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RIGHT TO INFORMATION: INTERNATIONAL STANDARDS, PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS AND NATIONAL REGULATION DURING WARTIME

Kyiv, October 2022

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This analytical review presents conclusions on Ukraine's compliance with its obligations to guarantee the right to information under the legal regime of martial law. Based on the decisions and approaches of the European Court of Human Rights, the overview assesses the degree of compliance of legislative regulation of state actions in the field of access to official information and open access information with the Constitution of Ukraine and approaches contained in international legal instruments. The material is part of the efforts of non-governmental experts of Ukraine to develop a policy aimed at strengthening democratic values in the context of armed aggression against the country. The findings can be used to monitor changes in legislation and regulations and the development of case law.

The overview was prepared by Tetiana Oleksiiuk, a representative of Ukraine in the Working Group on the Council of Europe Convention on Access to Official Documents (Tromsø Convention).

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Introduction

With no exaggeration, the situation in Ukraine resulting from the full-scale aggression of the Russian Federation against our independent state in February 2022 can be called unprecedented. Ukraine, a state with a high level of development of democratic institutions and significant achievements in ensuring human rights, is forced to confront a totalitarian regime, which, in addition to a powerful military machine, is armed with propaganda and infringement of civil rights and freedoms. The war has destroyed people's peaceful life, caused widespread destruction, slowed down progressive development, and, among other things, actualised the issue of ensuring the right to information as such, which directly affects the life and health of people. Balancing this right with such values as national security and protection of territorial integrity has become extremely important for public information administrators at all levels.

This analysis focuses on meeting three key conditions enabling restriction of the right to information:

1. the restriction must be established by law, must be clear and predictable;
2. restrictions are imposed to achieve a legitimate purpose; and
3. restrictions must be required in a democratic society, proportionate and not excessive.

The purpose of this analysis is to review the main challenges in access to information, as well as measures designed to form a balanced approach to providing the public with complete and timely official information along with the protection of other vital rights. The focus will also be on international standards that can serve as guidelines in finding solutions to balance the right to information with national security interests that are consistent with the rule of law and build trust between government and an active civil society. For the purposes of this analysis, the right to information will be considered not only as the right to access public (official) information, as provided for by the Law of Ukraine "On Access to Public Information"[1] and the Council of Europe Convention on Access to Official Documents[2] (Tromsø Convention), but also as the right to seek, receive and impart information in the sense of Article 19 of the International Covenant on Civil and Political Rights[3] and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

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1 Law of Ukraine No. 2939-VI of 13 January 2011 "On Access to Public Information". Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/2939–17#Text

2 Council of Europe Convention on Access to Official Documents of 18 June 2009. Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/994_001–09#Text

3 International Covenant on Civil and Political Rights of 16 December 1966. Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/995_043#Text

1. Overview of changes in the legislation of Ukraine on access to information in the context of the legal regime of martial law

Article 10 *of the Convention for the Protection of Human Rights and Fundamental Freedoms*[4] (European Convention on Human Rights), ratified by Ukraine in 1997, provides that "*everyone has the right to freedom of expression. This right shall include freedom to hold opinions and **to receive and impart information and ideas without interference by public authority** and regardless of frontiers.*"

Consequently, the European Court of Human Rights as an implementing body of the European Convention on Human Rights also adheres to the approach that the right to information should be protected as a component of the right to freedom of expression. Back in 1987, in its judgment in the case *Leander v. Sweden*, the European Court of Human Rights expressed its opinion on the scope of protection of freedom to receive information and ideas, noting that *"the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him."*[5]

The Constitution of Ukraine does not limit the right to information with the framework of freedom to expression, but guarantees the right of everyone to freely use and disseminate information. The norms of international treaties ratified by Ukraine and containing norms of direct effect, as well as special laws – the Law of Ukraine "On Information"[6] and the Law of Ukraine "On Access to Public Information" – promote and detail the rules of access to information, as well as procedures for restricting access to information if needed. This approach has ensured preconditions for further development of the right to information within the national legislation of Ukraine.

On a temporary basis, for the period of the legal regime of martial law, the Decree of the President of Ukraine No. 64/2022 of 24 February 2022 "On the Imposition of Martial Law in Ukraine"[7] introduced the possibility to restrict the constitutional rights and freedoms of a person and citizen provided for in certain articles, including Articles 30–34, 38, 39, 41–44, 53 of the Constitution of Ukraine. Thus, in particular, the right "…*to freely collect, store, use and disseminate information by oral, written or other means of his or her choice*" provided for in section two of Article 34 of the Constitution of Ukraine may be subject to restrictions.

