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# **STATE SECRECY AND FREEDOM OF INFORMATION**

**REPORT**

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# **STATE SECRECY AND FREEDOM OF INFORMATION**

## **REPORT**

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## I. FOREWORD

We would like to express our thanks to the US Embassy in Ulaanbaatar for providing an opportunity to make this report available.

The Constitution of Mongolia declares that “The fundamental principles of the activities of the State shall be democracy, justice, freedom equality and national unity and respect for the law” by its Article 1.2.

The main principles of democracy are guaranteed by transparency and openness. Information is fundamental and vital to good governance.

The Mongolian government has repeatedly pledged itself to transparency and openness. It is a key direction of the activities of the state institutions as stated in many of Mongolia’s laws.

The Action Plan of the Mongolian government (2004-2008) contains a commitment to “provide the citizens with rights to access any information”.

The National Human Rights Programme adopted in 2003 by the Parliament, the Ulsyn Ikh Khural (UIKH), obliges the Government “to provide for transparency of the activities of the legislative, executive and judicial powers, particularly by creating a legal ground which narrowly defines the rights of the citizens to obtain and disseminate information and responsibilities to provide information upon requests of the citizens and of media workers through abolishing unnecessary restrictions determined by the secrecy legislation and so on” (2.2.5.1).

The National Anti-Corruption Programme adopted in 2002 by the UIKH indicates that it is to focus its principles on “respect for the rule of law and human rights and freedoms, and provide for social justice and equality, transparency to the public, and evaluate the best practices and ways of other countries and international organizations” (2.3).

During the 2003 International Conference on New and Restored Democracies, the Mongolian government signed the Ulaanbaatar Declaration, promising support for “an open and transparent society, which encourages the free creation, pursuit and flow of information.”

Unfortunately, the existing restrictions on access to information and government records in Mongolia make it possible for virtually anything to be classified as “secret” and hidden from the public view for an indefinite period, contradicting the spirit of the Mongolian government’s commitment to openness and transparency. Unnecessary secrecy breeds irresponsibility on the part of government officials.

In 2002 Globe International, in cooperation with Article 19, the London based international organization, produced a report titled “Mongolia in Transition: Legal Analysis on the Mongolian Legislation Affecting Freedoms of Expression and Information”. Globe International lawyers reviewed 232 Mongolia laws valid until 2001 and identified 91 laws containing provisions related to the freedoms of expression, information and media.

Chapter 7 of the report is devoted to freedom of information and state secrecy legislation. Along other conclusions, the report noted: *“A key problem in Mongolia is the lack of openness of public bodies”*.

The rights of the citizens of Mongolia are restricted by laws protecting state secrecy, organizational privacy, privacy and many others.

This report deals with state secrecy legislation and the Mongolian laws which protect state secrets, the Law on State Secrets and Law on List of State Secrets.

According to Globe International and Article 19, the following preliminary problems are found in the current state secrecy legislation:

- The scope of the Law on State Secrets and the Law on List of State Secrets is too broad. Almost anything can be classified as “state secret”
- The classification periods are very long (for example, up to 60 years) and too many items are protected for an indefinite period (11 items out of 58 protected)
- The Law on State Secrets overlaps the Law on List of State Secrets
- The Criminal Law provides up to 8 years of imprisonment for disclosing state secrets which are not consistent with the Johannesburg Principles: National Security, Freedom of Expression and Access to Information. The authorities use harsh penalties to censor the media and journalists.
- Too many laws, such as the Law on National Security, Law on Foreign Trade Arbitration, Law on Resolution of Petitions and Complaints Issued by Citizens to Government Organizations and Officials, Law on Criminal Investigation and Charge Law on Statistics, Law on Archive, Law on **Geodesy** and Mapping, among others, protect state secrets in various ways, as some of them contradict or overlap the general law.

The Globe International and Article 19 report includes the following recommendations:

- The secrecy provisions of the Law on State Secrets, as well as many other laws which impose secrecy rules, should be reviewed and revised if they do not serve a legitimate secrecy interest.
- All secrecy provisions should incorporate a substantial harm test as well as the requirement that this harm is greater than the public’s interest in having the information

As a result of these findings, Globe International launched a project to meet the need for secrecy legislation reform by carefully and thoroughly analyzing the deficiencies of the Mongolian secrecy legislation in light of similar legislations in other countries and by drafting new state secrecy legislation.

The report introduces the readers to the results of the legal comparative study and the instigate survey on access to information, which were conducted by the project teams.

We are calling on the legislators and authorities of Mongolia to undertake the changes recommended in the present report.

H.Naranjargal, project leader

# **I. “STATE SECRECY AND FREEDOM OF INFORMATION” COMPARATIVE LEGAL STUDY**

## **1.1. Introduction**

The term human rights itself has the inherent essence of the human being, but also is a tool for limiting the state by laws, prevents unlawful voluntarism, sets measures of responsibility for its violation. All this is considered to represent citizens’ control over the state. In order for citizens to exercise this control they need the pillars of democratic society, a free, independent and powerful press, freedom of information and the right to know, which serve as citizens’ eyes and ears.

“Ability to access government information is one of the basic principles of democracy”. Information is the oxygen of democracy as defined by the global campaign for free expression “Article 19”. A democracy is a representative government elected by members of society and maintained through citizens’ participation and oversight, with a wide range of ways for holding the government responsible. This oversight and accountability is impossible without information access.

The Constitution of Mongolia provides for “freedom of conscience and religion...freedom of thought, free expression of opinion, speech, press, peaceful demonstration and meetings”<sup>1</sup>. The Constitution also guarantees “right to seek and receive information except that which the State and its bodies are legally bound to protect as secret. In order to protect human rights, dignity and reputation of persons and to defend State national security and public order, the disclosure of secrets of the State, individuals, or organizations which are not subject shall be defined and protected by law”<sup>2</sup>. Provisions “the State and its bodies are legally bound to protect as secret” and “to protect human rights, dignity and reputation of persons and to defend the State national security and public order” are understood as concerning information that could harm the national security of Mongolia. On the other hand, the more open the government is the better it will perform, because publicizing its decrees and resolutions in advance and making decisions which involve public participation will ensure better implementation. Decisions reflecting the public’s ideas and mindset are more effective.

The Mongolian Government’s promises for openness contradict the current legal status since freedom of information is limited by existing legislation that allows information to be hidden from citizens by classifying it for unlimited periods of time as “secret”. Results of a joint survey conducted by the NGO Globe International and “Article 19”, studies of the researcher Sergei Radchenko, revealed that classifying information that is not necessarily considered secret is irresponsible of the government officials.

In Mongolia, state secrecy is regulated by general laws such as the Mongolian Law on State Secrecy and the Law on the List of the State Secrets. They are out of date, and present large limitations of human rights. Therefore, our survey examined international practices and theories on state secrets, the correlation between national security issues and state secrecy, and the history and tradition of these regulations, while comparing laws of countries with similar circumstances to countries with advanced regulations. The survey was conducted in order to prepare a major document providing justifications for the need to reform the state secrecy legislation.

The project analyzed international standards and principles on the freedom of information, and the reasoning behind the need for national security and freedom of information standards and norms. A report and recommendations to improve laws relating to state secrecy were prepared.

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<sup>1</sup> Constitution of Mongolia, Article 16, clause 16.

<sup>2</sup> Constitution of Mongolia, Article 16, clause 17.

## **Objectives of the study project**

Objectives of the study project were:

- An analysis based on international standards and the principles behind the Mongolian Law on State Secrecy and the Law on the List of the State Secrecy
- A comparative study of Mongolian legislation with similar legislation in countries in transition and other countries.
- Developing recommendations to the new draft legislation.

## **Project team**

The project team consisted of lawyers and researchers: D.Munkhburen, D.Orosoo, D.Saranchimeg, J.Enkhnasan, M.Dorjkhand, G.Davaakhuu, and A.Tuvshintulga.

## **Study areas.**

1. Study of international sources on the standards, norms and principles on the issues of freedom of information, rights to free opinion and expression, the right to know, transparency, national security and secrecy.
2. Analysis of the Mongolian Law on State Secrecy and the Law on the List of the State Secrecy
3. Comparative study of the Mongolian Law on State Secrecy and the Law on the List of the State Secrecy with similar legislation in transition countries and other countries (1. Russian Federation, 2. Kyrgyz Republic, 3. Tajikistan, 4. Turkmenistan, 5. Ukraine, 6. Georgia, 7. Kazakhstan, 8. Republic of Korea, 9. United Kingdom, 10. Germany).

## **1.2. National security and freedom of information**

According to libertarian theory all human beings have inborn rights. Those rights existed long before states were established, which were created by people as a means to protect their rights. If the state violates or limits human rights the individual has a right to objection. Therefore it is understandable that individuals should be able to express their opinion freely and access information from the state. Freedom of expression and freedom of information access and dissemination are tools for controlling the government.

Jacob Burckhardt said that no matter who holds power, the state itself is a devil. Power corrupts. Not only kings and monarchs, but the majority rulers in democracy tend to abuse power.<sup>3</sup>

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<sup>3</sup> Ludwig von Mises. Liberalism. Ulaanbaatar, 2004, p.56

State or any type of centralized power is itself dangerous. Therefore libertarianism believes in the limitation and decentralization of state power. State power is limited by the separation of state power into three branches, securing openness and transparency of the state, and the citizens rights to information access and freedom of information. Government that is transparent to the public uses its power properly. If the government is closed, the separation of power as a mere formality will not help. On the other hand, if freedom of information and the freedom to seek, obtain and disseminate information are protected, and if government is open and transparent, the separation of power and limitations on state power will be genuine. In order to make power separation effective, it should be visible to the public how state power is separated and how this separation works.

Thus freedom of information is not only about accessing information, it has a broader importance as a way for the public to hold power, to participate in governance, to control the government, and to have input (ideas and criticism) in state affairs.

### **National security and Freedom of information**

National security is an old concept involving territorial and national sovereignty, social unity, protection from foreign aggressors, and other threats.

The process of democratization in the world after the Cold War and, more importantly, the deep changes in Mongolia's internal and international situation after 1990 led to new definitions of the concept of "national security" in Mongolia. Adopted in accordance with the modern universal concept of national security, Mongolia's definition of national security outlines potential threats for the country, factors affecting national security, preventative measures, and security guarantees.

The state has a duty to protect national interests as a means of protecting public interests.<sup>4</sup> In 1994 the Mongolian Parliament adopted the National Security concept. It says: "The ideological basis of the policy ensuring national security is national patriotism". The document also states that "The Constitution of Mongolia expresses the integrated interests of the people of all groups and strata of Mongolian society. **The national security of Mongolia represents the status when favorable external and internal conditions are secured to ensure vital national interests of Mongolia**". Furthermore, the document provides **ways and means of ensuring national security "by social, political, organizational, economic, diplomatic, military, intelligence and legal means, unilaterally or through the development of international cooperation"**.

