Access to Classified Information

France • Germany • United Kingdom

May 1999

LL File No. 1999-2383
LRA-D-PUB-002102

The Law Library of Congress, Global Legal Research Directorate
(202) 707-5080 • law@loc.gov • http://www.law.gov

This report is provided for reference purposes only.
It does not constitute legal advice and does not represent the official opinion of the United States Government. The information provided reflects research undertaken as of the date of writing.
It has not been updated.

99-2383

LAW LIBRARY OF CONGRESS

FRANCE

General rules regarding classification and declassification of information are contained in several *instructions générales interministérielles* (general inter-ministries instructions) which are not available at the Library of Congress. However, the following information can be provided based upon other available material citing or referring to these documents:

1. Classification of information

The authority responsible for choosing the degree of classification of information is the authority issuing the document. The classification degree depends upon the content and the destination of the information. Systematic under-classification or misuse of high level classification is proscribed.

Decree N° 98-608 of July 17, 1998[1] has redefined the classification of official secrets. It also allocates competence between the Prime Minister and his ministers in relation to the classification of information and determination of which person are eligible to view classified documents. The Decree sets forth three degrees of classification for national defense and state security material which are, in ascending order: (1) confidential, which is reserved to information not in itself secret, but which knowledge, associated with other information may result in the disclosure of a secret concerning the national defense or the security of the state; (2) secret, which is reserved to information the disclosure of which would gravely harm the state, and; (3) very secret which can only be decided by the Prime Minister.

A fourth category, *diffusion restreinte*, which corresponds to a simple interdiction of general disclosure is also used by heads of department, but is not part of the defense classification.

2. Reclassification of degrees of secrecy

The sensitivity of information evolves with time and circumstances, and the reclassification of degrees of secrecy must be done whenever possible. The decision to reclassify belongs to the authority who issued the document.

3. Establishment of a consultative committee for official secrets

For many years, ministers have been unwilling to communicate to the Justice Department documents necessary for the completion of criminal investigations. Each time, they claim that the

---

[1] JOURNAL OFFICIEL (J.O.), July 19, 1998, at 11118.

information is classified. To put an end to this practice, the Parliament created a few months ago an independent advisory authority, the *Commission consultative du secret de la défense nationale*.[2] The commission is composed of (a) a president, a vice president and a member chosen by the President of the Republic from a list of six judges (of the Conseil d'Etat, the Cour de Cassation or the Cour des Comptes)[3], (b) a deputy from the National Assembly and (c) a senator. It must be consulted by the administrative authority after a court requested the declassification and communication of classified information. The commission gives its opinion within two months, after which the administrative authority renders its decision within 15 days. The opinion of the commission is published in the official gazette.

4. Access of the public to official documents

Law N° 78-753 of July 17, 1978[4] gives a right of access to any person, on demand, to files, reports, studies, minutes, statistics, directives, circulars, etc., held by the administration. In addition, individuals may request documents which concern them personally. If the administration refuses the request, they may refer the matter to the *Commission d'accès aux documents administratifs,* which will then give an opinion as to whether the document is, or is not, one to which they may have access.

Prepared by Nicole Atwill
Senior Legal Specialist
Western Law Division
Directorate of Legal Research
Law Library of Congress
May 1999

---

[2] Law N° 98-567 of July 8, 1998, J.O., July 9, 1998, at 10488.

[3] The Conseil d'Etat is the highest administrative court, the Cour de Cassation is roughly the equivalent for judicial matters of the Supreme Court, and the Cour des Comptes exercises control over the expenditures of public money by governmental bodies.

[4] J.O., July 18, 1978, at 2851.

99-2383

LAW LIBRARY OF CONGRESS

GERMANY

Classified information originating from the federal government

Classified information is defined and categorized in the Act on Personnel Security Examinations of 1994,[1] § 4, which translates as follows:

> § 4. Classified matters
>
> (1) Classified matters are facts, objects and findings, that, irrespective of the form in which they are presented, require to be kept secret in the public interest. Classified matters are categorized by an official agency or upon its initiative in accordance with their need for protection.
>
> (2) A classified matter is classified
>
> 1. TOP SECRET, if the obtaining of knowledge thereof by unauthorized persons could endanger the existence or vital interests of the Federal Republic of Germany or of one of its states;
>
> 2. SECRET, if the obtaining of knowledge thereof by unauthorized persons could endanger the security of the Federal Republic of Germany or of one of its states or cause serious harm to their interests;
>
> 3. CONFIDENTIAL, if the obtaining of knowledge thereof by unauthorized persons could be harmful to the interests of the Federal Republic of Germany or of one of its states;
>
> 4. CONFIDENTIAL -- FOR OFFICIAL USE ONLY, if the obtaining of knowledge thereof by unauthorized persons could be detrimental to the Federal Republic of Germany or one of its states.

