



Republic of Moldova

CONSTITUTIONAL COURT

JUDGMENT

ON THE INTERPRETATION

**of Article 34 para. (3) of the Constitution of the Republic
of Moldova**

(access to information)

(Application No. 23b/2015)

CHISINAU

22 June 2015

In the name of the Republic of Moldova,
Constitutional Court composed of:

Mr. Alexandru TANASE, *president*,

Mr. Aurel BAIESU,

Mr. Igor DOLEA,

Mr. Victor POPA, *judges*,

With participation of Mr. Teodor Papuc, *registrar*,

given the application lodged on 27 May 2015

and registered on the same date,

having examined the application referred to in a plenary
public sitting, given the file documents and proceedings,

Deliberating in close plenary session

Delivers the following Judgment:

PROCEEDINGS

1. The case originated in the application lodged with the Constitutional Court on 27 May 2015, under Articles 135 para.(1) let.b) of the Constitution, 25 let.g) of the Law on the Constitutional Court and Art. 38 para. (1) let.g) of the Code of Constitutional Jurisdiction, by Members of the Parliament Mihai Ghimpu and Valeriu Munteanu on the interpretation of Article 34 para.(3) of the Constitution of the Republic of Moldova.

2. The authors of the application have requested the Constitutional Court to interpret Article 34 para. (3) of the Constitution to identify the limits of restriction of right of access to information.

3. Also, the authors of the application have requested the Court to deliver its judgment on the interpretation of provisions of Article 34 para.(3), on the constitutionality of assigning the word 'secret' to Government Decision No.938 of 13 November 2014 on ensuring macroeconomic stability in the context of regional conjuncture.

4. By the decision of the Constitutional Court of 2 June 2015 the application had been declared admissible, without any prejudices to the merits.

5. In preparing the applications for examination, the Constitutional Court has requested the opinions of the Parliament, President, and Government of the Republic of Moldova.

6. The authors of the application were not present in public hearing of the Court. The Parliament was represented by Mr. Ion Creanga, Head of Legal Division of Parliament Secretariat, and the Government was represented by Mr. Nicolae Esanu, Deputy Minister of Justice.

IN FACT

7. The Constitution of the Republic of Moldova guarantees the right to information in Article 34. According to the first paragraph of this Article, the right of a person to have access to any kind of information of public interest shall not be curtailed.

8. At the same time, in accordance with Article 34 para. (3) of the Constitution, the right of access to information shall not prejudice neither the measures taken to protect the citizens nor the national security.

9. Law No. 245 of 27 November 2008 on the State Secret establishes the categories of information that is considered state secret and regulates the principles of defining certain pieces of information as state secret and the procedure to appeal the decisions of declaring the information as a state secret.

10. On 13 November 2014, the Government of the Republic of Moldova adopted the Decision No.938 on ensuring macroeconomic stability in the context of regional conjecture by providing MDL 9,500 million to ensure the stability of financial system and issuance of state guarantees for emergency loans issued by the National Bank of Moldova, classifying it as 'secret'. This Decision was state secret until 14 April 2015, when it was declassified and published in the Official Gazette of the Republic of Moldova No. 93/180.

PERTINENT LEGISLATION

11. The relevant provisions of the Constitution (M.O., 1994, No.1) are the following:

Article 1

The State of the Republic of Moldova

'[...]

(3) Governed by the rule of law, the Republic of Moldova is a democratic State in which the dignity of people, their rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values that shall be guaranteed.'

Article 23

Right of Every Person to Be Acknowledged on his/her Rights and Duties

'[...]

(2) The State shall ensure the right of every individual to be aware of his/her rights and duties. For this purpose the State shall publish and make accessible all the laws and other normative acts.'

Article 34

Right of Access to Information

‘(1) The right of a person to have access to any kind of information of public interest shall not be curtailed.

