ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on the

Law of the Republic of Uzbekistan on "Protection of the State Secrets"

by

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Global Campaign for Free Expression

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Commissioned by the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe

OSCE

I. Introduction

This Memorandum analyses the Law of the Republic of Uzbekistan on "Protection of the State Secrets" (the Law or the Classification Law) adopted in 1993.[1]

We are deeply concerned that the Law poses a very substantial threat to the right to freedom of information and expression. The classification regime is exceedingly broad, potentially justifying the classification and "protection" of virtually all information. Moreover, the Law improperly imposes on some private entities and individuals the obligation to "apply" to the authorities to determine if they control any classifiable information, and subjects them to possible liability should they disclose any classified information in their control.

It may be noted that the Law of the Republic of Uzbekistan "On Principles of and Guarantees for Freedom of Information" (the FOI Law) fails to mitigate any of these concerns. The Classification Law makes no mention of, and certainly in no way defers to, the provisions of the FOI Law. In fact, the FOI Law effectively incorporates the standards of the Classification Law into its regime of exceptions, treating as exempt any information which has been classified pursuant to the Classification Law. As a result, overbreadth or other problems with the Classification Law directly threaten freedom of information. This is a particular problem given the climate of secrecy which continues to pertain in Uzbekistan.

II. International and Constitutional Guarantees

In two companion Memoranda,[2] we have outlined the international and constitutional guarantees for freedom of expression with particular attention, respectively, to the right to freedom of information and to protections for the mass media. We include by reference those discussions here.

III. Analysis of the Law

III.1 General Outline of the Law

Article 1 of the Law delineates the categories of information which may be subjected to classification, while Article 3 sets out and defines three different classification levels. Article 5 devolves responsibility for classification to certain national agencies. Article 7 provides for regular review of classification decisions. Article 9 mandates the National Security Service to oversee control of classified information, including through granting clearance to individuals and providing access to classified information. Finally, Article 10 creates duties in a range of individuals and organisations to protect State secrets, as well as liability for certain classification-related offences.

[1] The analysis is based on an unofficial English translation of the Law. ARTICLE 19 accepts no responsibility for errors based on inaccurate or mistaken translation.

[2] See Memorandum on the Law of the Republic of Uzbekistan on Principles of and Guarantees for Freedom of Information (June 2004) (FOI Law Memorandum) and Memorandum on the Law of the Republic of Uzbekistan on Mass Media (June 2004).

III.2 Failure to Subordinate the Law to the FOI Law

The Law defines "state secrets" and draws different categories of State secrets in unduly broad terms, with the effect that virtually any information may be classified as a State secret (described in more detail below). Virtually any information, therefore, may be subject to "protection" by the National Security Service, pursuant to its duties under Article 9 of the Law, so that ordinary individuals will not have access to this information.

In a number of countries, freedom of information laws supersede classification laws, so that the classification system is effectively an internal information management system. This is the case, for example, in countries like India,[3] Pakistan[4] and South Africa.[5] When a request for information is made under a freedom of information law, the mere fact of classification does not mean that the request will be denied. Rather, a request may be denied only if it falls within the scope of an exception specifically listed in the freedom of information law. If the regime of exceptions in a freedom of information law is comprehensive, as we recommend it should be (and as we have so recommended with respect to the Uzbekistan FOI Law),[6] it should not be permitted to be extended by other laws.

As we have noted, the FOI Law, as it presently stands, would include information classified under authority of the Classification Law as "confidential" information. As a result, the Classification Law effectively operates as an additional set of exceptions to the right of access. This obviously has important implications in terms of the right to access information held by public bodies, and requires the Classification Law to control classification far more tightly than if the FOI Law were to override it.

Recommendation:

- In case of inconsistency between the Classification Law and the FOI Law, the latter should dominate. Language should be added to either the Classification Law or the FOI Law to this effect.

III.3 Legal Basis for Protecting State Secrets

Article 2 provides that the "legal grounds for protection of state secrets" may be set forth by the Constitution, the Law itself "and other acts of law of the Republic of Uzbekistan …".

Analysis

It is not at all clear what this provision is meant to accomplish, as it is evident that the Law itself, and the Constitution, are by their explicit terms authorities which mandate the classification of information. It is furthermore not even clear what the provision means but, presumably, it envisages other "acts of law" setting out categories of State secrets different from, and perhaps broader than, the categories set out in this Law.[7]

[3] Freedom of Information Act, 2002,

[4] Freedom of Information Ordinance, 2002, Ordinance No. XCVI of 2002, 27 October 2002.

[5] Promotion of Access to Information Act, Act No. 2, 2000.

[6] See the FOI Law Memorandum.

[7] As we noted in the FOI Law Memorandum, we have been informed that the list of issues or categories of information which are considered to be State secrets is itself treated as a State secret in Uzbekistan. The extremely broad scope of the definitions described below, along with the fact that "other acts of law" may serve to broaden the scope of the concept of State secret even further, make it

There is no obvious reason why a classification system would need to be scattered across various legal enactments, some perhaps not accessible to the public. Indeed, in view of the breadth of the coverage provided by this Law (as detailed below), it is scarcely imaginable that any further protection in the name of classification could be called for in the country.

