

November 3, 2003

VIA FACSIMILE

Prof. Ognian Gerdjikov
President, National Assembly of Bulgaria

Mrs. Anelia Mingova
Chairperson, Legal Affairs Committee, National Assembly of Bulgaria

Dear President Gerdjikov and Chair Mingova:

We write to express the concerns of the Open Society Justice Initiative regarding a legislative proposal, initiated by the Bulgarian government, which would make dissemination of classified information by anyone a serious crime. This proposal is inconsistent with international standards of freedom of expression and information, as well as the requirements of democratic openness, and we urge the Parliament to reject it.

The Open Society Justice Initiative is an international non-governmental organization dedicated to right-based law reform worldwide. The Justice Initiative, which is affiliated with the Open Society Institute, has extensive expertise in promoting and defending freedom of expression and information, including in many countries in Eastern Europe and the former Soviet Union.

We have been informed that the government wishes to introduce a new section in article 357 of the Criminal Code (section 357.3), which would make it a crime for anyone to disclose state secrets, under the threat of a six-year punishment. In addition to leaks by government officials, already covered by the existing article 357, the proposed measure would apply to disclosures by everyone else, including journalists and other social communicators. The bill makes no exceptions for disclosures of classified information that serve the public interest or cause no or negligible harm to national security interests. Such an absolutist approach to protection of classified information is inconsistent with Bulgaria's international obligations and European standards.

International law and practice require that protection of classified information, especially through criminal sanctions, take due account of the fundamental rights of freedom of expression and information and the values of vibrant debate, including on matters of national security. This is the prevailing approach in the democratic world, including among NATO members. In particular, an increasing number of countries refrain from punishing good faith publications of state secrets by journalists and other social researchers if such disclosures cause no significant harm to national security or serve a greater public interest in openness. As the German Constitutional Court has noted, "the necessity of military secrecy for state security and the

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The Open Society Justice Initiative is a joint initiative of Open Society Institute, New York and Open Society Institute, Budapest.

400 West 59th Street, New York, New York 10019, USA ■ Tel: 1 (212) 548-0600 ■ Fax: 1 (212) 548-4662

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freedom of the press are not mutually exclusive principles. Rather, they are complementary, in that both are meant to preserve the [democratic state].”¹

A similar approach has been adopted by the European Court of Human Rights, whose authoritative interpretation of the European Convention on Human Rights is binding on Bulgaria. The European Court has long held that the public has a fundamental right to receive information and ideas, including on matters of national security, and that the media, in its capacity of “public watchdog,” has a corresponding duty to inform the citizenry on such matters.²

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information have also addressed the issue explicitly.³ Principle 15, General Rule on Disclosure of Secret Information, provides:

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.

The Bulgarian government’s proposal overlooks the principles summarized above. Government officials have suggested that the new criminal provisions may be required by NATO’s rules on protection of classified information shared among its member countries. While NATO regulations on these matters are themselves classified, it is unlikely that they would require states to protect such information through criminal sanctions that apply generally and in such overbroad fashion to all persons, including journalists. At least one NATO member, the United States, has no general laws that criminalize, as the Bulgarian proposal would, disclosure of state secrets of all kinds by every private person.

Recommendations

For the reasons outlined above, *we strongly recommend that the proposed article 357.3 of the Criminal Code be rejected*. The Bulgarian government has simply failed to make the case that its current laws are insufficient to protect national security.

If a decision is nevertheless made that the section at issue be adopted in some form, we recommend that it incorporate the following principles, which draw upon international standards and best state practice in this area of law:

1. It should *not* be a crime for *anyone* to divulge classified information unless he/she knew or had reason to know, at the relevant time, that the information was:

¹ 20 BVerfGE 162 (1966) (*Der Spiegel Case*), as cited in Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed. (1997), at 400.

² See, among other cases, *Observer and Guardian v. United Kingdom* (1991), 14 EHRR 84, para. 59 (also known as the *Spycatcher* cases).

