

**PROBLEMATIC ISSUES OF LEGAL REGULATION OF  
INFORMATION WITH RESTRICTED ACCESS (PUBLIC AND SECRET  
SERVICE INFORMATION)**

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Information, as it is known, is the way of people communication and often it is an object of people activity. Without information in its different aspects and forms it is impossible for people to evolve, for state and society to progress. "Information" is one of the key concepts for many fields of knowledge. Legal science, philosophy, sociology, history and other sciences pay big attention to this category. Any social relations, which are the subject of legal regulation, closely related to information.

Reflecting the reality as it is, information integrates into all direction of state, society, citizen activity. With appearance of new information technologies, foundation of which is implementation of means of computer technology, communication, telecommunication system, information become permanent and

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necessary attribute of providing framework for activity of state, legal entities, non-governmental organisations and citizens. Many decisions, made at different levels – from the head of the state to citizen, depend on quality and actuality, operational efficiency of receiving.

Providing framework for information security at all times was one of the most important directions of state activity. Today –time of transition from postindustrial to information society – problem of information security become more than actual.

This problem becomes more complicated not only because of the fact that nowadays information has got attributes of industry, millions of people deal with gathering, processing and distribution of information, first of all because of the fact that realisation of mechanism of restricted information security is accomplished under conditions of society democratisation, battle for civil rights and freedom of access to information. This requires high legal culture from those, who are intended in practice to provide necessary restricted information security.

Geopolitical direction of Ukraine galvanize into examination of procedural and institutional regulation of restricted information security in such strong military and political union as NATO. Rather-legal analysis of doctrines of restricted information security in internal legislation of countries of Central and East Europe, which became members of Alliance not so long ago and have many similar cultural and historical as well as social and economic features, is very interesting.

It is important to turn attention to the fact that laws on access to public information exist in most of democratic countries and they are real legal mechanism of realisation of one of human rights – right to access to public information, which is, in its turn, a requirement of European standards and necessary term for integration of Ukraine to Europe Union. There are examples of countries with laws on access to information, they are: USA (Law on freedom of access to information), Great Britain

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(Law on information freedom), Estonia (Law on information freedom), Slovakia (Law on free access to information), Bulgaria (Law on access to public information), Slovenia (Law on access to public information), Hungary (Law on access to information), etc.

Actual status of legal regulatory activity related to restricted information security in Ukraine is defined by passing recently of such Laws of Ukraine “On information” (as amended on the 13<sup>th</sup> of November, 2011), “On access to public information” and “On state secret” (as amended and supplemented).

Schematically division of information by regimes of access, according to these Laws, consists of three categories: confidential, secret and proprietary information.

Confidential information (art.7 Law of Ukraine “On access to public information”) is information exceptionally of private entities, which can be multi-various; main its features are that it is not widespread, and is known only by private entity, and it on its discretion decides how and when to spread information or to limit access to it (parties of governmental relations can not have their own confidential information, but only can hold information of such kind that was given to them by private entities) [1].

Secret information is restricted information, which has the highest in comparison with other types of closed information security level because distribution of it will cause losses to certain person, society, country. State secret, professional secrets (lawyer, doctor, etc.), secrecy of investigation and other types of secret information, which are determined by special laws, belong to secret information.

New category of restricted information is added by art. 9 of Law of Ukraine “On access to public information” – it is proprietary information.

Such information belongs to it:

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1. Information, which is contained in documents of parties of governmental relations and is intradepartmental official correspondence, inter-office memorandums, recommendations, if they are directly related to development of activity of establishment or to exercising of control, supervisory functions by public authorities, to process of making decisions and take priority of public discussion and/or making a decision;

2. Information gathered in the process of special investigative techniques, counterintelligence operation in the field of state security, which is not referred to state secret.

Label “only for official use” is assigned to documents that contain proprietary information. Access to such documents is given according to part 2 of art. 6 of Law of Ukraine “On access to public information”.

Such subcategory of proprietary information pointed out in item 1 after making by authority or establishment a decision should be removed from the proprietary information category and loses status of restricted information or it will be referred wholly or partially to another restricted category, if during the process of development of activity, inspection changed (became known new) facts and interest was expressed for reference of information to restricted category wholly or partially.