4 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/995_004#Text

5 Leander v. Sweden Application no. 9248/81, p.74. Website of the European Court of Human Rights // https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Leander%20v.%20Sweden%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57519%22]}

6 Law of Ukraine "On Information". Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/2657-12#Text

7 Decree of the President of Ukraine No. 64/2022 of 24 February 2022 "On the Imposition of Martial Law in Ukraine". Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/64/2022#Text

With the beginning of the full-scale armed aggression, Ukraine officially notified the relevant international implementing bodies of its derogation from certain obligations under the *European Convention on Human Rights* and the *International Covenant on Civil and Political Rights*, including those related to the right to information[8]. Such notification gives Ukraine, as a party to these international agreements, the discretion to impose additional restrictions, which, however, must be reasonable, legitimate and required in the current situation.

>> **Ukraine as a party to international agreements has the right to independently impose additional restrictions on the collection, storage, use and dissemination of information, but these additional restrictions must be reasonable, legitimate and required in the current situation.**

In addition to the Law of Ukraine "On the Legal Regime of Martial Law"[9], Article 114–2 of the Criminal Code of Ukraine[10], the dissemination of information under martial law is regulated by a number of by-laws, for example, by the Resolution of the Cabinet of Ministers of Ukraine No. 263[11] of 12 March 2022. Along with other restrictions, martial law provides for the introduction of control over the content and dissemination of information in order to limit or prevent false information or publication of information that may threaten human life and health, as well as national security.

The analysis of the above laws and by-laws leads to a common observation by experts and non-government organizations[12] regarding the proper quality of legal norms. Individual provisions of the laws are not always consistent with each other, contain evaluative and insufficiently clear definitions, which can lead to differences in interpretation and arbitrary application.

During 2021, a group of experts, in coordination with the Verkhovna Rada Committee on Freedom of Speech, developed systemic amendments to the Law of Ukraine "On Access to Public Information" to eliminate the accumulated shortcomings and harmonise it with the Council of Europe Convention on Access to Official Documents ratified in 2020. However, before the full-scale armed aggression of the Russian Federation, the Parliament did not consider these changes. At the same time, the legislator's practice of amending the special law regulating access to information by including provisions in legislative acts on other areas of legal relations remained widespread. For example, at the end of January 2022, the Verkhovna Rada adopted the Law of Ukraine "On Amendments to Certain Laws of Ukraine on

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8 Notification under Article 4(3) on 28 February 2002 to Secretary General of the United Nations // https://treaties.un.org/doc/Publication/CN/2022/CN.65.2022-Eng.pdf

9 Law of Ukraine "On the Legal Regime of Martial Law". Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/389–19#Text

10 Criminal Code of Ukraine, Article 114–2. Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/2341–14#n3905

11 Resolution of the Cabinet of Ministers of Ukraine No. 263 of 12 March2022. "Specific issues of ensuring functioning of information and communication systems, electronic communication systems, public electronic registers under martial law". Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/263–2022-%D0%BF#Text

12 War in the digital dimension and human rights. Human rights platform. Analytical report covering the period from 24 February to 30 April 30 2022. // shorturl.at/bfF06

Clarifying the Tasks and Principles of Preparing and Waging National Resistance"[13]. This law introduced amendments to the Law of Ukraine "On Access to Public Information", which actually exempted certain categories of information on the management of budget funds from the rules on restricting access to information. Due to the inconsistency of terms and certain norms, this way of introducing amendments prevents civil society from influencing the discussion of these changes, and may also lead to an unreasonable and unjustified narrowing of the right of citizens to access information on the use of budget funds.

Civil society activists were also concerned about certain provisions of the Law of Ukraine No. 2259-IX of 12 May 2022 "On Amendments to Certain Laws of Ukraine on the Functioning of the Civil Service and Local Self-Government during the Period of Martial Law[14]". Article 2 thereof amended the Law of Ukraine "On the Legal Regime of Martial Law", in particular, regarding the rules for publishing draft acts of local self-government authorities in accordance with the Law of Ukraine "On Access to Public Information". This change has led to remarks not only in view of the regression in the struggle of local activists for access to draft decisions of local authorities (in particular, draft decisions on land disposal) as an effective means of combating corruption but also in view of the significant flaws in the legal technique.

Generalisation of case law on this issue is contained in paragraph 5.1 of the Resolution of the Plenary Assembly of the High Administrative Court of Ukraine No. 10 of 29 September 2016 "On the practice of applying the legislation on access to public information by administrative courts"[15]: "*As a rule,* ***public information is open****. Exceptions to this rule are established by law (section two of Article 1 of Law No. 2939-VI, section two of Article 20 of Law No. 2657-XII). This is Law No. 2939-VI. The provisions of Article 6 of Law No. 2939-VI establish the types of information with possible restricted access – confidential, secret and proprietary information (section one), and* ***a set of requirements, compliance with which is mandatory to restrict access to such types of information*** *(section two)".*

Public information shall be open, except for cases when it is classified as information with restricted access – confidential, secret or proprietary.