Recommendation:

- Article 2 should be removed from the Law.

III.4 Definition of 'State Secret' and Classification Categories

Article 1 defines the term 'state secret' to include "especially important, top-secret or secret military, political, economic, scientific and technological *or other* information protected by the State and included into special inventories" (emphasis added).

Article 3 creates three categories of State secrets: (1) State secrets,[8] defined to consist of "information, disclosure of which may negatively impair economic and defence capacities of the Republic of Uzbekistan and entail other grave consequences for national defense, state security, and economic and political interests of" the country; (2) military secrets, defined as "information of military nature, divulgation of which may entail grave consequences for national defense, state security, and Armed Forces" of the country; and (3) official secrets, defined as "information related to research, technology, production and administration, disclosure of which may be against interests of" the country.

Analysis

There are a number of fundamental difficulties with this classification regime. First, some of the interests identified by Article 3 are not recognised as legitimate under international law. As we explained in the FOI Law Memorandum, restrictions on the right to information are permissible only if they serve the legitimate aims delineated in the *International Covenant on Civil and Political Rights* (ICCPR), which only recognises the following aims: the rights and reputations of others, national security, public order, and public health and morals. The "official secret" category includes "information related to … production and administration, disclosure of which may be against interests of the Republic of Uzbekistan" which is practically unlimited and clearly includes matters well beyond the interests recognised by the ICCPR.

Furthermore, these categories are unacceptably broad and, as a result, the Law effectively leaves it up to the discretion of those who make classification decisions to determine what interests to take into account when they are deciding whether or not to classify particular information. In a country which is still characterised by a culture of secrecy, many interests not recognised in international law are likely to figure prominently in such decisions. In short, according such wide discretion in these

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very difficult to ascertain with certainty whether or not something is a secret. This can be expected to have a serious chilling effect, particularly on the mass media, which may refrain from publishing or broadcasting much information of public interest, for fear of inadvertently divulging State secrets.

[8] We note a potential confusion, which may be due to the translation. The term "state secret" is used twice in the Law: first, in Article 1, as the generic category covering *any* information which the Law would protect and then as one of the three sub-categories of secrets in Article 3, entitled (again), "state secret". It would highly preferable that the same term were not used for these two different functions.

matters will have the predictable result that much information will be classified which should not be.

We note that the definition of the term 'state secret' at Article 1 is formally unlimited, including not only information of importance to the interest listed, but also "other information protected by the State". This is in no way defined or limited so, pursuant to this article, that any information whatsoever may be deemed a State secret, as long as it is information which the State specifically elects to protect. It is true that this definition does not appear directly to be operative in the classification scheme of Article 3, but it does provides impetus to officials who wish improperly to withhold information from the public.

Second, the harm tests employed in Article 3, particularly with respect to State secrets and official secrets, are very weak. For example, the first category, "state secrets", includes information which "may negatively impair" the economic or defence capacities of the country. The term "may negatively impair" is very weak – amounting only to requiring the mere *possibility* of something negative – and, coupled with the fact that the economic capacity of the country could be affected by almost anything, would allow for the classification of almost any information at all. The "harm" requirement for the official secret category is even weaker than that employed for the category of "state secret", requiring only that the information "may be against interests of the Republic". This, coupled with the very open-ended nature of the aim for this category – noted above – means that much information is likely to be classified to which the public should in fact have access.[9]

Adequately stringent harm tests are absolutely critical to an appropriate regime of State secrets. While it is true that some information may and should be withheld from public disclosure in the name of internationally recognised legitimate interests, such withholding must be predicated on the fact that the disclosure of the information would, or would be likely to, *seriously prejudice* one or more of such interests. To mandate the withholding of information where disclosure would do no harm makes no sense and is contrary to international standards.

Moreover, even where the disclosure of legitimately secret information would or would be likely to cause serious harm to a legitimate interest, it is recognised that when the public interest in the information is high enough, the information should still be disclosed. More specifically, information classified as secret under any category should not be protected unless the harm to a legitimate interest resulting from its disclosure would outweigh the public interest in its disclosure.

It is important to note, in this regard, that the FOI Law does not at present contain a public interest provision of this sort and it does not (in its current form) provide for access to classified information, because information which is classified under the Classification Law will be counted as confidential, and hence exempt from disclosure, under the FOI Law. As a result, a public interest override in the Classification Law is all the more important.

Recommendations:

[9] The middle category, "military secret", is somewhat more narrowly drawn, although the harm test is still put in the objectionably weak form of a mere possibility ("may entail grave consequences").

- Article 3 should be redrafted to ensure that the list of protected interests is clearly and narrowly drawn, and limited to interests recognised as legitimate grounds for restricting freedom of expression by the ICCPR.
- Each of the Article 3 classification categories should condition classification of information on the likelihood that a legitimate interest would be substantially prejudiced by disclosure of the information.
- Article 3 should include a general public interest override, as described above.