Need of reference of this or that information to proprietary information is connected with the fact that authorities in certain circumstances need to discuss and to make decisions non-public (not to generate lots of buzz, speculative activity in the market, suppression of evidence or facts of law infringement), in respect to information from above mentioned item 1, and also with the fact that certain arrays of information of law-enforcement authorities do not need difficult security methods as within state secret, but their distribution probably will cause losses to interests of

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country, society or certain entities, in respect to information from above mentioned item 2.

According to the Law Security Service Department of Ukraine is state law-enforcement authority of special-purpose, whose functions within defined by legislation competences are functions of defence of state sovereignty, constitutional structure, territorial integrity, economic, scientific and technical as well as armament potential of Ukraine, legal state interests and rights of citizens from reconnaissance and subversive activity of foreign special services, invasion on the part of certain organisations, groups and persons, and also providing framework for state secret security.

But today questions on restricted public information (proprietary information) security are still unsolved at the legislative level.

For example, art.24 of Law of Ukraine “On Security Service Department of Ukraine” is not amended in relation to organisation and accomplishment of measures on providing framework for proprietary information security, so long as by this norm such category as “confidential information that is state property” is defined [2].

Law of Ukraine “On state secret”, which is in effect in our country, is the only legislative act, which regulate social relations related to reference of information to state secret, securing, disclose its material media and state secret security with the purpose of protection of national security of Ukraine [3].

Security Service Department is authorized for function of control of documents’ turnover, which contain proprietary information by decree of Cabinet of Ministers of Ukraine of November 27, 1998, № 1893 (as amended and supplemented) “On authorisation of standard on procedure of accounting, keeping and use of documents, files, publications and other material information media, which contain proprietary information” [4].

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Therefore today powers and authority of Security Service Department of Ukraine are defined and are subject only to substatutory regulatory act of Cabinet of Ministers of Ukraine.

At the present stage of deep social and political as well as social and economic changes in Ukraine, directed to development of democratic legal state, one of the top-priority tasks of authorized government bodies are defence of interests of vital concernment of human and citizen, society and state. Article 17 of Constitution of Ukraine defines that providing framework for information security is one of the most important functions of state, business of the whole nation. Solving of these tasks will make a contribution to providing framework for functioning of complete and effective system of informational resources security, first of all secret and confidential information.

Instead of this realisation by Ukraine focus on integration into world community and extension of international cooperation in political, armament, scientific and technical spheres predetermines to bring norms of national legislation in the field of restricted information in balance with international and European standards.

Taking the foregoing into account, and guided by Strategy of national security of Ukraine, approved by Decree of President of Ukraine of February 12, 2007, № 105, under fulfilling of demands of Cabinet of Ministers of Ukraine of April 18, 2007, № 17669/1/1-07 by Security Service Department of Ukraine as special authorized government body in the field of state secret security draft law “On state secrets”, in which positive domestic and international experience on providing framework for restricted information security, and also suggestions of ministries, other authorities, enterprises, establishments, organisations are taken into account, is prepared [5].

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The purpose of draft law preparation is to improve and to bring in balance with demands of international standards (NATO, EU) regulatory support of state secret security and confidential information security, taking into account changes in legislation, and also in economic, social and political and other spheres after passage in 1994 of the framework Law of Ukraine “On state secret” and making range of amendments.

Among the tasks given to Security Service Department of Ukraine and represented in draft law, it should be noted such tasks:

- optimisation and improvement of countrywide system of restricted information security, bringing in balance with international standards;
- determination of new information categories – “state secrets” (which unit state with proprietary secret);
- definition of criteria of reference of information to state and proprietary secret, optimisation of state secret work;
- improvement of order of providing framework for state secret security and confidential information security (first of all it is subject to giving to persons access to state secrets, carrying on by enterprises, establishments and organisations activity related to restricted information, stipulation of security conditions, etc.)

Among main novelties in draft law, which are actively discussed by general public, foundation of National security body of secret information as public authority as part of Security Service Department of Ukraine, should be noted. Mentioned norm is captured in security standards of NATO and security rules of EU, which determine necessity of establishment in member-countries and partners of national security bodies, main function of which is implementation of information security standards and general control of compliance with the requirements of national legislation in the field of restricted information security.