"The vital national interests of Mongolia consist in the existence of the Mongolian people and their civilization, in the country's independence, sovereignty territorial integrity, inviolability of State frontiers, relative economic independence, sustainable ecological development and national unity. The vital national interests of Mongolia constitute the object of special care and protection on the part of the State and the people".

Mongolia shall protect its national security by political, economic, military, and intelligence means. Loss of national security has serious consequences for the existence of the country and citizens' freedom and liberties, and therefore state secrecy should be strictly safeguarded.

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<sup>4</sup> D.Lundeejantsan, Tch.Enkhbaatar. Constitutional law, Ulaanbaatar, p.37



**“The main guarantors of national security are the people of Mongolia and the Mongolian State”.** This provision of the above document demonstrates that not only the government, civil society and private sector should actively participate in the implementation of the national security policy, but citizens should be involved as well.

Factors affecting national security can be categorized as internal or external, depending on their origins, and into immediate, temporary, long-term or permanent, given their duration. The factors that may have a negative impact on national security can be designated as objective or subjective according to their character, and into real and possible considering the probability of danger they might cause. The policy of ensuring and strengthening national security aims at identifying and eliminating any threats at the "probable" stage of its occurrence, as well as at reducing or preventing objective threats by the timely elimination of subjective ones.

The concept of National Security of Mongolia sets following definitions for security:

**The security of the existence of Mongolia** means the endurance of its independence, sovereignty, territorial integrity, and inviolability of state frontiers of Mongolia .

**The security of the social order and State system** means the endurance of the state and socioeconomic structure, fundamental principles of State activities, as well as human rights and freedoms as provided for in the Constitution of Mongolia.

**The security of the citizens` rights and freedoms** means the situation when conditions are ensured for individuals to fully devote their physical and intellectual potential to their own benefit, to the interests of the country and the people, and for Mongolia to carry out its international obligations with respect to human rights.

**Economic security** means building an economic structure which has the potential for effective economic reproduction through the use of internal resources, for meeting the basic needs of the people and strengthening the country's independence, and in cases of need to sustain the country for a definite period of time.

**Scientific and technological security** means the endurance of conditions for the use of technologies, information and research for the purpose of the country's development adapted to its ecological conditions and for enhancing the national scientific potential and intellectual competitiveness.

**Information security** means that conditions are ensured for the Government to assess objectively the country's actual internal and external situation and to make correct decisions, for government organs and the people to have the necessary information for the exercise of their powers and rights provided by the Constitution and for the dissemination abroad of information about Mongolia. Freedom of information constitutes an important means for the development and strengthening of democracy.

**The security of Mongolian culture and way of life** means that conditions are ensured for the preservation of the national language, history, culture, customs and traditions that constitute the basis for the existence and development of the Mongolian nation and its statehood, and conditions for the eternal existence of the Mongolian people.

**The security of the population and its gene pool** implies a situation where conditions are ensured for the maintenance and protection of the health and gene pool of the Mongolian population and its sustained growth.

**Ecological security** means conditions are ensured for the prevention of a negative impact on the human environment and the economy as a result of ecological and climatic changes, and of irrational rise and insufficient protection of natural resources.

The Mongolian state has Constitutional obligations, **first**, to properly evaluate the internal and external situation and to provide effective solutions to problems, and **second**, in order to exercise its Constitutional powers, to provide government agencies and citizens with the necessary information or create conditions favorable for access to information.

**Information** has become the most influential factor for development of not only individuals and groups or nations, but for the whole world. In this regard it is very important to know the interests of the state and citizens in this field, threats and other factors affecting this.

Abuse of information that harms the interests of individuals, society, or the state could **be greater than material loss and be harmful to political, economic and international relations**. Therefore along with protecting the information rights of individuals, organizations and the state, **state policy on securing information security** has become an issue of concern.

Other than the 1995 set of laws on secrecy and the 2004 revised law on the list of state secrets, a legal environment for information security as a whole has not yet been created. Therefore a law (or a series of laws) is needed that will regulate issues related to the creation, gathering, processing, accumulation, seeking, and dissemination of information, and also provide protection of information. In other terms, the state should consider the information not primarily as a legal subject for secrecy, but regard it according to its modern importance and see it in the broader context of providing legal mechanisms for the effective exercise of the right of seeking and receiving the information.

Loss of national security has a serious consequence leading to the loss of the country's existence and the security of the citizens rights and liberties. But protection of national security should not set limits to the freedom of dissemination and free flow of information. Freedom of information relates to all information except those protected by the law and concerning national security, secrets of the state and its organizations, and individual privacy. But classifying information that is not harmful to national security or the state is one of the forms of limiting freedom of information. Freedom of information means free flow of information and is about seeking, obtaining and disseminating all information, without any limitations, pressures and censorship, which is not considered secret by the law.

The correlation between the freedom of expression and the right to seek information was studied at great length by courts, international organizations and legislators. Information on principles for limitations on national security in relation to secrecy is widely reflected in "The Johannesburg Principles on National Security, Freedom of Expression and Access to Information" (U.N. Doc. E/CN.4/1996/39 (1996). Universal legal principles have been accepted by the international community and are based on human rights standards, evolving state practice, and were drafted by a group of researchers recognized as leading experts in the field. This document contains universal standards for setting information secrecy in relation to national security.

## **National security and state secrecy**

Despite the willingness or unwillingness of the state, rapid technological developments have quickly increased the ability for citizens in a the democratic society to access information. In order to ensure information security within this policy framework, **the state** is considering the following:

**First**, to create an environment for the free exercise of citizens' right to seek, receive and use the information,

**Second**, because of the increased possibility for leakage of state secret information due to the development of information technology, to improve legislation and enforcement mechanisms of the state secrecy, and to strengthen organizational and technical measures for storing and protecting state secrecy without affecting the right to access information.

**Third**, to genuinely enforce major principles of government organizations and their employees – openness and transparency- at all levels of the state.

**Fourth**, although the protection of state secrecy is the sole responsibility of the state, and because this issue is directly related to the national security, to change the social mentality and ethics towards state secrecy.

The Johannesburg Principles recognize that “restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest”. But it also asserts that the protection of national security should not set limits on the free access of information.

Many of the Johannesburg Principles relate to secrecy legislation, as follows:

### **Principle 2: Legitimate National Security Interest**

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

### **Principle 15: General Rule on Disclosure of Secret Information**

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.

### **Principle 16: Information Obtained Through Public Service**

No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

(From the “The Johannesburg Principles on National Security, Freedom of Expression and Access to Information” (U.N. Doc. E/CN.4/1996/39 (1996)).

The above principles are used around the world when reforming state secrecy legislation.

Provisions that don't comply with the Johannesburg Principles are found in the Penal Code of Mongolia and impose a penalty of imprisonment for up to 8 years. Those harsh provisions allow those in power to censor “watchdog” media and journalists, and moreover violate civil rights.

### 1.3. About past legal acts on state secrecy in Mongolia

In 1935 Council of Ministers adopted the Resolution 512, a **“Detailed list of items strictly prohibited for publishing in the press or broadcasting on the radio”**. According to this resolution, the following groups of information were prohibited: 1) news and facts of political and ideological nature, 2) news and facts on military, 2) news and facts about population, 4) news and facts on economics, 5) other news and facts. For instance, information about population included **“population number by country, aimag (province) and soum (district) and by age and sex; number and cases of factory accidents; number of working class; morally wrong incidents among teachers and students”** etc.

The Council of Ministers Resolution 51, adopted on July 27, 1945 and titled **“List of news items deemed as state secret and to be protected”** could be identified as the first legal act on classifying state secrecy. This was followed by the Council of Ministers resolution 521, the **“List of information and facts approved as state secrets”** adopted on December 8, 1955. The list included: 1) news and facts on military, 2) news and facts on economics, and 3) other news and facts.

Decree #120 of the Presidium of the Great Hural from December 15, 1955 set responsibility for disclosure of state secrets. According to this, disclosure of information regarded as state secrets and authorized to the person of obtained from officials in charge, resulted in a punishment (if not considered as treason or espionage) of 6-12 years of imprisonment at the correction labor camp. Disclosure of information regarded as state secrets by an individual would be punished (if not considered as treason or espionage) by 5-10 years of imprisonment at the correction labor camp.

Council of Ministers resolution #258 from May 22, 1964 which approved a short list and instructions on state secret documents set three degrees for state secrecy: **“top secret – very important”, “top secret” and “secret”**. This resolution was valid until 1992 when Mongolia's new Constitution was adopted and in order to comply with the content of the new Constitution, the reform of social relations was invalidated by the decree #38 of the Government of Mongolia on September 25, 1992.

## 3. Analysis of the Mongolian Law on State Secrecy, the Law on the List of the State Secrets

Regarded as the main legislation protecting the basic national interests of Mongolia, the Law on State Secrecy should be legally clearly defined, suggest no misinterpretations, comply with the international norm and standards on the freedom of information, and be compatible with the Mongolian citizens' right to information access and public's right to know.

In 1995, when this law was passed, issues of the freedom of information, right to know and right to access information were not very familiar to Mongolia. Those issues are relatively new and it is no secret that our knowledge and stand is quite distant from the international culture, norms and standards on the freedom of information, right to information access and the public's right to know.

Within the study project we analysed the Mongolian Law on State Secrecy, the Law on the List of the State Secrets in the following capacities:

### **Classification and protection of state secrets**

When classifying state secrets international practice requires a proper balance between national security and secret information. If the balance is not kept, citizens' interests are affected.

The process of classifying state secrets involves news, documents and artifacts, and decisions should be made strictly by passing the law.

The Mongolian Law on State Secrecy provides for classifying **“parts necessary for secrecy”** of documents and does not relate to all information on national security, defence, espionage and counter espionage and secret operations.

But, the law does not explain at all the above provision and there is no indication about the distinction between what parts are secret and what are not. Thus, things that don't need to be kept secret are classified. The provision, **“parts necessary for secrecy”**, requires a clearer definition. The following are a few examples of this need.

Article 5 of the Mongolian Law on State Secrecy defines areas included in the state secrecy. Provision 4.5 cites **“parts of information and documents necessary for secrecy related to the fight with terrorism”**. But the Law on the List of the State Secrets includes **all information related to the fight with terrorism**. There is a discrepancy between the two laws.

