2004/02/11 - PL. ÚS 31/03: PROTECTION OF SECRET INFORMATION

HEADNOTES

Applying the method of teleological interpretation leads to the unquestioned conclusion that the purpose of the Act is to legally ensure that all information is kept secret which, under the definition, (§ 2 par. 2) conflict with the interests of the Czech Republic. This aim is projected in the substantive condition of § 3 par. 1 of Act no. 148/1998 Coll. It would be absurd to assume that the legislature, by including a second, formal, condition in § 3 par. 1 of Act no. 148/1998 Coll., intended to make it impossible to effectively fulfill the purpose of the Act. This is the absurd conclusion which would be reached if one accepted the thesis that the list of secret information, assembled by the government as instructed by the Act is to contain only completely specific items, and at the same time be a final, definitive list. The combination of great specificity and definitiveness in assembling the list of secret information would make it impossible to meet the purpose of the Act without anything further, and would inherently carry the risk that a piece of information which meets the substantive requisite for secrecy would not be kept secret, as it did not fall under any of the specific items on the list assembled by the government. The government did not have a mandate for such a "risky" combination.

Of course, legal certainty and the foreseeability of acts by the public power are not absolute categories which could be set above other components of the concept of "a democratic state governed by the rule of law." Protection of the interests of the Czech Republic as a sovereign state is also a constitutionally protected value (Art. 1 par. 1 of the Constitution). Thus, the task of the legislature, as well as of the government, is to optimize the possible discordant effects of the protective mechanisms for both values, in other words, to narrow as much as possible the room for possible arbitrariness in acts by the public power, and at the same time ensure the effective protection of state interests. Proportional limitation of foreseeability (legal certainty) is such necessary limitation as is still able to ensure effective fulfillment of the aims of Act no. 148/1998 Coll.

Legal certainty and the foreseeability of acts by the public power must also be preserved in relation to other subjects of international law. Under Art. 1 par. 2 of the Constitution "the Czech Republic shall observe its obligations under international law". The Czech Republic has accepted international obligations vis-à-vis its allies regarding keeping secret certain important and sensitive information. It is obligated to transmit these international obligations into domestic law, and through it ensure the secrecy of appropriate information. For these other states, a "foreseeable" legal framework for the actions of bodies of public power of the Czech Republic will be one which is capable of securing their international obligations as regards secrecy. In contrast, an "unforeseeable" framework will be one which is incapable of ensuring in all cases the secrecy of information which the CR has undertaken to protect under international law. Of course, the CR has an international responsibility vis-à-vis its allies only for the "result": it violates its obligation at the point when it does not ensure the protection o

a particular piece of information which is subject to secrecy under an international treaty. In order for the CR to be capable of meeting its international obligations in this area, its bodies must have the authorization to judge whether or not a particular piece of information is to be secret under an international treaty. If the CR is not able, due to the particular content of its domestic law, to fully ensure such specific evaluation and subsequent secrecy, its conduct is "unforeseeable" for its contractual partners, and violates legal certainty in internal law relations. The contractual partners may then not disclose certain sensitive information to the Czech Republic, possibly to the detriment of its security or other of its fundamental interests protected by Art. 1 par. 1 of the Constitution.

The Constitutional Court believes that the contested provision in the wider procedural context, as just defined, is also consistent with conclusions which the European Court of Human Rights reached on the required precision of a legal norm and the foreseeability of acts by the public power. That court requires in cases, where a legal regulation authorizes discretion by a body of public power, that the scope and modalities of the exercise of that discretion be defined with sufficient clarity in view of the particular legitimate aim, and that the provide the individual the corresponding protection against arbitrariness [Kruslin v. France (1990), §§ 27, 29, 30 and M. and R. Andersson v. Sweden, (1992), § 75].

CZECH REPUBLIC

CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court, consisting of JUDr. František Duchoň, JUDr. Pavel Holländer, JUDr. Dagmar Lastovecká, JUDr. Jiří Malenovský, JUDr. Jiří Mucha, JUDr. Jan Musil, JUDr. Jiří Nykodým, JUDr. Pavel Varvařovský, JUDr. Miloslav Výborný and JUDr. Eliška Wagnerová, ruled in the matter of a petition from the Ombudsman, JUDr. Otakar Motejl, seeking the annulment of point 18 of appendix no. 3 to government directive no. 246/1998 Coll., which provides lists of secret information, as amended by later regulations, as follows:

The petition is denied.

REASONING

I.

On 26 June 2003 the Constitutional Court received a petition from the Ombudsman (also the "petitioner"), seeking the annulment of point 18 of appendix no. 3 to government

directive no. 246/1998 Coll., which provides lists of secret information, as amended by government directive no. 89/1999 Coll., government directive no. 152/1999 Coll., government directive no. 17/2001 Coll., government directive no. 275/2001 Coll., government directive no. 403/2001 Coll. and government directive no. 549/2002 Coll. ("government directive no. 246/1998 Coll.") due to inconsistency with § 3 of Act no. 148/1998 Coll., on Protection of Secret Information, as amended by later regulations ("Act no. 148/1998 Coll."), and due to inconsistency with Art. 1 and Art. 78 of the Constitution of the Czech Republic (the "Constitution") and Art. 4 par. 2 and Art. 17 par. 1 and 5 of the Charter of Fundamental Rights and Freedoms (the "Charter"). The petitioner states that he was consulted by Petr Uhl, residing at Anglická 8, Prague 2, with an initiative aimed against the Ministry of Foreign Affairs, which kept secret its plan for human rights of 2000, and against certain provisions of appendix no. 3 to government directive no. 246/1998 Coll., on which the Ministry of Foreign Affairs relied as a basis for keeping the plan for human rights secret. After completing an investigation of the initiative, the Ombudsman, under § 18 par. 2 of Act no. 349/1999 Coll., on the Ombudsman, as amended by later regulations, took a position in which he concluded, among other things, that point 18 of appendix no. 3 to government directive no. 246/1998 Coll. (the "contested provision") is inconsistent with certain provisions of Act no. 148/1998 Coll., and certain provisions of the Charter and the Constitution. On the basis of that position, he is submitting the present petition.