To sum it up, it is important to emphasise that **the Law of Ukraine "On Access to Public Information" is special in terms of legal relations in this area, and therefore the norms of all other laws that aim to define the specifics of certain categories of information or data collected or published by certain public authorities should be harmonised with this law**. All attempts to remove certain categories of information about the activities of public authorities from the scope of the Law of Ukraine "On Access to Public Information" lower democratic standards and are risky in terms of arbitrary restriction of access to information.

13 Law of Ukraine "On Amendments to Certain Laws of Ukraine on Clarifying the Tasks and Principles of Preparing and Waging National Resistance". Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/2024–20#Text

14 Law of Ukraine "On Amendments to Certain Laws of Ukraine on the Functioning of the Civil Service and Local Self-Government during the Period of Martial Law". Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/2259–20#Text

15 Resolution of the Plenary Assembly of the High Administrative Court of Ukraine No. 10 of 29 September 2016. "On the practice of applying the legislation on access to public information by administrative courts". Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/v0010760–16#Text

2. Mechanisms for balancing the right to information and national security

Article 10 of the European Convention on Human Rights, the Council of Europe Convention on Access to Official Documents and the national Law "On Access to Public Information" use a well-known international legal mechanism – the so-called three-part test or public-interest test – when restricting access to information. Section 2 of Article 6 of the Law of Ukraine "On Access to Public Information" envisages this legal mechanism and aims to balance the right to access information and other legitimate interests, in particular, national security.

It should be noted that the possibility to restrict constitutional rights during martial law, including the right to information, has not eliminated the need to apply the three-part test in all cases of restriction.

>> **The restriction of constitutional rights for the period of martial law, including the right to information, did not eliminate the need to apply the three-part test in all cases of restriction.**

In other words, regardless of the impact of the situation and the decision taken (to provide access to information or not), responsible officials of public authorities must follow the formal procedure for applying restrictions[16]. Based on the provisions of section 2 of Article 6 of the Law of Ukraine "On Access to Public Information" and generalisation of case law, these responsible persons should establish:

1. which of the legitimate interests defined by the law the restriction corresponds to, as well as why the restriction of access corresponds to this interest. This means that restriction of the right to information cannot be arbitrary and must meet the purpose – protection of another legitimate interest;
2. what exactly is the harm to the legitimate interest, what is the causal link between granting access and the possible occurrence of harm; why this harm is significant; what is the likelihood of harm as a result of granting access to information. This requirement protects information seekers from formal refusals, requires the responsible official to justify the need for restriction;
3. why the harm of providing information outweighs the public interest in obtaining it. This component of the assessment obliges the responsible information administrator to conduct a comprehensive analysis of the situation and make a balanced decision on a particular situation at a particular time.

The existence of an urgent public interest obliges public authorities to provide, in response to a request from an interested person, a wide range of information, including personal data on civil servants, as, for

16 Resolution of the Plenary Assembly of the High Administrative Court of Ukraine No. 10 of 29 September 2016. "On the practice of applying the legislation on access to public information by administrative courts". Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/v0010760–16#Text

example, in the case of the *Center for Democracy and Rule of Law v. Ukraine*[17]. Thus, in its judgment, the European Court of Human Rights notes that

"84. *The information, data or documents to which access is sought must generally meet a public-interest test in order to prompt a need for disclosure under the Convention. Such a need may exist where, inter alia, disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the public at large.*

85. *The Court has emphasised that the definition of what might constitute a subject of public interest will depend on the circumstances of each case.* ***The public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community****. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about. The public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism. In order to ascertain whether a document relates to a subject of general importance, it is necessary to assess the document as a whole, having regard to the context in which it appears."*

When resolving this case, the European Court of Human Rights was guided by the principles set out in the judgment in *Magyar Helsinki Bizottsag v. Hungary*[18] case and took into account the specific circumstances of the current case, taking into account the following criteria: (a) the purpose of the request for information; (b) the nature of the information requested; (c) the role of the applicant; and (d) the readiness and availability of the information. The Hungarian Helsinki Committee (Magyar Helsinki Bizottsag) is a non-governmental organisation in Hungary that monitors compliance with international human rights standards in the country. When investigating the transparency of the appointment of public defenders in criminal cases by the police, the Hungarian Helsinki Committee requested their names and the number of cases assigned to each of them. In this case, the court found a violation of Article 10 of the Convention by the Hungarian government as follows:

"161… *Maintaining this approach, the Court considers that the information, data or documents to which access is sought must generally meet a public-interest test in order to prompt a need for disclosure under the Convention. Such a need may exist where, inter alia, disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the public at large.*