(2) Public authorities, according to their assigned competence, shall be committed to ensure that citizens are correctly informed both on public affairs and issues of personal interest.

(3) The right of access to information shall not prejudice neither the measures taken to protect the citizens nor the national security.

(4) The State and private public media shall be bound to provide the correct information of the public opinion.

(5) The public media shall not be subject to censorship.’

Article 54

Restrictions on the Exercise of Certain Rights or Freedoms

‘(1) In the Republic of Moldova no law may be adopted which might curtail or restrict the fundamental rights and freedoms of the individual and citizen.

(2) The exercise of the rights and freedoms may not be subdued to other restrictions unless for those provided by the law, which are in compliance with the unanimously recognized norms of the international law and are requested in such cases as: the defence of national security, territorial integrity, economic welfare of the country, public order aiming at preventing mass riots and crimes, protection of the rights, freedoms and dignity of other persons, prevention of disclosing confidential information or the guarantee of the power and impartiality of justice.

(3) The provisions under para. (2) does not allow the restrictions of the rights laid down in Articles 20-24.

(4) The restriction has to be proportionate to the situation that caused it and shall not affect the existence of the right or freedom.’

12. The relevant provisions of Law No. 245 of 27 November 2008 on State Secret (M.O., 2009, No. 45-46, Art.123) are the following:

Article 1

Terms

‘The following terms shall be used in this law:

[...] *state secret - information protected by the state in the areas of its national defence, economy, science and technology, external relations, state security, legal order insurance and activities of public authorities whose unauthorized disclosure or loss can harm the interests and/or the security of the Republic of Moldova*

Article 2

Purpose and Scope of the Law

‘(1) The present Law sets the legal framework for state secret protection in order to ensure the interests and/or security of the Republic of Moldova. The state secret protection is carried out by organizing the national system of state secret protection.

[...].’

Article 6 Principles of defining information as state secret and classifying it as secret

‘(1) Defining information as state secrets and its classification as secret is done in compliance with principles of legality, reasoning and suitability.

(2) The legality of defining information as state secret and its classification as secret consists in its compliance with the provisions of Articles 7 and 8 of the present Law and the legislation on state secrets.

(3) Reasoning the definition of information as state secret and classifying it as secret consists in establishing the rational character of classifying some concrete information as secret, of the eventual economic consequence as well as of other nature, on the basis of the major interests of the state, society and person.

(4) Suitability of defining information as state secret and its classification as secret consists in setting restriction on access and dissemination of this information as from the moment of their elaboration (reception) or beforehand’.

Article 7 Information Defined as State Secret

‘(1) Under the present Law, the information defined as state secret is:

1) In the sphere of national defence:

a) the content of the strategic and operative plans, the content of the documents related to battle command on preparation and holding operations, strategic, operative and mobilizing development of the troops, other important indicators that characterize the organization, effective force, dislocation, preparation for battle and mobilization, armament and technical and material supplies of the Armed Forces of the Republic of Moldova;

b) development directions of certain types of armament, military and special equipment, their quantity and technical and tactical characteristics, organization and production technologies, scientific works, scientific research works and experimental works on construction in the field of creation of new models of armament, military and special equipment and their updating, other works planned or carried out for the interests of national defence;

c) forces and means of civil protection, capacity of the localities and other separate units designed for the protection, evacuation and dispersal of population, insuring vital social activity of the population and the production activity for the legal entities during the state of war, siege or emergency, as well as in case of exceptional situations;

d) dislocation, destination, level of preparation and defence of the units of special regime, their design, building and exploitation, distribution of land, subsoil and water for such sites;

e) geodesic, gravimetric, cartographic and hydrometeorological data and characteristics that are important for the national defence;