The petitioner states that Act no. 148/1998 Coll. is based on the premise that only information can be kept secret which was designated as secret information by an appropriate body and assigned a degree of secrecy. Substantive law definition of secret information has two levels under Act no. 148/1998 Coll. The starting point is the substantive definition of secret information in § 3 of Act no. 148/1998 Coll., under which secret information is information unauthorized handling of which could damage the interests of the Czech Republic or interests which the Czech Republic undertook to protect, or could be disadvantageous to these interests, together with § 4 of Act no. 148/1998 Coll., which provides an illustrative list of areas in which secret information may appear. The Act expressly assumes that specifics will be provided by a government decree that will provide in detail, for the individual ministries, lists of information which may be subject to secrecy. Under Art. 78 of the Constitution the government is authorized to issue a directive only to implement a statute and only within its bounds. Therefore, it can not by directive include in a list of secret information other information that which meets, or may meet, the statutory definition of secret information.

The government is thus required to issue a list of secret information by directive. Without a detailed list it would not be possible to apply the Act at all. The legislature is allegedly aware that keeping information secret interferes in the fundamental rights and freedoms (freedom of expression and the right to information under Art. 17 of the Charter) and that secrecy, given its nature, is relatively easily abused. In this regard the petitioner refers to Constitutional Court Judgment file no. Pl. ÚS 11/2000. The list must materially specify individual pieces of information, because otherwise the instruction to the government would be completely useless. It would therefore be circumvention of the Act, or transgression of its bounds, if the government formulated the list of secret information so vaguely and generally that its provisions would practically not differ from the basic

definition contained in the Act. The requirement for a sub-statutory legal norm to provide material specifics of information which may be subject to secrecy is also consistent with the principle of legal certainty and foreseeability of actions by the public power, which, under the settled case law of the Constitutional Court, are one of the basic components of a democratic state governed by the rule of law (Art. 1 of the Constitution). With the list, the government makes known, in advance and in binding form, what will be excluded from the scope of the fundamental right to freedom of expression and to information, and under the threat of criminal penalty (§ 10 and § 107 of Act no. 140/1961 Coll., the Criminal Code). Thus, in terms of substantive law, one can only make secret information whose characteristics meet the basic substantive definition under the Act and which is included by government decree in the list of secret information, assuming that the definition of secret information on the list is substantive in content and more specific, in degree of generality, than the statutory definition.

Under the contested provision, it is within the jurisdiction of the Ministry of Foreign Affairs to make secret "sensitive political, security and economic information in the area of foreign relations." The Ombudsman considers the criterion of "sensitivity" of information to be superfluous, given the provisions of Act no. 148/1998 Coll. "Sensitivity" is only evaluated when deciding to make secret particular information, as part of considering whether unauthorized handling of such information can or can not damage the interests of the Czech Republic, or what kind of damage it can cause. This procedure is prescribed by the Act itself in § 5 in conjunction with § 2 par. 1 a 2 of Act no. 148/1998 Coll. As a result of such evaluation, a specific level of secrecy is set according to the degree of "sensitivity" of the secret information. Thus, from that point of view the modifier "sensitive" is redundant. The definition of foreign relations in the contested provision is also redundant, because in appendix no. 3 to government directive no. 246/1998 Coll. that is self-explanatory. Repeating the provisions of regulations of higher legal force in regulations of lower legal force is generally not considered desirable. Nonetheless, that alone can not lead to the conclusion that the regulation of lower legal force is defective for that reason. However, in the case of the contested provision, revealing the redundancy of the modifiers "sensitive" and "in the area foreign relations" is important for reasons of determining the true content of this norm. After eliminating these duplicate modifiers, it is evident that the Ministry of Foreign Affairs can make secret "political, security and economic information." However, that definition of secret information obviously does not meet the requirements in the Act on Protection of Secret Information imposed on the list issued by the government. The definition is vague, and does not in any way materially specify information which may be kept secret. Thus, it permits the Ministry of Foreign Affairs to arbitrarily make secret anything at all. In addition to this item, the other provisions of appendix no. 3 to government directive no. 246/1998 Coll. also appear unnecessary, because in all cases they concern political, security or economic information. Thus, the government, inconsistently with Art. 78 of the Constitution, by including "sensitive political, security and economic information in international relations" in the list of secret information, exceeded the bounds provided by Act no. 148/1998 Coll. (§ 3), which can lead to unconstitutional interference in the right to information under Art. 17 par. 5 of the Charter if that provision is applied in a particular case. In addition, the contested provision, to the extent that it permits the Ministry of Foreign Affairs to act arbitrarily in making information secret, is inconsistent with the constitutional principles of legal certainty and the foreseeability of acts by the public power, which are

indispensable attributes of a democratic state governed by the rule of law in the meaning of Art. 1 of the Constitution.

II.

The Constitutional Court, under § 69 par. 1 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations (the "Act on the Constitutional Court"), requested an opinion on the petition from the government of the Czech Republic, as a party to the proceedings. It also requested opinions under § 48 par. 2 of the Act on the Constitutional Court from the Ministry of Foreign Affairs and the National Security Office.