The Law on the List of the State Secrets (list # 5,9,20,49) stipulates terms for **“parts and provisions necessary for secrecy”**, **“issues necessary for secrecy”**, and **“secret operations necessary for secrecy”**, but it is not clear what “necessary for secrecy” means.

Classification of state secrets should fit reality. In 2006, on the occasion of the 800th anniversary of the Great Mongolian State, the State Great Hural passed a Law on pardoning. A draft of this law was not made public, because it was announced as a state secret. But in both laws, the Mongolian Law on State Secrecy, and the Law on the List of the State Secrets, there are no provisions related to the pardoning. Nonetheless there was a reason to hide this draft from the public: before the law was passed there was a debate on what crimes should be pardoned and what should not, and consequences of their disclosure could lead to serious controversies.

The term **“protection of state secrecy”** means all measures and tools used by the government agencies and officials within their discretion not to disclose the state secrets. Government officials responsible for state secrecy, and officials or citizens authorized to access state secrets, are restricted from seeking and disclosing state secrets to others or for accessing state secrets for personal use. This definition is too restrictive when state secrets are defined so broadly.

## Classification of state secrets

The Law on the List of the State Secrets provides 59 sets of documents to be classified as state secrets covering the areas: 1) of national security of Mongolia, 2) of defence, 3) economy, science and technology, 4) intelligence, counter-intelligence and secret operations. The list sets three degrees for state secrecy: **“very important-top secret”**, **“top secret”** and **“secret”**. But for some information on the list the classification could not be clearly identified and was simply referred to as **“classified”**. This should be defined specifically, or the term “as classified” explained properly.

The Mongolian Law on State Secrecy, Article 11, provides classification of the state secrets depending on their potential harm to national security and interests that their disclosure could cause. On the other hand, the Administrative responsibility law and Criminal code that impose fines for disclosing state secrets, don’t distinguish between degrees of state secrecy and is one-sided. It is logical that disclosure of **“very important-top secret”** information and disclosure of **“secret”** information should have different degrees of punishment.

## Secrecy period

Based on the Law on the List of the State Secrets, we compiled a table showing different periods for all secret information (59 categories).

No.	Period	Number		%
1	Permanently	13		20,96%
2	60 years	15		
3	50 years	2	28	45,16%
4	40 years	11		
5	30 years	1		
6	25 years	1	8	12,9%
7	20 years	6		
8	15 years	2		
9	10 years	6	9	14,5%
10	5 years	1		
11	Indefinite	4		6,45%

If we look at numbers in relation to the classification degree:

- very important-top secret – 6
- top secret – 24
- classified – 7

Secrets labeled “permanently” do not relate to the classification degree, they can belong to any one of the three degrees.

The List of Secrets allocates permanent periods for items labelled “national security” and “foreign relations”, and therefore citizens don’t have the opportunity to know about the foreign relations of their own country.

Article 1 of the Law on the List of the State Secrets provides permanent secrecy for information about Mongolia’s sovereignty and territorial integrity. If this provision is to be respected then well-known historical documents about Chinggis Khan’s “Secret History of Mongols” would become state secret. Article 3 keeps secret documents on relations with other countries, such as “state visits of highest level, bilateral and multilateral talks, negotiation topics,

reports and minutes (if not agreed otherwise) until the termination of negotiations” (Article 5). This provision seems to relate to all international visits.

Article 6 provides for secrecy of documents on bilateral and multilateral relations for the term of 60 years (if not agreed otherwise). May be only North Korea could require this type of agreement. Again, if this law is to be followed, the public is restricted from knowing about Mongolia’s foreign relations and related documents. Article 13 provides for secrecy of codification used in the government. Decodification is becoming more and more easy, so there is a need to change codes constantly, thus this provision seems to be useless.

Article 2 provides an average term of 40 years for secret documents related to concepts, strategies and tactics of the defense sector. Without denying the necessity of secrecy for these types of documents, a period of 40 years is too long.

The provision on intelligence and counter-intelligence information being held secret (for 60 years and permanently) should be changed, because this censors the citizen’s right to know (although in western countries the term is set for 30 years with a possible extension of up to 70 years in order to protect intelligence service agents).

It should be noted that above law provisions strongly contradict the Law about Archives (adopted in 1988) where documents on government activities are for public disclosure after 30 years, and in extreme circumstances after 50 years, and documents on private matters of individuals after 70 years.

### **The scope and limits of the state secrecy law**

The Mongolian Law on State Secrecy and the Law on the List of the State Secrets were passed in 1995 and the Law on the List of the State Secrets was revised in 2004.

Laws enter into force in the date of its passage (if not provided otherwise). Secrecy laws passed in 1995 do not have a provision for reverse power. So, it is not clear if the laws cover state secrets so defined before 1995. Legally they should refer to the secrecy situation after their passage, but on the other hand state secrets must remain protected regardless of the time when they were classified.

The project research team requested information about war time plans of 1939-1945 from the Military archives, but were denied access because this information was secret. We doubt that this information should remain secret, but nonetheless there seems to be some interest to keep it secret. On the other hand documents of 1939-1945 don’t seem to be related to the Law on the List of the State Secrets that was revised in 2004.

A very important mechanism against covering up failures was incorporated in the State Audit Law (Article 22, Clause 2) stating that **“if the Auditor General considers that the information classified as secret covers up wrongdoings and this way harms national interests, he may report it to authorized agencies and officials and propose actions”**.

### **Information classified as state secret but became public**

The Law on the List of the State Secrets (2004), Article 1, provides secrecy for **“The concept of Mongolia’s national security and foreign policy”**. But a Parliament decree from June 30, 1994 resolved the publication of these documents. Moreover, those documents became public domain long ago and were placed on the Internet in the legal site “Findlaw”.

The Law on the List of the State Secrets classified location maps below the resolution 1:100.000 as state secret for unlimited term. Meanwhile today everyone can download those

maps from the web. The law is outdated. The law should be specific about the types of maps, because military and war strategy maps need to be secret.

We could see that the above information does not need to be classified, because **naturally** (from various sources) they lose the importance for being kept secret. Here we see that the necessity for secrecy should be accurately defined.

There are numerous instances when Mongolian researchers obtained from open archives abroad information that is defined as state secret in Mongolia. This fact proves that actual necessity should dictate the decision about classifying secret information.

### **Information that does not need to be classified**

The Law on the List of the State Secrets (number 4) classified secrets as **“facts, documents, artifacts, objects and activities related to drafts of co-operation, debts and loans treaties and agreements of the Mongolian Government and the Central Bank with foreign countries and international organizations”**. Those drafts are to become not secret after the ratification of documents. It is unclear, why secret draft documents are kept secret if they become open after their signing.

The same law (number 37) stipulates secrecy for **“documents related to science and technology license agreements circulated internally and abroad”**. Concealing time is set for 10 years, if not agreed as otherwise between the parties. In our opinion, the secrecy term should be set by law and not by agreement. In general, we think, science and technology license circulation agreements don't need to be kept secret.

### **Disclosure procedures of state secrets**

The Mongolian Law on State Secrecy, Article 21, outlines disclosure procedures. Clause 21.1 says **“Disclosure of state secrets mean release from state protection by the State Great Hural decree”**. Here we have a discrepancy, since the list of secrets is approved by law, but the disclosure is approved by the decree. Those procedures should have equal form in laws. On the other hand, **the Mongolian president is authorized with the power “to decide by the recommendation of the Central Intelligence Agency head on the emergency disclosure of state secrets if such a necessity arises on the grounds of national security”**.

Provisions of the Mongolian Law on State Secrecy, stating **“immediate disclosure of the state secrets required by the necessity of the national security”** and **“disclosure due to change of circumstances”**, are vague and need clarification. A more proper definition would be the **“necessity to disclose state secrets”**.

The **“immediate disclosure of the state secrets required by necessity”** could mean that disclosure would not harm national security, and contrary non-disclosure could seriously harm public interests. And **“disclosure due to change of circumstances”** could mean that justifications and necessities for non-disclosure vanished and are not needed anymore. But we don't claim accuracy of our definition.

Essential criteria for classifying and protecting state secrecy in Mongolia is by definition for information that **“if disclosed would become harmful to national security”**. But in some instances information that does not fall under this definition is kept secret. In other words, if disclosure does not cause harm, then there is no need for secrecy and those who disclose such information shall not be held responsible.



If disclosure of state secrets or related information causes harm, but if non-disclosure is even more harmful, then it should be regulated for immediate disclosure. Similarly, if the public's right to know and public interests are greater than national interests disclosure should be legally justifiable.

In September 2006 the newspaper "Washington Post" published a CIA secret report, referring to a source close to the President George Bush. After the publication, American people doubted the President's statement that "America is protected stronger than ever before...". Few days after disclosure the secret information was excluded from the list of secrets.

One of grounds for disclosure provided in the Mongolian Law on State Secrecy is **"termination of the secrecy period"**. But for most secret information the initial classifying date is unknown to the public. Therefore it is impossible for the public to figure out the disclosure date, and is thus equivalent to permanently keeping the information secret. Open procedures should be put in place for immediate public access to disclosed information.

The Law about Archives **"allow[s] public access to state and other secret documents after 30 years since classified"** (Article 25, Clause 7), and **"disclosure time for public access of the information on national security, state's extreme rights and interests shall be 50 years, on individuals private matters and property shall be 70 years"** (Article 25, Clause 8). Archives are organized to receive, store, protect and provide for proper use political, economical and general interest documents. Their principle duty is to provide open access for public. To impose on the archives the duty to set a time limit on documents that are not classified or no longer state secrets does not comply with the citizens right to seek and receive information that is not state, agency or individual's secret.

The Law about Archives' provision that **"documents related to national security and externe rights and interests of the state"** is contradictory, because the same type of documents are protected by the Mongolian Law on State Secrecy.

### **Disclosure of state secrets**

Article 12, Clause 5 of the Mongolian Law on State Secrecy has a provision prohibiting **"seeking and obtaining, and disclosing to others state secrets"**, but doesn't provide any administrative penalties for this.

The Administrative responsibility law, Article 34, has a provision against violating the rules for storing and protecting state secrets, providing monetary fines of 10.000-50.000 tugriks, if no criminal charges are present.