2) In the field of economy, science and technology:

a) plans and mobilization potential of the national economy, reserve and volume of deliveries of raw materials and strategic materials, generalized data about the nomenclature and the levels of stocks, the volume of deliveries, allocation, depositing, refreshing, placing and the real volume of state material reserves;

b) the usage of transportation, communication, the potential of other branches and units of the national infrastructure in order to ensure the defence capacity and state security;

c) plans, content, volume, funding and realization of state orders to ensure the needs of state defence and security;

d) plans, volume and other important characteristics of extraction, production and selling of some strategic types of raw material and production;

e) operations related to producing monetary signs and state value titles, their keeping and protection against falsification, issuing, exchange and their withdrawal from the circuit, other special measures related to the state financial activity;

f) scientific works, scientific research works, experimental works on construction and design, that can serve as a basis for the creation of advanced technologies, new types of production, technological production and processes that are important for the national defence and economy or that have an essential influence on the external economic activity, state interests and/or security;

3) in the field of foreign relations:

a) foreign political activity, external economic relations of the Republic of Moldova, whose premature disclosure may harm the interests and/or security of the state;

b) military, technical - scientific and other type of cooperation of the Republic of Moldova with foreign states and international organizations, if the disclosure of this information will, doubtlessly, harm the state interests and/or security;

c) external financial, crediting and currency activity of the state, if the disclosure of this information will harm the state interests and/or security;

4) in the field of state security and legal order on:

a) the effective force, content, plans, organization, funding and strategic supplies, forms, tactics, methods, means and the results of the intelligence, counter-intelligence, operative investigation operations;

b) persons who secretly collaborate or have previously collaborated with the bodies that carry out intelligence, counter-intelligence and operative investigation operations;

c) forces, means and methods to ensure state protection of the injured party, witnesses and other persons who assist in criminal proceedings;

d) guard of the state border of the Republic of Moldova;

e) plans, organization, funding, effective force, means and methods of ensuring the security of the persons who enjoy the state protection, as well as the guarding of their work places and their houses;

f) systems of governmental telecommunication and other types of networks of electronic telecommunications intended for the needs of public authorities, national defence, state security and public order maintenance;

g) organization, content, status and plans for the development of cryptographic and technical protection of the state secrets, content and the results of scientific researches in the field of state secrets protection;

h) systems and means of cryptographic protection of state secrets, design, production, production technologies and their usage;

i) state ciphers, elaboration, creation, production technologies and their usage;

j) organization of a secret regime within the public authorities and other legal entities, plans and other measures in the field of state secrets protection;

k) other methods, forms and means of state secret protection;

5) in the field of activity carried out by public authorities:

a) the content of the extracts, commentaries, projects, their parties, any other document of internal usage of the public authority, whose disclosure may lead to the disclosure of information defined as state secret;

b) the activity of elaboration, amendment, completion, finalization of the official acts, other procedures, activities carried out by the public authorities regarding the data collection and processing, that are to be defined as state secrets according to the legislation;

c) the activity of consultation within and between public authorities in the process of settling problems related to the fields where the information is defined as state secrets.

(2) Justifying the need to define information as state secrets, in compliance with the principles of defining information as state secrets and classifying them as secrets, is the duty of the public authorities and other legal entities that developed/received such information.'

Article 8

Information that is not defined as state secret

'(1) The following data cannot be defined as state secrets and cannot be classified:

a) violation of human rights and fundamental freedoms of citizens;

b) environment conditions, quality of food products and household appliances;

c) accidents, catastrophes, dangerous natural disasters and other exceptional events that endanger the safety of citizens;

d) public health, living standards of the population, including food, clothing, medical assistance and social insurance, social-demographic indicators;

e) health status of persons who hold public positions;

f) cases of law infringement committed by public authorities and high officials within these authorities;

g) real situation in the field of education, culture, trade, agriculture, as well as the legal order.

(h) Other information in accordance with national legislation and international treaties to which the Republic of Moldova is a party shall not be determined and classified as state secret.

(2) Classification of information as secret is prohibited in case it limits the access to information of public interest, it has a negative influence over the implementation of state programs and sartorial programs for the social-economic development or it restricts competition of economic agents.’

