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Freedom of Information and National Security

A Study of Judicial Review under U.S. Law



Herbert Utz Verlag · München

Europäisches und Internationales Recht

herausgegeben von

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begründet von

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unter dem Titel Europarecht–Völkerrecht

Band 86

Umschlagabbildung: kaiurl / photocase.de



Zugl.: Diss., Berlin, Humbolt-Univ., 2014

Bibliografische Information der Deutschen Nationalbibliothek: Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

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ISBN 978-3-8316-4390-5

Printed in EU

Herbert Utz Verlag GmbH, München

089-277791-00 · www.utzverlag.de

Foreword

In this book, Dr. Amin Pashaye Amiri, addresses the crucial question of the relationship between freedom of information and national security. While concentrating on US law and case-law, he perceives the tension between the competing demands of ensuring freedom of information for the sake of an informed public debate and the need to restrict the public availability of certain information to maintain national security as a general problem for all democracies. He proposes to improve the judicial review of decisions by which applications for information have been rejected. By probing deep into the specificities of the US legal system, the author succeeds in identifying general impediments, but also possible improvements for a basic question which every modern democracy is confronted with. In this respect, his book gives an important impulse.

Berlin, September 2014,

Georg Nolte

Preface

This book is based on my doctoral dissertation, entitled *Freedom of Information and National Security: A Study of Judicial Review under U.S. Law*. The dissertation was written at Humboldt University of Berlin between 2008 and 2013 and defended in June 2014.

My particular gratitude belongs to my Ph.D supervisor, Prof. Dr. Georg Nolte. This book, as well as the dissertation, would not have been possible without his continuous guidance, patience, and support throughout my Ph.D studies. I would also like to thank other members of my dissertation committee, Prof. Dr. Martin Eifert and Prof. Dr. Anna-Bettina Kaiser, for their support and invaluable comments. Furthermore, I am grateful for the support of the German Academic Exchange Service (*DAAD*), which granted me a scholarship to pursue my Ph.D. Moreover, I wish to thank my editor, Anne Dorfman, for all of her assistance.

I owe a heartfelt gratitude to Prof. Dr. Matthias Weiter as well, and to his wife, Manuela, for their support and encouragement during my stay in Germany. Finally, I would like to sincerely thank my family, especially my parents, for their constant support during my Ph.D journey.

Tehran, September 2014,

Amin Pashaye Amiri

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Information about terms used in this dissertation:

The term “freedom of information” (FOI) concerns the public right of access to information held by public bodies.

“National security information” refers to information in the national security context, including both sensitive and nonsensitive information. This term, therefore, includes information that is claimed by public bodies to be sensitive even though the claim has not been proven.

“FOI national security cases” and “FOI national security decisions” refer to FOI cases and decisions in which a government’s claim concerns the sensitivity of requested information.

“Executive Order” means the Order on Classified National Security Information issued by a U.S. president.

ABSTRACT

National security has been invoked by governments around the world to withhold information whose disclosure could provide people with benefits, including protection of their human rights. A freedom of information (FOI) law allows people to request government-held information, including information in the national security context. Courts are considered by almost all FOI laws as the bodies that conduct final review of FOI decisions denying requests to disclose information. However, courts generally defer to public bodies' decisions when national security has been invoked to withhold information.

This dissertation examines the importance of effective judicial review of government FOI decisions in which national security is invoked, and considers how judicial review of these decisions should be conducted. For this purpose, it studies judicial review under the U.S. Freedom of Information Act (FOIA), which many countries have used as a model. This dissertation finds that, for effective judicial review of FOI national security decisions, a legislature should expressly and clearly require courts to conduct such a review, and should establish the standards and criteria to be used. The dissertation argues that, to guarantee meaningful review, the reviewing judicial body should enjoy a suitable level of independence, and be given the power and facilities needed to examine these cases, including access to independent national security experts when this is necessary. In addition, this study demonstrates that the right to access to information in the national security context is adversely affected if courts are not authorized to apply the public interest test, which requires that information be disclosed when the benefit of disclosure outweighs the harm of disclosure.

INTRODUCTION

To satisfy the public demand for transparency and accountability freedom of information (FOI) laws have been adopted in many countries. Some eighty-five nations have enacted FOI laws guaranteeing citizens access to government information. Most of these countries have adopted FOI laws during the last twenty years. FOI laws allow access to public information in two ways. They impose an obligation on public bodies to disseminate the information they hold regularly, subject to limited exemptions, including an exemption on national security grounds. In addition, FOI laws oblige public bodies to release information requested by any member of the public, subject to the same exemptions. The right to access to government information on request is considered a principal aspect of FOI laws. In cases concerning requests for information in the national security context, as in other FOI cases, almost all countries that have FOI laws consider the courts to be the last mechanism of review for public bodies' decisions.