---

[1] Gesetz über die Voraussetzungen und das Verfahren von Sicherheitüberprüfungen [SÜG], Apr. 20, 1994, BUNDESGESETZBLATT [BGBl., official law gazette of the Federal Republic of Germany] I at 867, as amended.

There appears to exist an instruction on classified information that applies to Federal agencies and that gives more detailed advice on how to select the degree of secrecy for a particular document.[2] This instruction, however, appears to be unavailable to the public. For private enterprises that works with or create classified information, references are also made to handbooks and instructions; however, these also appear to be unavailable.

There appears to be no scholarly debate on the classification process, even though grumbles are occasionally heard in newspapers.[3] The secrecy of government information is more readily accepted in Germany than in the United States. Germany does not have a Freedom of Information Act. Instead, German has statutory provisions protecting the confidentiality of governmental information.[4] Even the constitutional guarantee of informational freedom is limited to the gathering of information from the sources that are accessible to the public,[5] and information that is administered by government agencies is not considered as being accessible to the public.[6] Instead, the head of agency or the press officer designated by the head will inform the press in ways that are deemed appropriate by the agency.

Classified information originating from parliamentary bodies

The parliamentary rules of the Federal Diet [Bundestag], the lower house of the German parliament contain a chapter on classified information.[7] These rules apply to classified information that is communicated to parliamentary bodies, in particular committees of the Federal Diet, and also to sensitive information originating from within the Federal Diet. The rules describe how classified matter has to be handled and also what is to be classified.

Documents generated with the Federal Diet are to be classified if they qualify as follows:

> Classified matters are all kinds of matters that require protection by special security measures from becoming known to unauthorized persons.[8]

This very broad definition covers not only sensitive matter of the type described above, but also

---

[2] Geschäftsordnung des Bundestages [hereinafter GO BT], reenacted July 2, 1980, Anl. 3, § 2 ¶ 6, as amended.

[3] An editorial in the SUEDDEUTSCHE ZEITUNG [SDZ], one of the largest German newspapers, stated that the bureaucracy likes to classify events as secret when it seeks protection from the curiosity of its citizens [*Politik mit dem Stempel 'VS -- geheim',* SDZ 1 (June 24, 1998)].

[4] Bundesbeamtengesetz, reenacted Feb. 27, 1985, BGBl. I at 479, § 61, as amended.

[5] Grundgesetz für die Bundesrepublik Deutschland, May 23, 1949, BGBl. at 1.

[6] H. Schulze Fielitz, *in* H. Dreier, GRUNDGESETZ KOMMENTAR 370 (Tübingen, 1996).

[7] GO BT, Anl. 3, supra note 2.

[8] GO BT Anl. 3, § 1, ¶ 2.

information deserving privacy protection under circumstances when the privacy of the individual or the secrecy of business matters is deemed more worthy of protection than the public's right to know. [9] It is noteworthy in this context, that privacy is accorded a high value in the German legal system.

The degree of sensitivity of information classified by the Federal Diet is established in accordance with the same criteria that prevail for government documents (see above). This is under the use of the Federal government's instruction on classification. For the lowest classification category, that of "Confidential -- For Official Use Only", the parliamentary rules provide that this category may be assigned to any documents not intended for the public. One important exception to this principle, however, is that protocols of committee meetings that not open to the public are not classifiable as confidential by that reason alone. [10]

Classified information is not available to all members of the Federal Diet, but only to those need who need access urgently for their parliamentary work. A tension exists between the German parliamentary rules on secrecy and the right of members of the Federal Diet to have access to parliamentary documents,[11] and at times chairmen and majority members of committees have been suspected of playing politics with the classification rules.

Such a case became known in the summer of 1998, when the entire report of an ad hoc investigative committee on plutonium theft was deemed classified because some of the appendices to the report were classified. The report had to be rewritten to be fit for publication. It also was alleged that classification mania had overtaken that committee as newspaper articles and unused sheets of paper were routinely stamped “confidential”. At the same time, it was reported that the committee chairman had documents declassified whenever it suited him to make them public.[12]

As compared to former East Germany, however, the current German practices on classification can be considered as an improvement. These current practices are based on West German law that merely was extended to former East Germany at the time of unification in 1990. Before that time, East Germany was dominated by a veritable neurosis on security which led to the classification as secret of more than 12% of all dissertations, some of them dealing with harmless issues such as the quality of Swiss cheese. After the breakdown of the Communist regime in 1989, a declassification process for these scholarly works was implemented.[13]

---

[9] H. Schneider & W. Zeh, PARLAMENTSRECHT UND PARLAMENTSPRAXIS 623 (Berlin, 1989).

[10] GO BT § 73.

[11] GO BT § 16.

[12] *Politik mit dem Stempel 'VS -- geheim',* SDZ 1 (June 24, 1998).

[13] *Geheimsache Emmentaler Käse,* SDZ 6 (July 17, 1993).