The prime minister, PhDr. Vladimír Špidla, in his official letter of 12 August 2003, informed the Constitutional Court that the government of the Czech Republic approved its opinion on the present petition at a meeting on 6 August 2003. The government believes that lists of secret information contained in a government directive must be set forth to a certain degree by more general formulations so that, in the meaning of § 3 par. 1 of Act no. 148/1998 Coll., they will be an essential legal basis for the possibility of making certain information secret, and also so that they will not be, as a result of a casuistic legal framework, a barrier to such secrecy. Therefore, general information was also used with the contested provision of the government decree. Particularly in the situation of the Ministry of Foreign Affairs the accumulation of conditions contained in § 3 par. 1 of Act no. 148/1998 Coll. "forces" the inclusion of a more general provision on the list of secret information. Otherwise, when obtaining certain information from abroad, which can not be specified more precisely in advance, and which, if revealed, could clearly damage the interests of the Czech Republic, it would not be possible to designate such information as secret and keep it secret, if it were not possible to classify it under some provision of the list of secret information in the jurisdiction of the Ministry of Foreign Affairs. Yet, the danger that the interests of the Czech Republic will be damaged in the event of not making secret foreign information which is uncertain in advance is considerable. The issue of the possibility of making such information secret is related to the issue of the Czech Republic's trustworthiness vis-à-vis foreign partners and with the issue of access to such foreign information in general.

According to the government's statement, the contested provision, when applied in practice, helps to protect the key principle of the entire system of protection of secret information, expressed in § 3 par. 1 of Act no. 148/1998 Coll., i.e. the protection of the interests of the Czech Republic, yet one can not claim that it threatens the principle of proportionality in the manner of providing information. The criterion of "sensitivity" of information is an expression used in practice which is meant to more closely indicate the substance and emphasize the specific nature of secret information, and only after evaluating the circumstances arising from § 3 par. 1 and § 2 par. 1 and 2 of Act no. 148/1998 Coll. will it become apparent whether that sensitive information will be designated as secret information. Thus, the bounds of administrative discretion in the contested provision can be considered wider than is usual, but not unlimited.

In its statement, the government acknowledges the redundancy, as regards the definition of foreign relations, as the Ombudsman pointed out in his petition. However, the

redundancy is meaningless as regards possible annulment of the contested provision, given that this is a duplicate expression contained in the framework of appendix no. 3 to government directive no. 246/1998 Coll. as such, because appendix no. 3 of that directive is introduced by the heading "List of Secret Information in the Jurisdiction of the Ministry of Foreign Affairs." The redundancy leads to the fact that even after deleting the words "in the area of foreign relations" the Ministry of Foreign Affairs can not, under the contested provision of the government directive, make secret just any political, security, or economic information, but only such political, security and economic information as arises within the jurisdiction of the Ministry of Foreign Affairs, i.e. in the area foreign relations. Thus, the framework of the appendix again makes more concrete the content of secret sensitive information, as presupposed by § 3 par. 3 of Act no. 148/1998 Coll.

The government also states that the contested provision was added to appendix no. 3 to government directive no. 246/1998 Coll. upon the proposal of the Ministry of Foreign Affairs by government directive no. 403/2001 Coll., the draft of which was prepared by the National Security Office. These steps correspond to the requirements of § 3 par. 2 and 3 of Act no. 148/1998 Coll. Thus, one can not agree that the contested provision does not meet the requirements imposed by the Act on the list issued by the government. The contested provision is not inconsistent with § 3 of Act no. 148/1998 Coll., nor inconsistent with Art. 78 of the Constitution, because it does not exceed the bounds of the Act. Under Art. 17 par. 5 of the Charter, state bodies and territorial self-governing bodies are obliged to provide, in an appropriate manner, information with respect to their activities. Conditions therefor and the implementation thereof shall be provided for by law. That law is Act no. 106/1999 Coll., on freedom of access to information, which recognizes limitation of the right to information in the case of secret information. In view of the fact that the government, by including the contested provision in the government directive, did not exceed the bounds provided by the Act, making appropriate information secret under the contested government directive also can not lead to interference with the right to information. The government considers it open to discussion whether setting designating sensitive political, security and economic information in the area of international relations as secret information, or the bounds of administrative discretion arising from this provision, can, in this day and age, be interpreted with certainty as failure to observe the constitutional principle of legal certainty and the foreseeability of acts by the public power. Given the fact that the Czech Republic has belonged to international democratic society for a number of years now, one can assume that it is possible, in connection with international events, at least at the general level to deduce and predict of what nature secret information falling under the contested provision can be and what intensity of information value it can have. Thus, it also does not see the contested provision as inconsistent in relation to the meaning of Art. 1 of the Constitution. It points out that the principle of including secret information in a list issued as a legal regulation is not applied in other countries. The only condition for a particular piece of information to be designated secret is that if it is revealed it may lead to endangering or damaging the interests of the relevant country. Therefore, the substantive outline of a new legal framework for secret information, approved by the government of the Czech Republic, assumes that secret information will be classified by the party processing it only on the basis of an expert evaluation of the potential and scope to damage the interests of the Czech Republic, or interests which the Czech Republic undertook to protect, in the event

of disclosure of information, its unauthorized acquisition or unauthorized use, without a list of secret information being issued.