Article 17 Appealing the Decision on Classification of Information as Secret

‘(1) Citizens and legal entities are entitled to address to officials who classified the information with a reasoned proposal to declassify this information. The abovementioned officials are bound, within a month, to provide a written answer to the citizen or the legal entity concerning this request.

(2) Officials who evade examining the requests are liable according to the legislation.

(3) Decision to classify the information as secret can be appealed in the 15 hierarchically higher institution or official, in the inter-departmental Commission for State Secret Protection or in the Administrative Contentious Court. In case of denial of the request submitted in the hierarchical order, the citizen or the legal entity is entitled to appeal the decision of the hierarchically higher institution or official in the Administrative Contentious Court. If one of these bodies finds the classification as groundless, this information is to be declassified according to the procedure set by the present law.

(4) The administrative contentious court examines the request according to the provisions of the Law on Administrative Contentious No. 793-XIV of 10 February 2000.’

13. The relevant provisions of the Universal Declaration of Human Rights (adopted in New York on 10 December 1948 and ratified by the Republic of Moldova by Parliament Decision No. 217-XII of 28 July 1990) are the following:

Article 19

‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’

14. The relevant provisions of the International Covenant on Civil and Political Rights (adopted by the UN General Assembly on 16 December 1966 and ratified by the Republic of Moldova by Parliament Decision No.217-XII of 28 July 1990) are the following:

Article 19

‘1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- a) For respect of the rights or reputations of others;
- b) For the protection of national security or of public order, or of public health or morals.'

15. The relevant provisions of the United Nations Convention against Corruption (adopted in New York on 31 October 2003 and ratified by the Republic of Moldova in the Law No.158 of 6 July 2007; M.O., 2007, No.103-106, Art. 451) are the following:

Article 10 Public reporting

'Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. [...]'

IN LAW

16. Given the content of the application, the Court notes that it refers in the essence to the limitation of the right to information by invoking the existence of a state secret.

17. In this sense, the Court notes that the application refers to more interconnected constitutional principles, such as rule of law, democracy, guarantee of fundamental rights and freedoms and especially, the right to information.

A. ADMISIBILITY

18. In accordance with its decision of 2 June 2015, the Court observed that under Article 135 para. (1) let. b) of the Constitution, Article 4 para. (1) let. b) of the Law on the Constitutional Court and Article 4 para. (1) let. b) of the Code of Constitutional Jurisdiction, the application on interpretation of Constitution falls under the competence of the Constitutional Court.

19. Articles 25 let. g) of Law on the Constitutional Court and 38 para. (1) let. g) of the Code of Constitutional Jurisdiction grants MPs the right to submit applications to the Constitutional Court.

20. The Court notes that the aspects raised by the authors of the application have not previously been a matter of interpretation in the court of constitutional litigation.

21. The Court considers that the application cannot be rejected as inadmissible and that there is no ground for ceasing the process, according to the provisions of Article 60 of the Code of Constitutional Jurisdiction. The Court notes that the application has been lodged within the legal framework and that it is in its competence to rule on the interpretation of Article 34 para. (3) of the Constitution. Therefore, the Court will further examine the merits of the application.

22. At the same time, with regard to constitutional review of the classification of the Government Decision No. 938 of 13 November 2014 under Article 34 para. (3) of the Constitution, the Constitutional Court would like to state the following.

23. The Court notes that the above mentioned Government Decision that has accepted the proposal of the National Committee on Financial Stability

to allow the National Bank of Moldova to grant, when necessary, emergency loans to licensed banks to stabilize the financial system was declassified by being published in the Official Gazette of the Republic of Moldova No. 93/180 of 14 April 2015. Hence, the Court notes the lack of object of notification in this matter.

24. Therefore, in the interpretation of Article 34 para. (3) of the Constitution, the Court will analyse the importance of the right to information in light of a democratic society evolution.

