



PROSECUTOR OFFICE OF THE COMMUNITY OF MADRID

Type and number of original procedure:  
Fundamental Rights 509/2020  
Fiscal No.: 404/2020

**TO THE CONTENTIOUS - ADMINISTRATIVE ROOM OF THE COURT  
SUPERIOR OF JUSTICE OF THE COMMUNITY OF MADRID SECTION No. 6**

**THE PROSECUTOR** evacuating the transfer granted by virtue of Appeal 509/20 followed by the procedures of the Special Procedure for the Protection of Fundamental Rights of the Person, provided for in art. 114 and ss of Law 24/98 of July 13 of the LJCA and in accordance with the provisions of art. 119, formulates the following:

**ALLEGATIONS**

**FIRST.-** The subject of this appeal filed by the legal representation of Greenpeace Spain is the Agreement of September 15, 2020, issued by the General Director of Commercial Policy of the Ministry of Industry, Commerce and Tourism, denying access to the requested public information, referring to the licenses granted for the export to Saudi Arabia of the Alakran 120 mn mortar carrier, of the NTGS Company No. 001-045499., understanding that with this denial the right to information of article 20.1 d) of the EC is violated., by which the right to communicate or receive truthful information by any means of dissemination is recognized and protected.

**SECOND.-** On August 20, 2020, the General Directorate of Commercial Policy of the Ministry of Industry, Commerce and Tourism, by the plaintiff Green Peace Spain, received a request for access to public information, already mentioned, under the Law 19/2013, of December 9, on Transparency, Access to Public Information and Good Governance, request number 001-045499., which is denied to him because he understands it is information considered secret, and in his request he urged:

- Copy of the file referring to authorizations granted for the export to Saudi Arabia of the Alakran 120 mn mortar carrier of the NTGS Company, from 2016 to the present.

-Also the documents that contain the information on the evaluation carried out based on the requirements of article 7 of the Trade Agreement of





weapons.

-Minutes of the meeting of the Interministerial Regulatory Board of Foreign Trade in Defense Material and Dual Use-JIMDDU, in which the decision to authorize said export was adopted.

-The documents in which the reasoned decision in favor of the export authorizations is recorded.

**THIRD.-** Firstly, the type of public information that is requested by Greenpeace Spain and the causes of its denial must be defined, as it is considered an official secret.

In accordance with Law 19/2013, of December 9, on Transparency, its sections a, b, c, h of article 14) state that the right of access to information may be limited in the event of causing damage to national security, defense, economic interests, professional secrecy and the guarantee of confidentiality or secrecy in decision-making.

Also, Law 53/2007, of December 28, on the control of Foreign Trade in Defense matters protects and tries to prevent illicit traffic and the proliferation of sensitive weapons in favor of States that may be likely to act against peace and security. .

He continues pointing out this Law that corresponds to the Interministerial Regulatory Board of Foreign Trade of Defense Material and Dual Use-(JIMDDU) report with a mandatory and binding nature the administrative authorizations for the export of said material.

Given the above regarding the request by Greepeace to make available the minutes of the JIMDDU meeting, where the decision to authorize arms exports was adopted, it should be noted that the Agreement of the Council of Ministers of 13- 3-87, declared *classified matter* , with the *qualification of secret* the minutes of the JIMDDU and as such classified information in accordance with Law 9/68, of April 5 on Official Secrets, which in its article 13 *establishes that the matters classified may not be communicated, disseminated or published, nor can their content be used outside the limits established by this Law.*

With regard to the request for information by the plaintiff on the authorizations for the export to Saudi Arabia of the Alacran mortars from 2016 to the present and the documents for the sale of said weapons, carried out in accordance with the Arms Trade Treaty in force, it must be meant that said file contains sensitive information of a private operator that the Administration has collected in the exercise of its powers and that it must be treated with confidentiality, also applying the data protection of Law 39/2015, of October 1 , limiting the right to information to avoid damage to economic or commercial interests .

All these criteria have been confirmed in the report of the Advocacy of the State of 9-25-2019, in the file and in which it is indicated that the secrecy affects all Acts of the JIMDDU, for which the Agreement of the

Council of Ministers of 13-3-1987, on the acts of the JIMDDU and all the





Annexes of said Minutes.

*This argument has been endorsed by Resolution 648/2019, of 4 December 2019 of the Transparency and Good Governance Council*

**THIRD.-** For this reason we understand that there is no alleged violation of article 20 1 d) of the EC that deals with fundamental rights and public freedoms based on the following arguments and that in section 1 d it says:

*The rights that comprise it are recognized and protected and are:*

d) To freely communicate or receive truthful information by any means of dissemination. The law will regulate the right to the clause of conscience and professional secrecy in the exercise of these freedoms.

Article 20 of the Constitution encompasses several rights with points in common, but also with notable differences in their character and treatment, *it is not an absolute right nor can its unlimited application be predicated in any case.* The STC 254/88, of December 21, collects it, since the rights to freedom of expression and access to truthful information are not unlimited, but have the limits established in the Law, as long as they are oriented to safeguard democratic societies and the principles that integrate them.

Special incidence counts the formulation of the freedoms of expression and information (paragraph 1, sections a) and d), respectively), freedoms not always easily distinguishable, but that it is necessary to clarify to make the constitutional mandates fully operational; In this way, freedom of expression refers to the freedom to communicate thoughts, ideas, opinions by any means of dissemination, whether general or more restricted (banners...), although special protection is guaranteed in the first case. .