The Criminal Code of Mongolia includes the crime of **"disclosing state secrets"** (Article 87). Article 87, Clause 1 stipulates that "if facts, documents, artifacts, objects and activities related to state secrets are disclosed by an entrusted subject, or other subjects authorized access by official position or duty, if it does not constitute treason or espionage, shall be punished for up to 5 years of imprisonment". If substantial harm was caused (Article 87, Clause 2), they shall be punished by more than 5 and up to 8 years of imprisonment. A Doctor of Law and merited lawyer of Mongolia, G.Sovd, explains in his work "Comments to the Criminal Code of Mongolia" that the crime of "disclosing state secrets" is referred in the law to "entrusted subject, or other subjects authorized access by official position or duty". "Entrusted subject" means subject directly responsible for storing and protecting state secrets by official duty or contract, or legally authorized for the purpose of research and study, and "subjects authorized access by official position" mean subjects not directly entrusted, but legally authorized access by official position or for the special inspection task. Subjects "authorized access by official duty" mean subjects not directly responsible for storing and protecting state secrets, but authorized by official duty and performing supplemental, technical work (typists, copy workers, messengers etc.)

As we see, the Criminal Code relates penalties for disclosing state secrets to entrusted subjects, or other subjects authorized access by official position or duty. Therefore those who are not responsible directly for storing and protecting state secrets (journalists, media workers), should not be held legally responsible and imposed criminal charges for disclosing the secret information to the public. This seems to be the international practice and standard, but in reality in Mongolia it is quite different.

### **1.5. Survey of media publications related to state secrecy**

#### **Daily newspapers**

##### **“Daily newspaper” (formerly “People’s Right”), 1990.07.01, No.4**

Title: “Top secret! Can’t tell” (How many death sentences are carried out and how many are pardoned).

“Top secret! Can’t tell” – from a conversation between a reporter and an employee of the Parliament. If death sentences are not carried out before the public, at least the information about the carrying out of death sentences and pardons could be made public. What reporters want is statistics only, but unfortunately the Law on the List of the State Secrets provides secrecy for all information, including execution procedures and all related documentation. Concealing everything with the excuse “state secrecy” is nonsense.

##### **“Daily newspaper”, 1993.08.31, No.137(637)**

Author: B.Natsagdorj

Title: “My lost Mongolia” (On top secrecy).

There were times when everything was secret, infant mortality rate, livestock losses, number of military drafters etc. I learned later that a total of more than 300 items were considered state secrets. During the democratic revolution most of this information was disclosed, such as foreign debts. The former government released the resolution #206, containing list of 47 sets of secrets, followed by enforcement instructions adopted by the General Agency for Protection of State Security (GAPSS). But despite that, protection of state secrets did not improve. GAPSS inspection of the State agency for Geodesy and mapping (SAGM) revealed that more than 60 secret maps were missing, 48 among them were sold to foreigners by the former head of SAGM control department Demberel, who is now charged with a criminal offence. Meanwhile, because of secrecy laws, historical documents are inaccessible to those who work on the revised history of Mongolia. The country needs a secrecy law that is efficient and sensitive. For example, the state secrecy list includes location maps in general terms, but today everyone can get from the Internet maps of higher than indicated resolution 1:100.000. Military maps, in turn, deserve state protection.

##### **“Daily newspaper”, 1995.01.18, No.09(968)**

Author: Ts.Jargalsaikhan

Title: “If concealed, may be more intriguing”

A reporter asked J.Enkhsaikhan, secretary of the National Security Council, why Mongolia’s foreign policy concept was published. The answer was that there is no need to make this issue secret, and now everyone can access that paper.

**“Daily newspaper”, 2005.12.24, No.308(2129)**

Title: Reporter of the “Eagle” TV, G.Batjav will disclose secret materials related to intelligence service, tax and social insurance agencies.

If secret information is leaked because of the failure of officials who protect it, the journalists should not be held responsible for publishing the information. This does not fall under the provision of the Criminal Code about disclosing the state secret.

**“Daily newspaper”, 2000.10.24, No.250(503)**

Title: State secrecy disclosure case is under investigation.

B.Tsendbaatar, secret archives worker of the Defence University, is charged for disclosing state secrets. A third grade student, N.Tuvshinjargal, received from him books and documents on state borders and passed them onto another student, Otgonbaatar, who displaced the documents at the University’s cultural center. Experts concluded the documents belong on the secrecy list, and B.Tsendbaatar and N.Tuvshinjargal are now charged with the criminal offence (Criminal Code, Article 71). Otgonbaatar was found not guilty.

**“Daily newspaper”, 2006.10.04, No.244 (2378)**

Title: Secret issues in the Cabinet meeting agenda

13 issues were numbered on a cabinet meeting agenda (presenter Prime Minister M.Enkhbold) and 14 (presenter Finance minister N.Bayartsaikhan) had no titles, and were indicated as secret. One could guess that maybe those are government non-confidence vote issues, or something related to the country’s finance. In either case, if the public’s interest is concerned, issues should be discussed openly.

**Newspaper “Today” 1998.11.14. No.222 (516)**

From the interview

D.Chimed-Yunden: -There is no secret service that does not do surveillance.  
Reporter: -But the problem is that the fact of surveillance was leaked. The General Agency for Protection of State Security (GAPSS) should be indeed the highest secrecy organization, isn’t it? So why do you leak information?  
D.Chimed-Yunden: We should admit that this happens because of some of our employees level of education and professionalism. There are also some cases when secret information is obtained from outside. We lack experience in working in a new democratic, multiparty system, where personal greed sometimes causes leakage. It proves that overall conditions of storing and protecting state secrets is insufficient.

**L.Sanjaasuren case**

On May 19, 2005 Amnesty International (AI) issued an appeal regarding a Mongolian lawyer and human rights activist Lodoisambuu Sanjaasuren.  
L.Sanjaasuren, whose heart condition became critical while detained in prison, was denied medical treatment. He was sentenced in November 2004 with charges of disclosing state secrets. Amnesty International’s standpoint was that L.Sanjaasuren was detained because he fought for his client’s rights.

He was defending the rights of his client who was arrested by the intelligence service and later tortured in prison. For that L.Sanjaasuren was accused of disclosing state secrets. In April 2005, L.Sanjaasuren made an unsuccessful appeal to the Supreme Court of Mongolia.

In a newspaper interview given in the prison he told that he was kept in terrible condition in a crowded cell and suffered beatings. Conditions were specifically harmful to his heart disease.

L.Sanjaasuren was the attorney of D.Enkhbat, who was arrested in France and deported to Mongolia by intelligence agents as a suspect in S.Zorig's assassination case of 1998.

L.Sanjaasuren helped his client in the television interview on his arrest and torture by the General Intelligence Agency. The lawyer and his client both were accused of disclosing state secrets and were sentenced in October 2004 (L.Sanjaasuren for 18 months, D.Enkhbat for 3 years).

D.Enkhbat died in prison, and L.Sanjaasuren was released from prison with the pardon of the President after Amnesty International's appeal.

### **“Daily newspaper”, 2004.01.22**

#### **Politicized intelligence**

Last year's politicized case of U.Niamdorj's espionage and of D.Enkhbat's arrest in France continued to attract the public's attention. Justice minister U.Niamdorj's case was tried by the lower court. The former head of the General Intelligence Agency (GIA), general Baatar was found guilty of disclosing state secrets and libel and sentenced for total of 7 years of imprisonment. The other case (D.Enkhbat's) was announced by GIA press office twice as being exaggerated and politicized by opposition parties. Afterwards, the investigation team of S.Zorig's case made a public statement similar to GIA. Statements followed by media interviews and press conferences. Analysis of all information pro and contra reveal that there is some political conspiracy behind similar cases: arrests of D.Enkhbat in France, Batsukh a.k.a “ard” in America and Baatarjav a.k.a. “Selengiin” and his younger brother in Russia. All suspects were linked by the law enforcement to the Zorig case. L.Sanjaasuren first raised the issue of human rights violation in the D.Enkhbat case (local human rights advocates supported him, and the European Union and France were involved), but more than this it seems that the lawyer was trying to stress the political issue too. During his visit with his client in the prison hospital, a hidden video recording of D.Enkhbat's testimony was made and later broadcast on “Channel 25 TV” and published in some newspapers. In this tape D.Enkhbat repeatedly said that “intelligence allegedly linked me with the Zorig's case, trying to show that Ch.Enkhtaivan and M.Enkhsaikhvan reserved the murder and consequently aimed to discredit the Democratic Party before the upcoming elections”.

There were similar incidents in the past when politically motivated investigations were initiated on the eve of elections and dissolved afterwards, i.e. E.Bat-Uul's arrest as a suspect in the Zorig's case. When reporters inquired information on the case, both the police and Bat-Uul himself refused to tell anything, referring to the secrecy of the investigation. The bottom line is that Bat-Uul's political reputation as well as personality was badly damaged.

### **1.6. Comparative analysis of foreign countries laws**

Analysis was carried out on the Mongolian State Secrecy Law in comparison with similar legislations of countries in democratic transition and some other countries (1. the Russian Federation, 2. the Kyrgyz Republic, 3. Tajikistan, 4. Turkmenistan, 5. Ukraine, 6. Georgia, 7. Kazakhstan, 8. the Republic of Korea, 9. the United Kingdom, 10. Germany).

During the study, the following issues were considered:

- Definition of state (government) secrets
- Secrecy areas
- Secrecy period
- Concealing of secrets
- Classifying subjects

The Kyrgyz Republic, Turkmenistan, Ukraine, Georgia and Kazakhstan have legal definition of state secrecy and the difference with Mongolia is that they refer herewith to the term (as it relates to?) information only. Kyrgyz Republic, Turkmenistan and Kazakhstan enlist secret information. Ukraine and Georgia refer to information that could be harmful to national security if disclosed.

The Mongolian State Secrecy Law, Article 3, defines state secrecy as “facts, documents, artifacts and activities in the form of written statement, images, signs, technical and technological solutions and activities related to foreign policy, economics, science, technology, defence, intelligence and counter-intelligence, secret operations, that could be harmful if disclosed”. The Mongolian law’s definition, as we can see, is wider than the mentioned countries and includes not only information, but written statements, images, signs, and technical and technological solutions and activities.

In general, the Mongolian Law on State Secrecy and the Law on the List of the State Secrets cover very broad areas. Almost everything could fall under “state secrecy”. When analysed, laws of the Russian Federation, Ukraine, Turkmenistan and Tajikistan were structurally identical, and the Russian Federation, Ukraine and Tajikistan have secrecy lists. Turkmenistan’s and the Kyrgyz Republic’s laws have broader definitions, whereas Ukrainian and Georgian laws have more detailed definitions, including technical procedures of processing, storing and protecting secret information.

### **Secrecy areas**

The Russian Federation, Ukraine and Georgia define secrecy areas in general intelligence, counter-intelligence and investigative activities in:

- The defense (military) sector
- Science, technology, economics
- Foreign political and economic relations

This is similar to Mongolian law’s definition, but in Mongolian and Ukrainian laws the term “national security” is defined differently.