25. Also, the Court will take into account the case-law of the European Court of Human Rights and relevant acts of international organizations.

A. THE MERITS

1. Arguments of the author of application

26. According to the authors of the application, it is natural for the law to provide certain restrictions and to list the cases when the information cannot be made public, because it may prejudice the rights, legal interests and protection measures of citizens. These restrictions are set expressly in Article 54 para. (2) of the Constitution. Also, Article 7 para. (1) of the Law No. 245 of 27 November 2008 on state secret stipulates exhaustively the information defined as state secret.

27. The authors of the application state that regardless of the existing norms, the authorities classify the information that does not fall under the incidence of mentioned restrictions.

2. Arguments of the authorities

28. In its opinion, the Parliament considers that the restrictions imposed by Article 34 para. (3) of the Constitution have the purpose to avoid situations that could bring moral or material damage to a person or overall interests of the state. Hence, the protection measures of citizens is understood as protection of their legal rights and interests, while the national safety implies the status of legality, balance and social, economic and political stability necessary for state's existence and development, as a sovereign and independent, unitary and indivisible state to maintain the public order and exercise freely the rights, fundamental freedoms and obligations of citizens.

29. The President of the Republic of Moldova states in its opinion that there are a number of situations when the free access to information, and especially the publication of such information, may bring serious moral or material damage to a person or the state's interests in general. Also, the President considers that the constitutional and legal norms provide the citizens with the access to information in the same manner as the information providers, and when the citizens feel their rights are restricted, they may appeal the actions or inactions of information providers through extrajudicial or judicial remedies. At the same time, the President affirms that assigning the title 'secret' to a normative act is not a constitutional matter.

30. In its opinion, the Government considers that the application of the authors does not refer to the interpretation of Article 34 para. (3) of the Constitution, but directly to the act of assigning the 'secret' classification to a Government Decision. Hence, the application does not mention legal circumstances that interpret the constitutional provisions. The Government underlines that the applications on the interpretation of Constitution should not have cognitive purposes, but should contain certain indicators of different understanding of constitutional provisions by certain subjects.

3. Findings of the Court

3.1. General Principles

31. The Court mentions that according to Article 34 para. (1) and (2) of the Constitution, the right of a person to have access to any kind of information of public interest shall not be restricted. Public authorities, according to their assigned competence, shall be committed to ensure that citizens are correctly informed both on public affairs and issues of personal interest.

32. The Court notes that the right of access to any type of information refers to the manner, methods, and conditions of state affairs administration and the right to disseminate such information.

33. In the Judgment No. 19 of 16 June 1998, the Court noted that the right to information is a fundamental right of the person, because the development of the person in the society, the exercise of freedoms stipulated by the Constitution, including freedom of thought, opinion, creation, public expression through words, images or other possible manner implies the possibility to receive information about social, political, economic, scientific, cultural life etc.

34. The Court notes that the right to information entitles one to request information from public authorities and institutions. This right has two aspects: right to request and right to receive information.

35. In this sense, the Court mentions that any public authority and/or institution has to provide the requested information as long as there is no legal reason to refuse such request.

36. The Court notes that the right to information includes the following elements:

- right of the person, organisation or legal entity to request information of public interest from public authorities and institutions without proving the legal interest of the request;
- right of the person to request personal information from public authorities and institutions;
- obligation of public authority and institution to answer or provide the requested information, a fact that implies the existence of request and *timeframe management mechanisms* to reply to these requests;
- existence of some exceptions that would permit not to submit certain categories of information. These exceptions include defence of national security, international relations, private life of persons, commercial confidentiality, public order and law enforcement, as well as the refusal to submit information obtained under confidential conditions or that represent internal discussions. To be invoked, *the exceptions should justify the existence of a damage to public interest, if the information was to be communicated*;
- existence of some *appeal mechanisms* for information seekers, if public authorities and institutions refuse to submit;
- existence of some *external remedies*, in case of a refusal to submit information (usually ordinary courts);
- condition that public authorities and institutions *should communicate from office* certain types of information about their structure, rules and activities.