Prepared by Edith Palmer
Senior Legal Specialist
Western Law Division
Law Library of Congress
May 1999

99-2383

LAW LIBRARY OF CONGRESS

UNITED KINGDOM

Access to public records

The Public Records Act 1958[1] and the Public Records Act 1967[2] grant public access to records in the Public Records Office (PRO) after the expiration of thirty years from their creation. The period was reduced from fifty years by the 1967 Act. The period may be shortened or increased as the Lord Chancellor prescribes in respect of any particular class of public records, with the approval of the Minister or other person primarily concerned. The Lord Chancellor is assisted in this by the Advisory Council on Public Records, chaired by a senior judge and consisting of Members of Parliament, academics and researchers.

The records are opened en bloc at the start of each year. The records bearing a last date of 1969 will be released into the public domain on January 1, 2000, a process which generates much public interest and media attention each year.

Some records are available earlier without restriction from their date of transfer to the PRO. Examples of these include annual reports and published material. The Records Management Department of the PRO works with government departments to identify records that may be released early under a process known as accelerated opening.

Extended closure of records for longer than 30 years may be granted for various reasons. Longer periods have been allowed for the following categories:

> (i) Exceptionally sensitive papers, the disclosure of which would be contrary to the public interest whether on security or other grounds...
>
> (ii) Documents containing information supplied in confidence the disclosure of which would or might constitute a breach of good faith.
>
> (iii) Documents containing information about individuals, the disclosure of which would cause distress or danger to living persons or their immediate descendants.[3]

---

[1] 6 & 7 Eliz. 2, ch. 51, §5.

[2] Ch. 44.

[3] S.H. Bailey, D.J. Harris, B.L. Jones, Civil Liberties, Cases and Materials 466 (3d ed. 1991).

An example of extended closure of records are census reports, which are closed for 100 years.

Freedom of information

In 1992, an Open Government Initiative was launched requiring all government departments to examine their records to determine blocks of previously closed records that could be released early.[4] The documents released under the Initiative include Ministry of Defense war diaries, certain records of the Prime Minister's Office and the Foreign and Commonwealth Office.

The Labour Government which came into office in 1997 has yet to fulfil an election pledge to introduce a bill guaranteeing freedom of information. A White Paper[5] issued in December 1997 outlined proposals for legislation, but to date no bill has emerged.

Thus a non-statutory Code of Practice continues to apply in the release of official information.[6] The White Paper proposed that the 15 exemptions in the Code be substantially reduced to seven "specified interests". It did not propose that the new law "should contain exempt categories at all, but rather that disclosure should be assessed on a "content basis", records being disclosed in a partial form with any necessary deletions, rather than being completely withheld."[7]

The much debated Official Secrets Acts 1911 to 1989 also retain their potency against the unauthorized release of government records. These statutes make it an offense for a government official to disclose any official information in six specified categories, if the disclosure is made without lawful authority and is damaging to the national interest. The categories are: security and intelligence; defense; international relations; foreign confidences; information that may lead to the commission of a crime; and, information obtained through investigative powers, such as telephone tapping, authorized under statute.

[4] As stated in the Web site of the PRO: <http://www.pro.gov.uk> Copies of selected pages from the site are appended.

[5] Chancellor of the Duchy of Lancaster, Your Right to Know: Freedom Of Information, Cm. 3818 (1997).

[6] The Code contains 15 categories of official information which is exempted from release. *See* the comparative chart in "Your Right To Know" - Background Material (1997). A copy is appended.

[7] *Supra* note 5, at ¶3.8.

While the government initiative for a freedom of information measure appears to be stalling, a Private Members' Bill has been introduced in the House of Lords in December 1988, which received a second reading in February 1999.[8] Clause 2 of the Bill would grant a right of access to official information, notwithstanding any statutory or common law prohibition other than one contained in a court order. Clause 3 exempts from disclosure information that would be likely to cause substantial harm to several interests, including the defense or international relations of the United Kingdom.

Selection criteria for security service records

On February 3, 1999, the Advisory Council on Public Records issued a report to the Home Secretary on the *Review Of Security Service Selection Criteria.*[9] The Review reproduces the current Guidelines for the preservation of Security Service records of historical interest in Annex 2. The Service applies these criteria in deciding whether a record is likely to be of historical interest. Each file is examined individually and considered on its merits as a whole. These records are kept by the Service on the assumption that they will eventually be released by the PRO.

The Advisory Council recommended the addition of other criteria to those currently used.[10]

Prepared by
Kersi B. Shroff
Chief, Western Law Division
Law Library of Congress
May 1999

[8] HL Bill 10. Without government support, such measures face limited opportunities for enactment. The Bill can be accessed on Parliament's Web site:
<www.parliament.the-stationery-office.co.uk/pa/pabills>

[9] A copy is appended.