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Within NATO there are institutions, main tasks of which are monitoring (supervision) of results and quality of restricted information security in member-countries. In 1995 Security Bureau, reorganized today into NATO Office of Security (NOS), which is responsible for full coordination of questions on information security in NATO, was established. NOS publishes information about use of principles and standards and monitor national systems of information security.

In English tradition term “sensitive information”, in other words information, which is sensitive to threats, which appeared in connection with illegal access to it, and that is why it needs defense or at least limit of access to it, corresponds to category “restricted information”.

In legislation of member-countries of NATO on sensitive information term “classified” in phrases “classified information”, “classified materials”, “classified objects” is used.

Therefore term “classified information” in NATO is based on its classification by stages of possible losses, which are connected to its distribution or loss. It motives to understand proportionality of expenses, connected to information security, from one side, and risk of losses after its distribution or loss, from other side, as conceptual basis of information security in countries of NATO, Classification of information in any case is related to reference of it to certain registers.

Analog of NATO Office of Security (NOS) according to the draft Law of Ukraine “On state secrets” is National security body, which would act within the structure of Security Service Department of Ukraine, and its functions would be realisation of unified state politics in the field of information resources’ security.

In Ukrainian legislation in the field of state secret security information, referred to mentioned category, are classified in compilation of data, which is state secret, which is formed according to the legislation in effect by Security Service Department



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of Ukraine in virtue of decisions of State experts on secret questions. Together with this and in contradistinction from covered by legislation on state secret procedures of reference information to the category of proprietary at legislative level are undetermined in general.

Work out and approvals by state authorities of List of data, which contain proprietary information, are determined by Decree of Cabinet of Ministers of Ukraine of November 27, 1893. Today mentioned Lists are worked out by range of state authorities and departments and brought into effect by departmental administrative documents, for example:

- Decree of State judicial administration of Ukraine of June 22, 2011, № 104 “On proprietary information”;
- Decree of Ministry of Energy and coal-mining industry of Ukraine of October 19, 2011, № 632 “On approval of List of data, which are proprietary information and which is given label of access limitation “Only for official use” in Ministry of Energy and coal-mining industry of Ukraine”;
- Decree of State agency of water resources of Ukraine of November 10, 2011, № 299 “On approval of List of data, which are proprietary information in State agency of water resources of Ukraine”

Analysis of mentioned document shows that they are imperfect and are not brought in balance with generally accepted criteria on reference this or that data to category of restricted information that can cause negative consequences in the field of state information security in case of their practical use, for example:

- Data by certain characteristic value on characteristics of alternate posts of management of central office, on its location, security and defense system (item 7 of List) are put into the list of data, which is proprietary information in State agency of water resources of Ukraine. Together with this according to the article 1.12.2 of

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Abridgment of data that is state secret (hereinafter referred to as – ADSS - 2005), information on location, characteristics of alternate posts of management, which is related to alternate certain post of management, is referred to state secret that corresponds to level of sensitivity “Secret”;

- List of documents in judicial authorities, which contain information that is proprietary information, but it can not be understood what kind of information, which is contained in these documents by its place belong to the category of proprietary information, is approved by Decree of State judicial administration of Ukraine.

As positive example work out and approval by Decree of Prosecutor General’s Office of Ukraine of May 6, 2011, № 52 “On List of data, which is proprietary information and which can be contained in documents of prosecution agencies of Ukraine, and on List of documents, which contain proprietary information of Ukraine” can be given.

Certain array of proprietary information, which moves in prosecution agencies of Ukraine, and List of certain documents, which are given label of access limitation “Only for official use” is defined by this decree.

State Migration Service of Ukraine with such authorized functions as function of realisation of state politics on citizenship, immigration and registration of private entities, and also in cases of migration within limits, defined by legislation on refugees, was established by Decree of President of Ukraine “On optimisation of system of central executive authorities” of December 9, 2010, № 1085/2010.

Paperwork procedure for solving question on declaration refugee or person that need additional protection, is provided by Law of Ukraine “On refugees and persons, who need additional or temporary protection” of July 8, 2011, № 3671-VI.

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Norm, according to which information on fact of filing an application with the purpose of declaration a person that has right for protection in Ukraine, is confidential, is provided by mentioned Law [6].

According to Laws of Ukraine information about private entity belongs to the category of personal information, such information as data on person's nationality, its education, family status, religious commitment, health condition, and also address, date and place of birth, belongs to this category.