37. The Court noted that the right to information is a **prerequisite to exercise other rights**, and namely, political, economic and social rights; right to private life protection, right to take part in public affairs, right to a fair trial, etc.

38. With regard to political rights, the Court mentions that the possibility of individuals, groups of interest and organizations to participate actively in political debates that decide on issues on public agenda, as well as their possibility to introduce new issues on the same agenda, are closely related to their capacity to obtain relevant information.

39. The Court reiterates in this sense the statement of the European Court in the case of *Társaság a Szabadságjogokért v. Hungary*, and namely that the refusal to grant access to information may violate the **right to freedom of expression**, guaranteed by Article 10 of the Convention. In this case, the refusal to grant access to a non-governmental organization to inform a Member of Parliament submitted to the Constitutional Court on constitutional review of some criminal laws on drug consumptions was based on the existence of personal data of the parliamentarian in that application. The European Court noted that the NGOs that activate as one of society's 'watchdogs' benefited from the same protection provided by Article 10 as the press and the intention of the applicant was to contribute with formation in public debate (paragraphs 26 and 27).

The interference was appreciated as unjustified, and the Court considers that it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights, alleging that their opinions on public matters are related to their person and therefore constitute private data which cannot be disclosed without consent (paragraph 37).

40. As for the relation between the right to information and **the right to private life protection**, Court reminds the statement of the European Court in the case *Guerra v. Italy*, where the omission of the state authorities to communicate information on the risks of living in a city exposed to environmental dangers had created premises to violate Article 8. Similarly, especially in the case *McGinley & Egan v. the United Kingdom*, where the applicants tried to prove the link between their health status and alleged exposure to radiation during their military service, the Court noted the denying the access of applicants to certain sections of their medical records and radiation reports in the air equalled to violation of Article 8.

41. The Court observes that the Fundamental Law contains many provisions meant to promote the participation in **governing affairs**, and namely the right to participate in public affairs administration – which results from Articles 2 para. (1) and 39 – and the right to vote and the right of free elections guaranteed by Article 38 of the Constitution.

42. The Court underlines that one of the rationale of the right to information at constitutional level is that a functional democracy implies the existence of an informed electorate. The participative democracy models require the citizens to be well informed to be allowed to participate effectively in the governance.

43. The Court observes that the relation between the right to information and the **right to participate in public affairs** was recognized in international litigation in the field of human rights. In the case of *Gauthier v. Canada*, the UN Commission on Human Rights based on Article 25 of the International Covenant on Civil and Political Rights corroborated with the right to freedom of expression (paragraph 13.4), when considered the application of a journalist who was denied the access to amenities provided to the press in the parliament. The justification of the decision of the Commission was that the citizens should have, especially via the mass media, a wider access to information and should benefit from the opportunity to disseminate the information about the activity of elected entities and their members.

44. The Court notes the fact that the case-law of the European Court recognizes the relationship between the right to information and the **right to a fair trial** in civil context. In the case of *McGinley and Egan v. the United Kingdom*, the European Court admitted that the interference in the right to a fair trial may begin by restricting the access to information if the state prohibits willingly the access of the applicants and denies falsely the existence of documents in its possession that would be useful during the trial. Hence, their right to a free trial is denied.

45. As for the relationship with the **right to life**, in the case of *Osman v. United Kingdom*, the European Court established interference in the right protected by Article 2 when the state authorities know about the existence of a real and imminent risk to the life of people and refuse to inform them. And in the case of *Oneryildiz v. Turkey* was established that the local authorities of a city failed to inform the citizens about the possibility of an explosion

caused by the accumulation of methane gas, although they knew about it. As a result of explosion caused by landslide, 39 people died. The European Court noted the violation of the right to life.