The Ministry of Foreign Affairs (the "Ministry") said in its statement that the present petition is very one-sided. It emphasizes only making possible the widest possible access to information and devotes considerably less attention to the obligation to ensure protection of secret information. It also focuses on one of the conditions for assigning particular information an appropriate level of secrecy – per the specific provision from the list of secret information in the area of jurisdiction of the Ministry of Foreign Affairs, which the ministry considers a supporting, basically formal, condition. It believes that the petition does not take into account all the possibility that in a particular case the primary and fundamental condition may not have been met, that is, that there may have only been incorrect evaluation of whether and how much unauthorized dealing with the information in question can damage the interests of the Czech Republic. The problem at hand allegedly lies not in the contested provision, but in § 3 of Act no. 148/1998 Coll., under which both these conditions are cumulative. In the ministry's situation this statutory provision necessitates including a more general provision in the list of secret information. If certain information were obtained from abroad (which can not be specified more closely in advance), the disclosure of which could damage the interests of the Czech Republic, it would not be possible to designate it as secret information unless it were simultaneously possible to classify it under a provision from the list of secret information in the area of jurisdiction of the Ministry of Foreign Affairs. The danger that the interests of the Czech Republic would be damaged in such cases is substantially greater than the risk that some information, where the possible risk was assessed incorrectly, might not be made public. The ministry also emphasizes the issue of trustworthiness vis-à-vis foreign partners. If it were not possible to guarantee in advance that information provided, of which nothing is known at a given moment, can not be protected under the regime of secret information, one can assume that such information will not be provided. The ministry believes that if protection of secret information in the jurisdiction of the Ministry of Foreign Affairs and the possibility of obtaining information of a sensitive nature from foreign partners are not to be endangered, it is necessary first to amend § 3 of Act no. 148/1998 Coll. If the formal condition requiring that information which is to be assigned a level of secrecy must be listed in the list of secret information were deleted from that provision, then it would be possible to annul government directive no. 246/1998 Coll. completely.

The National Security Office (the "NSO") says in its statement that the list of secret information is, to a certain extent, only a guideline. It serves primarily as a general aid for designating individual pieces of information as secret and for classifying individual kinds of secret information at levels of secrecy. That is why lists of secret information use general formulations in some cases, as in the contested provision. The NSO does not agree that the contested provision is inconsistent with § 3 of Act no. 148/1998 Coll. The Act itself does not impose more detailed requirements on the contents of the list. Therefore, the contested provision is also not inconsistent with Article 78 of the Constitution, as it does not exceed the bounds of the law and is not formulated sufficiently vaguely and generally as to make its wording not differ from the basic definition contained in the Act, as the petition says. The wording of the contested provision is also not inconsistent with Art. 17 par. 5 of the Charter, as that entrusts conditions for and implementation of the right to information to a statute, and it is clear that the right to information is restricted in cases

of secret information, as is also recognized by § 7 of Act no. 106/1999 Coll. The contested provision, just like other items on the list of secret information, when applied in practice, help protect the key principle of the system for protecting secret information – protecting the interests of the Czech Republic. Apparently no great problems occur in practice. The NSO also adds that the classification of secret information depends on the particular cases, as the decision on the correct setting and designation of the appropriate level of secrecy is the obligation and responsibility of a statutory body [§ 12 par. 2 let. l) of Act no. 148/1998 Coll.]. However, secret information may only be such information as is listed in the list of secret information. Therefore, a level of secrecy can not be assigned to information whose content meets the conditions for secret information, but it can not be classified under any of the areas given in the list. In other countries this principle is not applied, and the only condition for a particular piece of information to be designated as secret is the possibility that its disclosure can lead to endangering or damaging the interests of the country. The substantive outline of the new legal framework, approved by the government, and likewise the draft of the new Act on Protection of Secret Information, therefore assume that the classification of secret information will be done by the party processing it (its author), and only on the basis of expert assessment of its potential for damaging the interests (or disadvantages for the interests) of the Czech Republic, or interests which the Czech Republic undertook to protect, in the event of its disclosure, unauthorized acquisition or unauthorized use.

III.

The Constitutional Court first, in accordance with § 68 par. 2 of the Act on the Constitutional Court, reviewed whether the government directive whose provision the petitioner claims to be unconstitutional, was passed and issued within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner. Constitutional authorization to issue directives is given to the government by Art. 78 of the Constitution, under which the government is authorized to issue directives to implements a statute and within its bounds. A directive is signed by the prime minister and appropriate minister. One can conclude from Act no. 148/1998 Coll. that the appropriate minister in the present case is the prime minister himself. Under § 7 par. 1 of the Act the central administrative office for the area of protection of secret information, which also prepares lists of secret information (§ 3 par. 2 of the Act), is the National Security Office, which is supervised by the prime minister (§ 7 par. 3 of the Act).

In this case the Constitutional Court determined that the government, by resolution no. 678 of 19 October 1998, approved the draft government directive which provides lists of secret information. Out of 15 cabinet members present, all 15 voted in favor. The directive was signed by Prime Minister Miloš Zeman. The directive was published as required in the Collection of Laws in part 86 as no. 246/1998 Coll. It went into effect on 2 November 1998. The contested provision of point 18 of appendix no. 3 was added to the contested government directive when it was amended by directive no. 403/2001 Coll., which amends government directive no. 246/1998 Coll., which provides lists of secret information, as amended by later regulations. This amendment was passed by government resolution no. 1048 of 15 October 2001. Out of 15 cabinet members present, all 15 voted in

favor. This government directive too was signed by Prime Minister Miloš Zeman, and it was duly published in the Collection of laws under the number cited above.

In these circumstances, the Constitutional Court concludes that the contested government directive was passed and issued within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner, within § 68 par. 2 of Act no. 182/1993 Coll., on the Constitutional Court. Therefore, the Constitutional Court could consider it on the merits.

IV.