162. The Court has emphasised that the definition of what might constitute a subject of public interest will depend on the circumstances of each case. The public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, ***which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community****. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about…"*

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17 Center for Democracy and the Rule of Law v. Ukraine, Application No. 10090/16, Judgment of 26 March 2020 Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/974_f18#Text

18 Magyar Helsinki Bizottsag v. Hungary, Application No. 18030/11, Judgment of 08 November2016, paragraphs 149–180. Website of the European Court of Human Rights // https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2218030/11%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-167828%22]}

To apply the three-part test, the time component is also essential – **the assessment under the three-part test takes place in each individual case where a decision** to **disclose information or restrict access to it is required**[19]. In other words, the decision on access to information is not immutable, it can be reconsidered at another time in relation to other circumstances, as, for example, was established in the judgment of the European Court of Human Rights in the case of *Éditions Plon v. France*.

The applicant company claimed that the ban on the distribution of the book "Le Grand Secret" about the health of French President Francois Mitterrand violated its right to freedom of expression. The French courts banned the applicant company, initially on a temporary basis and later permanently, from continuing to distribute the book it published and ordered the company to pay damages for the publication. In the judgment, the court noted that a distinction should be made between the temporary ban and the measures taken in the main proceedings. The judgment emphasised that the need to interfere with freedom of expression (of which the right to information is a component) may exist initially, but later cease. The Court took into account the passage of time to assess the compatibility of such a serious punishment – a general and complete ban on the distribution of the book – with freedom of expression. Furthermore, by the time the judgment on the merits was delivered, a significant number of copies of the book had already been sold, the book had been distributed via the Internet and had been widely commented on in the press, and therefore the interest of secrecy could no longer prevail.

In view of the above, it should be emphasised that **even the risks of wartime do not negate the need for proper compliance by public authorities with the procedure – the application of the three-part test in all cases of access to information restriction**. This is supported by the position of the Ukrainian Parliament Commissioner for Human Rights, who in the first months of the full-scale Russian aggression gave explanations on the peculiarities of ensuring access to information under martial law[20], emphasizing the need to apply the three-part test when restricting access to information.

At the same time, the Resolution of the Plenary Assembly of the High Administrative Court of Ukraine No. 10 of 29 September 2016 demonstrates the need for a structured and coordinated approach in the process of classifying information as a state secret:

"5.11. According to section two of Article 8 of Law No. 2939-VI, the procedure for access to secret information is regulated by this Law and special laws.

Consequently, only Law No. 2939-VI and special laws establishing certain types of secrets may regulate access to secret information.

Thus, in particular, Article 2 of the Law of Ukraine "On State Secret" provides that relations in the area of state secrecy are regulated by the Constitution of Ukraine, the Laws of Ukraine "On Information" and "On Access to Public Information", this Law, international treaties ratified by the Verkhovna Rada of Ukraine, and other regulatory acts.

5.12. Courts shall take into account the provisions of the third paragraph of Article 10 of the Law of

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19 Access to public information. Guide to using the three-part test. Edited by D. Kotliar. Kyiv, Center for Political Studies and Analysis, 2014 // http://eidos.org.ua/vydannya/posbinyk-publichna-informatsiya-posbibnyk-iz-zastosuvannya-tryskladovoho-testu/

20 Explanation of the Ukrainian Parliament Commissioner for Human Rights: Features of the implementation of the right to access public information under martial war regime. Website of the Ukrainian Parliament Commissioner for Human Rights // https://bit.ly/3TGRTIO

Ukraine "On State Secret" that information is considered to be a state secret from the date of publication of the Code of Information Constituting a State Secret, which includes this information, or amendments thereto in accordance with the procedure established by this Law.

When considering the issue of the legality of restricting access to information on the basis of its classification as a state secret, the courts are also obliged to establish whether the inclusion of information in the Code of Information Constituting a State Secret meets the requirements of Article 8 of Law No. 2939-VI.

In addition, if the inclusion of information in the said Code of Information complies with the requirements of Article 8 of Law No. 2939-VI, the courts shall verify whether the administrator, when refusing access to the relevant information, applied the three-part test (section two of Article 6 of Law No. 2939-VI).

This conclusion is consistent with compliance with the requirements of Article 6 of the Law of Ukraine "On Access to Public Information" and with the provision of section two of Article 8 of the Law of Ukraine "On State Secret", according to which specific information may be classified as a state secret according to the degrees of secrecy "of particular importance", "top secret" and "secret" only if it belongs to the categories specified in section one of this Article and its disclosure would harm the interests of national security of Ukraine".