46. The Court observes that the right to information may be a condition in achieving **economic, social, and cultural rights**. Social insurance system should ensure the rights of persons and organizations to receive and disseminate information in a more understandable and transparent manner in all fields of security.

47. In this sense, the European Committee for Social Rights mentioned in the case of *Maragopoulos Foundation for Human Rights v. Greece* that the Greek government failed to fulfil its obligations to present information on pollution caused by extraction of lignite, which violated the rights protected by the European Social Charter. The Committee stated the violation of the right to health (Article 11) and right to safe and healthy working conditions (Article 3). The guarantee of the right to health obliged the Greek government to inform and educate the public about the environment issues.

48. As for the right to safe and healthy working conditions, the Committee states that the Greek government, according to Article 3 of the European Social Charter, had the obligation to provide precise and plausible explications and information on labour accidents and measures to monitor the implementation of relevant health and safety regulations.

49. The Court notes that according to Article 54 para. (2) of the Constitution, the exercise of the rights and freedoms may not be subdued to other restrictions unless for those provided by the law, which are in compliance with the **unanimously recognised norms of the international law and are requested in such cases as: the defence of national security, territorial integrity, economic welfare of the country, public order aiming at preventing mass riots and crimes, protection of the rights, freedoms and dignity of other persons, prevention of confidential information disclosure or the guarantee of the power and impartiality of justice**.

50. In this context, the Court held that restriction of the right to information should comply with these legitimate purposes.

51. The Court states that Article 6 of the Law on state secret stipulates the principles to define the information as a state secret and to classify such information.

52. The Court mentioned that by assigning the title of 'state secret' to a document or information, the citizens are deprived **totally** from the right to information about those documents.

53. The Court underlines as a principle, the more is the interference in the case of a constitutional right, the more justified the grounds it relies on should be.

54. Hence, the public authorities and institutions should justify the existence of the legitimate purpose and the relationship between the document and information classified as state secret by pursuing this legitimate purpose.

55. In this sense, similar to Article 6 of the Law on state secret, the *Johannesburg Principles on national safety, freedom of expression and access to information* adopted on 1 October 1995, develop a typical proportionality test which foresees as a first phase – with regard to the need to limit the right to information due to national security – that public authorities have to prove that the disclosure of this information threatens severely the legitimate interest related to national security. Then, it is

followed by the phase that ascertains whether the disclosure of information (classification as state secret) is the most possible favourable procedure to protect this interest. Finally, the decisive phase stipulates that non-disclosure of the information is compatible with the principles of democracy and prevalence of the right.

56. The Court mentions that when the information is defined as state secret, the authorities will apply the proportionality test mentioned *supra*, in evaluating the proportionality of classified information in the case of all constitutional legitimate purposes. **The circumstance implies directly the fact that when this measure is challenged before Administrative Contentious Courts, they should not show judicial deference but proceed with the proportionality test.**

3.2. Application of principles in this case

57. The Court found out that according to Article 34 para. (3) of the Constitution, the right to information shall not prejudice neither the measures taken to protect the citizens nor the national security. Therefore, these provisions stipulate that the access to information may be limited due to the need to ensure protection measures of citizens or protection of national security.

58. As for the expression ‘national security’, there are *two aspects*: 1) right of access to information related to national security; and 2) right to communicate information relating to national security.

59. As for the first aspect, the Principle 2 of the Johannesburg Principles stipulates that ‘a restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a **country's existence or its territorial integrity against the use or threat of force**, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government’.

60. The actions directed against the state security that **represent a special danger** are listed in Article 4 para. (2) of the Law on State's Security No. 618 of 31 October 1995.