III.5 Scope of the Law

The Law unambiguously applies to private as well as to public entities and individuals. The Preamble states that the Law "set[s] forth legal grounds for protection of the state secrets in all kinds of activities of the bodies of government … as well as of enterprises, agencies, organizations, and associations, *regardless of the type of ownership thereof* … and individuals" (emphasis added). Article 5 goes on to provide that information in the possession or control of virtually any entity or person whatsoever may be subject to classification, providing: "National agencies … shall be enabled to classify and declassify information owned by physical and juridical persons of the Republic of Uzbekistan. Enterprises, agencies, organizations, social associations, and individuals that possesses information containing state secrets, *shall apply, concerning the necessity of classifying thereof, to the agencies for protection of the state secrets*" (emphasis added).[10] Finally, Article 10 provides that any citizen of Uzbekistan who "owns [state] secrets" has a duty to "protect" such secrets, and that the "head officials of … organizations and associations" are charged with the "[r]esponsibility for guarding state secrets".

Analysis

The Law clearly contemplates that private entities – at a minimum non-governmental organisations and individuals in their private capacity – may be in possession of information containing State secrets. Moreover, any such private organisation or individual bears the burden of ensuring the protection of any information constituting State secrets, since it must "apply" to the applicable national agency to find out if the information must indeed be classified. This obligation is a particularly serious one, in light of the fact that Article 10 imposes liability on anyone or any organisation which discloses State secrets or which loses documents or items containing State secrets.

To the extent that private entities and individuals legitimately possess information, the obligation to have such information classified and protected, including by not disclosing it, is highly problematical, particularly in light of the fact that almost any information may be subject to classification under the Article 3 scheme. NGOs working in the public interest will simply be unable to gather and maintain important information without continually needing to "apply" to the applicable national agency for clearance as to its use. Once having applied, they will be at the mercy of the national agency with respect to whether they may use it for public purposes. These obligations, not found in the classification laws of most other countries, appear to be simply another means by which the authorities will be able to monitor and control the

[10] We are informed that the Russian term which in our translation is rendered "social association" in fact refers to non-governmental organisations which are private entities. We are further informed that the terms "enterprise" and "organisation" could refer to private entities as well.

activities of those who would work in the public interest.[11] Such a system is not only in flagrant violation of international guarantees of freedom of expression, but it is clearly inimical to the public interest.

Recommendation:

- The Law's classification regime should apply only to information owned by or in the control of public bodies and their employees.

III.6 Re- and De-Classification

Article 7 provides that "grounds for classification shall be subject to a quinquennial review" in accordance with procedures to be developed by the Cabinet of Ministers.

Analysis

While a 5-year period for such review is not unreasonable, our view is that the time limit should ideally be somewhat shorter. We note, for instance, that the Hungarian classification law provides for review every three years and the Bulgarian law every two years, and we recommend a similar timeframe here. We note that this does not mean that the information will necessarily be re- or declassified; merely that its classification will be reviewed to assess whether or not it is still appropriate.

Recommendation:

- Consideration should be given to amending Article 7 to provide for a review of classified materials within a shorter period of time.

III.7 Liability

In addition to responsibilities already discussed, Article 10 imposes liability for "individuals guilty of disclosure of state secrets [and for the] loss of documents or items containing them", as well as for "undue classification of the information".

Analysis

The creation of liability for the "undue" classification of information – by which we understand, the classification of information which in fact should remain information to which all should have access – is very welcome.

On the other hand, we believe that the Law fails to provide sufficient protection against liability. First, to combat the prevailing culture of secrecy and to help expose wrongdoing, the Law should provide protection to whistleblowers who release classified information as long as they act in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing. Wrongdoing for these purposes should include the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body. Protection should also be afforded to those who release information disclosing a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not. The absence of such protection in this Law is particularly a matter of concern, given that the FOI Law also lacks such protection.

[11] As if to confirm the justification of this fear, Article 9 requires the National Security Service to "check implementation of the secrecy procedures in … organizations and associations".

Recommendation:

- The Law should provide protection to whistleblowers, unless such protection is already provided in another law, such as the FOI Law.

III.8 Abrogation of Other Rights

Article 8 of the Law provides that any citizen who "deals or has dealt with information classified as State or military secret may be, upon his written consent, be subjected to restrictions on his rights until expiration of the term of classification, but not exceeding five years".

Analysis

Article 8 effectively grants the authorities the power to impose apparently unlimited restrictions on the rights of those who deal with classified information. While some such limits may be appropriate, these should be set out directly in the legislation. At a minimum, the Law should set clear parameters for the types of restrictions that may be appropriate. Such parameters should include a form of public interest override, analogous to whistleblower protection, so that disclosing information in the public interest may not lead to sanction.

Recommendation:

- The system of restrictions and sanctions relating to those who deal with classified information should be set out directly in the Law and should include a form of public interest override, as described above.