The proper application of the procedure is key in resolving the issue of restricting access to information in all cases without exception, even in wartime. This is confirmed by the latest case law summarised in the Review of the Supreme Court Case Law for 2020[21], although it should be noted that this review does not cover the period of martial law.

21 Review of the Supreme Court of Ukraine case law in disputes on ensuring the right of a person to access public information, 2020 // https://supreme.court.gov.ua/userfiles/media/Ogljad_VS.pdf

3. Proportionality of restrictions application

The specific circumstances of the case play a decisive role in determining whether restrictions on access to information are proportionate to protect national security, although the final decision is left to the discretion of the information administrator. *The Global Principles on National Security and the Right to Information* (the Tshwane Principles)[22], a document interpreting the best international standards in this area for institutions and agencies drafting, reviewing, and implementing legislation, can serve as a guide.

The Tshwane Principles were developed to provide guidance to those drafting or implementing laws or regulations relating to the power of the state to restrict access to information on national security grounds or to punish the disclosure of such information. As stated in the document, the authors acknowledge that national security is one of the most important public grounds for restricting access to information, but emphasise the need to strictly adhere to clearly defined standards and rules for restricting the right to such access.

The authors of the *Tshwane Principles* emphasise that **in certain circumstances, to protect legitimate national security interests, it may be necessary to keep information secret, but only to the extent strictly required by exigent circumstances and only for a limited time**.

The Tshwane Principles do not define national security but recommend that the term "national security" should be precisely defined in national legislation in a way that this wording meets the needs of a democratic society. Ukraine has ensured compliance with this standard. The Law of Ukraine "On National Security of Ukraine"[23] defines the basic terms and procedures.

In order to prevent arbitrary restrictions on access to information, attention should be drawn to the provisions of paragraph (e) of Principle 1, which emphasises that **"*The government, and only the government, bears ultimate responsibility for national security, and thus only the government may assert that information must not be released if it would harm national security. Any assertion by a business enterprise of national security to justify withholding information must be explicitly authorized or confirmed by a public authority tasked with protecting national security*."** Unfortunately, nowadays there are cases when for the sake of national security information is restricted by bodies that, in view of their powers, do not fall under this definition (e.g. local self-government authorities).

Paragraph 3 *of the Tshwane Principles* reiterates that *"no restriction on the right to information on national security grounds may be imposed unless the government can demonstrate that: (1) the restriction (a) is pre-*

22 The Global Principles on National Security and the Right to Information. 12 June 2013. Website of the Open Society Justice Initiative // https://www.justiceinitiative.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles

23 Law of Ukraine "On National Security of Ukraine". Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/2469–19#Text

scribed by law and (b) is necessary in a democratic society (c) to protect a legitimate national security interest; and (2) the law provides for adequate safeguards against abuse, including prompt, full, accessible, and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts."

From a formal point of view, Ukrainian legislation meets these requirements, but there are complaints from civil society that the procedure for reviewing decisions on classification of information is not always "prompt, complete, accessible and effective".

Currently, in Ukraine there are two separate ways to resolve disputes in the sphere of access: appeal to the court, which is authorised to decide on the merits of the case (i.e. to determine whether the refusal of the administrator to provide access to information in the manner prescribed by law was lawful), and appeal to the Ukrainian Parliament Commissioner for Human Rights, whose regional representatives draw up protocols on violations of the right to access information, which, in turn, is the basis for imposing an administrative penalty by the court.

The study "*Powers of the Ukrainian Parliament Commissioner for Human Rights and legislation in the area of access to public information. Legislation analysis and recommendations*"[24], which provides a detailed analysis of the shortcomings of the existing mechanism for appealing to the Ukrainian Parliament Commissioner for Human Rights against denials of access to information, is still relevant. Due to the lack of human and material resources, as well as the fact that the institution of the Ombudsman does not have punitive functions, this way of appealing against denials of access to information cannot be considered effective and complete. Despite the imperfection of the mechanisms of bringing to administrative responsibility, the number of appeals to the Ombudsman is steadily increasing from year to year, because another way to appeal against denials of access to information – filing a lawsuit in court – is associated with additional material costs and difficulties. One of the obstacles to protecting the right to information is high court fees. Another, no less important obstacle to the restoration of the violated right to access information is the lengthy consideration of court cases.

Unfortunately, Ukraine has not yet established a special body that would ensure quick and free consideration of disputes in the area of access to information. Before the beginning of Russia's full-scale armed aggression against Ukraine, the Parliament did not consider the draft law[25] aimed at introducing such a body (the National Commission for Personal Data Protection and Access to Public Information).

The Tshwane Principles also outline several important fundamental approaches to restricting access to information as follows (Principle 4):

"(a) The burden of demonstrating the legitimacy of any restriction rests with the public authority seeking to withhold information.

