

Understanding the Global Principles on National Security and the Right to Information

12 JUNE 2013

The Global Principles on National Security and the Right to Information (“Tshwane Principles”) set out in unprecedented detail guidelines for those engaged in drafting, revising or implementing laws or provisions relating to the state’s authority to withhold information on national security grounds or to punish the disclosure of such information. This briefing paper provides a summary of what they say, and their genesis.

Why now?

The Principles were widely seen to be necessary because (1) more information of high public interest is being withheld on national security grounds than ever before, and (2) there was no detailed and comprehensive set of standards on how to balance the public's right to information and the government's need to keep some information secret.

Recognition of the right of everyone to have access to information held by public authorities has grown dramatically since the fall of the Berlin Wall. In 1989, only 13 countries had access to information laws on their books. As of June 2013, 94 countries – including the population giants of Brazil, China, India, Indonesia, Nigeria, Russia, and the US – have such laws, granting the right of access to information, at least in theory, to more than 5.2 billion people in all parts of the world. People in these countries are, many for the first time, grappling with how to keep information confidential pursuant to law rather than by culture or executive discretion.

It has come to be widely recognized that access to information, by enabling public scrutiny of state action, not only safeguards against abuse by public officials but also permits the public to play a role in determining the policies of the state and thereby forms a crucial component of genuine national security, democratic participation, and sound policy formulation.

A clear-eyed review of recent history suggests that legitimate national security interests are best protected when the public is well informed about the state's activities, including those undertaken to protect national security.

Yet, in recent years, governments have increasingly justified the withholding on national security grounds of all sorts of information of high public interest, from the justifications for going to war and information about serious human rights violations, to information about contracts for selling natural resources and purchasing major weapons systems.

International law tends to show considerable deference to assessments by national governments of measures needed to protect national security.

The Johannesburg Principles, the last significant statement on the appropriate balance to be struck between the right to information and national security, was developed 18 years ago (in 1995) by a group of international experts convened by Article 19, the Global Campaign for Free Expression. Those Principles set only broad standards and are not at the level of detail needed to guide nuanced discussions concerning law and policy reform.

Several of those involved in producing the Johannesburg Principles – including Article 19 and the University of Witwatersrand Centre for Applied Legal Studies, and staff members of the Justice Initiative, the Centre for Law and Democracy, and the Centre for National Security Studies – were active in producing these Tshwane Principles.

Did WikiLeaks play a role in the development of these Principles?

The WikiLeaks disclosures and whistleblower prosecutions heightened attention to the lack of clear standards concerning whistleblowers, the high public interest in information that governments often keep secret, and the pervasiveness of the abuse of national security secrecy, including concerning human rights violations. Whistleblowers are both unique sources of information on national security and other sensitive areas (since few outsiders have access to such data) and the engine of law development, by demonstrating that information the state has sought to keep secret is of overriding public interest.

What is the basis of the Principles?

The Principles are based on international and national law, standards, good practices, and the writings of experts. We are working on a principle-by-principle commentary that collects actual state practice, statements of international and national law, and court judgments that support each principle.

What authority do they have in law?

Several sets of principles developed by civil society actors have, over the past three decades, influenced national and international laws and policies. Impact tends to be based on two factors: the extent to which the principles are (1) based on actual practice, international and comparative law and emerging international norms; and (2) endorsed by relevant institutions and individuals.

Based on those factors, these Principles are likely to be highly persuasive. The Principles have been drafted by 17 organizations and five academic centres throughout Africa, the Americas, Europe and Asia based on conversations and information provided by more than 500 experts from more than 70 countries, including government and former government officials and military officers, at meetings around the world over a two-year period. There is broad consensus that the Principles are practical. And, the Principles have been welcomed by all three of the special experts on freedom of expression – for the UN, OAS and AU, as well as the OSCE’s expert on freedom of the media.

What difference will these Principles make?

The Principles' drafters expect that the Principles will influence the development and reform of laws and policies in countries that aspire to comply, and to be seen by the international community to comply, with international law.

The United States, China and Russia, for instance, have, regrettably, not shown much interest in compliance with international law, or in the laws and practices of other countries, especially in the area of human rights and national security; and we thus do not think that the Principles will have much impact, at least in the short-term, on the governments of those, and similar, countries.

However, we do expect that the Principles will have impact in countries where at least some reformers in government are concerned about ensuring that national security laws comply with international law and standards.

For instance, the Principles, in draft form, already played a role in supporting civil society demands, some of them successful, to modify the most troubling sections of South Africa's recently passed Protection of State Information Law (now sitting on President Zuma's desk for signature).