In the petition, the petitioner seeks the annulment of point 18 of appendix no. 3 to government directive no. 246/1998 Coll. Appendix no. 3 of that directive is titled "List of Secret Information in the Jurisdiction of the Ministry of Foreign Affairs" and point 18 of the appendix reads: "Sensitive political, security and economic information in the area of international relations." This directive was issued to implement Act no. 148/1998 Coll. Under § 3 par. 1 secret information is such information, the unauthorized handling of which could damage the interests of the Czech Republic or interests which the Czech Republic undertook to protect, or could be disadvantageous for these interests and which is listed in the list of secret information. Under par. 2 and 3 of this provision, the lists of secret information are processed by the National Security Office at the application of central offices and they are issued by the government by directive.

The petitioner claims first of all that the government acted inconsistently with Article 78 of the Constitution by passing the contested provision. Under the first sentence of the provision, the government is authorized to issue directives in order to implement statutes, within the bounds thereof. It must thus act secundum et intra legem, not outside the law (praeter legem). A government directive merely expands on or updates the disposition or hypothesis of the implemented statutory norm, and it is not possible for this statutory norm to be substantively widened or narrowed within in. It is required that a government directive be general and apply to an uncertain group of addressees, as the Constitution authorizes it to make a legal framework, not to issue an individual administrative act. The barrier of things reserved to be regulated exclusively by statute (the so-called "statutory reservation") guards against abuses of the executive power (cf. Constitutional Court judgment Pl. ÚS 45/2000).

The provision of § 3 par. 1 of Act no. 148/1998 Coll. defines the concept "secret information" with the help of two conditions, a substantive condition (unauthorized handling of such information may damage the interests of the Czech Republic or interests which the Czech Republic undertook to protect, or could be disadvantageous for these interests) and a formal condition (it is listed in the list of secret information). It is clear from the present petition that the petitioner, in interpreting § 3 of Act no. 148/1998 Coll. relied primarily on linguistic methods. He concluded that the Act foresees the existence of a definitively and concretely defined list of secret information. He then concludes from that that the government's actions deviated from the bounds of the law, because the list issued by the government does not meet this requirement.

The interpretation of a legal norm is nonetheless a complex, multi-layered intellectual operation, which knits together a number of methods. In the present circumstances the Constitutional Court considers e ratione legis to be an indispensable interpretative method. In its prior case law it accepted the principle of a looser relationship between a statute and a directive, with the provision that it considered the directive's consistency with the meaning and purpose of a statute as a whole to be a priority in assessing constitutionality (cf. judgment Pl. ÚS 45/2000). One of the primary aims of Act no. 148/1998 Coll., on Protection of Secret Information, is to protect the interests of the Czech Republic. This is shown by the wording of § 1a of the Act, under which its subject matter is primarily the definition of information which needs to be kept secret in the interest of the Czech Republic. This purpose of the Act is also to be fulfilled by its other provisions, not least § 3 par. 1. Applying the method of teleological interpretation leads to the unquestioned conclusion that the purpose of the Act is to legally ensure that all information is kept secret which, under the definition, (§ 2 par. 2) conflict with the interests of the Czech Republic. This aim is projected in the substantive condition of § 3 par. 1 of Act no. 148/1998 Coll. It would be absurd to assume that the legislature, by including a second, formal, condition in § 3 par. 1 of Act no. 148/1998 Coll., intended to make it impossible to effectively fulfill the purpose of the Act. This is the absurd conclusion which would be reached if one accepted the thesis that the list of secret information, assembled by the government as instructed by the Act is to contain only completely specific items, and at the same time be a final, definitive list. The combination of great specificity and definitiveness in assembling the list of secret information would make it impossible to meet the purpose of the Act without anything further, and would inherently carry the risk that a piece of information which meets the substantive requisite for secrecy would not be kept secret, as it did not fall under any of the specific items on the list assembled by the government. The government did not have a mandate for such a "risky" combination. It is not authorized to substantively narrow an implemented statutory norm (see above). This procedure would be "implementation of the statute and within its bounds," but a procedure contra legem, which Art. 78 of the Constitution does not permit.

The petitioner also believes that the list in government directive no. 246/1998 Coll. does not meet the principles of legal certainty and foreseeability of acts by the public power, which are required in a democratic state governed by the rule of law (Art. 1 par. 1 of the Constitution).

The Constitutional Court naturally agrees that the foreseeability of the law is one of the fundamental elements of the principle of legal certainty, and one can not imagine a democratic state governed by the rule of law without it. It also agrees with the petitioner's opinion that "foreseeability" is connected with a clear normative definition of individual groups of secret information, and with the definitive nature of the government-compiled list of such information.

Of course, legal certainty and the foreseeability of acts by the public power are not absolute categories which could be set above other components of the concept of "a democratic state governed by the rule of law." Protection of the interests of the Czech Republic as a sovereign state is also a constitutionally protected value (Art. 1 par. 1 of the

Constitution). The Act on Secret Information defines these interests as "preserving constitutionality, sovereignty, territorial integrity, ensuring the defense of the state, public safety, protection of important economic and political interests, the rights and freedoms of natural persons and legal entities and protection of life or health of natural persons." Thus, the task of the legislature, as well as of the government, is to optimize the possible discordant effects of the protective mechanisms for both values, in other words, to narrow as much as possible the room for possible arbitrariness in acts by the public power, and at the same time ensure the effective protection of state interests. It would not be "optimization" if a government directive ensured perfect legal certainty, as well as perfect foreseeability, at the expense of protection of state interests, which would have to unconditionally give way to the requirement of foreseeability, thus conceived.

In this context, the Constitutional Court points to the principle of proportionality, which is a different expression of the concept of optimization. It too must be used to evaluate the list in appendix no. 3 to government directive no. 246/1998 Coll., which is the subject of the petition. Proportional limitation of foreseeability (legal certainty) is such necessary limitation as is still able to ensure effective fulfillment of the aims of Act no. 148/1998 Coll. It is obvious that in the "optimization" operation, the government was forced to optimize, in the list of secret information, on the one hand, considerably opposing requirements for accuracy and specificity of items, and, on the other hand, the definitiveness of the entire group.