61. In the context of the above-mentioned, the Court notes that **restriction justified based on the purpose of national security protection is not legitimate, if it does not have a connection to national security.**

62. As for the second aspect, the Court underlines the fact that **no information may be disclosed, if it harms or might harm the legitimate interest of national security, except for the situation when the public interest to know the information outweighs the harm it might cause by information disclosure.** Hence, the information related to national security and public interest to know this information must be always carefully considered.

63. The Court mentions that according to Principle 15 of the Johannesburg Principles, no person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

64. With regard to the expression ‘protection measures of citizens’, the Court noted that it includes **all national positive and negative obligations of state authorities in time of peace and war to ensure the protection of**

population and its property under conditions of natural and ecological calamities, accidents and catastrophes, plant diseases, animal diseases, fires, as well as when modern destruction means are applied.

65. Two aspects of the access to information related to the protection measures of citizens and the right to communicate information regarding the protection measures of citizens may be taken into account in this case.

66. As for the first aspect, the Court mentioned that the activity of public authorities related to civil protection and safety of population in exceptional situations should be open to public opinion and the mass media. Also, public authorities are obliged to **ensure correct information of population through the mass media** about their level of protection, and in case of exceptional situations, about the type of danger, actions of population in existing situation and protection measures.

67. As for the second aspect, the interdiction according to which the communication of information should not prejudice the protection measures of the citizens refers to all information means that would mislead regarding civil protection and population safety in exceptional situations.

68. The Court underlines that the right to information is a multi-dimensional right. It serves many categories of individual and group interests.

69. The right to information represents an initial condition for public's participation in the democratic play. Access to information has important consequences for adequate functioning of a democratic regime.

70. The Court notes **that the democracy is based on citizens' consent, and the consent requires prior information of citizens about the issues of public interest, including regarding spending public money.**

71. The right of access to information is an important instrument to quantify the abuses, administrative errors, corruption and to exercise important social and economic rights.

72. The Court notes that without justified access to information or its presentation *ex officio*, the political system would not function openly, and the citizens would not be able to play their active parts in a democracy.

73. The Court declared the right to information as a national resource. The information kept by public authorities and institutions are not collected or created for the benefit of these entities, but for the benefit of the public.

74. The Court underlines that openness and transparency are recognised as essential part of modern governance. **The transparency is vital for supervising the activity of public authorities and institutions and represent constitutional dimensions.**

75. The Court mentions, in the context of the fight against corruption, that the guarantees of the right to information encourage transparency, and transparency attenuates corruption. For this reason, a government that acts in secret when a public interest is at stake, which does not justify the secrecy, is in full opposition with the purposes and the society designed by the constituent assembly.

76. The Court draws the attention of public authorities that in the decisions on information classification, they **should take into account first of all, the public interest regarding this information knowing.**

For these reasons, in accordance with Articles 140 of the Constitution, 26 of the Law on the Constitutional Court, 6, 61, 62 let. a) and 68 of the Code of Constitutional Jurisdiction, the Constitutional Court

DECIDES:

1. With regard to Article 34 para. (3) of the Constitution:

- restriction of the right to information may take place only if there is real and justified purpose for the protection of a legitimate interest regarding the protection of citizens or national security, and the public interest for such information does not prevail;

- any restriction of the access to information, including specific and limited categories of information that cannot be disclosed in order to protect the citizens or national security shall be envisaged by law and necessary in a democratic society to protect a legitimate interest;

- justification of the legitimate interest shall be based on the gravity of its harm, if such information is published, and the public authority should demonstrate that information disclosure would threaten severely the protection of citizens or national security.

2. The Constitutional Court will decide with discernment when to restrict the access to information in the acts of the Parliament, President of the Republic of Moldova and Government, in accordance with the requirements indicated in paragraph 1 of this decision.

3. This judgment is final, and cannot be subject to any kind of appeal. It shall come into effect on the date of adoption and shall be published in the *Official Gazette of the Republic of Moldova*.

President

Alexandru TANASE

Chisinau, 22 June 2015
JCC No. 19
Application No. 23b/2015