Particular types of information related to each of the above areas is provided in the Georgian and Mongolian laws, but often ill-defined, thus making legislation too general and contradictory.

Mongolian law classifies as secret all maps depending on the resolution, whereas Kazakhstan, Tadjikistan and Ukraine relate secrecy to maps for military use or containing economic data (Kazakhstan, Tadjikistan). All other countries don’t have any provisions related to maps. Georgian law even prohibits classifying maps except specifically for military use (Article 8.3.).

Mongolia law provisions regarding intelligence, counter-intelligence and secret operations (List of secrets, Article 4, Clauses 39,40 and 43), in our opinion, should not be used as tools for state repressions against people or human rights.

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information allows for the restriction of

freedom of information on specific grounds, as established in international law, national security, individual's privacy and other interests<sup>5</sup>. But practice shows that authorities use national interests in broader terms or misuse it. Therefore in order to protect freedom of opinion and freedom of information, national security should be defined very narrow and exact. The Johannesburg Principle 2: Legitimate National Security Interest, provides that "(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government".<sup>6</sup>

All information should be open except in cases if the harm to national security and other legitimate reasons exceed public's right to information access. Public interests shall always prevail<sup>7</sup>. If the threat to national security is clear and present, but disclosure of information is of greater importance, then the information should be disclosed.

Most of the provisions in the Article 5 of the Mongolian State Secrecy Law are widely defined. Examples of inappropriate provisions:

- Annual number of military drafters (5.2.7.)
- Amount of state reserve funds (5.3.2.)
- Death penalty procedures (5.5.)

In the majority of democratic countries this type of information is public, and it would be hard to find substantial grounds for not disclosing it. On the other hand, the disclosure of the state reserve fund might be useful for economic development. Again, even if the state has reasons for secrecy, but public interests shall always prevail. There can't be two criteria for one thing.

### **Exceptions to secrecy information**

Mongolian and Tadjik laws don't provide exceptions to state secrecy. Let's have a look at other countries' legislations.

The Russian Federation's state secrecy law contains (Article 7) two provisions, the gold and money reserve, and the health condition of high ranking officials. The following information shall not be categorized as secret:

- events that could harm population emergency, health and safety, natural disasters forecasts,
- Environment, health, sanitation, education, culture, agriculture information, crime situation,
- Special privileges, discounts, repayments by the state to citizens, government employees, organizations and business entities,
- Instances of human rights violations,
- Currency and gold reserves,
- The health conditions of high ranking officials,
- Information about illegal activities of state organizations and officials.

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<sup>5</sup> The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information.

<sup>6</sup> Ibid.

<sup>7</sup> Public's right to know. Note 78, principle 4.

Kyrgyz and Ukraine have similar law provisions. Turkmenistan has set exceptions on secrecy for citizens' human rights and legitimate interests, and information that could harm human security and health.

The Russian Federation and Turkmenistan impose penalties for concealing the above information.

Kazakh law prohibits hiding information about illegal actions and injustices done by government officials, whereas in Mongolia this type of information is considered secret and thus serves to hide misdeeds.

In Georgia all maps, except international treaties and military maps, are open. In Mongolia all maps with a resolution higher than 1:100.000 are secret. Furthermore, Mongolian ministries' and government agencies' rules and procedures for information distribution themselves fall under state secrecy.

In Georgia, exceptions to secrecy are information about the health conditions of high ranking officials, corruption and illegal activities of the state organizations and officials.

In Germany, most regulation is done through the Freedom of Information law, and the responsibility part is reflected in the Criminal law. Germany's Criminal law states that "facts which constitute violations of the independent, democratic constitutional order or of international arms control agreements by virtue of having been kept secret from the treaty partners of the Federal Republic of Germany", are not state secrets. Germany's Freedom of Information law provides that "State secrets are facts, objects or knowledge which are only accessible to a limited category of persons and must be kept secret from foreign powers in order to avert a danger of serious prejudice to the external security of the Federal Republic of Germany". And furthermore, "There is no right of access to information

1. if the disclosure of the information can have a detrimental effect on
  - a) international relations;
  - b) military or other sensitive security interests of the German Armed Forces;
  - c) internal or external security interests;
  - d) control or monitoring duties of financial, anti-trust or regulatory authorities;
  - e) matters of external financial control;
  - f) measures to prevent prohibited foreign trade;
  - g) an ongoing legal proceeding, the right of a person to a fair proceeding or the carrying out of criminal, administrative or disciplinary investigations;
2. if the disclosure of the information could jeopardize public safety;
3. if and as long as
  - a) the required confidentiality of international negotiations or
  - b) agencies' consultations could be impaired;
4. if the information is subject to secrecy or confidentiality regulated by law or by the General Administrative Regulation on the Material and Organizational Protection of Classified Information, or is subject to a professional or special official secret;
5. in regard to temporarily acquired information of another public office that shall not be part of the concerned agency's own operations;
6. if the disclosure of the information would be likely to impair the fiscal interests of the federal government when involved in economic transactions or the economic interests of the institutions of social insurance;

7. in the case of information gathered or supplied on a confidential basis, to the extent that the third party's interest in confidential treatment continues at the time the application for access to the information is made; and

8. in regard to intelligence services and agencies and other public offices of the federal government to the extent that they perform duties within the meaning of Sec. 10 (3) of the German Security Screening Act ("Sicherheitsüberprüfungsgesetz").  
All other information is open.

For Mongolia, models could be the law provisions on exceptions to secrecy of the Russian Federation, Turkmenistan, Kyrgyzstan, Georgia and Kazakhstan, and those providing guarantees for requesting and obtaining of secret information.

### **Secrecy period**

Among the studied countries, secrecy periods are not strictly set in the Russian Federation, Turkmenistan and Kazakhstan. An advanced provision in their laws is that secrets and their degrees are revised every 5 years and unnecessary ones are disclosed. Depending on the degree of secrecy, periods are set for not more than 30 years in Ukraine and not longer than 20 years in Georgia. Mongolia is the most conservative, with secrecy periods up to 60 years (2-3 times longer than in other countries), and some categories are kept secret permanently.

If we compare Mongolian law with other countries' legislations, most countries define secrecy in terms of their state secrecy laws, not in the law about the list of secrets (as is the case in Mongolia). Surprisingly, the Mongolian State Secrecy law does not have provisions on secrecy classification (same as Kyrgyzstan and Turkmenistan).

Examples of secrecy periods:

- For Kazakhstan, up to 30 years (Article 20.3.)
- Russia committed itself to the world average of 30 years. If we compare this to The secrecy period in Mongolia, some bilateral documents still closed by Mongolian standards are now accessible from Russian archives (Article 13).
- The Tadjik system is very complex and assigns to documents 7 degrees of secrecy periods (but still less than Mongolia's 10 degrees). Besides Mongolia, only the Tadjik Republic provides an unlimited secrecy period (Article 10.1).
- In Ukraine, 30 years for filed documents of extreme importance, 10 years for top secrets, and 5 years for secret documents (Article 13).
- In Georgia, 30 years for filed documents of extreme importance, 10 years for top secrets, and 5 years for secret documents (Article 14.1.).

Positive in most countries, for instance in Kazakhstan and Turkmenistan, is the fact that their laws avoid imposing secrecy periods, but relate unlimited periods to "state's and people's interests" or "extreme circumstances".

Countries impose secrecy periods (up to 30 years), and provide detailed justification and rules for disclosure. Another similarity is that laws provide for citizens rights for court appeal if they find that information was unnecessarily concealed and their human rights were violated.

Mongolia should adopt the semi-automatic disclosure procedures for information when its secrecy period expires, which is commonly used in the West. Secret government documents should be automatically elevated after a certain time, unless they contain extremely important



figures. In extreme cases, the issue of disclosure should be addressed to the National Security Council and its final decision made in the Parliament. This will prevent government attempts to conceal repeatedly expired secrets. Periodic reviews (every 3-5 years as it the case in the Russian Federation, Turkmenistan, and Kazakhstan) of secret documents for disclosure is a good model.

### **Disclosure of secrets**

Georgia and the Russian Federation have criteria for disclosure as follows:

- International obligations undertaken by the country with respect to open exchange of data which previously constituted a state secret;
- Change of factual circumstances after which protection of the information previously classified as state secret is no longer needed
- Expiration of the fixed term;

The Mongolian Law on State Secrecy provides the following grounds for declassification of secrets:

- If circumstances arise where protection is no longer needed,
- Expiration of the fixed term,
- Other grounds.

The experiences of other countries show that if disclosure procedures are handled by the government authorities (especially by the State Security agency), no information ever would be disclosed. State Security is always seeking secrecy and bureaucratic procedures that will allow this agency keep information closed.

In Mongolia seeking the information related to state secrets is itself punishable. Whereas in Ukraine and Kazakhstan laws ensure citizen's right to request and access secret information. This regulation is particularly helpful in legal disputes about the source of information, especially in Mongolia, where in court cases on the disclosure of state secrets, evidence is brought out of a "black box" and it is often impossible to determine the truth.

### **Conclusions and Recommendations**

The Mongolian Law on State Secrecy and the Law on the List of the State Secrets, in our opinion, should be revised according to legal principles, theory and practice, and in line with modern trends. We recommend:

1. The principle provided in Article 4 of the Mongolian Law on State Secrecy is not functional, because classifying of state secrets does not comply with Mongolian laws and is not timely appropriate.
2. The Mongolian Law on State Secrecy, the Law on the List of the State Secrets, and the Mongolian Law on Archives contain legal terms and definitions that are not properly explained and therefore create difficulties for correctly understanding and using them. Terms such as "parts necessary for secrecy", "urgent necessity to disclose state secrecy due to national security interests", "no longer needed to keep secret because of change of circumstances", "information that is harmful to national security if disclosed", "secrecy period expired", "facts related to national security, state's interests of extreme importance" require explanatory definitions. Some phrases in the content, for example, "secrecy of state secrets", "expiry of secrecy period", "other grounds provided in the law", and "urgent necessity to disclose due to extreme cases", need to be edited..
3. The study of 41 laws related to state secrets revealed that both the terms "state secret" and "government secrets" are used. Uniform use of the term "state secret" is needed.