There were hypothetically two possible approaches: to choose a completely specific expression of the individual items in the list and define the list as illustrative. The legislature itself obviously chose a similar path, when in § 4 of Act no. 148/1998 Coll. it assembled a list of "areas" in which secret information can occur. Despite its unusual size (27 items), it did not neglect to introduce the list with the term "in particular."

In a similar situation, the government could not choose this approach, as linguistic interpretation of § 3 par. 1 of Act no. 148/1998 Coll., as regards the formal condition (listing the information on the list), results in the requirement of a definitive enumeration in the list. Therefore, it had to proceed inversely, preserve the definitiveness of the list, and "optimize" in the degree of generality (specificity) of individual items in the list and the list as a whole.

The Constitutional Court states that appendix no. 3 to government directive no. 246/1998 Coll. (List of Secret Information in the Jurisdiction of the Ministry of Foreign Affairs) contains 18 items. Of those, 17 are relatively specific, whereas item no. 18 is relatively general. The list as a whole thus gives the ministry, a body of public power, room for broader substantive discretion only within item no. 18, which must be understood as a "residual" area not covered by items nos. 1-17. Only in this residual area (not in the entire area of international relations) there is objective room for acts which could theoretically be described as "unforeseeable."

Of course, the Constitutional Court points out that the petitioner extends his idea of legal certainty and foreseeability to an impermissibly narrowed concept of a democratic state governed by the rule of law. Legal certainty and the foreseeability of acts by the public power must also be preserved in relation to other subjects of international law. Under Art. 1 par. 2 of the Constitution "the Czech Republic shall observe its obligations under

international law" The Czech Republic has accepted international obligations vis-à-vis its allies regarding keeping secret certain important and sensitive information. It is obligated to transmit these international obligations into domestic law, and through it ensure the secrecy of appropriate information. For these other states, a "foreseeable" legal framework for the actions of bodies of public power of the Czech Republic will be one which is capable of securing their international obligations as regards secrecy. In contrast, an "unforeseeable" framework will be one which is incapable of ensuring in all cases the secrecy of information which the CR has undertaken to protect under international law. Of course, the CR has an international responsibility vis-à-vis its allies only for the "result": it violates its obligation at the point when it does not ensure the protection of a particular piece of information which is subject to secrecy under an international treaty. In order for the CR to be capable of meeting its international obligations in this area, its bodies must have the authorization to judge whether or not a particular piece of information is to be secret under an international treaty. If the CR is not able, due to the particular content of its domestic law, to fully ensure such specific evaluation and subsequent secrecy, its conduct is "unforeseeable" for its contractual partners, and violates legal certainty in internal law relations. The contractual partners may then not disclose certain sensitive information to the Czech Republic, possibly to the detriment of its security or other of its fundamental interests protected by Art. 1 par. 1 of the Constitution.

In view of the foregoing considerations, the Constitutional Court believes that the degree of legal uncertainty, non-foreseeability, that results form the list of secret information in the jurisdiction of the Ministry of Foreign Affairs as a whole is proportional in relation to the statutorily required degree of protection of state interests and in view of the constitutional principle of fulfilling obligations which arise to the Czech Republic from international law.

The petitioner also believes that government directive no. 246/1998 Coll., through the list, allows the Ministry of Foreign Affairs, when keeping information secret, to act in a way that may lead to unconstitutional interference in the right to information under Art. 17 par. 1 and 5 of the Charter. The Constitutional Court does not share his belief. Act no. 148/1998 Coll. limits freedom of expression and the right to seek out and disseminate information, on the grounds, among other things, of ensuring defense of the state or public security, i.e. on grounds which are expressly permitted by Art. 17 par. 4 of the Charter. In the contested provision, the government, while implementing this statute, did not exceed its bounds, and a certain, proportional degree of administrative discretion in applying the government directive is required by the purpose of the statute. Thus, applying the contested provision in the list does not prevent the Ministry of Foreign Affairs from appropriately providing information about its activities in accordance with the law.

The Constitutional Court also did not agree with the petitioner's claim regarding alleged violation of Art. 4 par. 2 of the Charter. The bounds of fundamental rights and freedoms (in the present case the right to information) in the present matter are indisputably defined by statute (by Act no. 148/1998 Coll., which specifies what is secret information, and by Act no. 106/1999 Coll., on Freedom of Access to Information, which, in § 7, provides that an obligated subject shall not provide secret information). As was discussed above, in the present case the government did not exceed the bounds of the law, and thus

did not limit the constitutionally guaranteed right to information more than the law allows.

The Constitutional Court recognizes that application of government directive no. 246/1998 Coll. and its appendices in particular cases may cause certain problems and doubts, as happened in the case which prompted the petitioner to act. In individual situations, the statutory room for administrative discretion can be abused to arbitrarily make secret a particular piece of information which at the time does not meet the substantive condition of § 3 par. 1 of Act no. 148/1998 Coll. In such a case, however, the legal order permits one to seek protection of his right to information, through means which are defined by Act no. 106/1999 Coll., on Freedom of Access to Information. Under § 16 par. 1 of the Act an appeal ["odvolání"] can be filed against a decision by the obligated entity denying an application to provide information, or an administrative appeal ["rozklad"] can be filed against a decision by a central state administration body (par. 5 of that section). A decision denying an application is also reviewable by a general court (§ 16 par. 6 of the Act), and that court's decision is then reviewable by the Constitutional Court.