Government, security sector and civil society actors in Colombia, Egypt, India, Mexico, Pakistan, Peru and elsewhere are similarly looking forward to the finalization of these Principles, which they expect will help reformers in their countries as well.

Do they call for absolute transparency?

The aim of the Principles is not absolute or radical transparency. The Principles, in keeping with international law, recognize that the right of access to information may be limited by other important interests including international relations, public order, public health and safety, law enforcement, future provision of free and open advice, effective policy formulation, economic interests of the state, personal privacy and commercial confidentiality.

Rather, the chief aim of the drafters is to produce Principles, and research, that people inside and outside of the government and the security sector can use to advocate successfully for laws and practices that achieve the appropriate balance in order to ensure public access to information of high public interest.

What are some of the most important Principles?

- Disclosure of information of high public interest

Principle 10 sets forth categories of information of high public interest that should be disclosed in all but the most exceptional circumstances, and only ever withheld for the shortest time necessary. These categories include laws and regulations that authorize the state to take people into custody; the location of detention centres; the existence of all military, police, security and intelligence agencies; information relevant to decisions to take military action; the possession or acquisition of nuclear and other weapons of mass destruction; information about overt and covert surveillance, including statistics about the extent of surveillance; information sufficient to enable the public to understand security sector and other public finances; information about public health, safety and the environment; and information about exploitation of natural resources.

Principle 10 states emphatically that under no circumstances may information about serious human rights violations be classified or withheld.

- Protections for whistleblowers and the media

Principles 40, 43 and 46 set forth protections for people who disclose information about wrongdoing and other information of high public interest. They specify that any person who discloses wrongdoing or other information of public interest (whistleblower) should be protected from any type of retaliation, provided he or she acted in good faith and followed applicable procedures.

If a person discloses more information than was reasonably necessary to disclose the information of public interest, any punishment should be proportionate to the harm caused.

Principle 47 provides that any person who is not a public servant having authorised access to classified information should not be subjected to criminal sanctions for breach of official secrecy.

- Disclosure requirements apply to all public entities

Principle 5 provides that no public authority, including all security sector entities, may be exempt from disclosure requirements in right to information laws.

How do punishments for disclosure of classified information in the US compare with punishments in other democracies?

To answer this question, and to uncover best practices, the Justice Initiative together with an academic at the University of Copenhagen recently undertook a survey of the laws and practices of 20 European countries.

All of the surveyed states proscribe criminal penalties for the disclosure of classified national security information. However, where there is no espionage, treason or disclosure to a foreign state, the penalties in most countries are far less than in the US: up to two years in Denmark and Great Britain; four years in Spain and Sweden; five years in Belgium, Germany, Poland and Slovenia; and seven years in France. Moreover, prosecutions are rare.

In six countries—Albania, Belgium, Norway, Romania, Spain and Turkey—there has not been a single conviction in the past 10 years. In eleven countries, there have been just a handful of prosecutions, and even fewer convictions.

Russia is the only country surveyed in which significant numbers of prosecutions have been conducted. In the past decade, 10 public servants were convicted and sentenced for terms ranging from 4 to 15 years for the public disclosure of information. The cases illustrate the serious consequences for individuals as well as the public's right to know of excessive prosecutions for public disclosure of classified information.

Significantly, ten states—Albania, Czech Republic, Germany, Italy, Moldova, the Netherlands, Norway, Romania, Spain, and Sweden—require the government to prove either actual or probable harm resulting from the disclosure in order for any penalty to be imposed. An additional three countries—Hungary, Denmark, and France—allow the lack of harm to be raised as a defence or mitigating circumstance.

In Britain, public servants, including members of the military, face a maximum penalty of two years in prison. Since Britain's Official Secrets Act (OSA) of 1989 entered into force, ten public servants with authorized access to confidential information have been prosecuted under the Act. In three of these cases, charges were eventually dropped; in a fourth case, a jury found the public servant not guilty. In a fifth case, a public servant was required to pay a small fine. In the five cases (in 23 years) that resulted in custodial penalties, the maximum sentence was one year. Other defendants, including a former MI6 agent, served sentences of between two and eight months.

Thus, in at least 14 countries in Europe, including all of the US's main allies, a public servant who disclosed classified information to the public could not, or

would be highly unlikely to, be found guilty of a crime in the absence of a showing by the prosecution of actual harm.

Why are they named the Tshwane Principles?

A meeting to finalize the Principles was held outside of Pretoria in the municipality that, since 2011, has been known as Tshwane.

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