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CLASSIFIED INFORMATION IN UKRAINE: STATUS AND PROBLEMS

Abstract. The article deals with the evolution of the legal status of proprietary information in Ukraine since the Soviet period. The problems of regulating access to information marked 'For Official Use' are analysed and ways of solving them are proposed to ensure a balance between openness and security.

Keywords: Official information, Classified information, Access to information.

For several decades of the twentieth century, Ukraine was a part of the USSR, whose rigid state and party nomenclature formed its own, highly ideological legal framework that determined the framework for the functioning of classified (or restricted) information.

The system of protection of classified information in the USSR was a complex, multi-level structure that permeated all spheres of public administration and public life. The period of the 60s and 80s of the XX century was characterised by the final formation of a centralised system of state secret protection, the expansion of the list of information subject to classification, and the strengthening of control over compliance with the secrecy regime. The Soviet system of information protection was based on an extensive regulatory framework and functioned in conditions of dominance of state interests over the interests of the individual, which created preconditions for unlawful classification of a wide range of socially important information.

The regulatory and legal support for the protection of classified information in the USSR in the period under review was a multi-level system of legislative and by-laws. The key document defining the general approaches to the protection of state secrets was the USSR Law «On Criminal Liability for State Crimes» of 25 December 1958. A significant innovation of Article 12 of this law was the establishment of differentiated liability for disclosure of state secrets depending on whether it caused grave consequences. The norms of the all-Union law were included in the Criminal Code of the Ukrainian SSR of 1961 without any changes [1].

During the 1960s and 1980s, the protection of classified information in the Soviet Union was regulated mainly by subordinate legislation, such as resolutions of the Council of Ministers of the USSR, KGB instructions and interdepartmental regulations. Departmental instructions on secrecy were also important, as they specified general requirements and adapted them to the specifics of each organisation and type of activity. It is noteworthy that many of the documents regulating this area were themselves classified, which created a paradoxical situation where individuals were held liable for breaching the secrecy regime on the basis of documents whose contents were unknown to them. This allowed for arbitrary interpretation of the norms and abuse by the authorised bodies.

The legal regulation of classified information (CI) in the USSR was carried out under conditions of absolute dominance of state interests over the interests of

individuals. Soviet law was focused on the protection of state interests, and a threat to the preservation of state secrets was seen as an encroachment on state security. This led to an expanded interpretation of the concept of state secrets and the inclusion of a wide range of socially important information in the list of secret information. In such conditions, it is impossible to talk about a balance between state security and the interests of society, and no one raised this question until the 1990s.

In the early 1990s, Ukraine inherited the Soviet structure of the CI, even the hierarchy of classifications («secret», «top secret», «special importance» and «Official Use Only» – OUO), so the democratisation of its political system required reforming the organisational and legal framework for the functioning of restricted information: state secret, official information, confidential information. In this sense, it was primarily about implementing Western models.

One of the basic models for balancing the interests of the state and society was proposed by the non-governmental organisation «Article 19». It is an international organisation that protects freedom of speech and information around the world. It was founded in 1987 in London and named after «Article 19» of the Universal Declaration of Human Rights, which guarantees everyone the right to freedom of opinion and expression.

The three-part test of the «Principles of Freedom of Information Legislation» of the international «Article 19» is an important tool for assessing whether access to public information may be restricted. This test involves consistent answers to three key questions that help determine whether access to information can be restricted in the interests of national security, public order or other important aspects [4]. First question: Does the restriction serve to protect national security, territorial integrity or public order? This may include preventing disorder, protecting public health or protecting the rights of others. Second question: Is the disclosure of the information likely to cause significant harm to these interests? Here it is important to assess the likelihood and nature of possible negative consequences. Third question: Does the harm from disclosure outweigh the public interest in obtaining the information? If the answer to all three questions is yes, access to information may be restricted.

This test has been a part of Ukrainian legislation since 2011 (when the Law of Ukraine «On Access to Public Information» was adopted) and is used to strike a balance between the right to information and the need to protect important public interests. The principle of maximum openness is fundamental in this context: any information is presumed to be open unless the contrary is proven. The three-part test for human rights defenders serves as a kind of methodological imperative that forms a scale for assessing certain legal practices and organisational measures in the area of CI. In this context, we will talk about such a category of as «Official Use Only» (Official restricted information or Official information).