Thus, possible arbitrariness in determining specific information which is to be kept secret can be effectively countered. The Constitutional Court therefore believes that the contested provision in the wider procedural context, as just defined, is also consistent with conclusions which the European Court of Human Rights reached on the required precision of a legal norm and the foreseeability of acts by the public power. That court requires in cases, where a legal regulation authorizes discretion by a body of public power, that the scope and modalities of the exercise of that discretion be defined with sufficient clarity in view of the particular legitimate aim, and that they provide the individual the corresponding protection against arbitrariness [Kruslin v. France (1990), §§ 27, 29, 30 and M. and R. Andersson v. Sweden, (1992), § 75].

In view of all the foregoing, the Constitutional Court denied the petition to annul point 18 of appendix no. 3 to government directive no. 246/1998 Coll., under § 70 par. 2 of Act no. 182/1993 Coll., on the Constitutional Court.

Notice: Decisions of the Constitutional Court can not be appealed.

Brno, 11 February 2004

Dissenting Opinion
of JUDr. Eliška Wagnerová, Ph.D.

I was led to express this dissenting opinion on the following grounds:

I.

The petition to annul point 18 of appendix no. 3 to government directive no. 246/1998 Coll., which provides lists of secret information, as amended, was filed by the Ombudsman, motivated by a request for investigation presented to his office by Petr Uhl, who unsuccessfully requested the Ministry of Foreign Affairs to provide information in the form of a "plan for human rights." The Ombudsman, in connection with addressing this particular case, was faced with the application of the above provision of the cited government directive, whose constitutionality he then questioned before the Constitutional Court. Therefore, his petition can be considered as grounds to open proceedings on so-called "specific review of norms," i.e. the norm which is to be, or was, applied by the body of public power to the particular case.

From a constitutional law viewpoint, the relationship between Petr Uhl and the Ministry of Foreign Affairs involved resolving the question of whether refusal of information on the plan for human rights meant interference in Petr Uhl's fundamental right to freely seek information, as declared by Art. 17 par. 4 of the Charter of Fundamental Rights and Freedoms (the "Charter"). The constitutional question at the level of proceedings on specific review of norms at the instigation of the Ombudsman, was then, viewed in a consistent manner, whether the contested provision can be interpreted in a constitutionally consistent way so that, in Petr Uhl's case there was no interference in his fundamental right, or whether the contested provision is incapable of such interpretation, and therefore must be annulled as unconstitutional.

It is evident from the genesis of the case as described and the unique nature of proceedings on specific review of a norm, that the contested norm should have been first (perhaps exclusively) reviewed in terms of Art. 17 par. 4 of the Charter, i.e. in terms of that fundamental right, the violation of which was the initial impetus to open proceedings before the Constitutional Court.

I reached this conclusion after deliberation motivated by questions connected with applying the principle of minimalism in the approaches and procedures of the Constitutional Court. This principle should be applied not only in final decisions, which is the approach that the Constitutional Court routinely practices when it gives priority to a constitutionally consistent interpretation of a legal norm over annulling it (from recent times, see the judgment in matter file no. Pl. ÚS 41/02), but also in the scope of review of contested legal acts, particularly in the case of proceedings on so-called "specific review of norms." In this type of proceedings it is practical life itself which formulates the constitutional questions connected with the application of a particular legal norm in specific, factually created situations, which the Constitutional Court is to answer. In

contrast, “gray” academic consideration about what could (but need not) may have a future influence on the interpretation of a legal norm, which clearly can never comprise the entire “green tree of life,” should be answered in this type of proceedings as little as possible, if at all.

The practical effect of this minimalist approach is tied to the creation of the obstacle res iudicata. The more minimal the approach which the Constitutional Court takes, the smaller the obstacle it will create in the form of an already adjudicated matter, and on the contrary – the greater the room it will leave for the development of real life, with its organically arising further questions.

II.

Article 17 of the Charter guarantees the right to information as a political right whose purpose is to ensure the public’s ability to participate in decision-making processes, and is thus one of the conditions making it possible to connect citizens to the operation of power. Being informed fundamentally affects one’s ability to express relevant opinions on issues of public life. In contrast, the institution of secrecy is an instrument which strengthens the power interests of the bureaucratic apparatus of the executive power (government in the wider sense). In modern society it is the bureaucracy which exercises power, and the bureaucratic administration has a tendency to be an administration without public participation. Controlling the provision of information, however necessary it may be in certain areas, is also a significant risk for the democratic principles of government. All these facts must be taken into account when interpreting the constitutional right to information.

Therefore, in light of this importance of the right to information, this right, in the form of a right to seek information (Art. 17 par. 4 of the Charter) can not be interpreted solely as a status negativus. Much more in line with its fundamental importance for democracy itself is an interpretation of the right as a right expressing a status positivus, with the corresponding obligations on the public power. Limitation of the obligations of the public power to provide information can range only in the limits set forth by Art. 17 par. 4 of the Charter. In my opinion, this par. 5 Art. 17 of the Charter must be interpreted along these lines. This restrictively interpreted purpose for limiting the right to information also corresponds to the wording of Art. 19 par. 3 of the International Covenant on Civil and Political Rights.

In any case, as follows from the doctrine of European legal knowledge, it is a question of the interpreter’s legal philosophy, which gives openly formulated fundamental rights one or another status (see, e.g., Böckenförde, E. W.: Grundrechtstheorie und Grundrechtsinterpretation, in Neue juristische Wochenschrift – NJW 35/1974, p. 1529 et seq.) And, of course, the specific circumstances of the case, viewed in terms of significance or the overlaps of an applied personal fundamental right into the public sphere, will play a role in determining the nature of the right applied. And it is precisely in proceedings on the specific review of norms that these specific circumstances can be taken into account.