For its part, freedom of information refers to the communication of facts through any general media, that is, freedom of expression carries a subjective nuance, while freedom of information contains a meaning that is intended to be objective. Obviously, expression and information often do not occur separately, but, on the contrary, together, since with the news it is common to insert the informant's own opinions. In this way, it will be considered that we are facing a manifestation of freedom of expression or, on the contrary, of information according to the predominant nature of the message.

Regarding the determination of this fundamental right, the Constitutional Court has established that "it is an individual right of freedom and not of benefit". Second, regarding the right to receive information; this fundamental right is not the same as the right of access to information regulated in article 105 of the Spanish Constitution. Thus, the term receiving is not the same as accessing, since they are two different rights that both enjoy different protection. The passive subject in this right is the recipient of the





information, which information will be provided by the media.

Article 10 of the European Convention on Human Rights recognizes the right of all citizens to receive and communicate information, without the interference of the States. However, according to the interpretations of said article made by the European Court of Human Rights, the limitation of the right to information is feasible and valid, as long as it is proportionally necessary and done for reasons of national security.

Article 105 section b) of the Spanish Constitution establishes: "that the law will regulate the access of citizens to administrative files and records, *except in what affects the security and defense of the State*, the investigation of crimes and the intimacy of people" Said article guarantees access by citizens, whether they are affected or not, to certain documents of interest. The current Law 19/2013, of December 9, on Transparency, Access to Public Information and Good Governance, is of great importance and determinant in the field of the right to information. The law establishes that information must be granted periodically, up-to-date, clear and with easy and free access to all interested parties through publications made on electronic sites (transparency portal) or web pages . *However, a certain limitation is imposed, establishing that citizens; they will only be able to access administrative files and records that do not affect the security and defense of the State; excluding also all those documents that have a non-documentary form or those that are not registered as well as those not qualified as administrative documents*

Consequently, the right of access to information is not unlimited, given that the content of said right does not admit "the general accessibility of all state information. Namely; "In our Law there is no presumption of general accessibility of all information belonging to or related to the Government

As established in the explanatory statement of Law 9/1968 on official secrets: "it is a general principle, even when it is not expressly declared in our Fundamental Laws, the publicity of the activity of State bodies, because the public things that are of interest to all can and should be known to all". *However, there are certain limitations to the principle of publicity when certain information causes damage or a risk to the security and defense of the State and that is when the qualification of certain information as classified matter or more commonly known as secret comes into play. State or official secret.* Therefore, "secrecy can be imposed on events of public interest when this safeguards national security, provided that there are no less burdensome alternative ways to achieve this end."

The delimitation of the State secret is not a current conception, but starts as antecedents of the Napoleonic Penal Code of 1810 and the Spanish Penal Code of 1822; In any case, the reservation and concealment of information by the State already occurred in ancient Rome and Greece. Although at present, the State secret has been newsworthy with the validity of the Law of the





Transparency and with the publications made by Wikileaks.

The State secret is constituted as an exception to the principle of publicity regulated in our legal system, constituting said principle as the general rule, and the State secret as the exception. State secrecy is recognized in our Spanish Constitution through article 105.b), (citizen access to archives unless it affects the security and defense of the State) 97 (defense of the State as a function of the government) and 20 (limit freedom of information).

The requirements for classification as a state secret are: First, Decree 242/1969 establishes as a requirement; that the documents classified by the Council of Ministers and the Joint Chiefs of Staff must state, in any case, the authority which has classified *such documents, as well as the constitutive declaration, the area to which said information belongs, the place where the act, date, signature, together with the constitution and adherence of a diligence.* In any case, the reason why said file or document has been classified as secret must be justified, that is, it must be considered that *"by official secrets we understand secrecy in the broad sense as non-publicity of public affairs, which may belong to the legislative, executive or judicial sphere; while by State secrets we understand secrets in matters of national security and defense, which is the legal asset protected by the Law on Official Secrets"* which, together with its corresponding regulations, establishes in a generalized way the classification of documents when they affect security and national defense.

In relation to what kind of matters can be classified as official secrets, it should be noted that. *Article 2 of Law 9/1968 provides that the following may be declared as classified matters: "matters, acts, documents, information, data and objects whose knowledge by unauthorized persons may damage or put at risk the security and defense of the State"* The security and defense of the State is therefore established as a material limit, a measure entrusted to the Government in article 94 of the Spanish Constitution. Regarding the assessment of the damage or risk, it must be carried out in accordance with the rules of experience. *In short, the essential requirements for us to be able to speak of a State secret are: that there is a concealment of information, that there is a real desire to hide it, that there is a certain interest that said information be concealed because its disclosure would cause certain damage. that would pose a risk or danger (probability of harm) to national security and/or national defense.*

The Official Secrets Law establishes that personnel can have access to this class of documents and indicates that only those subjects who have the authority to know said matters may have knowledge of classified matters and that the required formalities must be followed at all times. such effect as well as the appropriate security measures and systems so that said information is not leaked.

Consequently, the access or circulation of persons who are not authorized to know the content of said classified matters will be limited.





Finally, the legal concept of the State secret is developed by Law 9/1968, partially modified by Law 48/1978, as well as Decree 242/1969, which establishes the requirements for *information to be classified as a State secret*. , *the authorities in charge of qualifying and disqualifying, the differentiation between qualifying and classifying, as well as what must be secret and what is reserved, together with the system of protection, transmission and destruction of documents so that they are not disseminated, lost or reconstructed by subjects They do not have access to such information.*

Consequently, for all the reasons stated, it is considered that art. 20 1 d) of the Spanish Constitution, since the requested documentation is part of the official secrets, not being able to have access to it more than the persons authorized to do so, and therefore the present appeal of fundamental rights must be dismissed,

Madrid December 15, 2020

Signed.: MDolores Andrade Otero.



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