³ The Johannesburg Principles were adopted in 1995 by a group of experts in international law, national security, and human rights. According to the document’s Introduction, the principles are “based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, *inter alia*, in judgments of national courts), and the general principles of law recognized by the community of nations.”

- (a) lawfully classified;
 - (b) divulged to him/her in breach of a duty of confidentiality; and
 - (c) sufficiently sensitive that its publication would be likely, considering all circumstances of the publication, to cause such *serious harm* to national security interests
 - (d) that would outweigh any *public interest* benefits resulting from the publication.
2. Irrespective of the above, the person should not be held liable if the divulged information did not, *in fact*, cause serious harm, or a strong likelihood of serious harm, to national security.
 3. In a criminal trial, the prosecution must bear the burden of proving all of the above, including the fact that the defendant knew or had reason to know that 1(a) through (d) applied.
 4. The punishment for any criminal disclosures should be proportional and should not create undue chilling effects on future, legitimate expression.

Applying these principles to the text of the government proposal, we note the following deficiencies:

* **Absence of Knowledge Requirement** – The proposed article 357.3 does not clearly restrict its application only to persons who divulge information *that they know to be classified*. If adopted in its present form, criminal penalties can be applied to persons who did not know or had no reason to know that they were publishing classified information.

* **No Breach of Duty Requirement** – The proposed article would impose liability even where the defendant *reasonably believed the source of the information was authorized to disseminate it*. There may be situations in which government officials or others in possession of classified information may be legally authorized, or pretend to be authorized, to divulge classified information – for example, if they believe the classification was unlawful in the first place or has become redundant with time. Exposure of information that may have been unlawfully classified, to cover up wrongdoing or for some other unlawful purpose, has a long tradition in democratic societies and should be encouraged.

* **Lack of Balancing** – The proposal would impose liability even where *disclosure is not likely to cause, or does not actually cause, serious harm and where there is substantial public interest in disclosure*. Under prevailing international standards, it is legitimate for the media and others in a democracy to disclose lawfully classified information if the disclosure serves sufficiently strong public interests and causes no serious and irreparable harm to national security. National security interests cannot automatically prevail over the fundamental need for a free flow of information and opinions; the two competing interests must be carefully balanced against one another.⁴

⁴ Consider the German Constitutional Court's elaboration of this principle in the seminal *Der Spiegel* Case: "[The courts] must balance the dangers to the security of the country that may arise from the publication [of state secrets] against the need to be informed of important events, even those in the field of national defense. In this sense, [freedom of expression] exercises a basic limiting influence on the construction of the penal statute." *Der Spiegel* Case, *as cited* in Kommers, note 1 above, at 400. The principles developed by the German Constitutional Court have been explicitly incorporated into a number of German statutes.

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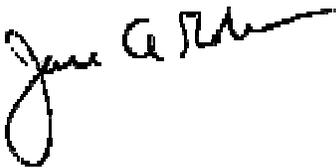
The absence of any balancing requirement is particularly troubling in light of the overly broad definitions of what constitutes classifiable information under Bulgaria's 2002 Law on the Protection of Classified Information. The lack of sufficient guarantees against unchecked over-classification, coupled with the proposed criminal sanctions for disclosure of any such secrets, irrespective of their sensitivity and public value, would create serious threats to freedom of expression and the media in Bulgaria.

* Disproportionate Punishment – The maximum punishment of six years envisaged by the current proposal would constitute an unnecessarily harsh and *disproportionate sanction*, especially in cases involving journalists and other social communicators. Government officials owe a special duty of confidentiality to their employer, the state, which sets them apart from private citizens, including media professionals who have different responsibilities to the public. If adopted, this proposal's penalties should reflect these important distinctions.

In conclusion, we urge the Bulgarian Parliament not to adopt the proposed article 357.3 and, at a minimum, to amend it in accordance with the principles of international and European law outlined above. Both Bulgaria's sad history of secret government, and its current commitment to consolidating a democratic and open society, demand nothing less.

We would be happy to provide any needed technical assistance on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "James A. Goldston". The signature is written in a cursive style with a large, looping initial "J".

James A. Goldston

cc: All Members of the National Assembly of Bulgaria