III.

I can not agree with the method for reviewing the contested provision as expressed in the judgment's reasoning. Primarily, I object that, insofar as the contested provision was interpreted teleologically, and only in relation to the purpose of Act no. 148/1998 Coll., on Protection of Secret Information, as amended (the "Act"), without the purpose of that Act being tested by the purpose for which the right to seek information can be limited from the viewpoint of Art. 17 par. 4, that test was incomplete. The Act can undoubtedly be considered a statute limiting the right to seek information, the passage of which is presupposed and permitted by that provision of the Charter, but, of course, only for the purpose stated therein. This test must be applied even though the relevant provisions of the Act were not, and could not be, contested by the petitioner. the Constitutional Court would address this issue as a "preliminary" issue, with effect on the decision on the merits.

I believe that there can be serious doubts as to whether the purpose of the Act (i.e. protection of the interests of the CR, as indicated by § 1a of the Act, and which is elaborated by § 3 par. 1 of the Act, which sets substantive conditions for designating secret information such that the information in question must be information, the unauthorized handling of which could damage the interests of the CR or interests which the CR undertook to protect, or could be disadvantageous for these interests) ranges within the limits of the purpose of the cited provision of the Charter, expressed there as "protecting the rights and freedoms of others, the security of the state, public security, public health, or morals." If, from this point of view, the purpose of the Act itself were cast in doubt, then of course, the contested provision, which is actually merely a formal condition supplementing § 3 par. 1 of the Act, also could not stand.

IV.

Only if the test of whether the purpose of the Act matches the purpose arising from Art. 17 par. 4 of the Charter were answered in the affirmative, would it be possible to further test the contested provision in terms of the principle of a democratic state governed by the rule of law (Art. 1 par. 1 of the Constitution of the CR), where the principle of foreseeability of law and the ban on arbitrariness by bodies of public power are immanent, both closely related to the issue of certainty in the terms used in the hypothesis and disposition of a legal norm, or their deontological expression.

The majority's starting point is the opinion that the contested provision creates room for wider substantive administrative discretion. I can not agree with this opinion, because both the construction of the Administrative Procedure Code (under § 78 of the Administrative Procedure Code a court reviews only the bounds of administrative discretion, perhaps abuse of administrative discretion), and the case law of the administrative courts indicate that the content of administrative discretion is outside judicial review. In this situation, one must insist that the norms or public law (including

the contested norm) that are directly tied to a fundamental right be formulated deontologically so that they do not provide room for administrative discretion, even if they use relatively abstract concepts. Unlike administrative discretion, interpretation of abstract or uncertain terms is not removed from judicial review.

V.

In the reasoning of the judgment the majority expressed an opinion which is difficult for me to accept, that the foreseeability of the contested provision must also be evaluated "in relation to other subjects of international law," with reference to the declaration contained in Art. 1 par. 2 of the Constitution of the CR, which states that "the Czech Republic shall observe obligations which arise to it from international law." The majority apparently takes this provision of the Constitution of the CR to be general grounds for limiting any fundamental right, including the fundamental right to seek information. I can not accept the majority's optics. I am of the opinion that the state may undertake only such international obligations as will respect the constitutional order of the Czech Republic, and in the event of conflict, the constitutional order of the CR should take precedence. In any case, the so-called "Euro-amendment" of the Constitution of the CR (constitutional Act no. 395/2001 Coll.), as well as the related opening of proceedings on preventive review of the constitutionality of international treaties before the Constitutional Court, were evidently based on this concept. However, this does not rule out a posteriori review of the constitutionality of international treaties, or their effects at the level of domestic law, as one must insist that the fulfillment of international law obligations (whether in the domestic or international sphere) must always be consistent with the constitutional order of the CR. This conclusion must also be applied in view of the text of Art. 10 of the Constitution of the CR, under which an international treaty takes precedence in application over a statute (and by argument a maiori ad minus also over a sub-statutory legal regulation). Therefore the argument applied by the majority is unacceptable to the extent that it quite sweepingly sets international law obligations over the content of domestic law, without, however, taking into account the effect of norms of the constitutional order of the CR (in this case Art. 17 par. 4 of the Charter).

For that reason too I consider the majority's position unacceptable, and in view of this it was also necessary to evaluate the contested provision through the lens of Art. 17 par. 4 of the Charter, and not through the lens of the Act on Protection of Secret Information and international treaties, or the international obligations of the CR. In my opinion, the priority of the constitutional order of the CR over international treaties must be insisted on at least in a scope which corresponds to the "essential requirements of a democratic state governed by the rule of law," which may not be changed (Art. 9 par. 2 of the Constitution of the CR) by any legal act, whether international or domestic, regardless of its legal force. The essential requirements of a democratic state governed by the rule of law also include, at a minimum, respect for fundamental rights by bodies of public power when exercising their jurisdiction (in certain cases one can also require bodies of public power to protect fundamental rights), according to the standard provided by the domestic constitutional order. Only in cases where an international treaty on fundamental rights (whether designated as a treaty on human rights or a treaty on civil and political rights) by

which the Czech Republic is bound provides a higher standard of fundamental rights than the domestic constitutional order is it possible, because of the content of treaties, or the nature of the rights contained in them, for the domestic framework to give way to the international framework, which would be respected by bodies of public power when exercising their jurisdiction. This approach corresponds to the interpretation of Art. 1 par. 1 of the Constitution of the CR which indicates that in a democratic state governed by the rule of law the individual is pre-eminent before the state, and the state, in contrast, is bound by respect for the fundamental rights of the individual.

Brno, 23 February 2004