated that the last Paragraph 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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