(b) The right to information should be interpreted and applied broadly, and any restrictions should be interpreted narrowly.

24 Powers of the Ukrainian Parliament Commissioner for Human Rights and legislation in the area of access to public information. Legislation analysis and recommendations // https://rm.coe.int/report-access-to-public-information-ukr/1680992d5b

25 Draft Law No. 6177 on the National Commission for Personal Data Protection and Access to Public Information. Website of the Verkhovna Rada of Ukraine // http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=72992

(c) In discharging this burden, it is not sufficient for a public authority simply to assert that there is a risk of harm; the authority is under a duty to provide specific, substantive reasons to support its assertions."

The above once again confirms the need to use the three-part test as a mechanism provided by law for assessing the balance of interests and proper justification of the grounds for restricting access to information in each case of such access restriction.

The use of the three-part test enables a situation in which, for example, during wartimes, especially in regions under the threat of occupation, the balance regarding the amount of open information may change to prevent risks to the life and health of citizens. For example, when it comes to protecting national security, the European Court of Human Rights uses a balanced approach.

In its recent judgment in the case of *Šeks v. Croatia*[26], the European Court of Human Rights concluded that providing the applicant with detailed reasons for refusing to disclose classified documents may contradict the very purpose for which the information was classified. In this case, the applicant had been trying for a long time to gain access to documents protected by the stamp "State Secret – Strictly Confidential". The National Security Council of the Republic of Croatia has examined the applicant's request and the content of the requested records and concluded that due to the nature of the content of certain records it is needed to protect the values for the preservation of which these documents were declared secret, namely the independence, integrity and national security of the Republic of Croatia and its foreign relations prevailed. In the opinion of the National Security Council Office, the disclosure of the documents in question would harm the values protected by secrecy legislation. The applicant appealed to the Information Commissioner, arguing, inter alia, that the impugned decision was arbitrary, unfair, and lacked any clear criteria. For the purposes of the appeal proceedings, the Information Commissioner directly reviewed the documents in question and ultimately agreed with the conclusion that their declassification could harm the national security and foreign relations of the State. In addition, the Commissioner noted that in his appeal the applicant did not argue why these documents should be declassified, or why his interests in access to information outweigh the public interest in protecting the objectives set. In its judgment in this case, the European Court of Human Rights found no violation of Article 10 of the European Convention.

Therefore, in the said judgment the European Court of Human Rights emphasised:

"*71. ... the Court is cognisant that in the context of national security – a sphere which traditionally forms part of the inner core of State sovereignty – the competent authorities may not be expected to give the same amount of details in their reasoning as, for instance, in ordinary civil or administrative cases. Providing detailed reasons for refusing declassification of top-secret documents may easily run counter to the very purpose for which that information had been classified in the first place.* ***Taking into consideration the extent of procedural safeguards provided to the applicant in the present case*** *(see paragraph 70 above),* ***the Court is satisfied that the reasons adduced by the national authorities for refusing him access to the documents in question had not only been relevant but also, in the circumstances, sufficient****.*

72. In view of the foregoing, the Court considers that the interference with the applicant's freedom of access to information had been necessary and proportionate to the important aims of national security relied

26 Šeks v. Croatia, application #39325/20, 3 February2022. Website of the European Court of Human Rights // https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2239325/%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-215642%22]}

on and that the subsequent independent domestic review of his request in the circumstances had not been outside the State's wide margin appreciation in this area".

In the Court's view, nothing in the case file suggests that the competent authorities failed to perform a proportionality analysis: the applicant's request for information had been carefully assessed by five different national authorities; the requested documents were directly inspected by at least two of them, the Information Commissioner was able to review the substantive criteria of the decision to deny access. The Court further notes that the President's decision refusing to declassify some of the requested documents was based on an opinion of a specialised body for dealing with national security issues and was ultimately reviewed and upheld by the Information Commissioner, the High Administrative Court and the Constitutional Court. In such circumstances, the Court does not find that the manner in which the domestic authorities assessed the applicant's request had been fundamentally flawed or devoid of appropriate procedural safeguards.

4. Application of restrictions on disclosure of information

Searching for official information on government websites is the fastest and most affordable way, especially during martial law. The Code of Civil Protection of Ukraine[27] obliges public authorities to take a range of measures to inform the public as quickly and efficiently as possible, and section 5 of Article 15 of the Law of Ukraine "On Access to Public Information" obliges the administrators to publish such information without delay. However, in reality, in many cases the authorities refrain from publishing official information or even delete previously published information, citing the threat to the lives of their employees and the functioning of the authority itself. For example, the decision to close the Open Data Portal[28] and public registers[29] with the beginning of the full-scale armed aggression of the Russian Federation against Ukraine caused a wide discussion. Many experts[30] have commented on the proportionality and expediency of closing energy and environmental data, the Unified Register of Legal Entities, Individual Entrepreneurs and Public Associations, and other registers as a necessary means to protect national security.