In Ukraine, official restricted information has a complex legal status and is regulated by legal acts of various levels. The main mechanism for restricting access to such information is the «Official Use Only» (OUO) stamp, which is widely used in government agencies. Historically, the use of the OUO stamp, both in Soviet practice and in modern Ukrainian office work, has long lacked a proper legislative basis.

The Law of Ukraine «On Information» is the basic document in this area, but it is declarative in nature and does not contain detailed provisions on proprietary information. According to this law, information is divided into open and restricted information, and any information is considered open unless otherwise provided by law. Restricted information, in turn, is divided into confidential, secret and proprietary information.

A significant addition to this law is the Law of Ukraine «On Access to Public Information», adopted in 2011 [3], which stipulates that official information may include information contained in documents of public authorities and constituting intra-agency official correspondence, memos, recommendations, if they are related to the development of the institution's activities, the exercise of control functions, decision-making, as well as information collected in the course of operational and investigative, counterintelligence activities.

Specific procedures for working with documents containing proprietary information are regulated by subordinate legislation, in particular the Instruction on the procedure for recording, storing and using documents, files, publications and other material carriers of information containing proprietary information (in 1998, when the Instruction was first adopted, it was referred to as «confidential information owned by the state») [2]. This Instruction defines the basic rules for handling such documents, including their acceptance, registration, reproduction, distribution, formation of files, use, removal of the OUO stamp, storage, destruction, as well as registration of seals and stamps.

A significant shortcoming in the regulation of classified information is the lack of clear criteria for categorizing information as classified. There are only «general guidelines», which are broad and allow for subjective interpretation. Among these criteria: information must be created using state budget funds or be owned or managed by an organization; be used to secure national interests; not be classified as a state secret; while its disclosure could potentially violate constitutional human rights and freedoms or cause negative consequences in various spheres of state life.

In practice, this leads to different government agencies creating their own lists of information that can differ significantly from one another.

Of particular concern are regulations that allow restricting access to non-classified documents if they are stored in the same file with documents marked «OUO». This means that because of one classified document, other non-classified documents automatically become classified based on a technicality. A problematic issue is the absence of a mechanism for reviewing OUO classifications. Although documents containing classified information can be reviewed for declassification during transfer to archives or during storage, this is not a mandatory procedure. The decision to remove the classification is made by the expert commission of the organization where the case originated, creating opportunities for unjustified extension of the secrecy regime. A serious problem at one time was the regulation according to which all unpublished information from state authorities created before 1998 was automatically considered to have a OUO classification. This led to the classification of an enormous amount of information. After criticism from experts, this regulation was changed, but many documents still remain under the OUO classification.

In 2016, an updated version of the Instruction was adopted. It introduced additional notations to the OUO classification: «Letter M» for mobilization issues, «Letter K» for cryptographic protection issues, and «SI» for special information issues. The Instruction prohibits the use of open communication channels for transmitting classified information and sending documents with a OUO classification outside Ukraine. This provision is also telling: It is permitted to add documents with open information to a file marked OUO if such documents relate to the issues of that file» [2]. The duration of the secrecy regime for files containing OUO documents is not clearly established and can be perpetual. Even documentation released upon request may contain classified fragments: a copy is made from such a document where these fragments are redacted, and from this copy another copy is made, which is then provided upon request.

To address problems in the area of access to classified information, it is necessary to implement a series of changes: conduct a mandatory review of all documents with OUO classification created before 1998 and automatically declassify information if there is no clear evidence of the need for its classification; clearly define categories of information that may receive OUO classification; establish mandatory timeframes for classification review; ensure independent oversight of the assignment and extension of OUO status; simplify the procedure for appealing decisions to deny access to information; implement the principle of presumption of information openness.

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АУДІОВІЗУАЛЬНІ ДОКУМЕНТИ ЯК ІНСТРУМЕНТ БОРОТЬБИ З ДЕЗІНФОРМАЦІЄЮ В НАУКОВОМУ ДИСКУРСІ

Анотація. Досліджено роль аудіовізуальних документів у боротьбі з дезінформацією в науковому дискурсі. Проаналізовано їх унікальні характеристики та функції як інструменту верифікації даних. Визначено значення аудіовізуальних документів у контексті інформаційної безпеки України.

Ключові слова: аудіовізуальні документи, дезінформація, науковий дискурс, верифікація даних, інформаційна безпека.