4. The Mongolian Law on State Secrecy and the Law on the List of the State Secrets provide classification of necessarily secret information. But because the laws are so general, information that doesn't need to be classified as secret ends up being put into a "black box". Classifying information that does not relate to national security or state secrets, and does not harm national security, should be considered as limiting freedom of information. Clear criteria for the classification of secret information should be legally defined.
5. The main reason for limiting the right to information access is the continued strong desire of government agencies to conceal information that they deem important even though this information is not subject to state secrecy law. This happens because secrets defined by the Mongolian Law on State Secrecy and the Law on the List of the State Secrets are too broad and general, and give officials the opportunity to deny access to almost everything. Therefore the list of state secrets should be narrowly defined, and information, documents, artifacts and activities that don't belong as state secrets should be identified and named. This way it will be possible to prevent government officials from illegally classifying information as state secret.
6. The Mongolian Law on state secrecy provides five areas for state secrecy. Exactly the same classification is given in the Law on the List of the State Secrets. This is an unnecessary duplication. Instead, the Mongolian Law on State Secrecy should state that areas for state secrecy are defined in the Law on the List of the State secrets. Interrelation between the two laws should be improved.
7. The Law on the List of the State Secrets imposes an unlimited period of secrecy to 13 types of secret information, but without grounds. Stated in the law as "classified according to the degree of secrecy", but concealed permanently is inappropriate. The practice of setting an unlimited period for secret information that does not belong to the categories "extremely important-top secret" and "top secret" should be stopped.
8. With regard to state secrets classified before the passage of the 1995 Mongolian Law on State Secrecy and the 2004 Law on the List of the State Secrets, it is not clear what set of laws shall govern. This should be regulated, and also citizens should know about when the secret documents were classified and when their secrecy term expires. A secrecy period of 60 years appears to be exaggerated and should rather be set for not more than 30 years. A mechanism is needed for the revision of state secrets every 5 years in order to determine whether declassification is necessary or not.
9. The Mongolian Law on State Secrecy, Article 5, among affected issues, does not provide a criteria for the superiority of public interests. Degrees of secrecy ("very important-top secret", "top secret" and "secret") are defined in accordance with the potential harm if disclosed, but the consequences and substance of disclosure are not clear. It is recommended, that the annual number of military drafters and death penalty execution procedures be excluded from the list of secrets. Location maps should be limited in the law to military maps only.
10. Archives are organized to receive, store, protect and provide for proper use political, economical and general knowledge documents. The fact that according to the Law about Archives certain documents (those not belonging to state secrets or declassified) are restricted for public use for a fixed term, does not comply with the citizens right to seek and receive information except secrets of the state, organisation or individual. The law terminology "documents related to extraordinary interests of national security and of the state" needs explanation and avoidance of duplication. If not classified according to the Mongolian Law on State Secrecy, this type of information should be open to the public and time restrictions should also be appropriately regulated.
11. Responsibility for the disclosure of state secrets and the punitive measures set in the Criminal Code and the Law on Administrative responsibility are justified but again

defined too generally. Therefore the degree of responsibility should be set in accordance with the secrecy degree, harm and other criteria thus providing an effective prevention and persecution mechanism.

12. If it is considered that a secrecy issue is used by officials to cover up their wrongdoings and failures, citizens' and organizations' right for appeals should be legalised as an important safeguard.

## **1.8. Annexes**

Annex #1

### **South Korea**

The National Security law was first enacted in 1948 and has been revised several times since then. Articles 3 and 4 of the National security law provide long prison sentences and the death penalty for crimes such as “espionage” and “anti-state” activities, but these terms are not clearly defined in the law and have often been used to imprison people because of the non violent exercise of their rights to freedom of expression and association. Under the National Security law, an “anti-state” organization is defined as “an association or group within or outside the Republic of Korea which has a structure of command and control, as organized for the purpose of assuming a title of government or disturbing the state”. Under the National Security law, North Korea is defined as an “anti-state” organization, rather than a country. The definition of “state secret” is so vague that in many cases it has included information which is publicly available in South Korea.

Amnesty International understands the government's need to maintain national security, but simply calls for the law to be amended in accordance with international human rights standards so that basic rights such as freedom of expression and freedom of association are protected.

The Act on Disclosure of Information by Public Agencies was enacted in 1996 and went into effect in January 1998. It allows citizens to demand information held by public agencies. Those requesting information must provide their names and resident registration numbers and the purpose for the use of the information.

The Act doesn't apply to information collected or created by agencies that handle issues of national security. There are eight categories of discretionary exemptions: secrets as defined in other acts; information that could harm national security, defense, unification or diplomatic relations; information that would substantially harm individuals, property or public safety; information on the prevention and investigation of crime; information on audits, inspections, etc. that would substantially hamper the performance of government bodies; personal information about an individual; trade secrets that would substantially harm commercial or public interests; and information that would harm individuals if disclosed, such as real estate speculation or hoarding of goods.

Agencies must set up an information disclosure deliberative committee to the determine release of information. Those denied can appeal to public agencies.

### **Freedom of Speech and Press**

While most political discourse is unrestricted, under the NSL the Government limits the expression of ideas that authorities consider Communist or pro-North Korean.

Broad interpretations of the NSL allow for restrictions on the peaceful expression of dissenting views.

Although the Government has abandoned direct control over the news media, it continues to exercise indirect influence. Some officials reportedly lobby journalists aggressively to discourage them from writing stories critical of the Government, although this practice reportedly has declined significantly.

### **Injustice under the National Security law: the case of Professor Park Chang-hee**

#### **Charges under the National Security law**

On 9 June 1995, Professor Park Chang-hee was charged under the National Security law. He was accused of meeting a Korean resident in Japan called Suh Tae-su, of passing him “state secrets” and receiving money from him. The prosecution claimed that Suh Tae-su was taking orders from an “anti-state” organization (this means the North Korean government which is defined as an “anti-state” organization under the National Security Law).

The “state secrets” which Professor Park is accused of passing to Sue Tae-su consisted of information already in the public domain. They included copies of South Korean newspapers, a photograph of President Kim Young-sam and the content of conversations about student politics and the labor movement in South Korea.

Under the National Security Law, a “State secret” has been defined as any information which may be useful to North Korea. The term has been widely interpreted by the courts in South Korea, in violation of their rights to freedom of expression and association and the right not to be detained arbitrarily.

## **Annex #2**

### **The United Kingdom**

#### **The Official Secrets Act 1989**

The primary purpose of the Official Secrets Act 1989 is to ensure that protected information remains within the circle of secrecy occupied by those who form part of the government apparatus. The 1989 Act is therefore the principal focus of attention for present purposes in that its main concern is to prevent the unauthorized release of information by officials and other insiders as opposed to those measures, such as section 1 of the 1911 Act, whose main aim may be said to be preventing outsiders from gaining illegitimate access to certain forms of official information.

The 1989 Act was preceded by a White Paper entitled ‘Reform of Section 2 of the Official Secrets Act 1911’. In that White Paper the government expressed its objectives as follows:

The central concern of any reform of section 2 is to determine in what circumstances the unauthorized disclosure of official information should be criminal... What justifies the application of criminal law, where disclosure is not caught by section 1 of the 1911 Act, is the degree of harm to the public interest which may result. The

objective of the Government's proposals is to narrow the scope of the present law so that the limited range of circumstances in which the authorized disclosure of official information needs to be criminal are clearly defined.

The categories of information protected by the 1989 Act

There are four categories of information which are protected by the Official Secrets Act 1989:

1. Information relating to security and intelligence;
2. Information relating to defence;
3. Information relating to international relations and confidential information obtained from foreign states and international organizations; and
4. Information relating to crimes and special investigation powers.

#### Security and intelligence

Security or intelligence in this context comprises the work of, or work in support of, the security and intelligence services or any part of them. Information relating to security or intelligence includes information held or transmitted by those services or by persons in support of, or of any part of, them.

The 1989 Act does not explain what the security and intelligence services are. But the following services are recognized by statute: the Security Service, the Secret Intelligence Service and General Communications Headquarters.

#### Defense

The matters falling within the category of information relating to defense are the size, shape, organization, logistics, order of battle, deployment, operations, state of readiness and training of the armed forces of the Crown; the weapons stores or other equipment of those forces and the invention, development, production and operation of such equipment and research relating to it; defense policy and strategy and military planning and intelligence; plans and measures for the maintenance of essential supplies and services that are or would be needed in time of war.

#### International relations

International relations are defined as comprising the relation between states, between international organizations or between one or more states and one or more such organizations and include any matter relating to a state other than the United Kingdom or to an international organization which is capable of affecting the relations of the United Kingdom with another state or with an international organization. International organization means an organization of which only states are members and includes a reference to any organ of such an organization.

#### Crimes and special investigations

Save that it all relates to promotion of law and order, the content of the fourth category of information is more varied. It includes information, the unauthorized disclosure of which:

1. results in the commission of an offence;
2. facilitates an escape from legal custody or the doing of any other act prejudicial to the safekeeping of persons in legal custody; or

3. impedes the prevention or detection of offences or the apprehension or prosecution of suspected offenders.

#### Official Secrets and the Freedom of Information Act

The principal point of impact between the Official Secrets and the Freedom of Information Act concerns the exemption of information the disclosure of which is capable of forming an element of one of what have been described above as the primary offences under the Official Secrets Act 1989. That is to say information within the four categories of information. The starting point is the exemption created: the exemption of information if its disclosure (otherwise than under the Freedom of Information Act) by the public authority holding it is prohibited by or under any enactment. The question, therefore, is whether the provisions of the Official Secrets Act 1989 constitute prohibitions within the meaning of that exemption. Those exemptions are:

1. exempting information which was supplied by any of the security services;
2. exempting information which is required to be exempt from disclosure for the purpose of safeguarding national security;
3. exempting information the disclosure of which would, or would be likely to, prejudice the defense of the British Islands or of any colony or the capability, effectiveness or security of the armed forces of the Crown or any forces co-operating with those forces;
4. exempting information the disclosure of which would, or would be likely to, prejudice international relations;
5. exempting information obtained in confidence from other states or certain international bodies;
6. exempting information relating to certain investigations and proceeding; and
7. exempting information relating to law enforcement.

## II. “POSSIBILITY FOR MONGOLIAN CITIZENS TO ACCESS INFORMATION” INSTIGATIVE SURVEY REPORT

### 2.1. Preamble

The survey was conducted by the NGO Globe International in the framework of the project “State Secrecy and Freedom of Information”, with the financial support of the US Embassy in Ulaanbaatar.

The survey was conducted by a team consisting of a researcher, a journalist and ordinary citizens. The survey team focused on the Constitution of Mongolia, the international law guaranteeing a citizen’s right to information, and international standards and principles concerning freedom of information.