Considering the broad discussion on this issue, the Ministry of Digital Transformation of Ukraine has started developing a new version of the Resolution of the Cabinet of Ministers No. 835 "*On Approval of the Regulation on Data Sets to be Disclosed in the Open Data Format*"[31], intending to harmonise the list of open data sets mandatory for disclosure with the needs of national security protection.

Legal assessment of this situation requires recalling another fundamental principle of access to information. In accordance with section 3 of Article 6 of the Law of Ukraine "On Access to Public Information", information with restricted access should be provided by the information administrator if he/she had legitimately published it earlier. This principle is based on common sense: if the administrator has already disseminated official information in some way, there is no point in classifying it further.

Some complaints, for example, were raised by the closure of the register of court decisions, while they

27 Code of Civil Protection of Ukraine. Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/5403–17#Text

28 Closed registries. What will happen to Open Data business, whose services were used by 7 million people. Uliana Bukatyuk, Liga.Business. 31 May 2022 // https://biz.liga.net/ua/all/all/article/reestry-zakryty-chto-budet-s-open-data-biznesom-kotorym-polzovalos-7-mln-lyudey

29 Most energy data is hidden because of the war. How can it harm Ukraine? Andriy Bilous, Novoe Vremya. 03 August 2022 // https://biz.nv.ua/ukr/experts/yak-prihovani-cherez-viynu-energetichni-dani-shkodyat-ukrajini-ostanni-novini-50260458.html

30 Public appeal of LIGA ZAKON regarding the intention to restrict access to public registers and data in Ukraine and the consequences for businesses and citizens. 19 August 2022 // https://biz.ligazakon.net/news/213364_publchne-zvernennya-liga-zakon-shchodo-namru-obmezhiti-dostup-do-publchnikh-restrv-ta-danikh-v-ukran-ta-nasldki-dlya-bznesu – gromadyan

31 Resolution of the Cabinet of Ministers No. 835 of 21 October 2015 "On Approval of the Regulation on Data Sets to be Disclosed in the Open Data Format." // https://zakon.rada.gov.ua/laws/show/835–2015-%D0%BF#Text

were still available through paid services. The provisions of the special Law of Ukraine "On Access to Court Decisions"[32] guarantee the publication of court decisions (Article 2): "*A court decision shall be pronounced in public, except in cases where the case was considered in closed court.* ***Everyone has the right to access court decisions in the manner prescribed by this law****. Court decisions are open and subject to publication in electronic form no later than the next day after they are made and signed*".

It should be emphasised that all the reservations mentioned in the previous sections also apply to the rules of restrictions on the disclosure of information, as set out in the European Court of Human Rights judgment in the case of *Chumak v. Ukraine*[33]. The applicant submitted a written information request to the President of Ukraine in relation to the practice of unlawful restriction (by restrictive classifications which had not been prescribed by law) of access to normative legal acts. He noted that on a programme broadcast on national television on 5 April 2005 an adviser to the President of Ukraine had said that some of the President's decrees which had been labeled "not for publication" (опублікуванню не підлягає) and "not for printing" (не для друку) would be made public in the very near future; and that the rest of the President's decrees, which contained strictly confidential information, would be categorised as "for official use" (для службового користування). Therefore, the applicant, "as a citizen of Ukraine and a journalist ..., in order to ensure the enjoyment of his civil and professional right to information", referring, *inter alia*, to Article 34 of the Constitution of Ukraine and Articles 9, 28, 29 and 32 of the Law "On Information", requested to be provided with the information on the above-mentioned decrees of the President of Ukraine.

Justifying the judgment in the case of *Chumak v. Ukraine*, the European Court of Human Rights found a violation of Article 10 of the European Convention on Human Rights in view of the following:

"44. *To sum up, it can be concluded that the domestic authorities, while not being completely consistent in their arguments, advanced two reasons for not providing the applicant with the information requested: its confidential nature and the fact that such information did not have any implications for his rights and freedoms.*

45. *The Court observes that in giving those reasons, both the administrative authorities and the courts referred to various legal provisions. However, none of those provisions concerned the main issue consistently raised by the applicant throughout the domestic proceedings, that is, the unlawfulness of the use of the restrictive labels "not for publication" and "not for printing", and thus, the limited access nature of the requested documents. The applicant, in particular, referred to an opinion expressed by the Minister of Justice and to the practice of "declassification" of similar legal documents by another State body, the Cabinet of Ministers... However, his arguments remained unanswered. Moreover, at neither stage did the domestic authorities provide any more detailed information about the conditions and procedure for classifying the particular requested legal documents as confidential. Finally, in their observations, the Government expressly stated that the use of the above labels was not provided by national legislation.*

46. The Court considers that the question of lawfulness and, in particular, the foreseeability and details of the legislative provisions as well as the legitimate aim pursued by the refusal in this case is closely linked to the broader issues of whether the interference was necessary in a democratic society and proportionate.