Although the literature on FOI has grown in recent years, the subject of judicial review of FOI national security cases has not received the attention it deserves from academic researchers. Some sources that have studied FOI generally have briefly considered judicial review of FOI decisions, including decisions denying requests for information on national security grounds. This author has found no in-depth discussion of judicial review of FOI national security decisions. A limited number of papers on U.S. law discuss some aspects of judicial review of public bodies' decisions denying requests for national security information under the U.S. Freedom of Information Act (FOIA).

Academic research on the judicial review of FOI national security decisions helps strike a reasonable balance between the competing interests of access to public information and national security. The need for such research becomes more evident when one takes into account that there is a high possibility of excessive secrecy in the name of national security by governments, and that access to information in the national security context may provide citizens with important benefits, including protection of their human rights. This research seeks to make an original contribution to the discussion about judicial review of public bodies' FOI national security decisions.

With the aim of helping to create a suitable balance between national security and access to government information, this dissertation seeks to answer the following questions: How important is independent judicial review of public bodies' FOI national security decisions? Should judicial deference be granted to such decisions? Which principles should be applied when FOI national security decisions are reviewed? What is the suitable mechanism of review for these decisions?

To answer these questions, the author decided to study U.S. law. There are several justifications for studying U.S. law in this research. Although the U.S. FOIA took effect in 1966, more than two centuries after 1766, when Sweden adopted the first FOI law, the United States was one of the first countries to enact a FOI law. In adopting and improving their FOI laws, many countries took the U.S. FOIA as a model.¹ In addition, a relatively large number of FOI cases have been decided by U.S. federal courts, a considerable number of which concern FOI national security cases. These cases provide suitable material for research in this area. The importance of these points is magnified when one notes that FOI is still at the early stages of development around much of the world, and that judicial review of FOI national security decisions has not been taken seriously in many countries. Moreover, the United States "is often referred to as the benchmark in setting national security standards."²

The existence of common factors in countries with differing legal and political systems suggests that it is reasonable to use the experience of judicial review of FOI national security decisions in a particular country to draw conclusions that may also be useful to other countries. Among these features is that it is typically a government's executive branch that is responsible for

¹ See John M. Ackerman and Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, *Administrative Law Review*, Vol. 58, Issue 1, 2006, pp. 85-130, at 111.

² Helen Darbishire, *Preface to National Security and Open Government: Striking the Right Balance*, New York, Campbell Public Affairs Institute (the Maxwell School of Syracuse University), 2003, available at <http://www.maxwell.syr.edu/uploadedFiles/campbell/events/NSOG.pdf>, at viii.

protecting sensitive national security information. In addition, experience shows that the executive may sometimes benefit from withholding information in the national security context, and may withhold information whose release would be in the public interest. Furthermore, in almost all countries the judiciary is the body that has final review of FOI decisions, including FOI national security decisions. For these reasons, even though national security threats differ from country to country, and even though every country tries to address disputes regarding national security information under its own legal and political system, studying the strengths and weaknesses of judicial review of such cases in one country can help to improve such review in other countries.

This dissertation has four chapters. The first provides a general examination of FOI. It next discusses the importance of protecting sensitive national security information for any society. The chapter then discusses the fact that information commonly is over-classified in a national security context, and describes the reasons for excessive secrecy in the area of national security.

The second chapter first examines arguments in favor of recognizing FOI, and explores the degree to which FOI has been recognized around the world. This chapter then studies the benefits the public may gain from access to national security information. The chapter also examines the need for conducting effective judicial review of public bodies' decisions in FOI national security cases.

The third chapter studies judicial review of FOIA national security decisions in the United States. The first three sections consider rules and procedures concerning access to national security information in the United States, as well as rules and procedures regarding review of U.S. agencies' FOIA national-security decisions. The fourth section examines how judicial review is conducted in FOIA national security cases and the degree to which judicial deference is granted to agency decisions in these cases. The last section of the third chapter offers suggestions for ensuring effective judicial review by U.S. courts of agency decisions in such cases.

Finally, the fourth chapter presents conclusions drawn from the discussions in previous chapters for the purpose of helping to improve judicial review of public bodies' FOI national security decisions in various countries around the world.

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