In its very first session in 1946 the UN General Assembly adopted Resolution 59(I) which stated, “Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”<sup>8</sup>

ARTICLE 19 has published a key standard-setting work on this topic, *The Public’s Right to Know: Principles on Freedom of Expression Legislation*.<sup>9</sup> This has been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression in his 2000 Annual Report.<sup>10</sup> These principles may be summarised as follows:

1. **Maximum disclosure:** The legislation should be guided by the principle of maximum disclosure.
2. **Obligation to publish:** Public bodies should be under an obligation to publish key information at their own volition.
3. **Promotion of open government:** Public bodies must actively promote open government.
4. **Limited scope of exceptions:** Exceptions should be clearly and narrowly drawn and subject to strict “harm” and “public interest” tests.
5. **Processes to facilitate access:** Requests for information should be processed rapidly and fairly, and any refusal to disclose should be subject to an appeal to an independent body.
6. **Costs:** Individuals should not be deterred from making requests for information by excessive costs.
7. **Open meetings:** Meetings of public bodies should be open to the public.
8. **Disclosure takes precedence:** Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed.
9. **Protection for whistleblowers:** Whistleblowers – individuals who release information on wrongdoing – should be protected.

### 2.2. Need for an Instigative Survey

Open information is pivotal to a democratic society which respects human rights. That is why information is called the oxygen of democracy. Information guarantees freedom, social justice and development.

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<sup>8</sup> 14 December 1946.

<sup>9</sup> (London: June 1999).

<sup>10</sup> Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, Para. 43.

The freedom to information is guaranteed by the Constitution of Mongolia, so information is one of the main services of the Mongolian state.

However, a culture supporting open information has not yet been established and the mentality of secrecy still remains, which affects the country's development. Particularly, simple information, which should be open to the public, is kept secret. Henceforth is the need for conducting such a study.

### **2.3. Purpose of the Instigative Survey**

The purpose of the instigative survey is to show an accurate portrayal of the possibility of Mongolian citizens to access information held by government institutions.

The objectives of the survey are:

- To study the use of the Law on State Secrecy and the Law on the List of State Secrecy
- To reveal if the state institutions protect information related to public interest, and if so what are its justification and reasons
- To expose constraints or problems faced by citizens

### **2.4. Methodology**

Instigation as a method was used for the survey. The team approached state institutions through telephone calls and visited the selected institutions with requests to get information held by them. There was some state secret information. It should be noted that it was risky for the team because the secrecy legislation imposes harsh penalties on those who seek this secret information. Acquiring the information was not the primary purpose of the team.

The team defined its strategy in consultation with lawyers and researchers and studied the Law on State Secrets and the Law on the List of State Secrecy. They were also introduced with the Decree No. 120, titled "Imposing Penalties on the Disclosure of State Secrets", of the Presidium of the Ikh Khural of the Mongolian People's Republic (MPR) of 1955.12.15; Resolution No. 521, titled "Determining the List of the State Secret Information and Documents of Ministers' Commission", of the MPR of 1955.12.08; and Resolution No. 250 of the Ministers' Commission, titled "Approval of the Procedure and the Short List of the State Secret Information and Documents" of 1954.5.22.

The criteria of selection of state institutions to instigate and classify the information was developed consistent with international standards.

The team based on that the following information should be open to the public:

1. Information on the services and activities of the state institution
2. Information pertinent to public interest and public concern
3. Official documents held by state institutions
4. Information on the job profiles of state officials

### **2.5. Duration and Framework**

The instigative survey was conducted for two months, starting July 1, 2006. The survey involved the following 13 state institutions:



1. Archive of State Intelligence Service (IS)
2. Archive of the Ministry of Defence (MD)
3. State Agency of the Professional Supervisory (PS)
4. Government of Mongolia (G)
5. Mongolian National University (MNU)
6. Archive of the Ministry of Foreign Affairs (MFA)
7. The Ministry of Environment (ME)
8. National Auditing Department (AD)
9. The Parliament- Ulsyn Ikh Khural (P)
10. The Mongol Bank (MB)
11. The Ministry of Education, Culture and Science (MECS)
12. Office of Execution of Court Decisions (OECD)
13. State Office of Prosecutor (SOP)

## 2.7. Classification of Information

The team agreed that they would request 15 types of information included in the following categories:

Information which must be open to the public	12
State secret information	3

Types of information which must be open to the public (from 12)

- information which should be necessarily available to the public 3
- information of public interest upon request 6
- information of public concern upon request 2
- information which should be disclosed by law 1

## 2.8. Results of the Survey

As a result of the survey the team succeeded in getting only 4 pieces of information of which:

Information which must be open to the public	2
State secret information	1

## Results by Information Classification

The team requested 15 types of information and anticipated access to 12 types of information:

Type of information	# of Requests	Obtained	Refused	Not obtained*
Information which must be necessarily made available	3	2	1	
Information of public interest	6	1	3	2
Information of public concern	2		2	
Information which must be disclosed by the law	1			1
State secret information protected by the law	3	1	2	
<b>Total</b>	<b>15</b>	<b>4</b>	<b>8</b>	<b>3</b>

\* The state institutions did not refuse, but did not provide

The state institutions refused to provide 9 pieces of information which should be made available to the public. They did not refuse to give 3 pieces of information, but the team did not obtain it.

The reasons of their refusals:

State secret	6*
Organizational secret	1
No experiences that citizens request such information	1
Refused without reasons	1

Information which was not refused, but not obtained:

Researchers were referred to a web site, but it was not there	1
The researchers could access the information only at a high cost	1
No reason given	1

## 2.8. Results by the list of information requested

#	Information requested	Category	Institution	Results
1	Concept of Mongolian Foreign Policy	State secret	MFA	Obtained. At first it was refused as state secret, but CSG later found it published.
2	Visit of Willis, the US Vice President in 1944	Public interest	MFA	Obtained.
3	Report of inspection on MIAT (Mongolian Airways)	Public interest	AD	Not obtained. Researchers were told that the information was available on the web site, but CSG could not find it.
4	Minutes of the Court hearings on cases of Handdolgors and Erdenetuya, journalists arrested for 23 days - 6 months	Public interest	SOP	Not obtained. Information is not for the public. Researchers can get the information with a letter from their organization.
5	List of students studying abroad by state subsidies	Public interest	MECS	Refused.

6	Information on the liquidation of the Mongolian currency notes used before the new Constitution, i.e., in the Mongolian People's Republic	Secret for 5 years (should have been disclosed)	MB	Not obtained.
7	Process of the execution of Bodoov and Danzan's death sentence, political leaders repressed in the 1930s	Secret	IS	Refused as state secret.
8	Plans of the 1939-1945 War and related materials	Secret	MD	Refused as state secret.
9	Voting results of MPs on the Law on Criminal Procedure adopted in 2002	Must be available	P	Obtained. Available on web sites.
10	Materials on the latest examination on products and services affecting food security	Must be available	PS	Refused as state secret.
11	Minutes of meetings in which decisions on the 'Big Debt' to Russia were made	Public concern	G	Refused with the reason that citizens never request it.
12	Number of students given donations	Public concern	MNU	Refused as organizational secrecy.
13	Minutes of meetings with former Yugoslavian president Tito during his visit to Mongolia at the beginning of 1970s	Public interest	MFA	Refused as state secret.
14	Number of people executed by death sentences	Public interest	OECD	Refused with the reason that it is state secret.
15	Results of surveys on air and pollution	Must be available	ME	Obtained.

## 2.9. Cases

### 1) State Intelligence Service

I visited the IS, met the security guard and explained my purpose. The security guard called the relevant officer. The officer came and I explained the purpose of my visit. I requested to see documents related to the death sentences of Bodoov and Danzan, who were active in the establishment of Mongolian People's Party and were later repressed. The officer, who did not want to tell his name, said that the IS archive is open to the public, but that citizens can only access information which is disclosed by law. He said it is not possible to give information on the death sentences of Bodoov and Danzan.

### 2) Ministry of Defense

I called Mr. Zorig, Chairman of the Central Military Archive (tel: 451249) and asked if it was possible to get information on the 1939-1945 war strategy and related documents. The request was refused.

### 3) State Office of the Professional Supervisory

I approached the PS and requested information on the latest examination of products and services which affect food security. The request was refused with the reason that the information was state secret. I tried again through a daily newspaper “People’s Right”, but the result was the same.

#### 4) Government of Mongolia

I approached the Government to see the minutes of the meetings where decisions on the ‘Big Debt’ to Russia were made. I was told that there are no experiences with that and that “the citizens get introduced with such information, it does not mean they cannot access the information. All the documents related to the ‘Big Debt’ are available at the Ministry of Foreign Affairs. You should go there”

I called to Ganhuyag, officer of the Archive of MFA and he said “We did not receive those materials. These documents must be at the Government”.

I tried again through journalists from a daily newspaper Onoodor. The result was the same.

#### 5) Mongolian National University

I called the financial officer of the MNU with a request to find out the number of students who were paid donations. The Officer said, “the MNU does not receive donations any more. The information you’re requesting is an organisational secret”

#### 6) Archive of the Ministry of Foreign Affairs

I requested to see the minutes of meetings with former Yugoslavian President Tito during his visit to Mongolia at the beginning of 1970s.

The officer of the Archive said, “The researchers can be introduced with the materials, which do not belong to the secrecy category. They have to pay. Actually, all the information, which are not secret, are open.”

#### 7) Agency of Executing Court Decisions

I approached Colonel Ulambayar with the request to find out how many people are sentenced to death every year in Mongolia and how they are excuted. He said this information is a state secret protected by the Law on the List of State Secrecy.

#### 8) The Ministry of Foreign Affairs

I visited the MFA with two purposes. First was request for information on the visit of Mr. Willis, the former Vice President in 1944 to Mongolia. It was the easiest one. Nergui, officer of the Archive (tel: 262397) kindly brought a file and said “A lot of people are interested in this. Unfortunately, no minutes were taken during that time. There are not many materials: some pictures and films. If you want the copies of the pictures, you have to pay, as well as for the films. In one picture he was wearing the Mongolian national costume and was smiling.

The second request was for information on the foreign policy of Mongolia. I talked on the phone to several people from the security guard phone. First, I talked to a woman from the Press Department and she said me: “Who are you to try to find out the state secret and what your reason is? You do not need to know it”. The security guard was calling many people and he did not tell

me who he was calling. After several attempts he suggested that I meet Mr. Tomorchuluu, chairman of Policy Planning, Information and Evaluation. While I was talking to him, Mr. Bayarkhuu came in and said that it was published in the blue book”. He took me to meet Mrs. Tsetsegmaa and I bought The Blue Book for 5,000 MNT. I was greatly surprised that the state secret information was published.

#### 9) The Ministry of Environment

I met Mrs. Sarantuya, officer of the section of environment and natural resources (265615) and requested access to information on the results of a survey on air pollution. She said they do not have the survey results, but I was given 3 publications about monitoring. She said I can use it and return later.