32 Law of Ukraine No. 3262-IV of 22 December 2005 "On Access to Court Decisions". Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/3262–15#Text

33 Yuriy Chumak v. Ukraine, Application No. 23897/10, ECHR judgment of 18 April 2021Website of the Verkhovna Rada of Ukraine // https://zakon.rada.gov.ua/laws/show/974_g52#Text

47. *The Court notes in this regard that any analysis as to proportionality of the refusal is equally absent from the domestic courts' decisions. The domestic courts failed to address the applicant's arguments and, despite the various reasons invoked by the authorities, based their findings on a short statement that the information in question did not concern him personally and was confidential, without giving any further reasons for that conclusion. The domestic courts cannot be said to have applied standards which were in conformity with the procedural principles embodied in Article 10 of the Convention and to have fulfilled their obligation to adduce "relevant and sufficient" reasons that could justify the interference at issue."*

To sum up, it should be noted that along with the above principles of legality, proportionality and necessity in a democratic society, the principle of expediency should form the basis of all decisions related to restrictions on the dissemination of information taken at all levels of government, from the legislative body to local military administrations. After all, ensuring the right to full, timely, and accurate information is a significant contribution to building trust between society and the state, as illustrated, in particular, by the 2021 Report of the Organization for Economic Cooperation and Development *Building Trust in Public Institutions*[34].

34 Building Trust in Public Institutions, Main Findings from the 2021 OECD Survey on Drivers of Trust in Public Institutions. Website of the Organization for Economic Cooperation and development // https://www.oecd-ilibrary.org/governance/building-trust-to-reinforce-democracy_b407f99c-en

Conclusions and recommendations

1. Access to complete, timely, and accurate official information is a vital democratic tool, the restriction of which, even in times of armed conflict, should be carried out strictly pursuant to the law and only to the minimum extent necessary. The Verkhovna Rada of Ukraine and MPs should make efforts to develop a draft law designed to eliminate the shortcomings of the current legislation on access to information and to ensure a quick, effective and inexpensive procedure for reviewing decisions to restrict access to information.

2. When deciding on the restriction of access to information, all information administrators shall apply the mechanism provided by law to balance national security and public interest in obtaining information. The requirement to apply this mechanism is provided for by both national legislation and international agreements ratified by Ukraine. In applying the three-part test for assessing the public interest in information and finding a balance between openness of information and protection of national security, information holders should be guided by the principles of legitimacy, proportionality, and necessity in a democratic society. Information administrators should discharge their duties responsibly and in good faith to proactively publish information, including on official websites and by other means in digital formats.

3. Fulfilment of such duties requires a high level of knowledge from the authority's representatives and assigns them responsibility for the decision taken, but ensures the preservation of democratic achievements of Ukrainian society and the strengthening of trust between the state and citizens.

4. The Parliament and the government should involve civil society representatives to address the challenges of detecting a balance between ensuring the right to information and threats to national security. Such collaboration can also help correct shortcomings in regulatory acts caused by haste legal regulation of certain aspects of access to information during martial law. In Ukraine, there is an efficient experience involving civil initiatives and non-governmental organizations in developing draft laws. NGO's expert groups were engaged in developing almost every rule in the media area, such as the legislation on public broadcasting or media. It is the activists and journalists who perform the functions of the "watchdog of democracy" who can provide an assessment of society's need for official information for defending and rebuilding Ukraine.

Right to information: international standards, practice of the European Court of Human Rights and national regulation during wartime

Overview of legal approaches

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About the Ukrainian Center for Independent Political Research

The Ukrainian Center for Independent Political Research is a non-governmental organisation that has been working since 1991 to strengthen democracy and civil society in Ukraine.

"Civil Liberties and National Security: A Balance for Protection with UCIPR" project, which is being implemented in 2022 with the support of the United States Agency for International Development (USAID), is aimed to assess the changes in the exercise of the right to access information and freedom of expression in Ukraine due to the introduction of the legal regime of martial law, and to develop a technique for identifying discourse that poses threats to human rights and national security.

This publication is a contribution of the Ukrainian Center for Independent Political Research team to overcoming the challenges of wartime and is part of UCIPR's ongoing efforts to build a sustainable open society in which human rights and civil liberties are realised.

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