Distribution of mentioned information can lead to negative consequences for these persons and cause losses to international reputation of Ukraine.

Together with this order of accounting, keeping or use of material media of information, which contain confidential information about person, because these questions are subject to range of approved recently laws of Ukraine, are not defined by legislation of Ukraine.

Also made analysis of legislative acts in the field of state secret security shows existence of problematic questions on reference of this or that information to the category "state secret" due to the fact of absence of statutorily defined criteria of evaluation of this information.

For example, data by different characteristic values about belonging to cooperation, fact (time-independent), plans of attraction to cooperation on a confidential basis with the purpose of fulfilling of tasks of special investigative techniques, counter- reconnaissance and reconnaissance activity of person that gives opportunity to identify it (art. 4.2.1. of ADSS - 2005), but criteria, according to which person can be identified, are not defined, are referred to the category "state secret".

Branching of legal field in sphere of information resources do not allow to regulate in an appropriate manner social relations in this field, to provide appropriate protection and security of information resources.

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In summary with accounting of experience of European countries it is considered that it is wise to establish in country unified National security body in information sphere, which would act within the structure of Security Service Department of Ukraine or establishment of separate state agency with such authorized functions as implementation of standards of information security and general control of clinging to demands of national legislation in the field of restricted information.

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**ПРОБЛЕМНІ ПИТАННЯ ПРАВОВОГО РЕГУЛЮВАННЯ ОБІГУ  
ІНФОРМАЦІЇ З ОБМЕЖЕНИМ ДОСТУПОМ (ДЕРЖАВНА ТАЄМНИЦЯ ТА  
СЛУЖБОВА ІНФОРМАЦІЯ)**

**Федоренко О. О., Керсіцький С. О., Курбатов А. І.**

Стаття присвячена питанням обігу інформації з обмеженим доступом. Досліджуються проблеми, пов'язані з обігом інформації з обмеженим доступом в Україні, та аналізується міжнародний досвід у сфері захисту інформаційних ресурсів.

**Ключові слова:** інформація, конфіденційна інформація, інформація з обмеженим доступом, забезпечення охорони державної таємниці.

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**ПРОБЛЕМНЫЕ ВОПРОСЫ ПРАВОВОГО РЕГУЛИРОВАНИЯ ОБОРОТА  
ИНФОРМАЦИИ С ОГРАНИЧЕННЫМ ДОСТУПОМ (ГОСУДАРСТВЕННАЯ ТАЙНА  
И СЛУЖЕБНАЯ ИНФОРМАЦИЯ)**

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Статья посвящена вопросам оборота информации с ограниченным доступом. Исследуются проблемы, связанные с оборотом информации с ограниченным доступом в Украине, проводится анализ международного опыта в сфере защиты информационных ресурсов.

**Ключевые слова:** информация, конфиденциальная информация, информация с ограниченным доступом, обеспечение охраны государственной тайны.

**PROBLEMATIC ISSUES OF LEGAL REGULATION OF INFORMATION WITH  
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The article deals with circulation of information with limited access. The problems associated with the turnover of restricted access in Ukraine, and analysis of international experience in the brunch of protection of information resources. In modern world national legal framework should be harmonized with international practice. There are many laws on access to public information in majority of democratic states and these regulations allow access by the general public to data held by national governments. This is one of the basic requirement for Ukraine to obtain a European standards and to finalize EU integration. All information can be divided into three categories – confidential, secret and information for internal use only according to Ukrainian legislation. In NATO countries definition «classified» concerning restricted information is used (classified information, classified data, classified objects). The 1996 Constitution does not include a specific general right of access to information but contains a general right of freedom of collect and disseminate information and rights of access to personal and environmental information. The 1992 Law on Information (since 2011.05.09 - new edition) is a general information policy framework law that includes, classification of information, a citizen's a right to access information, accreditation policy, information of public interest and exemptions from liability for journalists. Law on Access to Public Information was adopted 13 January 2011 and go into force from 9 may 2011. It widens the range of subjects, obliged to provide information, gives legislative definition of public

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information and makes public information accessible with statutory restrictions. Some corresponding conclusions have been formulated by the authors in this paper.

**Keywords:** information, confidential information with restricted access, maintenance, government security.