#### 10) National Auditing Agency

I visited the NAA with the purpose of obtaining information on the results of the latest financial examination of MIAT (Mongolian Airlines). Mrs. Narantsetseg said there were no complex examinations of MIAT since 1999 and there was some partial auditing. She told me the information is featured on the web site, but she did not know the link. I was told their web master Ganhuyag will start working soon and I have to call him at 261745.

Indeed, citizens can visit the web site <http://www.mnao.pmis.gov.mn> and look at the reports on auditing conducted after 2002, but I could not find any reports on MIAT.

#### 11) The Parliament of Mongolia

I called the Office of the Parliament to find information on the MP’s voting results on the 2002 Criminal Law of Mongolia. I was suggested to contact Erdenbat, the web master. He told me to visit the web site: <http://www.parl.gov.mn/home.php?loc=detail.php&val1=pid&val2=20>. He also added that I can find the videos of the Parliament sessions, but there are no processes by which citizens can request such information.

It seems to me that the Parliament’s web site is well designed and it contains good information.

#### 12) State General Office of Prosecutor (SGOP)

I visited the Sukhbaatar District Court in order to see the minutes of the court hearings of detained journalists Handdolgor and Erdenetuya. I was told that the materials are stored in the Archive of the SGOP. When I visited the Central Archive of Crime, which is a part of the SGOP, I was told that I can get it, if the chairman permits. Then I met Mr. Huyag, the chairman (tel: 324984), but he said that they have documents dated before September 2002 and I should go to the City Office of the Prosecutor. He added that this information is private and asked me why I need the minutes of the court hearings. I said I need it for my research. He said I have to bring an official letter from my organization.

I went to the Office of the City Prosecutor. The Archive is closed to the public on Mondays and Thursdays. They receive requests on Tuesdays between 9 and 11 a.m, and on Wednesdays between 2 and 6 p.m. They issue documents on Fridays between 9-12 a.m and 2 and 4 p.m. That means they serve the public for 11 hours a week, of which 6 hours are devoted to receiving requests.

They asked me why I was interested in the minutes of the court hearings. I explained it is necessary for my research. They required me to present an official letter. I explained that the director of my school would not produce any letter with his stamp for my research. He would put his stamp in the letter confirming I am student.

When the letter is presented, I was told that I have to pay 20,000 MNT for the use of the archive materials. I also needed to complete a special form. In order to get permission for using archive materials I met Mrs. Enkh TUYA, officer of the Archive, and Mr. Dagvasuundel, chairman of the Office (tel: 325582).

#### 13) The Ministry of Educating, Culture and Science and (MECS)

I went to the MECS and met Mr. Munkhbat (tel: 263449) in order to find out the information on students studying abroad through state subsidies. He refused to provide this information and referred me to the Ministry's web site.

#### 14) Mongol Bank

I went to Mongol Bank to get information on the liquidation of the Mongolian currency notes used before the new Constitution, i.e., in Mongolian People's Republic. The information must be disclosed in accordance with the Law on the List of State Secrets.

I came to Mongol Bank with my written request. I was told the information is not given to individuals. When I explained that I am from the Mongolian National University, they promised to send me the information by post. I did not receive it in 2 weeks. I visited Mongol Bank several times, but I could not meet any officials face to face. I talked to officials through the receptionist. Indeed, my written request should have reached the relevant person through Mr. Gan-Ochir, officer of the department of cash and research of Mongol Bank. (Tel: 318330, 313330)

### **2.10. Constraints/Problems**

1. Procedures of the state institutions on access information are very bureaucratic. Citizens must present written requests, provide official letters, and other various documents, or complete special forms.
2. Public institutions are not open to the public, so the opportunity to meet an official responsible for particular information directly is very limited. Citizens have to talk on the phone from the reception desk or spend a long time seeking the right person, or talking to officials through receptionists.
3. There is no culture supporting written statements. Officials wonder why they should provide written refusals.
4. Payment for information is comparatively high for ordinary citizens. There is a list of tariffs approved by the National Archive, but the payment is different in different places.
5. Officials wonder why ordinary citizens need such information, for example, on international and inter-governmental agreements.
6. Officials are self-censored, so they avoid providing information and give explanations because the scope of the state secrecy law is too broad
7. It is strange that 70-80 year-old information is still covered by state secrecy because the Law on the List of State Secrets adopted in 2004 does not specify how and in which

- criteria information should be disclosed. It is not clear how information, produced before the date that the law came into force, should be disclosed.
8. All officials ask about the purpose behind requesting such information. They get angry and ask who is requesting the information and why.
  9. In rare cases the officials do not refuse to provide information, if the information is published. It is profitable to sell the information.
  10. Many officials refer to their web sites, even though they do not know the domain names of their web sites. There are a few of good web sites. Sometimes the information requested is not available on the referenced web sites. In order to get the information you have to have Adobe Acrobat Reader in your computer. In reality there are not many people using this programme, so you have to spend 1-4 hours to download it. State institutions have launched their web sites over recent years. The information before 2000 is not available on their web sites.
  11. Some officials are not responsible for their work. Works done by the same institution are not interrelated.
  12. The archives do not serve the public. It is open to researchers, if they are able to pay for the information. The ordinary citizen is not able to get information. You have to be a researcher with an official letter with a stamp and you have to pay.

## **2.11. Conclusion**

National security, privacy and other interests are recognized under international law as being legitimate grounds for restricting the free flow of information. The instigative survey team requested information which would not harm the 'protection of national security, or public order, of public health or morals, and violating rights or reputations of others' (Article 19 of UHRD and ICCPR).

The results of the survey show that the rights of ordinary citizens in Mongolia to access information are very limited.

State secrecy legislation unnecessarily protects information of public concern and public interest. Even simple information is kept secret under the umbrella of protection of state secrets.

The right to information does not apply equally to all citizens.

Finally, the results of the instigate survey prove that state secrecy legislation should be immediately amended because it does not meet the requirements of modern development and it is against the nature and principles of democracy and human rights.

It urges the Mongolian Government to take urgent measures to fulfill their pledge to transparent governance and adopt the Freedom of Information law, and amend the secrecy legislation, as promised and declared in the Constitution and other laws, including the Strategy and Action Plan of the Government, National Programmes such as the National Human Rights Programme, the National Anti-corruption Programme, and international documents such as the Ulaanbaatar Declaration.

### **III. CALL FOR CHANGE**

#### **You Can Do it as a Parliamentarian!**

##### **To give input to the security policy by civil society**

- Make sure that mechanisms are in place to enable the UIKH to benefit from inputs from civil society representatives in its work with regarding security and security related issues
- If appropriate, promote the adoption of legislation allowing competent institutions, NGOs and the media to contribute to the work of the parliamentary committees which are competent to address security and security-related issues
- Make sure that the UIKH has an active public relations policy with regard to its decisions affecting security and its decision-making process in that field

##### **Guaranteeing freedom of information and promoting rights of independent media**

- Make sure that freedom of the press is upheld in law and in practice with regard to security issues and that any limitations imposed do not breach international human rights principles
- Ensure that appropriate freedom of information legislation is in place
- Amend the State secrecy law and Law on the List of State Secret in consistency with international freedom of information standards

**The UIKH as our representative power will provide better results in the national security sector, if they take into account the following:**

#### **1. Involvement of civil society in security activities**

Civil society is of great importance and basic requirement in the strong functioning democracy.

Groups within civil society can influence decisions and policies with regard to the security sector.

The UIKH and the Government must encourage the participation of NGOs in public discussion about national security, the armed forces, policing and intelligence. NGOs and research institutions can strengthen democratic and parliamentary oversight of the security sector by:

- Disseminating independent analysis and information on the security sector, military affairs and defense issues to the UIKH, the media and public;
- Monitoring and encouraging respect for the rule of law and human rights within the security sector;
- Putting on the political agenda security issues which are important for society as whole;
- Contributing to parliamentary competence and capacity building by providing training courses and seminars;
- Giving an alternative expert points of view on government security policy, defense budgets, procurement and resource options, fostering public debate and formulating possible policy options;
- Providing feedback on national security policy discussions and the way they are implemented;
- Educating the public and facilitating alternative debates in the public domain



## **2. Improving effectiveness of the media**

Independent media help the public and their political representatives in the task of informed decision-making.

The media will help the UIKH in their democratic oversight and will ensure greater transparency and public accountability in the security sector.

For an democratic and good governance, the media has the right to gather and disseminate information on the security related matters that is public interest and has the responsibility to provide news that is true, accurate and fair.

## **3. Improving access to documents**

Democratic oversight can be effective, as a principle of good governance, if the public is aware of major issues open to debate at the parliamentary level.

One effective way for parliament to secure public information is to make a variety of information on security or security related issues available to the public. Information that could be released to the public:

- Documents of strategic importance such as the national security policy;
- The defence budget (not including secret funds)
- Press releases concerning all major debates, decisions, motions, laws, etc. in parliament concerning the security sector;
- Minutes of the parliamentary or committee meetings and debates on security issues(except closed meetings) and reports on the scope and terms of reference of such closed hearings;
- Publications related to parliamentary inquiries into security issues;
- Annual parliamentary reports or reviews on the functions of all security services;
- Reports on the audit concerning the security sector. Some special investigations may not be allowed, but would be asked to submit them to committees, the government should table any action taken upon the auditor's report to the parliament
- Information on multilateral and bilateral agreements;
- Information on the voting of individual parliamentarians and factions on security issues such as the budget, joining international alliances, conscription issues, procurement
- Freedom of information legislation

## **4. Facilitating public involvement in parliamentary work**

One way information that comes from the parliament or government to the public is not sufficient. The UIKh should give the public the possibility of communicating with it on security issues. Two way information and communication are important because:

- It ensures participation and permanent oversight from the citizen's side;
- It increases the public's confidence in the functioning of the parliament;
- It offers a potential check on maladministration
- It secures public support and legitimacy for legislation and government policies, and hence democratic stability

Two-way communication could be enhanced by parliamentary information, hearings and monitoring news services, television debates and tailor-made news mailers to committee members, provided by the parliamentary research service.

In doing this, we are referring to the Constitution, the promises of the Government on transparency and results of our project and handbook Parliamentary oversight of the security sector jointly produced by the Inter-Parliamentary Union and Geneva Center for the Democratic Control of Armed Forces.

Mongolia has guaranteed the citizens' security and freedoms of expression and information in the Constitution.

Security is central to people's well-being, it is essential that their views are expressed in the national security policy.

We, the participants of the round table "State Secrecy and Freedom of Information" call on the Speaker and Members of the UIKH for CHANGE.

Ulaanbaatar, December 20 , 2006